SRI LANKA SUPREME COURT **Judgements Delivered (2022)**

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Judgments Delivered in 2022

14/12/22	SC/APPEAL 47/2021	K.G. Somawathie, Mudiyala, Kotagama, Bibile. PLAINTIFF vs. 1. Y. R. Upul, Wedikumbura, Monaragala. 2. Y.R. Nimal Jayathilaka, No. 51, Dutugemunu Road, Monaragala 3. W.G. Gunadasa, No 48, Wedikumbura Road, Monaragala. DEFENDANTS AND BETWEEN 1. Y. R. Upul, Wedikumbura, Monaragala. 2. Y.R. Nimal Jayathilaka, No. 51, Dutugemunu Road, Monaragala 3. W.G. Gunadasa, No 48, Wedikumbura Road, Monaragala. DEFENDANTS- APPELLANTS Vs K.G. Somawathie, Mudiyala, Kotagama, Bibile. PLAINTIFF-RESPONDENT AND NOW BETWEEN 1. Y. R. Upul, Wedikumbura, Monaragala. 2. Y.R. Nimal Jayathilaka, No. 51, Dutugemunu Road, Monaragala 3. W.G. Gunadasa, No 48, Wedikumbura Road, Monaragala. DEFENDANTS- APPELLANTS-PETITIONERS Vs K.G. Somawathie, Mudiyala, Kotagama, Bibile. DEFENDANT-RESPONDENT-RESPONDENT
14/12/22	SC/FR No. 591/2012	

14/12/22	S.C.F.R. Application No: 452/2019	Thilangani Kandambi, No.259/1A, Sethsiri Mawatha, Panamura Road, Koswatta, Thalangama. Petitioner S.C.F.R. Application No: 452/2019 Vs. 1. State Timber Corporation, No.82, Rajamalwatta Road, Battaramulla. 2. Niluka Ekanayake, Chairperson (Ceased to hold office), State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 2A. U.C. Walisinghe, Chairman (Ceased to hold office), State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 2B. M.S. Karunarathna, Chairperson, State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 3. H.Y.T. Pawakumar Working Director (Ceased to hold office), State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 3A. H.K.M.J.H. Kumarasinghe, Working Director (Ceased to hold office), State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 4. D. Wijesiriwardhana (Ceased to hold office) Director and Senior Assistant Secretary and General Treasury, State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 4A. B.N. Gamage, Director (Ceased to hold office), State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 4B. S.A.C. Kulathilake, Director (Finance Ministry Representative), State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 5. W.A.C. Weragoda, Director and Conservator (Ceased to hold office), General of Forests, State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 5A. Dr. K.M.A. Bandara, Director and Conservator General of Forests, State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 6. A.M.C. Perera, Director (Deputy Director) (Ceased to hold office), State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 6A. G.K. Prasanna, Director (Ceased to hold office), State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 6B. B.T.B. Dissanayake, Director, State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 7. M.V. Karunaratne, Director (Ceased to hold office), State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 7A. B.A. Dharmarathne, Director (Ceased to hold office), State Timber Corporation, No.82, Rajamalwatta Road, Battaramulla. 7B. M.R.A.K. Bandara, Director, State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 8. Ranjan Fernando, Director and Senior Assistant (Ceased to hold office), Secretary, State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 8A. D.G.S. Dasanayake, Director, State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 8B. Chamila Samarasinghe, Deputy General Manager (Human Resources and Administration), State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 9. Leslie Fernando, Secretary to Board (Ceased to hold office), State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 8A. M.G.D. Sharika, Secretary to Board, State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 10. K. Siriwansa, Former Acting General Manager, State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 11. Ananda Tilakasiri, State Timber Corporation, No. 82, Rajamalwatta Road, Battaramulla. 12. Priyani Perera, State Timber Corporation, No. 82

12/12/22	SC Spl LA No. 86/2020	D.H. Waruna Priyanka, No. 03, Sri Naga Vihara Road, Pagoda, Nugegoda. Applicant vs. Commercial Bank of Ceylon PLC, Commercial House, No. 21, Sir Razik Fareed Mawatha, Colombo 01. Respondent And between D.H. Waruna Priyanka No. 03, Sri Naga Vihara Road, Pagoda, Nugegoda. Applicant – Appellant vs. Commercial Bank of Ceylon PLC, Commercial House, No. 21, Sir Razik Fareed Mawatha, Colombo 01. Respondent – Respondent And now between D.H. Waruna Priyanka, No. 03, Sri Naga Vihara Road, Pagoda, Nugegoda. Applicant – Appellant – Petitioner vs. Commercial Bank of Ceylon PLC, Commercial House, No. 21, Sir Razik Fareed Mawatha, Colombo 01. Respondent – Respondent – Respondent
12/12/22	SC Appeal No. 234/2017	People's Bank, No. 75, Sir Chittampalm A. Gardiner Mawatha, Colombo 2. PLAINTIFF vs. Jagoda Gamage Nishantha Pradeep Kumara, No. 8/18, Katuwawala Lane, Boralesgamuwa. DEFENDANT And between People's Bank, No. 75, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. PLAINTIFF – APPELLANT vs. Jagoda Gamage Nishantha Pradeep Kumara, No. 8/18, Katuwawala Lane, Boralesgamuwa. DEFENDANT – RESPONDENT And Now Between People's Bank, No. 75, Sir Chittampalm A. Gardiner Mawatha, Colombo 2. PLAINTIFF – APPELLANT – APPELLANT vs. Jagoda Gamage Nishantha Pradeep Kumara, No. 8/18, Katuwawala Lane, Boralesgamuwa. DEFENDANT – RESPONDENT – RESPONDENT
06/12/22	SC Appeal No: 223/2016	M.S.P. Nanayakkara, No. 13, M.J.C. Fernando Mawatha, Idama, Moratuwa. APPLICANT vs. The Associated Newspapers of Ceylon Limited, 'Lake House,' No. 35, D.R. Wijewardena Mawatha, Colombo 10. RESPONDENT And between The Associated Newspapers of Ceylon Limited, 'Lake House,' No. 35, D.R. Wijewardena Mawatha, Colombo 10. RESPONDENT – APPELLANT vs. M.S.P. Nanayakkara, No. 13, M.J.C. Fernando Mawatha, Idama, Moratuwa. APPLICANT – RESPONDENT And now between The Associated Newspapers of Ceylon Limited, 'Lake House,' No. 35, D.R. Wijewardena Mawatha, Colombo 10. RESPONDENT – APPELLANT – APPELLANT vs. M.S.P. Nanayakkara, No. 13, M.J.C. Fernando Mawatha, Idama, Moratuwa. APPLICANT – RESPONDENT – RESPONDENT
05/12/22	Case No. SC/CHC/Appeal 33/2013	Sri Lanka Savings Bank Ltd No: 110, D.S. Senanayake Mawatha Colombo 08 Plaintiff Vs. 1. Good Value Importers (pvt) Ltd 536, R.A.De Mel Mawatha Colombo 04 2.Good Value Distributors (pvt) Ltd 104/11, Grandpas Road Colombo 14 Defendants And now between Sri Lanka Savings Bank Ltd No: 110, D.S. Senanayake Mawatha Colombo 08 Plaintiff-Appellant Vs. 1. Good Value Importers (pvt) Ltd No: 536, R.A.De Mel Mawatha Colombo 04 2. Good Value Distributors (pvt) Ltd No: 104/11, Grandpass Road Colombo 14 Defendant-Respondents

02/12/22	SC/APPEAL/108/2019	Aluthgama Hewage Ariyapala Amaradasa, No. 555/16B, Elhenewatte, Gonahena, Kadawatha. Plaintiff Vs. Hewaralalage Dulani Dilrukshi, No. 555/16A, Elhenawatte, Gonahena, Kadawatha. Defendant AND BETWEEN Hewaralalage Dulani Dilrukshi, No. 555/16A, Elhenawatte, Gonahena, Kadawatha. Defendant-Appellant Vs. Aluthgama Hewage Ariyapala Amaradasa, No. 555/16B, Elhenewatte, Gonahena, Kadawatha. Plaintiff-Respondent (deceased) Gamlath Ralalage Chandrawathie, No. 555/16B, Elhenewatte, Gonahena, Kadawatha. Substituted-Plaintiff-Respondent AND NOW BETWEEN Gamlath Ralalage Chandrawathie, No. 555/16B, Elhenewatte, Gonahena, Kadawatha. Substituted-Plaintiff-Respondent Vs. Hewaralalage Dulani Dilrukshi, No. 555/16A, Elhenawatte, Gonahena, Kadawatha. Defendant-Appellant-Respondent
02/12/22	SC/APPEAL/160/2016	

01/ 12/ 22	SC/HC/LA/ 45/2021	MATRIX LIFECARE (PVT) LTD No. 52/13A, Rubber Watta Road, Nikape, Dehiwela. SC/HC/LA/45/2021 PLAINTIFF Commercial High Court Case No: H.C.(Civil)/15/2021/IP -Vs- 1. HEALTHTRUST PHARMACEUTICALS (PVT) LTD No. 78/4, Sangaraja Mawatha, Hunupitiya, Wattala. 2. FAITH ONE PHARMACEUTICALS (PVT) LTD No. 78/4, Sangaraja Mawatha, Hunupitiya, Wattala. 3. PEER MOHAMED ABDUL RAHUMAN No. 45/15, Swarna Road, Off Havelock Road, Colombo 6. 4. MOHIDEEN RAMEEZ PEER MOHAMED No. 45/15, Swarna Road, Off Havelock Road, Colombo 6. 5. MOHAMED ZAFRULLAH MARIKKAR F 23, St. Anthony's Government Flats, St. Anthony's Mawatha, Colombo 3. AND/OR No. 78/4, Sangaraja Mawatha, Hunupitiya, Wattala. 6. SEYAD MOHAMED SITHY SHAHEENA F 23, St. Anthony's Government Flats, St. Anthony's Mawatha, Colombo 3. AND/OR No. 78/4, Sangaraja Mawatha, Hunupitiya, Wattala. DEFENDANTS -AND NOW BETWEEN- 1. FAITH PHARMACEUTICALS (PVT) LTD No. 78/4, Sangaraja Mawatha, Hunupitiya, Wattala. 2. MOHAMED ZAFRULLAH MARIKKAR F 23, St. Anthony's Government Flats, St. Anthony's Mawatha, Colombo 3. AND/OR No. 78/4, Sangaraja Mawatha, Hunupitiya, Wattala. DEFENDANTS - PETITIONERS -Vs- MATRIX LIFECARE (PVT) LTD No.52/13A, Rubber Watta Road, Nikape, Dehiwela. PLAINTIFF – RESPONDENT 1. HEALTHTRUST PHARMACEUTICALS (PVT) LTD No.78/4, Sangaraja Mawatha, Hunupitiya, Wattala. 2. PEER MOHAMED ABDUL RAHUMAN No. 45/15, Swarna Road, Off Havelock Road, Colombo 6. 3. MOHIDEEN RAMEEZ PEER MOHAMED No. 45/15, Swarna Road, Off Havelock Road, Colombo 6. 4. SEYAD MOHAMED SITHY SHAHEENA F 23, St. Anthony's Government Flats, St. Anthony's Mawatha, Colombo 3. AND/OR No. 78/4, Sangaraja Mawatha, Hunupitiya, Wattala. DEFENDANTS - RESPONDENTS
30/ 11/ 22	SC/Appeal 53/2022	The Democratic Socialist Republic of Sri Lanka. COMPLAINANT Vs. Madapathage Dona Thilaka Alias Shyamali ACCUSED AND BETWEEN Madapathage Dona Thilaka Alias Shyamali ACCUSED - PETITIONER Vs. The Hon. Attorney General, Attorney General's Department, Colombo 12. COMPLAINANT-RESPONDENT AND NOW BETWEEN Attorney General Attorney Generals Department, Colombo 12. COMPLAINANT – RESPONDENT-APPELLANT Vs Madapathage Dona Thilaka Alias Shyamali ACCUSED-PETITIONER-RESPONDENT

28/ 11/ 22	SC Appeal No: 03/2020	Christhombu Wasangalwadu Lakshman Jayasiri Wijeratne, No. 126/2A, Galwala Road, Dehiwala. Plaintiff Vs. 1. Colombage Nandawathie De Silva Wijeratne, No. 126/2A, Galwala Road, Dehiwala. 1a. Christhombu Tasan Galwaduge Ishara Deepthi Kanchana Wijeratne, No. 126/2A, Galwala Road, Dehiwala 2. Mohammad Haneefaa Ahamad Jamaldeen, No. 58, Marikkar Place, Colombo 10. 3. Christhombu Galwadu Saranadasa De Silva Wijeratne, No. 126/2A, Galwala Road, Dehiwala. 4. Nimala Theressa Atapattu alias Nimala Theressa Chandrapala, No. 126/2A, Galwala Road, Dehiwala. Defendants And Christhombu Wasangalwadu Lakshman Jayasiri Wijeratne, No. 126/2A, Galwala Road, Dehiwala. Plaintiff-Appellant Vs. 1. Colombage Nandawathie De Silva Wijeratne, No. 126/2A, Galwala Road, Dehiwala. 1a. Christhombu Tasan Galwaduge Ishara Deepthi Kanchana Wijeratne, No. 126/2A, Galwala Road, Dehiwala. 2. Mohammad Haneefaa Ahamad Jamaldeen, No. 58, Marikkar Place, Colombo 10. 3. Christhombu Galwadu Saranadasa De Silva Wijeratne, No. 126/2A, Galwala Road, Dehiwala. 4. Nimala Theressa Atapattu alias Nimala Theressa Chandrapala, No. 126/2A, Galwala Road, Dehiwala. Defendant-Respondents And Now Between Christhombu Wasangalwadu Lakshman Jayasiri Wijeratne, No. 126/2A, Galwala Road, Dehiwala. Plaintiff-Appellant-Petitioner-Appellant Vs. 1. Colombage Nandawathie De Silva Wijeratne, No. 126/2A, Galwala Road, Dehiwala. 1a. Christhombu Tasan Galwaduge Ishara Deepthi Kanchana Wijeratne, No. 126/2A, Galwala Road, Dehiwala. 2. Mohammad Haneefaa Ahamad Jamaldeen, No. 58, Marikkar Place, Colombo 10. 3. Christhombu Galwadu Saranadasa De Silva Wijeratne, No. 126/2A, Galwala Road, Dehiwala. 4. Nimala Theressa Atapattu alias Nimala Theressa Chandrapala, No. 126/2A, Galwala Road, Dehiwala. 4a. Anuraj Narendra Palliyaguruge, No. 73, Sri Gnanegra Road, Ratmalana. Defendant-Respondent-Respondent-Respondents
25/ 11/ 22	S.C. (F.R.) Application No. 141/2017	Dr. Indika Mudalige, 391/3C, 2nd Lane, Ekamuthu Mawatha, Thalangama North, Battaramulla. Petitioner Vs. 1. National Water Supply and Drainage Board, Ratmalana. 2. G.A Kumararatna, General Manager, National Water Supply and Drainage Board, Ratmalana. 3. Mangala Abeysekera, Project Director, National Water Supply and drainage Board, Ratmalana. 4. Sarath Chandrasiri Vithana, Secretary, Ministry of City Planning and Water Supply, No.05, ‘Lak Diya Medura’, New Parliament Road, Pelawatte, Battaramulle. 5. K.D Ebert and Sons Holdings (Pvt) Ltd, No. 5/41, Madiwela Road, Embuldeniya, Nugegoda. 6. JITF-KDESH JV (Pvt) Ltd, No.5/41, Madiwela Road, 7. Asian Development Bank (ADB) Sri Lanka Resident Missiom, 23, Independence Avenue, Colombo 07. 8. Hon. Attorney General, Attorney General’s Department Colombo 12. Respondents

23/ 11/ 22	SC/FR/ 46/2021	1. Balachandra Arachchige Don Nuwan Chathuranga Padmasiri, Sub Inspector Criminal Investigation Department P.O. Box 534, Colombo 01 2. Koskola Waththage Harsha Lakmal Kumara, Sub Inspector, Criminal Investigation Department, P.O. Box 534, Colombo 01. 3. Munasingha Arachchige Sajitha Chathusanka Bandara Karunathilaka, Sub Inspector, Police Station, Peliyagoda. Petitioners Vs. 1. C. D. Wickramaratne Inspector General of Police, Police Headquarters, Colombo 01. 2. Jagath Balapatabendi, Chairman 3. Indrani Sugathadasa, Member 4. V. Shivagnanasothy, Member 5. T. R. C. Ruberu, Member 6. Ahamod Lebbe Mohamed Saleem, Member 7. Leelasena Liyanagama, Member 8. Dian Gomes, Member 9. Dilith Jayaweera, Member 10. W. H. Piyadasa, Member All of the members of the Public Service Commission of Sri Lanka, No. 1200/9, Rajamalwatta Road, Battaramulla. 11. K. R. Saranga Perera, Head of Division (Recruitment and Promotion Scheme Preparation Division) Police Headquarters Colombo 01 12. Wajira Gunawardena Director (Civil Administration) Sri Lanka Administration Division Police Headquarters Colombo 01 13. The Attorney-General, Attorney-General's Department. Respondents
21/ 11/ 22	SC FR Application No. 411/2021	Malka Denethi Attorney-at-Law No. 305/11, Janatha Mawatha, Werahera, Boralasgamuwa. Petitioner Vs. 1. K.S.K. Rupasinghe Senior Superintendent of Police, Nugegoda Police Division, Nugegoda. 2. Police Officer No. 48513 C/O Deputy Inspector General (Western – South), DIG Office – Western Province (South), Nugegoda. 3. K.G. Wijerathne Inspector of Police, Officer-in-Charge, Police Station, Boralesgamuwa. 4. Asiri Jayasooriya Sub-Inspector, Miscellaneous Complaints Unit (MO Branch), Police Station, Boralesgamuwa. 5. C.D. Wickramarathna Inspector General of Police, Sri Lanka Police Headquarters, Colombo 1. 6. Rajeev Amarasooriya Attorney-at-Law, Secretary, Bar Association of Sri Lanka, No. 153, Mihindu Mawatha, Colombo 12. 7. Dona Anushka Dilani Kannangara No. 192/3, 2nd Lane, Egodawaththa, Boralesgamuwa. 8. Attorney General Attorney General's Department, Colombo 12. Respondents

21/ 11/ 22	SC APPEAL NO: SC/ APPEAL/ 133/2015	Film Locations (Private Limited) No. 282/6, Kotte Road, Nugegoda. Plaintiff Vs. 1. Sri Lanka Mahaweli Authority, No. 500, T.B. Jayah Mawatha, Colombo 10. 2. M. Sirisena, Resident Project Manager, Victoria Office, Digana. 3. Taprobane Studio Ranch (Private) Limited, No 282/6, Kotte Road, Nugegoda. Defendants AND BETWEEN Sri Lanka Mahaweli Authority, No. 500, T.B. Jayah Mawatha, Colombo 10. 1st Defendant-Petitioner Vs. Film Locations (Private Limited) No. 282/6, Kotte Road, Nugegoda. Plaintiff-Respondent M. Sirisena, Resident Project Manager, Victoria Office, Digana. 2nd Defendant-Respondent Taprobane Studio Ranch (Private) Limited, No 282/6, Kotte Road, Nugegoda. 3rd Defendant-Respondent AND NOW BETWEEN Film Locations (Private Limited) No. 282/6, Kotte Road, Nugegoda. Plaintiff-Respondent-Petitioner Vs. Sri Lanka Mahaweli Authority, No. 500, T.B. Jayah Mawatha, Colombo 10. 1st Defendant-Petitioner-Respondent M. Sirisena, Resident Project Manager, Victoria Office, Digana. 2nd Defendant-Respondent-Respondent Taprobane Studio Ranch (Private) Limited, No 282/6, Kotte Road, Nugegoda. 3rd Defendant-Respondent-Respondent
21/ 11/ 22	SC APPEAL NO: SC/ APPEAL/ 78/2021	Uduruwangala Gedarage Charaka Pathum Galagedara, No. 151, Punagala Road, Dulgolla, Bandarawela. Plaintiff Vs. 1. Geethika Sudhirani Samaraweera, No. 153, Pungala Road, Bandarawela. 2. Janaka Sampath Samaraweera, Lining Tex, No. 144/4, Keysar Street, Colombo 11. Defendants AND BETWEEN Uduruwangala Gedarage Charaka Pathum Galagedara, No. 151, Punagala Road, Dulgolla, Bandarawela. Plaintiff-Appellant Vs. 1. Geethika Sudhirani Samaraweera, No. 153, Pungala Road, Bandarawela. 2. Janaka Sampath Samaraweera, Lining Tex, No. 144/4, Keysar Street, Colombo 11. Defendant-Respondents AND NOW BETWEEN Geethika Sudhirani Samaraweera, No. 153, Pungala Road, Bandarawela. 1st Defendant-Respondent-Appellant Vs. 1. Uduruwangala Gedarage Charaka Pathum Galagedara, No. 151, Punagala Road, Dulgolla, Bandarawela. Plaintiff-Appellant-Respondent 2. Janaka Sampath Samaraweera, Lining Tex, No. 144/4, Keysar Street, Colombo 11. 2nd Defendant-Respondent-Respondent
21/ 11/ 22	SC APPEAL NO: SC/ APPEAL/ 180/2011	Wedikkarayalage Nirosha Sanjeewani, Adurapotha, Kegalle. Plaintiff Vs. Hewavitharanage Podimenike, “Saman Nivasa”, No. 40, Hitinawatte, Colombo Road, Kegalle. Defendant AND BETWEEN Wedikkarayalage Nirosha Sanjeewani, Adurapotha, Kegalle. Plaintiff-Appellant Vs. Hewavitharanage Podimenike, “Saman Nivasa”, No. 40, Hitinawatte, Colombo Road, Kegalle. Defendant-Respondent AND NOW BETWEEN Hewavitharanage Podimenike, “Saman Nivasa”, No. 40, Hitinawatte, Colombo Road, Kegalle. Defendant-Respondent-Appellant Vs. Wedikkarayalage Nirosha Sanjeewani, Adurapotha, Kegalle. Plaintiff-Appellant-Respondent

21/ 11/ 22	SC APPEAL NO: SC/ APPEAL/ 154/2017	Stella Gwendelline Hycinth Wijesinghe, No. 05, Railway Avenue, Nugegoda. Plaintiff Vs. Lalith Wickramarathne, No. 51/1, Stanley Thilakaratne Mawatha, Nugegoda. Defendant AND BETWEEN Lalith Wickramarathne, No. 51/1, Stanley Thilakaratne Mawatha, Nugegoda. Defendant-Appellant Vs. Stella Gwendelline Hycinth Wijesinghe, No. 05, Railway Avenue, Nugegoda. Plaintiff-Respondent AND NOW BETWEEN Stella Gwendelline Hycinth Wijesinghe, No. 05, Railway Avenue, Nugegoda. Plaintiff-Respondent-Appellant Vs. Lalith Wickramarathne, No. 51/1, Stanley Thilakaratne Mawatha, Nugegoda. Defendant-Appellant-Respondent
21/ 11/ 22	SC APPEAL NO: SC/ APPEAL/ 233/2017	1. Kukule Kankanamge Chandrasena Yakupitiya, Bellana. 2. Edirisinghe Athukoralage Pushpalatha Yakupitiya, Bellana. Plaintiffs Vs. 1. Liyanage Don Buddhadasa Yakupitiya, Bellana. Defendant AND BETWEEN Liyanage Don Buddhadasa Yakupitiya, Bellana. Defendant-Appellant Vs. 1. Kukule Kankanamge Chandrasena Yakupitiya Bellana. 2. Edirisinghe Athukoralage Pushpalatha Yakupitiya, Bellana. Plaintiff-Respondents AND NOW BETWEEN Liyanage Don Buddhadasa Yakupitiya, Bellana. Defendant-Appellant-Appellant Vs. 1. Kukule Kankanamge Chandrasena Yakutupitiya, Bellana. 2. Edirisinghe Athukoralage Pushpalatha Yakupitiya, Bellana. Plaintiff-Respondent-Respondents

18/11/22	SC APPLICATION NO. SC (FR) 303/2013	K.A. Gunasena No. 18/6A, Nikape Road, Dehiwala PETITIONER Vs. 1. Public Service Commission No. 177, Nawala Road, Narahenpita, Colombo 05. 2. Justice Sathyaa Hettige, PC, Chairman, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 2A. Mr. Dharmasena Dissanayaka, Chairman, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 3. Mrs. Kanthi Wijetunge, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 3A. Mr. A. Salam Abdul Waid, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05 3B. Prof. Hussain Ismail, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 4. Mr. Sunil S Sirisena, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 4A. Ms. D. Shirantha Wijayatilaka, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 4B. Mrs. Sudharma Karnarathna, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 5. Mr. S.C. Mannapperuma, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 5A. Dr. Prathap Ramanujm, Member, Public Service Commission, No. 177, Nawala Road, Narahenpit Colombo 05 6. Ananda Seneviratne, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 6A. Mrs. V. Jegarasasingam, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 7. N.H. Pathirana, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 7A. Mr. Santi Nihal Seneviratne, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 7B. Mr. G.S.A. de Silva PC, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 8. S. Thillinadarajah, Member, Public Service Commission, No. 177, Nawala Road, Colombo 05. 8A. Mr. S. Ranugge Member, Public Service Commission, No. 177, Nawala Road, Colombo 05. 9. Dr. I.M. Zoyza Gunasekara, Member, Public Service Commission, No. 177, Nawala Road, Colombo 05. 9A. Mr. D. L. Mendis Member, Public Service Commission, No. 177, Nawala Road, Colombo 05. 10. A. Mohamed Nahiya, Member, Public Service Commission, No. 177, Nawala Road, Colombo 05. 10A. Mr. Sarath Jayathilaka, Member, Public Service Commission, No. 177, Nawala Road, Colombo 05. 11. Dr. B. M. S Batagoda, Deputy Secretary of the Treasury, Ministry of Finance and Planning, The Secretariat, Colombo 01. 11A. Ms. G. D. C. Ekanayake Deputy Secretary of the Treasury, Ministry of Finance and Planning, The Secretariat, Colombo 01. 11B. Mr. A.R. Desapriya Deputy Secretary of the Treasury, Ministry of Finance and Planning, The Secretariat, Colombo 01. 12. Hon. The Attorney General, Attorney General’s Department, Colombo 12. RESPONDENTS

18/ 11/ 22	S.C.(F.R.) Application No: 23/2021	K.P.K.L.P. Maduwanthi, No. 75/A, MC Road, Matale. Presently at: Quarters of Divisional Secretary, No. 107/3, Scout Land, Matale Petitioner Vs. 1. S.M.G.K. Perera, District Secretary, District Secretariat, Matale. 2. Hon. Justice Jagath Balapatabendi, Chairman 3. Mrs. Indrani Sugathadasa, Member 4. Mr. V. Shivagnanasothy, Member 5. Dr. T.R.C. Ruberu, Member 6. Mr. Ahamod Lebbe Mohamed Saleem, Member 7. Mr. Leelasena Liyanagama, Member 8. Mr. Dian Gomes, Member 9. Mr. Dilith Jayaweera, Member 10. Mr. W.H. Piyadasa, Member 2nd to 10th Respondents: All of: Public Service Commission, No. 1200/9, Rajamalwatta Road, Battaramulla. 11. The Secretary, Public Service Commission, No. 1200/9, Rajamalwatta Road, Battaramulla. 12. General Kamal Guneratne, Secretary to the Ministry of Defense, Home Affairs and Disaster Management, Nilamedura, Elvitigala Mawatha, Colombo 05. 12(A). Hon. N.H.M. Chithrananda, Secretary to the State Ministry of Home Affairs, Nilamedura, Elivitigala Mawatha, Colombo 05. 13. J.J. Rathnasiri, Secretary, Ministry of Public Services, Provincial Councils and Local Government, Independence Square, Colombo 07. 14. Additional Secretary (Internal Administration), Ministry of Public Services, Provincial Councils and Local Government, Independence Square, Colombo 07. 15. Piyal Jayasuriya, Divisional Secretary (Attending to Duties), Divisional Secretariat, Dambulla. 16. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents
18/ 11/ 22	SC/ Appeal 175/2016	Nandawathie Kodituwakku nee A.R Nandawathie, Landewelawatte, Karagahawela, Bandarawela. Plaintiff Vs. 1. Wanigasinghe Aratchchige Piyadasa, Waharakgoda, Ussapitiya 2. Ananda Ajith Chandralal, Landewelawatte, Karagahawela, Bandarawela. 3. Sumith Prasanna Rohitha, Landewelawatte, Karagahawela, Bandarawela. Defendants AND BETWEEN Nandawathie Kodituwakku nee A.R Nandawathie, Landewelawatte, Karagahawela, Bandarawela. Plaintiff- Appellant Vs. 1. Wanigasinghe Aratchchige Piyadasa, Waharakgoda, Ussapitiya 2. Ananda Ajith Chandralal, Landewelawatte, Karagahawela, Bandarawela. 3. Sumith Prasanna Rohitha, Landewelawatte, Karagahawela, Bandarawela. Defendants-Respondents AND NOW BETWEEN 1. Wanigasinghe Aratchchige Piyadasa, Waharakgoda, Ussapitiya 1st Defendant-Respondent- Petitioner Vs. Nandawathie Kodituwakku nee A.R Nandawathie, Landewelawatte, Karagahawela, Bandarawela. Plaintiff- Appellant- Respondent 1. Ananda Ajith Chandralal, Landewelawatte, Karagahawela, Bandarawela. 2. Sumith Prasanna Rohitha, Landewelawatte, Karagahawela, Bandarawela. Defendants- Respondents-Respondents
18/ 11/ 22	SC/SPL/LA/ No.224/2020	

17/ 11/ 22	SC APPEAL NO: 170/2019	Attorney General, Attorney General's Department, Colombo 12. Plaintiff Vs. Ceylinco General Insurance Ltd, No. 69, Janadipathi Mawatha, Colombo 01. Defendant AND BETWEEN Attorney General, Attorney General's Department, Colombo 12. Plaintiff-Appellant Vs. Ceylinco General Insurance Ltd, No. 69, Janadipathi Mawatha, Colombo 01. Defendant-Respondent AND NOW BETWEEN Ceylinco General Insurance Ltd, No. 69, Janadipathi Mawatha, Colombo 01. Defendant-Respondent-Appellant Vs. Attorney General, Attorney General's Department, Colombo 12. Plaintiff-Appellant-Respondent
17/ 11/ 22	SC/APPEAL/ 18/2021	Hettiarachchige Don Sugath Nandana, Meda Arambe, Nawagamuwa, Devalegama. Plaintiff Vs. Caroline Hewa Abewickrama, Pussella, Devalegama, Kegalle. Defendant AND BETWEEN Caroline Hewa Abewickrama, Pussella, Devalegama, Kegalle. Defendant-Appellant Vs. Hettiarachchige Don Sugath Nandana, Meda Arambe, Nawagamuwa, Devalegama. Plaintiff-Respondent AND NOW BETWEEN Caroline Hewa Abewickrama, Pussella, Devalegama, Kegalle. Defendant-Appellant-Appellant Vs. Hettiarachchige Don Sugath Nandana, Meda Arambe, Nawagamuwa, Devalegama. Plaintiff-Respondent-Respondent
17/ 11/ 22	SC/APPEAL/ 220/2017	Lakshani Madusha Sammuarachchi, "Suramya", Welimanna, Aranayake. Petitioner Vs. Surangi Deepika Jayawardhena, "Suramya", Welimanna, Aranayake. Respondent AND BETWEEN 1. Nirmala Shiranthani Siriwardhena, 2/55, Welimanna, Aranayake. 2. Krishan Lakshman Siriwardhena, "Suramya", Welimanna, Aranayake. Intervenient Petitioners Vs. 1. Lakshani Madusha Sammuarachchi Petitioner-Respondent 2. Surangi Deepika Jayawardhena Respondent-Respondent Both of, "Suramya", Welimanna, Aranayake AND BETWEEN 1. Nirmala Shiranthani Siriwardhena, 2/55, Welimanna, Aranayake. 2. Krishan Lakshman Siriwardhena, "Suramya", Welimanna, Aranayake. Intervenient Petitioner-Petitioners Vs. 1. Lakshani Madusha Sammuarachchi Petitioner-Respondent-Respondent 2. Surangi Deepika Jayawardhena Respondent-Respondent-Respondent Both of, "Suramya", Welimanna, Aranayake. AND NOW BETWEEN Lakshani Madusha Sammuarachchi, "Suramya", Welimanna, Aranayake. Petitioner-Respondent-Respondent-Appellant Vs. 1. Nirmala Shiranthani Siriwardhena, 2/55, Welimanna, Aranayake. 2. Krishan Lakshman Siriwardhena Intervenient Petitioner-Petitioner-Respondents 3. Surangi Deepika Jayawardhena Respondent-Respondent-Respondent-Respondent Both of, "Suramya", Welimanna, Aranayake.

09/ 11/ 22	SC Appeal 169/2014	Kapukotuwa Mudiyanselage Jayatissa, No. 09/01, Neelapola, Seruwila. PETITIONER Vs. 1. Divisional Secretary, Divisional Secretariat, Serunuwara. 2. District Secretary, District Secretariat, (Kachcheri) Trincomalee. 3. Deputy Commissioner of Lands, Office of the Additional Commissioner of Lands, Trincomalee. 4. Commissioner General of Lands, No. 07, Gregory's Avenue, Land Commissioner General's Department, Colombo 07. 5. Additional Commissioner of Land Development, No. 07, Gregory's Avenue, Land Commissioner General's Department, Colombo 07. 6. K. H. Sandya Kumari, No. 10, Neelapola, Neelagala. (via Kantale) 7. Hon. Attorney General, Attorney General's Department, Colombo 12. RESPONDENTS AND NOW BETWEEN Kapukotuwa Mudiyanselage Jayatissa, No. 09/01, Neelapola, Seruwila. PETITIONER - APPELLANT Vs 1. Divisional Secretary, Divisional Secretariat, Serunuwara. 2. District Secretary, District Secretariat, (Kachcheri) Trincomalee. 3. Deputy Commissioner of Lands, Office of the Additional Commissioner of Lands, Trincomalee. 4. Commissioner General of Lands, No. 07, Gregory's Avenue, Land Commissioner General's Department, Colombo 07. 5. Additional Commissioner of Land Development, No. 07, Gregory's Avenue, Land Commissioner General's Department, Colombo 07. 6. K. H. Sandya Kumari, No. 10, Neelapola, Neelagala. (via Kantale) 7. Hon. Attorney General, Attorney General's Department, Colombo 12. RESPONDENT - RESPONDENTS
07/ 11/ 22	SC/FR Application No. 356/2014	1. Don Piyasena Karunaratne, No. 01, Stadium Road, Anuradhapura. 2. Thamara Gunatunge, No.05, Stadium Cross Road, Anuradhapura. 3. Magilin Nona Hapangama, No.03, Stadium Cross Road, Anuradhapura. Petitioners Vs. 1. Anuradhapura Municipal Council, Anuradhapura. 2. H. P Somadasa, Mayor, Anuradhapura Municipal Council, Anuradhapura. 3. S.S.M Sampath Rohana Dharmadasa, Municipal Commissioner, Anuradhapura Municipal Council, Anuradhapura. 4. Honourable Attoreny General Attorney General's Department, Colombo 12. Respondents

07/ 11/ 22	SC/ Appeal No. 48/2016	Disanayakage Lional Rajapaksha No 2/324, Asswedduma, Kuliayapitiya. Plaintiff Vs. 1. W.A Prema Swarnamali Bandara, No 324/A,Kurunegala Road, Kuliyapitiya. 2. Hettiarachchi Mudiyanselage Cyril Bandara, No 324/A,Kurunegala Road, Kuliyapitiya. 3. Singhage Nandawathi Podimanike, No 2/324, Asswedduma, Kuliayapitiya. 4. Disanayakage Harshani Trishila Rajapaksha, No 2/324, Asswedduma, Kuliayapitiya. Defendant AND 1. W.A Prema Swarnamali Bandara, No 324/A, Kurunegala Road, Kuliyapitiya. 2. Hettiarachchi Mudiyanselage Cyril Bandara, No 324/A, Kurunegala Road, Kuliyapitiya. 1st and 2nd Defendant Petitioner Vs. Disanayakage Lional Rajapaksha, No 2/324, Asswedduma, Kuliayapitiya. Plaintiff- Respondent 3. Singhage Nandawathi Podimanike, No 2/324, Asswedduma, Kallayapitiya 4. Disanayakage Harshani Trishila Rajapaksha, No 2/324, Asswedduma, Kuliayapitiya. Defendant- Respondents AND NOW Disanayakage Lional Rajapaksha, No 2/324, Asswedduma, Kuliyapitiya Plaintiff- Respondent-Petitioner Vs. 1. W.A Prema Swarnamali Bandara, No 324/A,Kurunegala Road, Kuliyapitiya 2. Hettiarachchi Mudiyanselage Cyril Bandara, No 324/A, Kurunegala Road, Kuliyapitiya. 1st and 2nd Defendant Petitioner-Respondents 3. Singhage Nandawathi Podimanike, No 2/324, Asswedduma, Kuliayapitiya. 4. Disanayakage Harshani Trishila Rajapaksha No 2/324, Asswedduma, Kuliayapitiya. 3rd and 4th Defendant- Respondent- Respondents
03/ 11/ 22	SC Appeal No: 184/2019	Democratic Socialist Republic of Sri Lanka. Complainant Vs. Kotuwe Gedara Sriyantha Dharmasena Accused And Now Kotuwe Gedara Sriyantha Dharmasena Accused-Appellant Vs. The Hon. Attorney General, Attorney General’s Department, Colombo. Respondent And Now Between Kotuwe Gedara Sriyantha Dharmasena Accused-Appellant-Petitioner (Presently incarcerated in Welikada Prison) Vs. The Hon. Attorney General, Attorney General’s Department, Colombo. Complainant-Respondent-Respondent

17/ 10/ 22	SC (FR) 13/2019	Bandara Wijesundara, No. 296/19C, Shanthi Mawatha, High Level Road, Colombo 06. PETITIONER -Vs- 1. D. N. R. Sirirwardena, Registrar General of Companies, The Department of the Registrar of Companies Sri Lanka, No. 400, D. R. Wijewardena Mawatha, Colombo 10. 1(a). Sanjeewa Dissanayake, Registrar General of Companies, The Department of the Registrar of Companies Sri Lanka,No. 400, D. R. Wijewardena Mawatha, Colombo 10. 2. Baqian Law Group Lanka (Pvt) Ltd, No. 11, Station Road, Bambalapitiya, Colombo 04. 3. Hon. Attorney General, Attorney General's Department, Colombo 12. RESPONDENTS 4. Kalinga N. Indatissa, President's Counsel, The President, The Bar Association of Sri Lanka No. 153, Mihindu Mawatha, Colombo 12. And also, of No. 20, 1st Lane, Epitamulla Road, Pitakotte. 4(a). Saliya K.M. Pieris, PC, The President,The Bar Association of Sri Lanka, No. 153, Mihindu Mawatha, Colombo 12. And also of No. 79/3, Kuruppu Road, Colombo 08. 5. W. J. Shavindra Fernando, President's Counsel, Deputy President Bar Association of Sri Lanka, No. 153, Mihindu Mawatha, Colombo 12. And also, of No. 4/3, Sri Sumangala Mawatha, Ratmalana. 5(a). Anura B. Meddegoda, PC, Deputy President, Bar Association of Sri Lanka, No. 153, Mihindu Mawatha, Colombo 12. And also of No.195/21, Royal Court, Koswatta Road, Nawala. 6. Kaushalya Nawaratne, Attorney-at-Law, Secretary, Bar Association of Sri Lanka, No. 153, Mihindu Mawatha, Colombo 12. And also, of No. 8B, 1st Lane, Pagoda Road, Nugegoda. 6(a). Rajeev Amarasuriya, Attorney-at-Law, Secretary, Bar Association of Sri Lanka, No. 153, Mihindu Mawatha, Colombo 12. And also of No.8/2, Coniston Place, Colombo 07. 7. A. W. Nalin Chandika De Silva,Attorney-at-Law, Treasurer, Bar Association of Sri Lanka, No. 153, Mihindu Mawatha, Colombo 12. And also, of No. 321/ 15a, Rankethyaya Road, Makola South, Makola. 7(a). T. Rajindh Perera, Attorney-at-Law, Treasurer, Bar Association of Sri Lanka, No. 153, Mihindu Mawatha, Colombo 12. And also of No.457/14A, Nawala Road, Rajagiriya 8. V. De Livera Tennekoon, Attorney-at-Law, Assistant Secretary, Bar Association of Sri Lanka, No. 153, Mihindu Mawatha,Colombo 12. And also, of No. 74/5, Jaya Road, Udahamulla, Nugegoda. 8(a). T.M.S. Pasindu Silva, Attorney-at-Law, Assistant Secretary, Bar Association of Sri Lanka, No. 153, Mihindu Mawatha, Colombo 12. And also of No.6/1, Watarappola Road, Mount Lavinia. ADDED RESPONDENTS

12/ 10/ 22	SC (FR) Application No. 139/12	1. Mahapitiya Gedera Shanuka Gihan Karunaratne (Minor) Shantha Stores, Nagahapola, Akuramboda. Appearing through his Next Friend: Mahapitiya Gedera Ananda Karunaratne (Father) Shantha Stores, Nagahapola, Akuramboda. 2. Purijjala Puwakpitiyegedara Amila Dilshan Puwakpitiya (Minor), Thalwatte Road, Nillannoruwa, Madupola. Appearing through his Next Friend: Purijjala Puwakpitiyegedera Neeladasa Puwakpitiya (Father), Thalwatte Road, Nillannoruwa, Madupola. PETITIONERS -VS- 1. Lory Koswatte Deputy Principal, M/Weera Keppetipola Madya Maha Vidyalaya, Pallepola, Akuramboda. 2. H.M. Gunasekera Secretary, Ministry of Education, Isurupaya, Battaramulla. 3. Chief Inspector of Police Abeysinghe Officer-in-Charge, Mahawela Police Station, Mahawela. 4. N.K. Illangakoon Inspector General of Police, Police Headquarters, Colombo 01. 5. Hon. Attorney General Attorney Generals' Department, Colombo 12. RESPONDENTS
06/ 10/ 22	S.C.Appeal No.116/2020	N. Dinesha Marita Amarasekera No. 736, Negombo Road, Maththumagala, Ragama. Plaintiff Vs. M.T. Theobald Perera "Sriyawasa", St. Sebastian Mawatha, Kandana. Defendant And M.T. Theobald Perera (Deceased) 1(a). Hetti Kankanamlage Dona Filamina Jasintha 1(b). Jenita Samanthi Perera 1(c). Anil Susantha Perera 1(d). Amitha Chandima Perera 1(e). Manel Gayani Perera All of "Sriyawasa", St. Sebastian Mawatha, Kandana. Substituted-Defendant- Appellants Vs. N. Dinesha Marita Amarasekera No. 736, Negombo Road, Maththumagala, Ragama. Plaintiff-Respondent AND NOW BETWEEN N. Dinesha Marita Amarasekera No. 736, Negombo Road, Maththumagala, Ragama. Plaintiff-Respondent-Appellant Vs. M.T. Theobald Perera (Deceased) 1(a). Hetti Kankanamlage Dona Filamina Jasintha 1(b). Jenita Samanthi Perera 1(c). Anil Susantha Perera 1(d). Amitha Chandima Perera 1(e). Manel Gayani Perera All of "Sriyawasa", St. Sebastian Mawatha, Kandana. Substituted-Defendant- Appellant-Respondents

06/10/22	SC FR No. 195/2022 & SC FR No. 212/2022	SC FR No. 195/2022 1. Dr. Athulasiri Kumara Samarakoon. 2. Soosaiappu Neavis Morais. 3. Dr. Mahim Mendis. Petitioners Vs. 1. Hon. Ranil Wickremesinghe Minister of Finance 2022-Present. 2. Mahinda Rajapakse Former Cabinet Minister of Finance 2019 – 2020. 2A. Basil Rajapakse Former Cabinet Minister of Finance 2020 – 2022. 2B. Ali Sabri, PC Former Cabinet Minister of Finance 2022. 3. Prof. G.L. Peiris. 4. Dinesh Gunawardena. 5. Douglas Devenanada. 6. Dr. Ramesh Pathirana. 7. Prasanna Ranathunga. 8. Rohitha Abeygunawardena. 9. Dullas Alahapperuma. 10. Janaka Wakkumbura. 11. Mahinanda Aluthgamage. 12. Mahinda Amaraweera. 13. S.M. Chandrasena. 14. Nimal Siripala de Silva. 15. Johnston Fernando. 16. Udaya Gammanpila 17. Bandula Gunawardena. 18. Gamini Lokuge. 19. Vasudeva Nanayakkara. 20. Chamal Rajapakse. 21. Namal Rajapakse 22. Keheliya Rambukwella. 23. C.B. Ratnayake. 24. Pavithra Devi Wanniarachchi. 25. Sarath Weerasekera. 26. Wiman Weerawansa. 27. Janaka Bandara Tennakoon. The 1st to 27th Respondents are all former Members of the Cabinet of Ministers of the Republic and presently sit as Members of Parliament of the Republic. 28. The Monetary Board of the Central Bank of Sri Lanka. 29. Ajith Nivad Cabral Former Governor of the Central Bank of Sri Lanka. 30. W.D. Laxman Former Governor of the Central Bank of Sri Lanka. 31. S.R. Attygalle Former Secretary to the Treasury. 32. S.S.W. Kumarasinghe Former Member of the Central Bank of Sri Lanka. 32A. Gotabaya Rajapakse ADDED 32A RESPONDENT 33. Hon. Attorney General. 34. Chulantha Wickremaratne Auditor General. 35. Hon. Justice Eva Wanasundara. 36. Hon. Justice Deepali Wijesundara. 37. Mr. Chandra Nimal Wakishta. Members of the Commission To Investigate Allegations of Bribery or Corruption. 38. Mr. P.B. Jayasundera. 39. Mr. Dhammika Dasanayake. Respondents SC FR No. 212/2022 1. Chandra Jayaratne 2. Julian Bolling 3. Jehan CanagaRetna, 4. Transparency International Sri Lanka Petitioners Vs 1(a) Hon. Attorney General. 1(b) Hon. Gotabaya Rajapakse Former President of Sri Lanka. 2. Hon. Mahinda Rajapakse Former Prime Minister, Former Minister of Buddhasasana, Religious & Cultural Affairs Former Minister of Urban Development & Housing, Former Minister of Economic Policies and Plan Implementation and Former Minister of Finance. 3. Hon. Basil Rajapakse Former Minister of Finance. 4. Hon. M.U.M. Ali Sabri, PC Former Minister of Finance. 5. Hon. Ranil Wickremesinghe Prime Minister. 6. Deshamanya Professor W.D. Lakshman Former Governor of the Central Bank. 7. Mr. Ajith Nivad Cabral Former Governor of the Central Bank. 8. Dr. P. Nandalal Weerasinghe Governor of the Central Bank of Sri Lanka. 9. The Monetary Board of the Central Bank of Sri Lanka. 10. S.R. Attygalle Former Secretary to the Treasury. 11. Mr. K.M. Mahinda Siriwardana Secretary to the Treasury. 12. Mr. Saliya Kithsiri Mark Pieris, PC. President of the Bar Association of Sri Lanka. 13. Mr. Isuru Balapatabedi, AAL Secretary of the Bar Association of Sri Lanka Respondents

06/ 10/ 22	S.C.Appeal No.117/2020	N. Dinesha Marita Amarasekera No. 736, Negombo Road, Maththumagala, Ragama. Plaintiff Vs. M.T. Theobald Perera “Sriyawasa”, St. Sebastian Mawatha, Kandana. Defendant And M.T. Theobald Perera (Deceased) 1(a). Hetti Kankanamlage Dona Filamina Jasintha 1(b). Jenita Samanthi Perera 1(c). Anil Susantha Perera 1(d). Amitha Chandima Perera 1(e). Manel Gayani Perera All of “Sriyawasa”, St. Sebastian Mawatha, Kandana. Substituted-Defendant- Appellants Vs. N. Dinesha Marita Amarasekera No. 736, Negombo Road, Maththumagala, Ragama. Plaintiff-Respondent AND NOW BETWEEN N. Dinesha Marita Amarasekera No. 736, Negombo Road, Maththumagala, Ragama. Plaintiff-Respondent-Appellant Vs. M.T. Theobald Perera (Deceased) 1(a). Hetti Kankanamlage Dona Filamina Jasintha 1(b). Jenita Samanthi Perera 1(c). Anil Susantha Perera 1(d). Amitha Chandima Perera 1(e). Manel Gayani Perera All of “Sriyawasa”, St. Sebastian Mawatha, Kandana. Substituted-Defendant- Appellant-Respondents
06/ 10/ 22	SC (Appeal) 103/2018	Thiremuni Peter, Morakale- Opposite the School, Upper Kottaramulla. Plaintiff Vs. 1. A. S. Jayawardene, Secretary to the Treasury, The Secretariat, Colombo. 2. Daya Liyanage, Deputy Secretary to the Treasury, The Secretariat, Colombo. 3. Seemasahitha Wennappuwa Janatha Santhaka Pravahana Sevaya, Dummaladeniya, Wennappuwa. Defendants AND BETWEEN 1. A. S. Jayawardene,Secretary to the Treasury, The Secretariat, Colombo. 1A. Punchi Bandara Jayasundara, Secretary to the Treasury, The Secretariat, Colombo 01. 1B. Ranepura Hewage Samantha ……Samaratunga, Secretary to the Treasury, The Secretariat, Colombo 01. 2. Daya Liyanage, Deputy Secretary to the Treasury, The Secretariat, Colombo 01. 2A. Sajith Ruchika Artigala, Deputy Secretary to the Treasury, The Secretariat, Colombo 01. Defendants – Appellants Vs. Thiremuni Peter, Morakale- Opposite the School, Upper Kottaramulla. Plaintiff - Respondent Seemasahitha Wennappuwa Janatha Santhaka Pravahana Sevaya, Dummaladeniya, Wennappuwa. Defendant - Respondent Sri Lanka Transport Board, No. 200, Kirula Road, Colombo 05. Substituted 3rd Defendant-Respondent AND NOW BETWEEN Thiremuni Peter, Morakale- Opposite the School, Upper Kottaramulla. Plaintiff-Respondent-Appellant Vs. Sri Lanka Transport Board, No. 200, Kirula Road, Colombo 05. Substituted 3rd Defendant-Respondent-Respondent

05/ 10/ 22	SC Appeal No: 23/2019	Ummu Yasmin Mulafer, No. 39/5, Railway Lane, Colombo 02. Plaintiff Vs. 1. Merinnage Rupika Wijesingha, No. 9/D/193, Jayawadanagama, Battaramulla. 2. P. Sunil Lakshman Fernando, No. 3/D/47, Jayawadanagama, Battaramulla. Defendants AND Ummu Yasmin Mulafer, No. 39/5, Railway Lane, Colombo 02. Plaintiff-Appellant Vs. 1. Merinnage Rupika Wijesingha, No. 9/D/ 193, Jayawadanagama, Battaramulla. 2. P. Sunil Lakshman Fernando, No. 3/D/47, Jayawadanagama, Battaramulla. Defendant-Respondents AND NOW BETWEEN Merinnage Rupika Wijesingha, No. 9/D/193, Jayawadanagama, Battaramulla. 1st Defendant-Respondent-Petitioner Vs. Ummu Yasmin Mulafer, No. 39/5, Railway Lane, Colombo 02. Plaintiff-Appellant-Respondent P. Sunil Lakshman Fernando, No. 3/D/47, Jayawadanagama, Battaramulla. 2nd Defendant-Respondent-Respondent
04/ 10/ 22	S.C. Appeal No.44/2016	1. Nawa Rajarata Appliances (Pvt) Ltd., No. 111, Kurunegala Road, Galewela. 2. K.D.G.S. Wijeratne Managing Director, Nawa Rajarata Appliances (Pvt) Ltd.,No. 111, Kurunegala Road, Galewela. Plaintiffs Vs Commercial Bank of Ceylon PLC, Commercial House, No. 21, Sir Razeek Fareed Mawatha, P.O. Box 856, Colombo 01. Defendant AND NOW BETWEEN Commercial Bank of Ceylon PLC, Commercial House, No. 21, Sir Razeek Fareed Mawatha, P.O. Box 856, Colombo 01. Defendant-Petitioner/Appellant Vs 1. Nawa Rajarata Appliances (Pvt) Ltd., No. 111, Kurunegala Road, Galewela. 2. K.D.G.S. Wijeratne. Managing Director, Nawa Rajarata Appliances (Pvt) Ltd., No. 111, Kurunegala Road, Galewela. Plaintiffs-Respondents
29/ 09/ 22	SC. FR Application No. 109/2014	1. Nadesan Balamurali 2. A. Anbalgan 3. R. Vijayakumaran (All members of the School Development Society Talawakelle Tamil Maha Vidyalaya, Talawakelle,) Petitioners Vs. 1. W.J.L.S Fernando, Project Director, Upper Kotmale Hydro Power Project, Ceylon Electricity Board, No. 385, Fourth Floor, Landmark Building Galle Road, Colombo 03. 2. Ceylon Electricity Board, No. 72, Ananda Kumaraswamy Mawatha, Colombo 07 3. S.G.K Bodhimanna, Divisional Secretary, Divisional Secretariat Office, Nuwaraeliya 4. M.G.A Piyadasa, Zonal Director Education, Zonal Education Office, Nuwaraeliya 5. H.M Wijayasiri, Provincial Director of Education, Provincial Department of Education, Central Province, Kandy 6. R. Krishnasamy, Principal, Tallawakelle Tamil Maha Vidyalaya, Talawakelle 7. Hon. Attorney General, Attorney Generals' Department, Colombo 12 Respondents

29/ 09/ 22	SC Appeal 20/2021	Officer-In-Charge, Special Crime Investigation Unit, Police Station, Moratuwa. Complainant Vs. Rasika Deepal Bandara Dissanayake, No. 154, Uduwerella, Gampaha. Accused AND NOW Rasika Deepal Bandara Dissanayake, No. 154, Uduwerella, Gampaha. Accused-Appellant Vs 1. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondent 2. Officer-In-Charge, Special Crime Investigation Unit, Police Station, Moratuwa. Complainant-Respondent AND NOW BETWEEN Rasika Deepal Bandara Dissanayake, No. 154, Uduwerella, Gampaha. Accused-Appellant-Appellant Vs 1. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondent-Respondent 2. Officer-In-Charge, Special Crime Investigation Unit, Police Station, Moratuwa. Complainant-Respondent-Respondent
28/ 09/ 22	SC /FR/ Application No.135/2017	Liyanagamage Anoma Santhi, Welikanda, Ahungalla. Petitioner Vs, 1. W.A. Mahinda, Headquarters' Inspector, 2. Sandaruwan, Police Constable 69864, 3. Bandara Karunathilake, Sub-Inspector, 1st to 3rd Respondents, all of Ambalangoda Police Station, Ambalangoda. 4. Pujith Jayasundara, Inspector General of Police, Police Headquarters, Colombo 01. 5. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents

28/ 09/ 22	SC /FR/ Application No. 56/2018	Mr. M.N.M. Nafees 54/3, Haskampola, Siyambalagaskotuwa. Petitioner Vs, 1. Hon. Lakshman Kiriella MP The Minister of Higher Education, No. 18, Ward Place, Colombo 07. 1A. Hon. Kabir Hashim MP The Minister of Higher Education, No. 18, Ward Place, Colombo 07. Substituted 1A Respondent 1B. Wijeydasa Rajapakshe MP The Minister of Higher Education, No. 18, Ward Place, Colombo 07. Substituted 1B Respondent 1C. Hon Bandula Gunawardena MP The Minister of Higher Education and Cultural Affairs, No. 18, Ward Place, Colombo 07. Substituted 1C Respondent 1D. Hon. Prof. G.L. Peris The Minister of Higher Education, No. 18, Ward Place, Colombo 07. Substituted 1D Respondent 1E. Hon. Dinesh Gunawardena MP The Minister of Higher Education, The Ministry of Higher Education, No. 18, Ward Place, Colombo 07. Substituted 1D Respondent 2. University Grants Commission No. 20, Ward Place, Colombo 07. 3. Prof. Mohan de. Silva, The Chairman, University Grants Commission, No. 20, Ward Place, Colombo 07. 3A. Prof. Sampath Amarathunga The Chairman, University Grants Commission, No. 20, Ward Place, Colombo 07. Substituted 3A Respondent 4. Prof. P.S.M. Gunarathne Vice Chairman, University Grants Commission, No. 20, Ward Place, Colombo 07. 4A. Prof. Janitha A. Liyanage Vice Chairman, University Grants Commission, No. 20, Ward Place, Colombo 07. Substituted 4A Respondent 5. Prof. Malik Ranasinghe The Member, University Grants Commission, No. 20, Ward Place, Colombo 07. 5A. Prof. Kollupitiye Mahinda Sangharakhitha Thero The Member, University Grants Commission, No. 20, Ward Place, Colombo 07. Substituted 5A Respondent 6. Dr. Wickrema Weerasooriya The Member, University Grants Commission, No. 20, Ward Place, Colombo 07 6A. Senior Prof. A.K.W. Jayawardane The Member, University Grants Commission, No. 20, Ward Place, Colombo 07. Substituted 6A Respondent 7. Prof. Hemantha Senanayake The Member, University Grants Commission, No. 20, Ward Place, Colombo 07. 7A. Prof. Premakumara de. Silva The Member, University Grants Commission, No. 20, Ward Place, Colombo 07. Substituted 7A Respondent 8. Dr. Ruviaz Haneefa The Member, University Grants Commission, No. 20, Ward Place, Colombo 07. 8A. Mr. Palitha Kumarasinghe The Member, University Grants Commission, No. 20, Ward Place, Colombo 07. Substituted 8A Respondent 9. Prof. R. Kumaravadivel The Member, University Grants Commission, No. 20, Ward Place, Colombo 07. 9A. Prof. Mrs. Vasanthy Arasarathnam The Member, University Grants Commission, No. 20, Ward Place, Colombo 07. Substituted 9A Respondent 10. Mr. P.K.G. Harischandra The Treasury Representative University Grants Commission, No. 20, Ward Place, Colombo 07. 10A. Mr. A.R.H.W.A. Kumarasiri The Treasury Representative University Grants Commission, No. 20, Ward Place, Colombo 07. Substituted 10A Respondent 11. Dr. Priyantha Premakumara The Secretary to the Commission University Grants Commission, No. 20, Ward Place, Colombo 07. 12. Mrs. Shalika Ariyarathne Senior Assistant Secretary for Secretary University Grants Commission, No. 20, Ward Place

28/ 09/ 22	SC /FR/ Application No. 13/2020	01. Paalawa Rankoth Gedara Kenudi Dilandi 02. Peramuna Kankanamge Achala Dilrukshi all of, No. H2/4, National Housing Scheme, (Commonly known as Chithra Lane Flats), Chithra Lane, Colombo 05. Petitioners Vs, 01. Sandamali Aviruppola, The Principal, Visakha Vidyalaya, No. 133, Vajira Road, Colombo -05. 02. Kalani Sooriyapperuma, The Deputy Principal, Administration, Visakha Vidyalaya, No. 133, Vajira Road, Colombo -05. 03. Sumudu Weerasinghe, The Deputy Principal, Education and Development, Visakha Vidyalaya, No. 133, Vajira Road, Colombo -05. 04. Jeevana Ariyarathna, The Deputy Principal, Co-Curricular and Extra Curricular, Visakha Vidyalaya, No. 133, Vajira Road, Colombo -05. 05. Ranjith Chandrasekara, Director of National Schools Ministry of Education, Isurupaya, Baththaramulla. 06. N.H.M. Chithrananda, Secretary, Ministry of Education, Isurupaya, Baththaramulla. 07. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents
27/ 09/ 22	SC Appeal No. 15/2019, SC Appeal No. 16/2019, SC Appeal No. 17/2019	
27/ 09/ 22	SC Appeal No: 109/2017	Officer in Charge, Police Station, Wattegama. COMPLAINANT vs. Puwakgahakumbure Gedara William Wijesinghe, 120A, Kudugala Road, Wattegama. ACCUSED AND BETWEEN Puwakgahakumbure Gedara William Wijesinghe, 120A, Kudugala Road, Wattegama. ACCUSED-APPELLANT Vs 1. Attorney-General Attorney-General's Department, Colombo 12. RESPONDENT 2. Officer in Charge, Police Station, Wattegama, COMPLAINANT-RESPONDENT AND NOW BETWEEN Puwakgahakumbure Gedara William Wijesinghe, 120A, Kudugala Road, Wattegama. ACCUSED-APPELLANT-PETITIONER Vs 1. Attorney-General Attorney-General's Department, Colombo 12. RESPONDENT-RESPONDENT 2. Officer in Charge, Police Station, Wattegama, COMPLAINANT-RESPONDENT-RESPONDEN

26/ 09/ 22	SC FR 163/2019, SC FR 165/2019, SC FR 166/2019, SCFR 184/2019, SCFR 188/2019, SCFR 191/2019, SCFR 193/2019, SC.FR 195/2019, SCFR 196/2019, SC FR No. 197/19, SC FR 198/2019, SCFR 293/2019	
25/ 09/ 22	SC HCCA LA 147/2022 WP/ HCCA/COL/ 143/2022/LA DSP/00136/22	Pattiyage Harsha Kamal Gomes Sole Proprietor of Vishmitha Enterprises No.18, Turbo Houses Pitawella Road Boralesgamuwa Plaintiff-Petitioner Vs. 1. Sri Lanka Rupavahini Corporation P.O. Box 2204, Independence Square, Colombo 07. 2. Sonala Digath Weerawickrema. Gunawardana The Chairman P.O. Box 2204, Independence Square, Colombo 07. Defendant- Respondents 2A. Asanka Priyanath Jayasuriya The Chairman P.O. Box 2204, Independence Square, Colombo 07.

22/09/22	SC APPEAL NO: SC/APPEAL/82/2020	Jayasinghe Arachchige Thilakeratne, Pannala Post, Galayaya Plaintiff Vs. 1. Jayasinghe Arachchige Wijesena (Deceased) 1A. Jayasinghe Arachchige Wimalawathie, Pannala Post, Galayaya 2. Jayasinghe Arachchige Piyadasa, Belvian Market, Hingurakgoda 3. Jayasinghe Arachchige Karunawathie, Pannala Post, Galayaya 4. Jayasinghe Arachchige Wimalawathie 5. Jayasinghe Arachchige Weerasinghe, 2 SC/APPEAL/82/2020 Pothuwatawana Post, Pothuwatawana 6. Don George Lionel Senarath, Pannala Post, Galayaya 7. Warnakulasuriya Patrick Valentine Fernando, Sudharshni Ulu Mola, Negombo Road, Galayaya 8. Guruge Mervyn Dharnawardene, No. 884, Ja-ela Post, Weligampitiya 9. A.M. Shanthi Sagarika Kumari, Pannala Post, Galayaya 10. Ranhamige Sarath Wickremapala 11. W.M.U. Rohana Parakrama, Gonawila Post, Makandura 12. L.A. Lal Pathirana 13. M.M. Hemantha Kumara, Gonawila Post, Makandura 14. Herath Hitihami Appuhamilage Lenard Krishantha 15. Rajakaruna Mudiyanselage Chandrasiri Janaka of Mukalana 16. Ranasinghe Arachchilage Leena Damayanthi 17. Wijesuriya Arachchige Sheron Crishantha 18. Dombawala Hitihamilage Anura Crishantha 19. Dona Harriet Somalatha 20. Indrani Padmalatha 21. Indrani Sandhya, All of Pannala Post, Galayaya Defendants AND BETWEEN 1. A.M. Shanthi Sagarika Kumari, Pannala Post, Galayaya 2. Ranhamige Sarath Wickremapala, Pannala Post, Galayaya 3. W.M.U. Rohana Parakrama, Gonawila Post, Makandura 4. L.A. Lal Pathirana, Pannala Post, Pallama 5. M.M. Hemantha Kumara, Gonawila Post, Makandura 6. Herath Hitihami Appuhamilage Lenard Krishantha, Pannala Post, Galayaya 7. Rajakaruna Mudiyanselage Chandrasiri Janaka of Mukulana 8. Ranasinghe Arachchilage Leena Damayanthi, Pannala Post, Galayaya 9. Wijesuriya Arachchige Sheron Crishantha, Pannala Post, Galayaya 10. Dombawala Hitihamilage Anura Crishantha, Pannala Post, Galaya 11. Dona Harriet Somalatha, Pannala Post, Galayaya 12. Indrani Padmalatha, Pannala Post, Galayaya 13. Indrani Sandhya, Pannala Post, Galayaya 9th to 21st Defendant-Appellants Vs. Jayasinghe Arachchige Thilakeratne, Pannala Post, Galayaya Plaintiff-Respondent 1. Jayasinghe Arachchige Wijesena (Deceased) 1A. Jayasinghe Arachchige Wimalawathie, Pannala Post, Galayaya 2. Jayasinghe Arachchige Piyadasa, Belvian Market, Hingurakgoda 3. Jayasinghe Arachchige Karunawathie, Pannala Post, Galayaya 4. Jayasinghe Arachchige Wimalawathie, Pannala Post, Galayaya 5. Jayasinghe Arachchige Weerasinghe Pothuwatawana Post, Pothuwatawana 6. Don George Lionel Senarath, Pannala Post, Galayaya 7. Warnakulasuriya Patrick Valentine Fernando, Sudharshni Ulu Mola, Negombo Road, Galayaya 8. Guruge Mervyn Dharnawardene, No. 884, Ja-ela Post, Weligampitiya Defendant-Respondents AND NOW BETWEEN Jayasinghe Arachchige Thilakeratne, Pannala Post, Galayaya Plaintiff-Respondent-Petitioner Vs. 1. Jayasinghe Arachchige Wijesena (Deceased) 1A. Jayasinghe Arachchige Wimalawathie, Pannala Post, Galayaya 2. Jayasinghe Arachchige Piyadasa, Belvian Market, Hingurakgoda 2A. Jayasinghe Arachchige

22/ 09/ 22	SC Appeal No: 63/2014	1. Amarasinghe Arachchige Somawathie 2. Muthuthanthrige Irene Fernando Both of No. 146/15, Kaldemulla, Moratuwa. PLAINTIFFS vs. 1. Mabima Vitharanage Sunil Wickremasinghe, No. 394, Radawana, Pugoda. 2. D.P. Tillekeratne, No. 95/3, Kirillawala, Weboda, Kadawatha. DEFENDANTS And D.P. Tillekeratne, No. 95/3, Kirillawela, Weboda, Kadawatha. 2ND DEFENDANT – PETITIONER vs. 1. Amarasinghe Arachchige Somawathie 2. Muthuthanthrige Irene Fernando Both of No. 146/15, Kaldemulla, Moratuwa. PLAINTIFFS – RESPONDENTS And between Dodampe Gamage Tillekeratne, No. 95/3, Kirillawala, Weboda, Kadawatha. 2ND DEFENDANT – PETITIONER – APPELLANT vs. 1. Amarasinghe Arachchige Somawathie 2. Muthuthanthrige Irene Fernando Both of No. 146/15, Kaldemulla, Moratuwa. PLAINTIFFS – RESPONDENTS – RESPONDENTS And now between Dodampe Gamage Tillekeratne, No. 95/3, Kirillawala, Weboda, Kadawatha. vs. 2ND DEFENDANT – PETITIONER – APPELLANT – APPELLANT 1. Amarasinghe Arachchige Somawathie 2. Muthuthanthrige Irene Fernando. No. 146/15, Kaldemulla, Moratuwa. PLAINTIFFS – RESPONDENTS – RESPONDENTS – RESPONDENTS Amarasinghe Arachchige Somawathie. No. 146/15, Kaldemulla, Moratuwa. SUBSTITUTED 2ND PLAINTIFF – RESPONDENT – RESPONDENT-RESPONDENT
15/ 09/ 22	SC/ Appeal No. 88/2017	Kerewgoda Dona Shiromi, No. 56, St. Sebastian Mawatha, Kandana. Plaintiff Vs, 1. Hanwellage Don Francis, No. 1/56, St. Sebastian Mawatha, Kandana. 2. Hettige Don Newton Donatus, No. 1/56, St. Sebastian Mawatha, Kandana. Defendants 1. Hanwellage Don Francis, No. 1/56, St. Sebastian Mawatha, Kandana. 2. Hettige Don Newton Donatus, No. 1/56, St. Sebastian Mawatha, Kandana. Defendant-Appellants Vs, Kerewgoda Dona Shiromi, No. 56, St. Sebastian Mawatha, Kandana. Plaintiff-Respondent -And Now Between- Kerewgoda Dona Shiromi, No. 56, St. Sebastian Mawatha, Kandana. Plaintiff-Respondent- Appellant Vs, 1. Hanwellage Don Francis, No. 1/56, St. Sebastian Mawatha, Kandana. 2. Hettige Don Newton Donatus, No. 1/56, St. Sebastian Mawatha, Kandana. Defendant-Appellant- Respondents
07/ 09/ 22	SC/APPEAL/ 184/14	Gallage Saummehammy alias Somawathie, Gallage Mandiya, Doloswala, Nivithigala. Plaintiff. Vs. I. A. Dharmapala, Gallage Mandiya, Doloswala, Nivithigala. Defendant. AND BETWEEN I. A. Dharmapala, Gallage Mandiya, Doloswala, Nivithigala. Defendant - Appellant Vs. Gallage Saummehammy alias Somawathie, Gallage Mandiya, Doloswala, Nivithigala. Plaintiff - Respondent. AND NOW BETWEEN Gallage Saummehammy alias Somawathie, Gallage Mandiya, Doloswala, Nivithigala. Plaintiff – Respondent - Petitioner. Vs. I. A. Dharmapala, Gallage Mandiya, Doloswala, Nivithigala. Defendant –Appellant – Respondent.

06/09/22	SC Appeal 117/2017	Rajakannagedera Senarath Wijesinghe Parape, Rambukkana 2nd Defendant-Appellant-Appellant Vs. Rajakannagedera Lalith Chandana Thusitha Kumara, Parape, Rambukkana Plaintiff-Respondent-Respondent 1. Manathunga Arachchilage Piyadasa Parape, Rambukkana. 1A. Manathunga Arachchilage Ranjith Thilakasiri Manathunga 1B. Manathunga Arachchilage Sarath Nandasiri Manathunga. 1C. Lalitha Sriyawathie Manathunga All of Parape Rambukkana. 3. Rajakannagedera Premawathie Parape Rambukkana. 4. Manathunga Dewage Premawathie Parape Rambukkana. 5. Edirisinghe Dewage Edirisinghe Parape Rambukkana. Defendants-Respondents-Respondents
06/09/22	CASE NO. SCFR 18/2020	

09/08/22	SC Appeal 239/16	Pulukkutti Ralalage Karunaratne Baduwila Road Kidelpitiya. Plaintiff-Appellant- Appellant Vs. 1. Pulukkuttiralalage Dhanapala Baduwila Road,Kidelpitiya. 2. Lawaris Gunathilaka Baduwila Road,Kidelpitiya. 2A. Payagala Maha Liyanage Don Kawanis.KidelpitiyaWelmilla Junction, Bandaragama. 2B Yogama Widanalage Somawathie of 112/C. Saddatissa Mawatha Kidelpitiya Welmilla Junction. 3. David Gunathilake Baduwila Road, Kidelpitiya. 3A. Payagala Maha Liyanage Don Kawanis, Kidelpitiya Welmilla Junction, Bandaragama. 3B. Yogama Widanalage Somawathie of 112/C. Saddatissa Mawatha Kidelpitiya Welmilla Junction. 4. Adlyn Gunathilake Baduwila Road, Kidelpitiya. 4A. Yogama Widanalage Somawathie of 112/C. Saddatissa Mawatha Kidelpitiya Welmilla Junction. 5. Pulukkuttiralalage Sirisena Baduwila Road, Kidelpitiya. 6. Pulukkuttiralalage Thepanis alias Daniel, Baduwila Road, Kidelpitiya. 7. Payagala Mahaliyanage Don Victor, Baduwila Road, Kidelpitiya . 7A. Payagala Mahaliyanage Don Nihal, Baduwila Road, Kidelpitiya . New Address No. 166/D,Sri Wimalarama Mawatha, Kidelpitiya, Welmilla Junction. 8. Payagala Mahaliyanage Don Hemawathie, Baduwila Road, Kidelpitiya . Junction. Welmilla. 9. Payagala Mahaliyanage Don Gomis, Baduwila Road, Kidelpitiya . 9A. Payagala Mahaliyanage Hemawathie, No. 168/B In front of the Temple Welmilla, Kidelpitiya. 10. Payagala Maha Liyanage Don Kavanis. Kidelpitiya, Bandaragama. New Address No.112/C, Saddatissa Mawatha Kidelpitiya, Welmilla Junction. 10A. Yogama Widanalage Somawathie of 112/C. Saddatissa Mawatha Kidelpitiya Welmilla Junction. 11. Surage David Baduwila Road, Kidelpitiya . 12. Surage Nathoris Baduwila Road, Kidelpitiya . 12A. Buddarage Jayanthimala Perere No. 136, Saddatissa Mawatha Kidelpitiya ,Welmilla Junction. 13. Surage Nomis Baduwila Road, Kidelpitiya 13A. Amarasinghe Arachchilage Kulawathi of No. 09, Senapura, Kidelpitiya Welmilla Junction. 14. Hapuarachchige Charlott Nona Kotuwegedera, Kidelpitiya, Welmilla. 15. Us-hettige Badrawathi Perera 5/3, Kuda Edanda Road, Waththala. 16. Ushettige Silawathi Perere No. 38, Kuda Edanda Road, Waththala. 17. Hettiarachchige Don Karunasena No. 70, Helapitiwela, Ragama. 18. Pitiyage Hemarathne Perere Kothalawala Junction, Raigama, Bandaragama. 19. Dickson Premarathne Pererea Wathsala Stores, Welmilla, Kidelpitiya, in front of the Temple. New Address No. 163/B, In front of the Temple, Kidelpitiya, , Welmilla Junction. Defendants-Respondents- Respondents

08/08/22	SC [FR] Application No. 06/2011	F. A. Azeez 660/22, Main Street Matale Petitioner Vs. 1. H. M. Gunasekera Secretary, Ministry of Education & Higher Education, Isurupaya Battaramulla 1A Upali Marasinghe Secretary, Ministry of Education & Higher Education, Isurupaya Battaramulla 1B W. M. Bandusena Secretary, Ministry of Education & Higher Education, Isurupaya Battaramulla 1C Sunil Hettiarachchi Secretary, Ministry of Education & Higher Education, Isurupaya Battaramulla 1D N. H. M. Chitrananda Secretary, Ministry of Education & Higher Education, Isurupaya Battaramulla 2. M. S. Premawansa Secretary, Ministry of Education Central Provincial Council Gatambe, Peradeniya 2A P. B. Wijeratne Secretary, Ministry of Education Central Provincial Council Pallekelle, Kundasale 2B R. M. P. S. Ratnayake Secretary, Ministry of Education Central Provincial Council Pallekelle, Kundasale 2C Gamini Rajaratne Secretary, Ministry of Education Central Provincial Council Pallekelle, Kundasale 3. H. M. Wijesiri Herath Provincial Director of Education Department of Education Central Province, Kandy 3A E. P. T. K. Ekanayake Provincial Director of Education Department of Education Central Province, Kandy 4. A. H. M. H. A. Herath Zonal Director of Education Zonal Education office Galewala 4A A. L. M. Zarudeen Zonal Director of Education Zonal Education office Galewala 4B T. N. Hettiarachchi Zonal Director of Education Zonal Education office Galewala 5. Secretary Public Service Commission Carl will Place, Colombo 3 6. Hon. Attorney General Attorney General's Department Colombo 12 7. Auditor General Auditor General's Department Independence Square, Colombo 7 Respondents
27/07/22	S.C. Appeal No. 177/2016	Subadhra Irene Mangalika Wijewickrama, No. 61/41 A, Manel Avenue, Old Kesbawa Road, Delkanda, Nugegoda Plaintiff Vs D.S.B.S. Chandrawathi, Kegalle Road, Alawathura. Defendant AND BETWEEN D.S.B.S. Chandrawathi, Kegalle Road, Alawathura. Defendant-Appellant Vs. Subadhra Irene Mangalika Wijewickrama, No. 61/41 A, Manel Avenue, Old Kesbawa Road, Delkanda, Nugegoda. Plaintiff-Respondent AND BETWEEN Subadhra Irene Mangalika Wijewickrama, No. 61/41 A, Manel Avenue, Old Kesbawa Road, Delkanda, Nugegoda. Plaintiff-Respondent-Appellant Vs. D.S.B.S. Chandrawathi, Kegalle Road, Alawathura. Defendant-Appellant-Responde

27/ 07/ 22	SC (FR) Application No. 104/2017	1. Senadipathige Neville Gratiaen Stanley Rodrigo. 2. Senadipathige Sudesh Priyankara Rodrigo. 3. Senadipathige Chamara Prasanna Rodrigo. 4. Warnakulasuriya Anita Grace Peiris. All of No. 12, Marian Place, Negombo, carrying on business under the name, style and firm of 'Rodrigo Suppliers.' PETITIONERS Vs. 1. G.S. Vithanage, Secretary (Former), Ministry of Foreign Employment, No. 30, Janadhipathi Mawatha, Colombo 1. 2. Eng. Karunasena Hettiarachchi. 2A. Kapila Waidyarathne, PC. 2B. Major General (Retd.) Kamal Gunarathne, Secretary, Ministry of Defence. 3. P. Ranepura, Secretary, Ministry of Skills Development and Vocational Training, 'Nipunatha Piyasa,' Elvitigala Road, Narahenpita, Colombo 5. 4. D.U.S. Wickramarachchi, Chief Finance Office, Sri Lanka Customs, No. 40, Main Street, Colombo 11. 5. A.R. Deshapriya, Director General, Department of National Budget, Ministry of Finance, Colombo 1. 6. Vice Admiral Ravindra Wijegunaratne. 6A. Vice Admiral Travis Sinniah. 6B. Vice Admiral Sirimevan Ranasinghe. 6C. Vice Admiral Priyal de Silva. 6D. Vice Admiral Nishantha Ulugethenna, Commander of the Navy. 7. D.A.W. Wanigasooriya, Chief Accountant, Presidential Secretariat, Colombo 1. 8. Samanthi Weerasinghe, Senior Assistant Secretary (Parliamentary and Civil Affairs), Ministry of Defence. 9. W.H.D. Priyadarshana, Head of Division (Sales and Agricultural Branch), Ministry of Defence. 10. Indika Ranathunga, Director (Corporation and Statutory), Ministry of Industry and Commerce, 73/1, Galle Road, Colombo 10. 11. M.P. Perera, Assistant Director (Administration), Department of Census and Statistics, "Sankyna Mandiraya," Battaramulla. 12. Commander Y.M.G.B. Jayathilake, Sri Lanka Navy. 6th, 6A – 6D and 12th Respondents at Naval Headquarters, Colombo 1. 13. S.M. Jayasinghe, Accountant (Funds), Ministry of Defence. 14. W.G.C. Chandrika, Director, Department of Public Finance, Ministry of Finance, Colombo 1. 15. D.N.K. Hettiarachchi, Chief Accountant. 2nd, 2A, 2B, 8th, 9th, 13th and 15th Respondents at Ministry of Defence, 15/5, Baladaksha Mawatha, Colombo 3. 16. Rodesha Enterprises (Pvt) Ltd., No. 25, Charles Place, Rawathawatta, Moratuwa. 17. Hon. Attorney General, Hulftsdorp, Colombo 12. RESPONDENTS
24/ 07/ 22	SC Appeal 164/12	AHAMED LEBBE HADIAR ATHAMLEVVAI No. 1, Second Cross Street, Batticaloa. -PLAINTIFFVs. 1. ADAMBAWA MAHMOOTHU, (Deceased) 2. SEYADU PATHTHUMMAH, (Deceased) 70/1, Main Street, Batticaloa. -DEFENDANTSFOUSIYA UMMAH ABDUL CADER 70/1, Main Street, Batticaloa. SUBSTITUTED-DEFENDANT AND NOW AHAMED LEBBE HADIAR ATHAMLEVVAI No. 1, Second Cross Street, Batticaloa. -PLAINTIFF-APPELLANT-PETITIONER Vs. FOUSIYA UMMAH ABDUL CADER 70/1, Main Street, Batticaloa. -SUBSTITUTED-DEFENDANTRESPONDENT- RESPONDENTBefore

21/ 07/ 22	SC Appeal No: 146/2015	Gurunnanselage Dona Sandya Manohari Wimalatunga of No.32, Elapitiwala, Ragama. PLAINTIFF -VS- Rajathewa Mohotti Appuhamilage Nihal Seneviratne of Thiriwanegama, Kalagedihena. DEFENDANT AND BETWEEN Rajathewa Mohotti Appuhamilage Nihal Seneviratne of Thiriwanegama, Kalagedihena. DEFENDANT -APPELLANT -VS- Gurunnanselage Dona Sandya Manohari Wimalatunga of No.32, Elapitiwala, Ragama. PLAINTIFF -RESPONDENT AND NOW BETWEEN Gurunnanselage Dona Sandya Manohari Wimalatunga of No.32, Elapitiwala, Ragama. PLAINTIFF-RESPONDENT- APPELLANT -VS- Rajathewa Mohotti Appuhamilage Nihal Seneviratne of Thiriwanegama, Kalagedihena. DEFENDANT -APPELLANT RESPONDENT
21/ 07/ 22	SC Appeal 94/2020	Walihingage Karunarathne Silva, No.53/G, Gonagaha, Makawita. APPLICANT vs. Polytex Garments Ltd, Minuwangoda Road, Ekala, Ja-E1a. RESPONDENT AND BETWEEN Polytex Garments Ltd, Minuwangoda Road, Ekala, Ja-E1a. RESPONDENT – APPELLANT Vs Walihingage Karunarathne Silva, No.53/G, Gonagaha, Makawita. APPLICANT-RESPONDENT AND NOW BETWEEN Esquel Sri Lanka Ltd (Formerly known as Polytex Garments Ltd) Minuwangoda Road, Ekala, Ja-Ela. RESPONDENT – APPELLANT-PETITIONER Vs Walihingage Karunarathne Silva, No.53/G, Gonagaha, Makawita. APPLICANT-RESPONDENT-RESPONDENT
18/ 07/ 22	S.C.F.R. Application No: 205/2022	In the matter of an application under and in terms of Articles 17 & 126 read with Articles 3, 4, 12, 82(6) and 125 of the Constitution. Nagananda Kodituwakku General Secretary, Vinivida Foundation, 99, Subadrarama Road, Nugegoda. Petitioner Vs. 1. Election Commission Elections Secretariat, P.O. Box 02, Sarana Mawatha, Rajagiriya. 2. Nimal G. Punchihewa Chairman, Election Commission, P.O. Box 02, Sarana Mawatha, Rajagiriya. 3. S.B. Divarathna Member, Election Commission, P.O. Box 02, Sarana Mawatha, Rajagiriya. 4. M. M. Mohomed Member, Election Commission, P.O. Box 02, Sarana Mawatha, Rajagiriya. 5. K. P. P. Pathirana Member, Election Commission, P.O. Box 02, Sarana Mawatha, Rajagiriya. 6. Mrs. P. S. M. Charles Member, Election Commission, P.O. Box 02, Sarana Mawatha, Rajagiriya. 7. Sagara Kariyawasam General Secretary, Sri Lanka Podujana Peramuna, 1316, Nelum Mawatha, Battaramulla. 8. Akila Viraj Kariyawasam General Secretary, United National Party, 400, Sirikotha, Pitakotte, Kotte. 9. Ranil Wickramasinghe, Prime Minister, 58, Sir Earnest De Silva Mawatha, Colombo 7. 10. Dhammika Perera Member of Parliament, Parliament of Sri Lanka, Sri Jayawardenapura, Kotte. 11. Attorney General Attorney General’s Department, Colombo 11. Respondents

07/ 07/ 22	SC Appeal 210/2016 [with SC Appeal 209/2016 & SC Appeal 208/2016]	Ran Malu Fashions (Private) Limited, No. 3, Bullers Lane, Colombo 07. PETITIONER AND THEN BETWEEN Wallabha Jayathissa Liyanage Upali Wijayaweera, Acting Commissioner General of Labour, Department of Labour, Narahenpita, Colombo 05. INTERVINIENT- PETITITIONER Vs Ran Malu Fashions (Private) Limited, No 3, Bullers Lane, Colombo 07. PETITIONER-RESPONDENT AND NOW BETWEEN (IN THE SUPREME COURT) Expolanka Freight (Private) Limited No 10, Mile Post Avenue, Colombo 03. CREDITOR -APPELLANT Vs Wallabha Jayathissa Liyanage Upali Wijayaweera Acting Commissioner General of Labour Department of Labour, Narahenpita, Colombo 05. INTERVINIENT PETITITIONER - RESPONDEN Ran Malu Fashions (Private) Limited, No. 3, Bullers Lane, Colombo 07. PETITIONER- REPONDENT- RESPONDENT P. E. A. Jayawickrama and G. J. David Liquidators of Ran Malu Fashions (Private) Ltd, C/O SJMS Associates, No. 11 Castle Lane, Colombo 04. LIQUIDATOR- RESPONDENT
23/ 06/ 22	S.C. Appeal No. 71/2017	Plaintiffs Vs. Jayakodi Arachchige Dona Patriciahamy No. 40, Naththandiya Road, Marawila. Mohamed Anver Mohamed Ashrof, No. 96, Central Road, Colombo 12. Defendants AND Mohamed Anver Mohamed Ashrof, No. 96, Central Road, Colombo 12. 2nd Defendant – Appellant Vs Merryl Ephram Henry De Almeida, No. 62/2, Old Kottawa Road, Mirihana, Nugegoda and 32 others Plaintiffs - Respondents Jayakodi Arachchige Dona Patriciahamy, No. 40, Naththandiya Road, Marawila. 1st Defendant – Respondent AND NOW BETWEEN Mohamed Anver Mohamed Ashrof, No. 96, Central Road, Colombo 12. 2nd Defendant – Appellant – Petitioner/Appellant Vs Merryl Ephram Henry De Almeida, No. 62/2, Old Kottawa Road, Mirihana, Nugegoda and 32 others Plaintiffs – Respondents - Respondents Jayakodi Arachchige Dona Patriciahamy, No. 40, Naththandiya Road, Marawila. 1st Defendant – Respondent - Respondent

20/ 06/ 22	SC /FR/ Application No. 378/2017	Dr. Chanaka Harsha Talpahewa No. 380/56, Bullers Road, Colombo 07. Petitioner Vs, 1. Mr. Prasad Kariyawasam Secretary to the Ministry of Foreign Affairs, Ministry of Foreign Affairs, Republic Building, Colombo 01. 1A. Mr. Ravinatha Aryasinha Secretary to the Ministry of Foreign Affairs, Ministry of Foreign Affairs, Republic Building, Colombo 01. 2. Mr. Dharmasena Dissanayake Chairman- Public Service Commission 2A. Hon. Justice J. Balapatabendi (retired) Chairman- Public Service Commission 3. Prof. Hussain Ismail Member- Public Service Commission 3A. Mrs. Indrani Sugathadasa Member- Public Service Commission 4. Ms. Dhara Wijayatilake Member- Public Service Commission 4A. Mrs. Shivagnanasothy Member- Public Service Commission 5. Dr. Prathap Ramanujam Member- Public Service Commission 5A. Dr. T.R.C. Ruberu Member- Public Service Commission 6. Mr. V. Jegarasasingam Member- Public Service Commission 6A. Mr. Ahamod Lebbe Mohamed Saleem Member- Public Service Commission 7. Mr. Santi Nihal Seneviratne Member- Public Service Commission 7A. Mr. Leelasena Liyanagama Member- Public Service Commission 8. Mr. S. Ranuuge Member- Public Service Commission 8A. Mr. Dian Gomes Member- Public Service Commission 9. Mr. D. Laksiri Mendis Member- Public Service Commission 9A. Mr. Dilith Jayaweera Member- Public Service Commission 10. Mr. Sarath Jayatilaka Member- Public Service Commission 10A. Mr. W.H.Piyadasa Member- Public Service Commission 3rd to 10th Respondents all of No. 177, Nawala Road, Narahenpita. 11. Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents
16/ 06/ 22	SC Appeal No. 42/2010	Visenthi Baduge Piyasiri, Peoples’ Bank, Mutiyangana Branch, Badulla Plaintiff Vs. Dissanayaka Mudiyanselage Gunarathna Banda, No.71, Tangalle Road, Beliatta Defendant AND Dissanayaka Mudiyanselage Gunarathna Banda, No.71, Tangalle Road, Beliatta Defendant-Appellant Visenthi Baduge Piyasiri, Peoples’ Bank, Mutiyangana Branch, Badulla Plaintiff-Respondent AND NOW Visenthi Baduge Piyasiri, Peoples’ Bank, Mutiyangana Branch, Badulla Plaintiff-Respondent-Petitioner Vs. Dissanayaka Mudiyanselage Gunarathna Banda, No.71, Tangalle Road, Beliatta Defendant-Appellant-Respondent

15/ 06/ 22	SC / FR No. 429/2016	1. H.M.M. Sedara, No. 131/D, Pahala Biyanwala, Kadawatha. 2. K.A.P. De Silva, No. 25/1, Kowila Mawatha, Dadalla, Galle. 3. W.M.C. Peiris, No. 17/2, Kammala South, Waikkala. 4. D.D. Millaniya, No. 31, Kottawa Road, Miriswatta, Piliyandala. 5. R.W. Asoka Sriyani, No. 477/4, Batapola Road, Kurudugahahethakma, Elpitiya. 6. C.S. Gunatilaka, No. 58 C 2, Kanaththa Road, Asgiriya, Gampaha. 7. K.S. Abrew, No. 101/15, Bandarawatta, Gampaha. 8. G.G. Seneviratna, No. 78, Keerapana, Gampola. 9. M.T. Ramya Renuka, 5B, Eral Jayawickrama Mawatha, Hettiveediya, Weligama. 10. B.G. Kumudu Nelum, No. 145/C, Meewathura, Peradeniya. 11. N.P. Asoka, No. 22, “Prabashi”, Kuruduwatta, Welipitiya Weligama. 12. G.G. Dayani, Muththettuwa Watta, Nadugala Road, Matara. 13. B.L.N. Thamalika, No. 447/1/D, Pitipana North, Moragahahena Road, Homagama. 14. N.B. Silva, No. 191, Weluwana Road, Dematagoda, Colombo 09. 15. G.D.A. Ariyaratna, Suhada Mawatha, Nagoda, Kalutara. 16. K.M.P.K. Kodituwakku, No. 239/7, Devalegawa, Ratnapura. 17. P.D. Sriyani, No. 300/7A, Old Galle Road, Walliwala, Weligama. 18. K.P. Sandaya, No. 216/1, Mudiyansege Watta, Dalugama, Kelaniya. 19. W.I. Mallika, No. 156/27, Peradeniya Road, Kandy. 20. H.R.S. Perera, Bilingahawatta Lane, Matugama. 21. N.B.A.N. Ratnaseeli, No. 600/7/A/3, Ihala Biyanwila, Mankada Road, Kadawatha. 22. M.T.N. Sovis, No. 45/7 S, Station Road, Kapuwatta, Ja-Ela. 23. A.G. Janaki, No. 110/15, Sri Bidhiraja Mawatha, Polwatta, Pannipitiya. 24. Nalinda Peiris, No. 160/1, Kumbuka West, Gonapola. Petitioners Vs. 1. Sri Lanka Tea Board, No. 574, Galle Road, Colombo 03. 2. Rohan Pethiyagoda, Chairman (Former), Sri Lanka Tea Board, No. 574, Galle Road, Colombo 03. 2A. W.L.P. Wijewardena, Chairman (Former), Sri Lanka Tea Board, No. 574, Galle Road, Colombo 03. 2B. Jayampathy Molligoda, Chairman, Sri Lanka Tea Board, No. 574, Galle Road, Colombo 03. 3. Upali Marasinghe, Secretary, (Former) Ministry of Plantation Industries, 55/75, Vauxhall Lane, Colombo 02. 3A. J.A. Ranjith, Secretary (Former), Ministry of Plantation Industries, 55/75, Vauxhall Lane, Colombo 02. 3B. Ravindra Hewavitharana, Secretary, Ministry of Plantation Industries, 11th Floor, Sethsiripaya 2nd Stage, Battaramulla. 4. N. Godakanda, Director General (Former), Department of Management Services, General Treasury, Colombo 01. 4A. Ms. Hiransa Kaluthantri, Director General, Room 343, 3rd Floor, Ministry of Finance, The Secretariat, Colombo 01. 5. K.L.L. Wijerathne, Chairman (Former), 6. Ashoka Jayasekara, Secretary (Former), Both of National Pay Commission. 6A. Anura Jayawickrema, Secretary (Former), National Pay Commission. 7. Nimal Bandara, 8. Dayananda Vidanagamachchi, 9. J. Charitha Rathwatte, 10. Prof. Kithsiri Madapatha Liyanage, 11. Leslie Shelton Devendra, 12. Suresh Shah, 13. Sanath Jayantha Ediriweera, 14. V. Regunathan, 15. Kamal Mustapha, 16. Prof. Gunapala Nanayakkara, 17. Nandapala Wickramasooriya, 17A. S. Naullage, 18. Sujatha Cooray, 19. Gerry Jayawardena, 20. S. Thillainanadarajah, 21. Dr. Anura Ekanayake, 22. Sembakuttige

15/ 06/ 22	SC Appeal No. 44/2019	1. Dilipan Thyagarajah, No.92, Kynsey Road, Colombo 08. 2. Dhara Levers alias Dhara Alycia Levers, No. 47, Graham Heights, Kingston 08, Jamaica. Plaintiffs Vs. 1. Liyanage Dilshan Keerthi Prasanna, No. 40,44, Church Road, Colombo 02. 2. Merennage Kingsley de Costa, No. 6, Somadevi Road, Kirulapone Avenue, Colombo 05. 3. Niluka P. Withanachchi, The Registrar of Lands, Land Registry, Gampaha. Defendants And 1. Dilipan Tyagarajah, No.92, Kynsey Road, Colombo 08. 2. Dhara Levers alias Dhara Alycia Levers, No. 47, Graham Height, Kingston 08, Jamaica. Plaintiff-Petitioners Vs. 1. Liyanage Dilshan Keerthi Prasanna, No. 40,44, Church Road, Colombo 02. 2. Merennage Kingsley de Costa, No. 6, Somadevi Road, Kirulapone Avenue, Colombo 05. 3. Niluka P. Withanachchi, The Registrar of Lands, Land Registry, Gampaha. Defendant-Respondents And Now Between 1. Dilipan Tyagarajah, No.92, Kynsey Road, Colombo 08. 2. Dhara Levers alias Dhara Alycia Levers, No. 47, Graham Height, Kingston 08, Jamaica. Plaintiff-Petitioner-Petitioners Vs. 1. Liyanage Dilshan Keerthi Prasanna, No. 40,44, Church Road, Colombo 02. 2. Merennage Kingsley de Costa, No. 6, Somadevi Road, Kirulapone Avenue, Colombo 05. 3. Niluka P. Withanachchi, The Registrar of Lands, Land Registry, Gampaha. Defendant-Respondent-Respondents
15/ 06/ 22	S.C. Appeal No.244/2014	T. T. P. Anthony Fernando, No. 150, Averiwatte Road, Wattala. Plaintiff Vs. 1. H.D. Felix Nevill Tirimanne, 1st Defendant (DECEASED) 1A. Lalani Patricia Tirimanne No.225, Kurukulawa, Ragama Substituted 1A Defendant 2. P. N. Wimalaratne, No. 150/2, Averiwatte Road, Wattala. Added 2nd Defendant AND P. N. Wimalaratne, No. 150/2, Averiwatte Road, Wattala. Added 2nd Defendant- Appellant Vs. T. T. P. Anthony Fernando, No. 150, Averiwatte Road, Wattala. Plaintiff-Respondent Lalani Patricia Tirimanne No.225, Kurukulawa, Ragama Substituted 1A Defendant Respondent AND NOW BETWEEN P. N. Wimalaratne, No. 150/2, Averiwatte Road, Wattala. Added 2nd Defendant-Appellant-Appellant Vs. T. T. P. Anthony Fernando, No. 150, Averiwatte Road, Wattala. Plaintiff-Respondent Respondent Lalani Patricia Tirimanne No.225, Kurukulawa, Ragama Substituted 1A Defendant Respondent-Respondent

15/ 06/ 22	SC Appeal No: 13/2019	R.A. Dharmadasa, No. 72/2/C ‘Sandamali,’ Parakandeniya Road, Pahala Imbulgoda, Imbulgoda. APPLICANT Vs. Board of Investment of Sri Lanka, World Trade Centre, 26th Floor, West Tower, Bank of Ceylon Mawatha, Colombo 1. RESPONDENT And between Board of Investment of Sri Lanka, World Trade Centre, 26th Floor, West Tower, Bank of Ceylon Mawatha, Colombo 1. RESPONDENT – APPELLANT Vs. R.A. Dharmadasa, No. 72/2/C ‘Sandamali,’ Parakandeniya Road, Pahala Imbulgoda, Imbulgoda. APPLICANT – RESPONDENT And Now Between R.A. Dharmadasa, No. 72/2/C ‘Sandamali,’ Parakandeniya Road, Pahala Imbulgoda, Imbulgoda. APPLICANT – RESPONDENT – APPELLANT Vs. Board of Investment of Sri Lanka, World Trade Centre, 26th Floor, West Tower, Bank of Ceylon Mawatha, Colombo 1. RESPONDENT – APPELLANT – RESPONDENT
08/ 06/ 22	CASE NO. SC/FR/ 311/2019	M.D. Malik Sachinthana, 231/1, Lucasgoda, Tissamaharama. PETITIONER vs 1. University Grants Commission, No. 20, Ward Place, Colombo 7. 2. Chairman, University Grants Commission, No. 20, Ward Place, Colombo 7. 3. Director, Advanced Technological Institute, Labuduwa, Galle. 4. Director General, Sri Lanka Institute of Advanced Technological Education, No. 320, T.B. Jayah Mawatha, Colombo 10. 5. Hon. Attorney General, Attorney General’s Department, Colombo 12. RESPONDENTS
08/ 06/ 22	SC (CHC) No. 05/2010	The Sampath Bank Limited No.110, Sir James Peiris Mawatha, Colombo 02. PLAINTIFF Vs The Pay Phone Company (Pvt) Ltd. No.367, R.A De Mel Mawatha, and now at No.18, 5th Lane, Ratmalana. DEFENDANT AND NOW The Pay Phone Company (Pvt) Ltd. No.367, R.A De Mel Mawatha, and now at No.18, 5th Lane, Ratmalana. DEFENDANT-APPELLANT Vs The Sampath Bank Limited No.110, Sir James Peiris Mawatha, Colombo 02. PLAINTIFF- RESPONDENT

06/06/22	SC Appeal No. 110/2016 SC Appeal No. 111/2016 SC Appeal No. 112/2016 SC Appeal No. 113/20160	Shamali Arunika de Zoysa, No.532/20 A, Siebel Place, Kandy Plaintiff Vs. 1.Lilani Oosha Ramanaden, No. 532/20 A, Siebel Place, Kandy. 2.Ranjithan Justin, Tambimuttu Casinader, 38, Denbigh Road, Armadale 3143, Victoria, Australia Appearing by his Attorney the 1st Defendant. 3.Victorine Sounderam Rogers, (dead) C/O Mrs. Y Nadaraja, 13, Ebenezer Avenue, Dehiwala. 3A. Daphne Seevaratnam, 146/8, Poorwarama Road, Colombo 05. Defendents 1. K. Sarojinidevi, 28/5, Central Road, Orr's Hill, Trincomalee. 2. A. Sellathangam, 28/4, Central Road, Orr's Hill, Trincomalee. 3. Chndramugam Mahendran, (dead) 28/3, Central Road, Orr's Hill, Trincomalee. 3A.Mahenthiran Saraswathy, 28/3, Central Road, Orr's Hill, Trincomalee. 4. J. Vartharajah, 24, Konespuram, Orr's Hill, Trincomalee. 5. S. E Chandrabose, 26D5, Central Road, Orr's Hill, Trincomalee. 6. N. Sritharan, 26F, Central Road, Orr's Hill, Trincomalee. 7. A. Vallliamma, 26E, Central Road, Orr's Hill, Trincomalee. 8. G. Parashakthi (dead) 26 D 1, Central Road, Orr's Hill, Trincomalee. 8A.T. Gopalasingham 26 D 1, Central Road, Orr's Hill, Trincomalee. 9. K. Indrani 26 G, Central Road, Orr's Hill, Trincomalee. Added Defendants AND Shamali Arunika de Zoysa, No.532/20 A, Siebel Place, Kandy Plaintiff-Petitioner 1.Lilani Oosha Ramanaden, No. 532/20 A, Siebel Place, Kandy. 2.Ranjithan Justin, Tambimuttu Casinader, 38, Denbigh Road, Armadale 3143, Victoria, Australia Appearing by his Attorney the 1st Defendant. 3.Victorine Sounderam Rogers, (dead) C/O Mrs. Y Nadaraja, 13, Ebenezer Avenue, Dehiwala. 3A. Daphne Seevaratnam, 146/8, Poorwarama Road, Colombo 05. Defendant-Respondents 1. K. Sarojinidevi, 28/5, Central Road, Orr's Hill, Trincomalee. 2. A. Sellathangam, 28/4, Central Road, Orr's Hill, Trincomalee. 3. Chndramugam Mahendran, (dead) 28/3, Central Road, Orr's Hill, Trincomalee. 3A.Mahenthiran Saraswathy, 28/3, Central Road, Orr's Hill, Trincomalee. 4. J. Vartharajah, 24, Konespuram, Orr's Hill, Trincomalee. 5. S. E Chandrabose, 26D5, Central Road, Orr's Hill, Trincomalee. 6. N. Sritharan, 26F, Central Road, Orr's Hill, Trincomalee. 7. A. Vallliamma, 26E, Central Road, Orr's Hill, Trincomalee. 8. G. Parashakthi (dead) 26 D 1, Central Road, Orr's Hill, Trincomalee. 8A.T. Gopalasingham 26 D 1, Central Road, Orr's Hill, Trincomalee 9. K. Indrani 26 G, Central Road, Orr's Hill, Trincomalee. Added Defendant- Respondents AND Shamali Arunika de Zoysa, No.532/20 A, Siebel Place, Kandy Plaintiff-Petitioner- Petitioner Vs. 1.Lilani Oosha Ramanaden, No. 532/20 A, Siebel Place, Kandy. 2.Ranjithan Justin, Tambimuttu Casinader, 38, Denbigh Road, Armadale 3143, Victoria, Australia Appearing by his Attorney the 1st Defendant. 3.Victorine Sounderam Rogers, (dead) C/O Mrs. Y Nadaraja, 13, Ebenezer Avenue, Dehiwala. 3A. Daphne Seevaratnam, 146/8, Poorwarama Road, Colombo 05. Defendant-Respondent-Respondents 1. K. Sarojinidevi, 28/5, Central Road, Orr's Hill, Trincomalee. 2. A. Sellathangam, 28/4, Central Road, Orr's Hill, Trincomalee. 3A.Mahenthiran Saraswathy, 28/3, Central Road, Orr's Hill, Trincomalee. 4. J. Vartharajah, 24, Konespuram, Orr's Hill, Trincomalee. 5. S. E Chandrabose, 26D5, Central Road

06/ 06/ 22	SC Contempt 06/18	Ranjan Ramanayake No. A5, Housing Scheme for Members of Parliament, Madiwela, Sri-Jayawardenapura-Kotte. Respondent
30/ 05/ 22	SC APPEAL No. 239/2017	
19/ 05/ 22	S.C. Appeal No. 77/2016	In the matter of an appeal from the Judgement of the High Court of the Western Province sitting in Mount Lavinia. Freedom of High Seas (Pvt) Limited, No.5, Soysa Mawatha, Templers Road, Mount Lavinia.Plaintiff Vs Kardin International (Pvt) Limited, No. 206, Attidiya Road, Attidiya, Dehiwala. Defendant AND BETWEEN Kardin International (Pvt) Limited, No. 206, Attidiya Road, Attidiya, Dehiwala. Defendant-Appellant Vs Freedom of High Seas (Pvt) Limited, No.5, Soysa Mawatha, Templers Road, Mount Lavinia. Plaintiff-Respondent AND NOW BETWEEN Kardin International (Pvt.) Limited, No. 206, Attidiya Road, Attidiya, Dehiwala. Defendant-Appellant-Petitioner/Appellant Freedom of High Seas (Pvt.) Limited, No.5, Soysa Mawatha, Templers Road, Mount Lavinia. Plaintiff-Respondent-Respondent
19/ 05/ 22	SC APPEAL NO: SC/ APPEAL/ 159/2016	1. Jayawardene Liyanage Gunadasa, No. 449, Elvitigala Mawatha, Colombo 05. Plaintiff Vs. 1. Narangodage Amarapala, No. 449, Elvitigala Mawatha, Colombo 05. Defendant AND BETWEEN 1. Jayawardene Liyanage Gunadasa, (Deceased) No. 449, Elvitigala Mawatha, Colombo 05. Plaintiff-Appellant 1A. Gamekankanamge Gunawathie, No. 01/11, Samaranayake Road, Kolonnawa. 1B. Jayawardeneliyanage Prasanna, No. 01/11, Samaranayake Road, Kolonnawa. 1C. Jayawardeneliyanage Lasantha, No. 01/11, Samaranayake Road, Kolonnawa. 1D. Jayawardeneliyanage Achini No. 01/11, Samaranayake Road, Kolonnawa. Substituted Plaintiff- Appellants Vs. 1. Narangodage Amarapala, (Deceased) No. 449, Elvitigala Mawatha, Colombo 05. Defendant-Respondent 1A. Indra Josephine Jayasinghe, No. 449/1A, Elvitigala Mawatha, Colombo 05. 1B. Narangodage Ishan Dilantha, No. 449/1A, Elvitigala Mawatha, Colombo 05. 1C. Narangodage Hasini Chathurani, No. 449/1A, Elvitigala Mawatha, Colombo 05.Substituted Defendant- Respondents AND NOW BETWEEN 1A. Indra Josephine Jayasinghe, No. 449/1A, Elvitigala Mawatha,Colombo 05.1B. Narangodage Ishan Dilantha,No. 449/1A, Elvitigala Mawatha, Colombo 05. 1C. Narangodage Hasini Chathurani, No. 449/1A, Elvitigala Mawatha, Colombo 05. Substituted Defendant- Respondent- Petitioners Vs. 1A. Gamekankanamge Gunawathie, No. 01/11, Samaranayake Road, Kolonnawa. 1B. Jayawardeneliyanage Prasanna, No. 01/11, Samaranayake Road, Kolonnawa. 1C. Jayawardeneliyanage Lasantha, No. 01/11, Samaranayake Road, Kolonnawa. 1D. Jayawardeneliyanage Achini No. 01/11, Samaranayake Road, Kolonnawa. Substituted Plaintiff-AppellantRespondents

19/ 05/ 22	SC APPEAL NO: SC/ APPEAL/ 127/2019	H.M. Chandrakanthi, Kohombagahawatta, Badulla golla, Medegama. Applicant Vs. K.M. Gamini Kumara, Lununeligahawatta, Helearawa, Pitadeniya, Medegama. Respondent AND BETWEEN K.M. Gamini Kumara, Lununeligahawatta, Helearawa, Pitadeniya, Medegama. Respondent-Appellant Vs. H.M. Chandrakanthi, Kohombagahawatta, Badulla golla, Medegama. Applicant-Respondent AND NOW BETWEEN H.M. Chandrakanthi, Kohombagahawatta, Badulla golla, Medegama. Applicant-Respondent-Appellant Vs. K.M. Gamini Kumara, Lununeligahawatta, Helearawa, Pitadeniya, Medegama. Respondent-Appellant-Respondent
19/ 05/ 22	SC APPEAL NO: SC/ APPEAL/ 39/2017	1A. Palihawardana Arachchige Shiroma Dilrukshi Jayawardena 1B. Virendri Sajani Waranasuriya Jayawardena Both of No. 251/1, Dharmapala Mawatha, Colombo 7. Substituted DefendantRespondent-Appellants Vs. 1. H.J. Shalana Rodrigo, No. 109/1, Gothami Road, Borella. 2. H.C.S. Romesh Rodrigo, No. 109/A, Gothami Road, Borella. 3. H.M. Sharon Rodrigo, No. 48/1, Gothami Road, Borella. 4. H.M. Shanali Rodrigo, No. 133/27, Gothami Road, Borella. 5. Union Chemist Property Development Limited, No. 460, Union Place, Colombo 2. Plaintiff-Petitioner-Respondents
19/ 05/ 22	SC APPEAL NO: SC/ APPEAL/ 56/2020	1.. Weerappuli Gamage Gamini Ranaweera, No. 415/18, High-Level Road, Delkanda, Nugegoda. Plaintiff Vs. 1. Matharage Davith Singho, Aluth Ihala, Mapalagama. Defendant AND BETWEEN 1. Matharage Davith Singho, (Deceased) Aluth Ihala, Mapalagama. Defendant-Appellant Vs. 1. Weerappuli Gamage Gamini Ranaweera, No. 415/18, High-Level Road, Delkanda, Nugegoda. Plaintiff- Respondent AND NOW BETWEEN 1. Weerappuli Gamage Gamini Ranaweera, No. 415/18, High-Level Road, Delkanda, Nugegoda. Plaintiff-Respondent- Appellant Vs. 1A. Matharage Dharmasiri, 1B. Matharage Mahinda, 1C. Matharage Premawathi, 1D. Matharage Shiriyawathie, All of Dehigodawatta, Aluth Ihala, Mapalagama. 1E. Matharage Ariyawathie of Bambarawana, Mattaka. 1F. Matarage Seetha of Gorakagashuduwa, Mapalagama. 1G. Matarage Renuka of Akuresse Gedara, Etahawilwatta, Mapalagama. Substituted DefendantsAppellants-Respondent

18/ 05/ 22	SC (Application No. 377/2015	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. 1. Rita Rathnayake, 105/1a, Ginnaliya Road, Urubokka. 2. Rani Gunathilake Siriwardana, Padaukema, Tissamaharama. 3. Rathnaweera Patabandige Ramya, Miriswatta, Diyasyaya, Tissamaharama. 4. Wehella Hewage Shirani, Dikwella Niwasa, Koggala Road, Ruhunuridiyagama. PETITIONERS -Vs- 1. Y. Wickramasiri, Secretary to the Provincial Ministry of Education, Land and Land Development, Highways, Information, Rural and Estate Infrastructure Facilities of Southern Province, 2nd Floor, Talbot Town Shopping Complex, Dickson Junction, Galle. 2. H. W. Wijerathne, Chairman, Provincial Public Service Commission, 6th Floor, District Secretariat Office, Kaluwella, Galle. 2A. Gunasena Hewawitharana, Chairman, Provincial Public Service Commission, 6th Floor, District Secretariat Office, Kaluwella, Galle. 3. U. G. Vidura Kariyawasam Secretary, Provincial Public Service Commission, 6th Floor, District Secretariat Office, Kaluwella, Galle. 4. R. K. R. R. Ranaweera, Member, Provincial Public Service Commission, 6th Floor, District Secretariat Office, Kaluwella, Galle. 5. V. A. V. D. P. Rasanjanee, Member, Provincial Public Service Commission, 6th Floor, District Secretariat Office, Kaluwella, Galle. 6. Hemakumara Nanayakkara, Governor of Southern Province, Governor's Office, Upper Dickson Road, Galle. 6A. Marshall Perera PC, Governor of Southern Province, Governor's Office, Upper Dickson Road, Galle 6AA. Dr. W. W. Gamage, Governor of Southern Province, Governor's Office, Upper Dickson Road, Galle. 7. Secretary to the Ministry of Education, Isurupaya, Battaramulla. 8. Hon. Attorney General, Attorney General's Department, Colombo 12. 9. K. K. P. A. Siriwardana, Member, Provincial Public Service Commission, 6th Floor, District Secretariat Office, Kaluwella, Galle. 9A. K. K. G. J. K. Siriwardhane, Member, Provincial Public Service Commission, 6th Floor, District Secretariat Office, Kaluwella, Galle. 10. D. W. Vitharana, Member, Provincial Public Service Commission, 6th Floor, District Secretariat Office, Kaluwella, Galle. 11. Shirmal Wijesekara, Member, Provincial Public Service Commission, 6th Floor, District Secretariat Office, Kaluwella, Galle. 12. D. K. S. Amarasiri Member, Provincial Public Service Commission, 6th Floor, District Secretariat Office, Kaluwella, Galle. 12A. Sunil Dahanayake, Member, Provincial Public Service Commission, 6th Floor, District Secretariat Office, Kaluwella, Galle. 13. K. L. Somarathna, Member, Provincial Public Service Commission, 6th Floor, District Secretariat Office,Kaluwella, Galle. 13A. L. K. Ariyaratne, Member, Provincial Public Service Commission, 6th Floor, District Secretariat Office, Kaluwella, Galle. 14. Munidasa Halpadeniya, Member, Provincial Public Service Commission, 6th Floor, District Secretariat Office, Kaluwella, Galle. RESPONDENTS

04/ 05/ 22	SC/FR APPLICATION No: 427/2018	
04/ 05/ 22	S.C. Appeal No. 60/201	Kachchakaduge Frank Romeo Fernando, No. 17/28, Raja Mawatha, 3rd Kurana, Negombo. Applicant Vs Brandix Apparel Solutions Limited (Formerly Brandix Casualwear Ltd), No. 409, Galle Road, Colombo 03. (having a factory at 21, Temple Road, Ekala, Ja-ela). Respondent AND BETWEEN Kachchakaduge Frank Romeo Fernando, No. 17/28, Raja Mawatha, 3rd Kurana, Negombo. Applicant-Appellant Vs. Brandix Apparel Solutions Limited (Formerly Brandix Casualwear Ltd), No. 409, Galle Road, Colombo 03. (having a factory at 21, Temple Road, Ekala, Ja-ela). Respondent-Respondent AND NOW BETWEEN Brandix Apparel Solutions Limited (Formerly Brandix Casualwear Ltd) No. 409, Galle Road, Colombo 03. (having a factory at 21, Temple Road, Ekala, Ja-ela). Respondent-Respondent-Petitioner Vs. Kachchakaduge Frank Romeo Fernando, No. 17/28, Raja Mawatha, 3rd Kurana, Negombo. Applicant-Appellant-Responden
07/ 04/ 22	SC Appeal No. 59/2021	The Hon. Attorney General, Attorney General's Department, Colombo 12. Complainant Vs. Asselage Sujith Rupasinghe, No. 30/6, Nadun Uyana, Katukurundugasyaya, Mirigama. Accused AND BETWEEN Mrs. P.M. Ranasinghe, 21B, Alfred Place, Colombo 3. Aggrieved Party – Petitioner Vs 2 1. Asselage Sujith Rupasinghe, No. 30/6, Nadun Uyana, Katukurundugasyaya, Mirigama. Accused – Respondent 2. The Hon. Attorney General, Attorney General's Department, Colombo 12. Complainant – Respondent AND NOW BETWEEN Mrs. P.M. Ranasinghe, 21B, Alfred Place, Colombo 3. Aggrieved Party – Petitioner – Appellant Vs. 1. Asselage Sujith Rupasinghe, No. 30/6, Nadun Uyana, Katukurundugasyaya, Mirigama. Accused – Respondent – Respondent 2. The Hon. Attorney General, Attorney General's Department, Colombo 12. Complainant – Respondent – Responden

04/04/22	SC (FR) No. 346/2017	1. Kekulandara Mudiyanse le Huri Arawe Gedara Sudath, 19/1, Watagoda Temple Road, Aruppala, Kandy 2. Kekulandara Mudiyanse le Huri Arawe Gedara Kusal Annuththara Kekulandara, 19/1, Watagoda Temple Road, Aruppala, Kandy 3. Kekulandara Mudiyanse le Huri Arawe Gedara Maithree Annuththara Kekulandara 19/1, Watagoda Temple Road, Aruppala, Kandy PETITIONERS Vs. 1. E.P.T.K. Ekanayake, Director of Education, Department of Education, Central Province, Kandy 2. S.A.K. Kulatunga, Assistant Director of Education, Department of Education, Central Province, Kandy 3. M.W. Wijeratne, Zonal Director, Zonal Education Office, Kandy 4. R. Rajapakse, Principal, Kandy Maha Vidyartha Viduhala, Kandy 4A. M.R.P. Mayadunne, Principal, Kandy Maha Vidyartha Viduhala, Kandy 5. P.B. Wijayaratne, Secretary, Chief Ministry, Central Province, Kandy 5A. R.M.P.S. Ratnayake, Secretary, Chief Ministry, Central Province, Kandy 6. Hon. Sarath Ekanayaka, Central Province Chief Minister, Central Province Chief Ministry, Digana Road, Kundasale 7. Hon. Akila Viraj Kariyawasam, Minister, Ministry of Education, Isurupaya, Battaramulla 8. The Attorney General, Attorney General’s Department, Colombo 12. RESPONDENTS

04/04/22	SC / FR No. 64/2014	Werage Sunil Jayasekera, 38, Susara, Kadawathagama, Kadugannawa. 2. Amarakoon Mudiyanselage Keerthi Amarakoon, “Amara Sevana”, Varahakkogada, Danturei. 3. Sampath Priyadarshana Gunathilake, “Narmada”, Hammalawa, Kuliyapitiya. 4. Kariyawasam Don Jayantha Weerasinghe, 08/A, Abihamani, Vaharakkogada, Danturei. 5. Murukkuvadura Tilaka Asela Wijerathna, 34/6 A, Sri Seewala Road, Nalluruwa, Panadura. 6. Amarakoon Achchilage Somapala Amarakoon, 25/3E, Gohagoda Road, Katugastota. 7. Obada Kankanamlage Lalith Kumara, 131, Pelahela, Dompe. 8. Atapattu Mudiyanselage Thilak Nanda Wijerathne, 488/2, Halbarawa, Talahena, Malambe. 9. Widanagamage Shantha Kumara Wickramanayake, Totupala Road, Weragampitiya, Matara. 10. Meemendra Kumara Aberathna, Weliyaya Road, Digana, Mahawa. 11. Singahalage Gamini Weerasinghe, 345/B, Denipagoda, Muruthugahamulla, Gampola. 12. Jayakody Arachchige Pradeep Lalantha Priya, 33/1, Koskandawala, Yakkala. 13. Chandana Elanperuma Kodituwakku, “Samaya”, Samagi Mawatha, Walgama, Matara. 14. Bopage Prince Wijerathna, Hospital Road, Puwakdeniya, Rambukkana. 15. Don Amarasiriwardenage Prasanna Sylvester Wijesekera, 971/17, Maradana Road, Colombo 08. Petitioners Vs. 1. B.A.P. Ariyaratne, General Manager, Department of Railways, Maradana, Colombo 10. 1A. Vijaya Amaratunga, General Manager, Department of Railways, Maradana, Colombo 10. 1B. S.M. Abewickrama, General Manager, Department of Railways, Maradana, Colombo 10. 1C. M.J.D. Fernando, General Manager, Department of Railways, Maradana, Colombo 10. 1D. W.A.D.S. Gunasinghe, General Manager (Acting), Department of Railways, Maradana, Colombo 10. 2. Dhammika Perera, Secretary, Ministry of Transport, No. 1, D.R. Wijewardene Mawatha, Colombo 10. 2A. Nihal Somaweera, Secretary, Ministry of Transport, No. 1, D.R. Wijewardene Mawatha, Colombo 10. 2B. G.S. Vithanage, Secretary, Ministry of Transport, No. 1, D.R. Wijewardene Mawatha, Colombo 10. 2C. N.B. Monti Ranatunga, Secretary, Ministry of Transport, No. 1, D.R. Wijewardene Mawatha, Colombo 10. 3. Dayasiri Fernando, Chairman, 4. Palitha M. Kumarasinghe, Member, 5. Sirimavo A. Wijeratne, Member, 6. S.C. Mannapperuma, Member, 7. Ananda Seneviratne, Member, 8. N.H. Pathirana, Member, 9. S. Thillanadarajah, Member, 10. M.D.W. Ariyawansa, Member, 11. A. Mohamed Nahiya, Member, 3rd to 11th Respondents all at: Public Service Commission, No. 177, Nawala Road, Narahenpita. 12. Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents 13. Justice Sathyaa Hettige, PC, Chairman, 14. Kanthi Wijetunga, Member,15. Sunil S. Sirisena, Member, 16. Dr. I.M. Zoysa Gunasekera, Member, 13th to 16th Added Respondents all at: Public Service Commission, No. 177, Nawala Road, Narahenpita. Added Respondents 17. Dharmasena Dissanayaka, Chairman, 17A. Hon. Justice Jagath Balapatabendi (Retired), Chairman, 18. A. Salam Abdul Waid, Member, 18A. Indrani Sugathadasa, Member, 19. D. Shirantha Wijayatilaka, Member, 19A. V. Shivagnanasothy, Member, 20. Prathap Ramanujam, Member

03/ 04/ 22	SC Appeal No. 115/2019	In the matter of an application for Special Leave to Appeal from the Judgment of the High Court of the Provinces holden in Panadura in terms of Article 154 P (3) read together with Section 9(1) of the High Court of the Provinces (Special Provisions) Act. Officer-in-Charge, Horana Police Station, Horana. Complainant Vs. Sirimanna Hettige Jayasena, 45, Srimaha Vihara Mawatha, Kalubowila, Dehiwala. Accused And Between Sirimanna Hettige Jayasena, 45, Srimaha Vihara Mawatha, Kalubowila, Dehiwala. Accused-Appellant Vs. Officer-in-Charge, Horana Police Station, Horana. Complainant-Respondent Hon. Attorney General, Attorney General's Department, Colombo 12. Respondent And Now Between Sirimanna Hettige Jayasena, 45, Srimaha Vihara Mawatha, Kalubowila, Dehiwala. Accused-Appellant-Petitioner Vs. Officer-in-Charge, Horana Police Station, Horana. Complainant-Respondent-Respondent Hon. Attorney General, Attorney General's Department, Colombo 12. Respondent-Respondent
01/ 04/ 22	SC Appeal: 80/2016	Ushettige Vinodanie Preethika Dayadarie Perera of No. 532, Weligampitiya, Ja-Ela. PLAINTIFF VS Herathpathirannehelage Ranjan Hera of Punchi Vileththewa, Mugunawatawana. DEFENDANT AND BETWEEN Herathpathirannehelage Ranjan Herath of Punchi Vileththewa, Mugunawatawana. DEFENDANT-PETITIONER VS Ushettige Vinodanie Preethika Dayadarie Perera of No. 532, Weligampitiya, Ja-Ela. PLAINTIFF-RESPONDENT AND BETWEEN Herathpathirannehelage Ranjan Herath of Punchi Vileththewa, Mugunawatawana. DEFENDANT-PETITIONERAPPELLANT VS Ushettige Vinodanie Preethika Dayadarie Perera of No. 532, Weligampitiya, Ja-Ela. PLAINTIFF-RESPONDENTRESPONDENT AND NOW BETWEEN Herathpathirannehelage Ranjan Herath of Punchi Vileththewa, Mugunawatawana. DEFENDANT-PETITIONERAPPELLANT-APPELLANT VS Ushettige Vinodanie Preethika Dayadarie Perera of No. 532, Weligampitiya, Ja-E la. PLAINTIFF-RESPONDENTRESPONDENT- RESPONDENT

29/ 03/ 22	SC Appeal 66/2018	Inter Company Trade Union, No. 259/9, Sethsiri Mawatha, Koswatta, Thalangama. On behalf of Yakupitiyage Senavirathne, Kudagama Liyanage Kapila Udayanga, Sunil Bandara, Heenpatilage Wimal Premarathne. Applicants Vs, Trico Maritime (Pvt) Ltd., 50K, Cyril C. Perera Mawatha, Colombo 13. Respondent And then between Inter Company Trade Union, No. 259/9, Sethsiri Mawatha, Koswatta, Thalangama. On behalf of Yakupitiyage Senavirathne, Kudagama Liyanage Kapila Udayanga, Sunil Bandara, Heenpatilage Wimal Premarathne. Applicant-Appellant Vs, Trico Maritime (Pvt) Ltd., 50K, Cyril C. Perera Mawatha, Colombo 13. Respondent-Respondent And Now between Trico Maritime (Pvt) Ltd., 50K, Cyril C. Perera Mawatha, Colombo 13. Respondent-Respondent- Appellant Vs, Inter Company Trade Union, No. 259/9, Sethsiri Mawatha, Koswatta, Thalangama. On behalf of Yakupitiyage Senavirathne, Kudagama Liyanage Kapila Udayanga, Sunil Bandara, Heenpatilage Wimal Premarathne. Applicant-Appellant-Respondent
24/ 03/ 22	SC/Revision/ 02/2019	Indika Roshan Francis, No. 252/12A, Pahala Karagahamuna, Kadawatha. Plaintiff Vs. 1.Bulathsinghalage Lal Cooray, 2.Rajapaksha Pathirannahelage Priyadarshani Both of No. 10/6, Pahala Karagahamuna, Kadawatha. Defendants And between Indika Roshan Francis, No. 252/12A, Pahala Karagahamuna, Kadawatha. Plaintiff- Appellant Vs. 1. Bulathsinghalage Lal Cooray, 2. Rajapaksha Pathirannahelage Priyadarshani Both of No. 10/6, Pahala Karagahamuna, Kadawatha. Defendant-Respondents And now between Indika Roshan Francis, No. 252/12A, Pahala Karagahamuna, Kadawatha. Plaintiff- Appellant-Petitioner Vs. 1. Bulathsinghalage Lal Cooray, 2. Rajapaksha Pathirannahelage Priyadarshani Both of No. 10/6, Pahala Karagahamuna, Kadawatha. Defendant- Respondent-Respondents
23/ 03/ 22	SC Appeal 96/2013	In the matter of an appeal with Leave of the Supreme Court first had and obtained in terms of section 5C of the High Court of the Provinces (Special provisions) (Amendments) Act No 54 of 2006 read with Article 127 and 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka. Senok Trade Combines (Pvt) Ltd. 03, R.A. De Mel Mawatha, Colombo 05. Petitioner-Petitioner-Appellant Vs. Mirama, Beach Hotel Limited 137, Vauxhall Street, Colombo 02. Respondent-Respondent-Respondent

22/ 03/ 22	S.C. (F/R) Application No. 116/2021	1. R. L. Buddhika Yangani Henri, 2. Hewa Bettage Sadiv Sasmin (minor) The Petitioners of; 294/A/1, Matara Gedarawatta, Gunersekara Mawatha, Puvakwatta, Kuburugamuwa. Petitioners Vs. 1. Francis Welege, Principal, Rahula College, Matara. (Chairman) 1A. Sudath Samarawickrama,Principal, Rahula College, Matara. 1. Padmini Ganewatta, Principal Primary Section 2. Nuwan Senaka Representative of the Old Boys Association The 1st to the 3rd Respondent of; Interview Board, Rahula College, Matara 3. H.D.B.L. Gunathilaka, Additional Director of Minister, Isurupaya 4. P.A.U. Dulmani 5. P.K. Nanayakkara, Deputy Vice Principal of Sujatha Vidyalaya 6. C.R. Vikramanayaka, Representative of the School Development Committee 7. Manuranga De Silva, Representative of the Old Boys Association The 4th to 8th Respondents of; Appeals Board, Rahula College, Matara 8. Director- National Schools, Isurupaya, Battaramulla. 9. Secretary, Ministry of Education, Isurupaya, Battaramulla 10. Hon. Attorney General; Attorney General's Department, Hulftsdrop, Colombo 12. Respondents
21/ 03/ 22	S C Appeal No. 119/2017 (with S C Appeal No. 120/2017)	1. Sathsindu Forwarding & Security (Pvt) Limited, No. 80, Navam Mawatha, Colombo 02. 2. Bagnold Associates Limited, No. 85, Grace Church Street, London, EC3 0AA, United Kingdom. CLAIMANTS Vs. Sri Lanka Ports Authority, No. 19, P.O Box No. 595, Church Street, Colombo 01. RESPONDENT AND BETWEEN 1. Sathsindu Forwarding & Security (Pvt) Limited, vNo. 80, Navam Mawatha, Colombo 02. 2. Bagnold Associates Limited, No. 85, Grace Church Street, London, EC3 0AA, United Kingdom. CLAIMANT-PETITIONERS Vs. Sri Lanka Ports Authority, No. 19, P.O Box No. 595, Church Street, Colombo 01. RESPONDENT-RESPONDENT AND NOW BETWEEN Sri Lanka Ports Authority, No. 19, P.O Box No. 595, Church Street, Colombo 01. RESPONDENT-RESPONDENT-APPELLANT Vs. 1. Sathsindu Forwarding & Security (Pvt) Limited, No. 80, Navam Mawatha, Colombo 02. 2. Bagnold Associates Limited, No. 85, Grace Church Street, London, EC3 0AA, United Kingdom. CLAIMANT-PETITIONER-RESPONDENTS

17/03/22	SC/APPEAL/149/2016	1. P. Shanthakumar of Kugan Motors, 52, Second Cross Street, Vavuniya. 2. M. H. D. Mailvaganam 65, Mill Road, Vavuniya. 3. M. Murugathas, Island Lodge, 97, Bazaar Street, Vavuniya. 4. T. Thirunavukkarasu, Pillaiyar Stores, 69, Mill Road, Vavuniya. 5. K. Nithiyananthan, Mala Distributors, No.113, Mill Road, Vavuniya. 6. S. Shanmugaratnam, No. 171, Kandasamy Kovil Road, Vavuniya. 7. B. Annalingam, Kugan's Honda House, No.110, Bazaar Street, Vavuniya. 8. A.Sabanathan, City Trade Corporation, Sathiya Building, 12, 15, First Cross Street, Vavuniya. 9. S. Theiventhiran, New Mala Battery Trading Centre, 87, Mill Road, Vavuniya. 10. S. N. Nathan, Second Cross Street, Vavuniya. 11. N. Suntharampillai, M. Kasipillai & Sons, Mill Road, Vavuniya. 12. K.A. Senthilnathan, J.P, First Cross Street, Vavuniya. PLAINTIFFS Vs 1. Rasa Vijendranathan No.127, Kandasamy Kovil Road, Vavuniya. 2. Joy Mahil Mahadeva No.2, Foundation House Lane, Colombo 10. Presently at 79, Kandasamy Kovil Road, Vavuniya. 3. Senthini Dharmaseelan, Chinthamani, Lowton Road, Manipay. 4. Jeyaratnam Ravikumar, "Crown Villa" Navaly South, Manipay 5. Sri Durga Jeyaratnam "Crown Villa" Navaly South, Manipay 6. Jeyaratnam Gokhale. 7. Jayaratnam Veerasingam and 8. Jeyaratnam Ragavan All of "Crown Villa" Navaly South, Manipay DEFENDANTS AND BETWEEN In the matter of Leave to Appeal to set aside the order dated 15/05/2008 in D.C. Vavuniya Case No. TR/1097/05. Rasa Vijendranathan No.127, Kandasamy Kovil Road, Vavuniya 1ST DEFENDANT - PETITIONER Vs 1. P. Shanthakumar of Kugan Motors, 52, Second Cross Street, Vavuniya. 2. M. H. D. Mailvaganam 65, Mill Road, Vavuniya. 3. M. Murugathas, Island Lodge, 97, Bazaar Street, Vavuniya. 4. T. Thirunavukkarasu, Pillaiyar Stores, 69, Mill Road, Vavuniya. 5. K. Nithiyananthan, Mala Distributors, No.113, Mill Road, Vavuniya. 6. S. Shanmugaratnam, No. 171, Kandasamy Kovil Road, Vavuniya. 7. B. Annalingam, Kugan's Honda House, No.110, Bazaar Street, Vavuniya. 8. A.Sabanathan, City Trade Corporation, Sathiya Building, 12, 15, First Cross Street, Vavuniya. 9. S. Theiventhiran, New Mala Battery Trading Centre, 87, Mill Road, Vavuniya. 10. S. N. Nathan, Second Cross Street, Vavuniya. 11. N. Suntharampillai, M. Kasipillai & Sons, Mill Road, Vavuniya. 12. K.A. Senthilnathan, J.P., First Cross Street, Vavuniya. PLAINTIFFS- RESPONDENTS 1. Joy Mahil Mahadeva No.2 Foundation House Lane, Colombo 10. Presently at 79, Kandasamy Kovil Road, Vavuniya. 2. Senthini Dharmaseelan, Chinthamani, Lowton Road, Manipay. 3. Jeyaratnam Ravikumar, "Crown Villa" Navaly South, Manipay. 4. Sri Durga Jeyaratnam "Crown Villa" Navaly South, Manipay. 5. Jeyaratnam Gokhale. 6. Jayaratnam Veerasingam and 7. Jeyaratnam Ragavan All of "Crown Villa" Navaly South, Manipay. DEFENDANTS- RESPONDENTS AND NOW BETWEEN 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 Provinces) (Amendment) Act No. 54 of 2006 read together with Article 128 of the Constitution. Rasa Vijendranathan No.127, Kandasamy Kovil Road, Vavuniya 1ST DEFENDANT – APPELLANT- APPELLANT

07/03/22	SC/HCCA/LA/378/17	Ransegoda Wimalasiri Thero, of Morawaka Sriwijaya Pirivena known as Ganegoda Rajamahaviharaya, Morawaka Plaintiff Vs. Dellawa Sisiela Thero (Deceased), of Ganegoda Rajamahaviharaya, Morawaka Defendent Dellawa Suneetha Thero, of Ganegoda Rajamahaviharaya, Morawaka Substituted Defendant AND BETWEEN Dellawa Suneetha Thero, of Ganegoda Rajamahaviharaya, Morawaka Substituted-Defendant-Appellant Vs. Ransegoda Wimalasiri Thero, of Morawaka Sriwijaya Pirivena known as Ganegoda Rajamahaviharaya, Morawaka Plaintiff-Respondent AND NOW BETWEEN Ransegoda Wimalasiri Thero (Deceased), of Morawaka Sriwijaya Pirivena known as Ganegoda Rajamahaviharaya, Morawaka Plaintiff-Respondent-Petitioner Vs. Dellawa Suneetha Thero, of Ganegoda Rajamahaviharaya, Morawaka Substituted Defendant-Appellant- Respondent An application for substitution on behalf of the deceased Plaintiff-Respondent- Petitioner Thero Edandukitha Gnanasiri Thero, Sri Wijaya Piriven Wiharaya, Morawaka Petitioner Vs. Dellawa Suneetha Thero, of Ganegoda Rajamahaviharaya, Morawaka Substituted Defendant-Appellant-Respondent- Respondents

23/ 02/ 22	SC/Appeal/ 199/17	1. Subramaniam Ramasamy No. 68, Colombo Road, Kandy. 2. Balasubramaniam Vaitheeswaran No.74, Colombo Road, Kandy. PETITIONERS Vs. V. R. Soundarajan No. 40, Venkarasamy Road, ChettianKottam, Erode 63800 Tamil Nadu- South India. RESPONDENT AND In the matter of an Appeal against the order dated 19/11/2014 delivered in case No. 1240/L/2012 under the Civil Procedure Code. V. R. Soundarajan No. 40, Venkarasamy Road, ChettianKottam, Erode 63800 Tamil Nadu- South India. RESPONDENT-APPELLANT Vs. 1. Subramaniam Ramasamy No. 68, Colombo Road, Kandy. 2. Balasubramaniam Vaitheeswaran No.74, Colombo Road, Kandy. PETITIONERS-RESPONDENTS AND NOW In the matter of an application under Section 839 of the Civil Procedure Code. Nadesan Sathasivam No. 128/11, Vihara Lane, Mulgampola, Kandy. PETITIONER Vs V. R. Soundarajan No. 40, Venkarasamy Road, Chettian Kottam, Erode 6380 Tamil Nadu- South India. RESPONDENT-APPELLANT- RESPONDENT 1. SubramaniamRamasamy No. 68, Colombo Road, Kandy. 2. Balasubramaniam Vaitheeswaran No.74, Colombo Road, Kandy. PETITIONERS-RESPONDENT-RESPONDENTS AND NOW BETWEEN In the matter of an Application for Leave to Appeal to the Supreme Court under Section 5C of the Act No.54 of 2006 from the Order of the High Court of Civil Appeal holden in Kandy dated 2nd June 2016. Subramaniam Ramasamy No. 68, Colombo Road, Kandy. PETITIONER-RESPONDENT- RESPONDENT-PETITIONER Vs V. R. Soundarajan No.40, Venkarasamy Road, Chettian Kottam, Erode 63800 Tamil Nadu- South India. RESPONDENT-APPELLANT- RESPONDENT-RESPONDENT Nadesan Sathasivam No. 128/11, Vihara Lane, Mulgampola, Kandy. PETITIONER-RESPONDENT Balasubramaniam Vaitheeswaran No.74, Colombo Road, Kandy. PETITIONER-RESPONDENT RESPONDENT -RESPONDENT

22/ 02/ 22	S.C. Appeal No. 74/2019	Walimunidewage Indrasena, No. 23, Radawana Road, Kirindiwela. Plaintiff Vs. 1. Walimuni Dewage Wijewardena, Raddalana, Welpalla. 2. Ganegodage Wijeratne, No. 23, Radawana Road, Kirindiwela. Defendants AND BETWEEN 1. Walimuni Dewage Wijewardena (Deceased), Raddalana, Welpalla. 1st Defendant-Appellant (Deceased) 1a(1). Piyadasa Dissanayake (Deceased), No. 739, Sudarshana Mawatha, Kelaniya. 1a(1)1. Thalagala Thilaka, No. 739, Sudarshana Mawatha, Kelaniya. 1a(1)2. Thalagala Thilaka, No. 739, Sudarshana Mawatha, Kelaniya. 1a(1)3. Shamith Nirashan, No. 739, Sudarshana Mawatha, Kelaniya. 1a(1)4. Chandima Subashini Kanchana Dissanayake, No. 739, Sudarshana Mawatha, Kelaniya. 1a(2). Abeyratne Dissanayake, No. 2/B, Hiswella, Kirindiwela. Substituted 1st Defendant-Appellant 2. Ganegoda Wijeratne, No. 23, Radawana Road, Kirindiwela. 2nd Defendant-Appellant Vs. Walimunidewage Indrasena, No. 23, Radawana Road, Kirindiwela. Plaintiff-Respondent AND NOW BETWEEN Walimunidewage Indrasena, No. 23, Radawana Road, Kirindiwela. Plaintiff-Respondent-Appellant Vs. 1. Walimuni Dewage Wijewardena (Deceased), Raddalana, Welpalla. 1st Defendant-Appellant-Respondent (Deceased) 1a(1). Piyadasa Dissanayake (Deceased), No. 739, Sudarshana Mawatha, Kelaniya. 1a(1)1. Thalagala Thilaka, No. 739, Sudarshana Mawatha, Kelaniya. 1a(1)2. Thalagala Thilaka, No. 739, Sudarshana Mawatha, Kelaniya. 1a(1)3. Shamith Nirashan, No. 739, Sudarshana Mawatha, Kelaniya. 1a(1)4. Chandima Subashini Kanchana Dissanayake, No. 739, Sudarshana Mawatha, Kelaniya. 1a(2). Abeyratne Dissanayake, No. 2/B, Hiswella, Kirindiwela. Substituted 1st Defendant-Appellant-Respondents 2. Ganegoda Wijeratne, No. 23, Radawana Road, Kirindiwela. 2nd Defendant-Appellant-Respondent
22/ 02/ 22	S.C. Appeal No. 157/2019	Avenra Gardens (Private) Limited, No. 22/5, Muhahunaupitiya, Negambo. Plaintiff Vs. 1. Global Project Funding AG Samstagernstrasse, CH- 8832, Wollerau, Switzerland. 2. My Star Spain S L C/Padre Thomas Montana, 36-2-46023, Valencia, Spain. 3. CAIXA Bank SA, Main Brach, Barcelona ES, Spain. 4. Seylan Bank PLC, Head Office, Seylan Tower, No. 90, Galle Road, Colombo 03. Defendants AND NOW BETWEEN 4. Seylan Bank PLC, Head Office, Seylan Tower, No. 90, Galle Road, Colombo 03. Defendant-Petitioner Vs. 1. Global Project Funding AG Samstagernstrasse, CH- 8832, Wollerau, Switzerland. 2. My Star Spain S L C/Padre Thomas Montana, 36-2-46023, Valencia, Spain. 3. CAIXA Bank SA, Main Brach, Barcelona ES, Spain. Defendant-Respondents Avenra Gardens (Private) Limited, No. 22/5, Muhahunaupitiya, Negambo. Plaintiff-Respondent

21/ 02/ 22	SC (F/R) No. 222/2016	Viraj Priyankara Abeyratne, No.179, Wijaya Road, Kolonnawa. Petitioner Vs. 1. Ceylon Electricity Board, Sir Chittampalam A. Gardiner Mawatha, P.O. Box 50, Colombo 02. 2. W.D.A.S. Wijepala, The Chairman, Ceylon Electricity Board, Sir Chittampalam A. Gardiner Mawatha, P.O. Box 50, Colombo 02. 3. M.C. Wickramasekara, The General Manager, Ceylon Electricity Board, Sir Chittampalam A. Gardiner Mawatha, P.O. Box 50, Colombo 02. 4. S.S. Kahanda, Deputy General Manager, Southern Province, Ceylon Electricity Board, No. 167, Matara Road, Galle. 12. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents
20/ 02/ 22	SC Appeal No. 130/15	1. C. Karunanayake Principal, WP/GP Veyangoda Maha Vidyalaya, Veyangoda. 2. A.M.R.B. Amarakoon Commissioner General of Examinations, Department of Examinations, Pelawatta, Battaramulla. 3. Honourable Attorney General Attorney General's Department, Colombo 12. Defendants - Appellants - Appellants Vs. Mannapperuma Mohotti Appuhamilage Thushari Ranga Mannapperuma No. 19, Udammita, Veyangoda. Plaintiff - Respondent - Respondent

Judgments Delivered in 2022

20/ 02/ 22	SC (FR): SCFR 147/2018	In the matter of an application under and in terms of Article 17 & 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka. 1. M.M.F Rizna 2. M.N.M Arham (minor) The Petitioners of No. 103/43, Abdul Wahab Mawatha, Thalapitiya, Galle. PETITIONERS Vs. 1. P.P.W Seneviratne Principal, Vidyaloka College, Galle. 2. Jayantha Wickramanayake, Director-National Schools, Ministry of Education Isurupaya, Battaramulla. 3. Sunil Hettiarachchi, Secretary Ministry of Education, Isurupaya, Battaramulla. 4. Hon. Attorney General; Attorney General's Department, Hulftsdorf, Colombo 12. RESPONDENTS
10/ 02/ 22	SC Appeal No. 67/2017	O.L.M. MACAN MARKAR LIMITED No: 26, Gall Face Court Sir Mohamed Macan Markar Mawatha Colombo 03. PLAINTIFF -VSAL-HAMBRA HOTEL LIMITED No. 30, Sir Mohamed Macan Markar Mawatha, Colombo 03 DEFENDANT AND AL- HAMBRA HOTELS LIMITED No. 30, Sir Mohamed Macan Markar Mawatha, Colombo 03 DEFENDANT - PETITIONER -VSO. L.M MACAN MARKAR LTD No. 26, Galle Face Court, Sir Mohamed Macan Markar Mawatha, Colombo 03. PLAINTIFF-RESPONDENT AND NOW AL- HAMBRA HOTELS LTD. No. 30, Sir Mohamed Macan Marker Mawatha Colombo 03. DEFENDANT- PETITIONER- APPELLANT Vs. O.L.M MACAN MARKAR LTD No. 26, Galle Face Court, Sir Mohamed Macan Markar Mawatha Colombo 03. PLAINTIFF-RESPONDENT-RESPONDENT

21/01/22	S.C.Appeal No.77/2013	In the matter of an Appeal to the Supreme Court in terms of Section 5 C 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. Galdeniyalage Ukkuwa of Polpitiya,Metikumbura Plaintiff Vs. 01. Galdeniyalage Podina 02. Parapayalage Devadasa 03. Parapayalage Karunawathie All of Polpitiya, Metikumbura Defendants AND BETWEEN 01. Galdeniyalage Podina (deceased) 01.a). Parapayalage Devadasa S.C. Appeal No. 77/2013 2 01.b). Parapayalage Karunawathie All of Polpitiya, Metikumbura Substituted-Defendant-Appellants 02. Parapayalage Devadasa 03. Parapayalage Karunawathie All of Polpitiya, Metikumbura 2nd & 3rd Defendant-Appellants Vs. Galdeniyalage Ukkuwa(deceased) Galdeniyalage Jasintha of Polpitiya,Metikumbura Substituted-Plaintiff-Respondent AND NOW BETWEEN 01. Galdeniyalage Podina(deceased) 01a). Parapayalage Devadasa 01b). Parapayalage Karunawathie All of Polpitiya, Metikumbura SubstitutedDefendant-Appellant-Appellants 02. Parapayalage Devadasa 03. Parapayalage Karunawathie 2nd & 3rd Defendant-Appellant-Appellants S.C. Appeal No. 77/2013 3 Vs. Galdeniyalage Ukkuwa(deceased) Galdeniyalage Jasintha of Polpitiya,Metikumbura Substituted-Plaintiff- Respondent-Respondent
20/01/22	SC (FR) Application No: 4/2017	K. M. R. Perera, 51/1, Northpole Residencies, Apartment 5/1, Peter’s Lane, Dehiwala. PETITIONER vs. 1) Dharmadasa Dissanayake, Chairman. 1A) Justice Jagath Balapatabendi, Chairman. 2) A.W.A. Salam. 2A) Hussain Ismail. 2B) Indrani Sugathadasa. 3) D. Shirantha Wijayatilake. 3A) Prathap Ramanujam. 3B) Dr. T.R.C. Ruberu. 4) V. Jegarajasingam. 4A) Ahamed Mohammed Saleem. 5) Santi Nihal Seneviratne. 5A) Sudarma Karunaratne. 5B) Leelasena Liyanagama. 6) S. Rannuge. 6A) Dian Gomes. 7) D.L. Mendis. 7A) Dilith Jayaweera. 8) Sarath Jayatilake. 8A) G.S.A. De Silva. 2nd, 2A, 2B, 3rd, 3A, 3B, 4th, 4A, 5th, 5A, 5B, 6th, 6A, 7th, 7A, 8th & 8A Respondents are members of the Public Service Commission. 9) H.M.G. Seneviratne. 9A) M.A.B. Senaratne. 9B) Daya Senarath, Secretary. 1st, 1A, 2nd, 2A, 2B, 3rd, 3A, 3B, 4th, 4A, 5th, 5A, 5B, 6th, 6A, 7th, 7A, 8th, 8A, 9th, 9A & 9B, Respondents are at Public Service Commission, No 177, Nawala Road, Narahenpita. 10) K.S.C. Dissanayake, Director General, Overseas Administration Division. 10A) M.K. Pathmanathan, Additional Director General. 10B) Sumith Dissanayake, Director General, Human Resources and Mission Management. 11) Esala Weerakoon. 11A) Ravinatha Ariyasinghe. 11B) Admiral Jayanath Colombage, Secretary. 10th, 10A, 10B, 11th, 11A & 11B Respondents are at Ministry of Foreign Affairs, The Republic Building, Colombo 1. 12) Hon. Attorney General, Attorney General’s Department, Colombo 12. RESPONDENTS

20/ 01/ 22	SC (FR) Application No: 55/2017	K. M. R. Perera, 51/1, Northpole Residencies, Apartment 5/1, Peter's Lane, Dehiwala. PETITIONER vs. 1) Dharmadasa Dissanayake, Chairman. 1A) Justice Jagath Balapatabendi, Chairman. 2) A.W.A. Salam. 2A) Hussain Ismail. 2B) Indrani Sugathadasa. 3) D. Shirantha Wijayatilake. 3A) Prathap Ramanujam. 3B) Dr. T.R.C. Ruberu. 4) V. Jegarajasingam. 4A) Ahamed Mohammed Saleem. 5) Santi Nihal Seneviratne. 10B) Sumith Dissanayake, Director General, Human Resources and Mission Management, Ministry of Foreign Affairs. 11) Esala Weerakoon. 11A) Ravinatha Ariyasinghe. 11B) Admiral Jayanath Colombage, Secretary. 10th, 10A, 10B, 11th, 11A & 11B Respondents are at Ministry of Foreign Affairs, The Republic Building, Colombo 1. 12) Hon. Attorney General, Attorney General's Department, Colombo 12. RESPONDENTS
19/ 01/ 22	SC APPEAL NO: SC/ APPEAL/ 61/2014	D.M. Sumanawathie, No. 267, 5th Village, Siyambalanduwa. Plaintiff Vs. D.M. Susiripala, Kongaspitiya, Kandaudapanguwa. Defendant AND BETWEEN D.M. Sumanawathie, No. 267, 5th Village, Siyambalanduwa. Plaintiff-Appellant Vs. D.M. Susiripala, Kongaspitiya, Kandaudapanguwa. Defendant-Respondent AND NOW BETWEEN D.M. Susiripala, Kongaspitiya, Kandaudapanguwa. Defendant-Respondent-Appellant Vs. D.M. Sumanawathie, No. 267, 5th Village, Siyambalanduwa. Plaintiff-Appellant-Respondent
19/ 01/ 22	SC APPEAL NO: SC/ APPEAL/ 131/2016	Rambandi Deveyalage Gamini Pushpalatha of Kandegedara, Devalegama. Plaintiff Vs. 1. Wickrema Arachchilage Suneetha, 'Jeewana' Devalegama. 2. Kapuwella Gamlath Ralalage Abeywickrema of Kandegedara, Devalegama. Defendants AND BETWEEN Rambandi Deveyalage Gamini Pushpalatha of Kandegedara, Devalegama. Plaintiff-Appellant Vs. 1. Wickrema Arachchilage Suneetha, 'Jeewana' Devalegama. 2. Kapuwella Gamlath Ralalage Abeywickrema of Kandegedara, Devalegama. Defendant-Respondents AND NOW BETWEEN Rambandi Deveyalage Gamini Pushpalatha of Kandegedara, Devalegama. Plaintiff-Appellant-Appellant Vs. 1. Wickrema Arachchilage Suneetha, 'Jeewana' Devalegama. 2. Kapuwella Gamlath Ralalage Abeywickrema of Kandegedara, Devalegama. Defendant-Respondent-Respondents
19/ 01/ 22	SC APPEAL NO: SC/ APPEAL/ 6/2021	Juwan Hettige Sriyalatha Silva, No.19/80, New Neegrodharama Road, Kalutara North. Plaintiff Vs. Meemanage Duneetha Chandrakanthi Silva, No. 19/80, New Neegrodharama Road, Kalutara North. Defendant AND BETWEEN Juwan Hettige Sriyalatha Silva, No.19/80, New Neegrodharama Road, Kalutara North. Plaintiff-Appellant Vs. Meemanage Duneetha Chandrakanthi Silva, No. 19/80, New Neegrodharama Road, Kalutara North. Defendant-Respondent AND NOW BETWEEN Meemanage Duneetha Chandrakanthi Silva, No. 19/80, New Neegrodharama Road, Kalutara North. Defendant-Respondent-Appellant Vs. Juwan Hettige Sriyalatha Silva, No.19/80, New Neegrodharama Road, Kalutara North. Plaintiff-Appellant-Respondent

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

S.C. Appeal No. 177/2016
SC/HCCA/LA 105/2016
WP/HCCA/COL 166/2013 (LA)
DC Colombo 35953/MS

Subadhra Irene Mangalika Wijewickrama,
No. 61/41 A, Manel Avenue,
Old Kesbawa Road,
Delkanda,
Nugegoda.

Plaintiff

Vs.

D.S.B.S. Chandrawathi,
Kegalle Road, Alawathura.

Defendant

AND BETWEEN

D.S.B.S. Chandrawathi,
Kegalle Road, Alawathura.

Defendant-Appellant

Vs.

Subadhra Irene Mangalika Wijewickrama,
No. 61/41 A, Manel Avenue,
Old Kesbawa Road,
Delkanda,
Nugegoda.

Plaintiff-Respondent

AND BETWEEN

Subadhra Irene Mangalika Wijewickrama,
No. 61/41 A, Manel Avenue,
Old Kesbawa Road,
Delkanda,
Nugegoda.

Plaintiff-Respondent-Appellant

Vs.

D.S.B.S. Chandrawathi,
Kegalle Road, Alawathura.

Defendant-Appellant-Respondent

AND NOW BETWEEN

D.S.B.S. Chandrawathi,
Kegalle Road, Alawathura.

Defendant-Appellant-Respondent-Appellant

Vs.

Subadhra Irene Mangalika Wijewickrama,
No. 61/41 A, Manel Avenue,
Old Kesbawa Road,
Delkanda,
Nugegoda.

Plaintiff-Respondent-Appellant-Respondent

Before: E.A.G.R. Amarasekara, J.
Janak De Silva, J.
Arjuna Obeyesekere, J.

Counsel:

P.P. Gunasena for the Defendant-Appellant-Respondent-Appellant

Uchitha Wickremesinghe with Saumya Hettiarachchi for the Plaintiff-Respondent-Appellant-Respondent

Written Submissions tendered on:

25.05.2017 by the Defendant-Appellant-Respondent-Appellant

23.01.2018 by the Plaintiff-Respondent-Appellant-Respondent

Argued on: 22.10.2021

Decided on: 28.07.2022

Janak De Silva, J.

The Plaintiff-Respondent-Appellant-Respondent (hereinafter referred to as the "Respondent") filed this action in the District Court of Colombo under Section 703 of the Civil Procedure Code to recover a sum of Rupees 1,050,000/- from the Defendant-Appellant-Respondent-Appellant (hereinafter referred to as the "Appellant") who was at that time a public officer. Judgment and decree had been entered in favour of the Respondent and in order to satisfy the decree, the salary of the Appellant had been seized in terms of the Civil Procedure Code.

Sometime later, the Appellant had retired from public service and since the amount of the decree had not been recovered fully, the Respondent had taken steps to seize the pension of the Appellant and her commuted gratuity in order to satisfy the decree. The Appellant then made an application to the District Court of Colombo seeking to prevent the seizure of her pension on the basis that her pension is exempt from seizure in terms of section 218(g) of the Civil Procedure Code.

The Learned Additional District Judge by order dated 20.11.2013 allowed the application of the Appellant and her pension was declared free from seizure. In doing so the learned Judge held that the term 'stipend' in section 218(g) of the Civil Procedure Code means and refers to the entire pension and hence the entire pension of the Appellant is exempt from seizure.

Aggrieved by the said order, the Respondent appealed to the High Court of Civil Appeal of the Western Province holden in Colombo.

The High Court of Civil Appeal by order dated 27.01.2016 allowed the appeal and declared that the Respondent is entitled to seize the pension of the Appellant including her commuted gratuity. It was held that the pension of the Appellant is not exempt from seizure under section 218(g) as "*the term used in section 218(g) is 'stipend' and not 'pension' and therefore it should mean something additional and distinct from the pension.*" Further it was held that in Sri Lanka public servants have no absolute right to any pension or allowance and that Sri Lankan law does not recognize a public policy of the

State to protect the pension of a public officer from seizure in the execution of a decree. In conclusion, the High Court of Civil Appeal applied the maxim *Noscitur a sociis* and held that '*stipend'* is an additional or supplementary payment (although it could be a regular and fixed payment) and as the Appellant had not shown the existence of such a component in her emolument her pension can be seized.

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

1. Has the High Court of Civil Appeal erred in Law in allowing the seizure of the Defendant's pension including her commuted gratuity?
2. If the entirety of the Petitioner's pension is exempted from seizure would the Petitioner be unjustly enriched at the expense of the Respondent?
3. If the answer to the aforesaid issue is in the affirmative ought the Petitioner's appeal be dismissed?

The main contention of the Appellant is that in terms of section 218(g) of the Civil Procedure Code, the pension of the Appellant cannot be seized during the execution of a decree. The learned counsel for the Appellant submitted that the term '*stipend*' used in section 218(g) of the Civil Procedure Code refers to the entirety of the pension and not to a portion of the pension drawn by a pensioner. He submitted that therefore, the entirety of the Appellant's pension cannot be seized under and in terms of section 218(g) of the Civil Procedure Code.

In response the learned counsel for the Respondent submitted that the term '*stipend*' used in section 218(g) does not refer to the entire pension. He submitted that it only refers to a component of the pension and that the terms *stipend, the cost-of-living allowance and the special living allowance,* refers to 'three components' of a pension. He submitted that through section 218(g) of the Civil Procedure Code, the legislature intended to exclude from seizure only the said 'three components' of a pension, and that the balance portion of the pension is liable to being seized to satisfy a money decree issued against a pensioner. The learned counsel for the Respondent further submitted that as the

Appellant had failed to provide a breakdown of her pension to prove that the above three components are included in her pension, the entirety of her pension is liable to be seized.

The main issue for determination is the meaning to be given to the word *'stipend'* in section 218(g) of the Civil Procedure Code.

In this endeavour, it is important to examine the evolution of the wording in section 218(g) of the Civil Procedure Code since when the meaning of words or phrases used in a statute are unclear and has not been judicially interpreted, according to well established legal principles and principles of common sense, reference can be made to the historical evolution of the statute to understand its meaning. [Per Lord Coleridge, J. in ***Queen v. Most*** **(1881) 7 QBD 244 at 251**]. Moreover, when interpreting legislation, it is a necessary requirement to always give effect to the intention of the legislature. Where there is ambiguity with regard to a meaning of a word or where a word is capable of having two meanings, reference can be made to the history of the statue to determine the intention of the legislature [*NS Bindra's Interpretation of Statutes*, 10th ed., page 945]

The Civil Procedure Code was enacted in 1889 as Ordinance No. 2 of 1889. Although there are several provisions which have been added to it later, section 218(g) was enacted in the English language. Article 23(1) of the Constitution states that all laws and subordinate legislation shall be enacted or made and published in Sinhala and Tamil, together with a translation thereof in English. The Second Proviso to Article 23 of the Constitution mandates that in respect of all other written laws the text in which such written laws were enacted or adopted or made, shall prevail in the event of any inconsistency between such texts. In ***The Attorney-General v. Herath Mudiyanselage Hamyge Herath Banda*** **[(1983) Bar Association Law Journal Reports Vol. I Part III 108]** it was held that Bribery Act was enacted in English language and for the purposes of legal work it could not be considered in any other language.

As originally enacted Section 218(g) read as follows;

> "*Stipends allowed to naval, military and civil pensioners of Government and political pensions*"

Subsequently the section was amended by Civil Procedure Code (Amendment) Acts No. 43 of 1949 and by No. 24 of 1961. Thereby the words '*the cost-of-living allowance'* and '*the special allowances'* were added respectively to the list of items that are excluded from liability of being seized during execution of a money decree.

Hence it is clear that as originally enacted, '*Stipends'* meant something different and distinctive to 'the cost-of-living allowance' and 'the special allowances and the High Court of Civil Appeal erred in applying the maxim *Noscitur a sociis* to section 218(g) of the Civil Procedure Code to ascertain the meaning of the word '*Stipend'.*

The important question is whether 'stipend' means the pension a public officer receives upon retirement.

The High Court of Civil Appeal went on the basis that section 218(g) of the Civil Procedure Code uses the word 'stipend' and not 'pension' and therefore it should mean something additional and distinct from the pension. However, it was not examined whether the words 'stipend' and 'pension' are synonyms. In fact, the High Court of Civil Appeal proceeded on the basis that they are not.

One of the basic rules in interpretation of statutes is to assume that words and phrases of legislature are used in their ordinary meaning. It is an equally well-established technique of statutory interpretation as held by Lord Coleridge in ***R v. Peters*** **[1886] 16 QBD 636**, for Courts of law to refer to dictionary in order to ascertain the ordinary relevant meaning of words.

Lord Coleridge held (at page 641)

> *"I am quite aware that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books."*

Dictionary usage is particularly important in textualist analysis, which seeks to find "a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law" and places foremost priority on the text itself, as opposed to utilizing external sources of understanding. This method has its proclaimed roots in democratic principles: if the nebulous intent of the legislature controls over the plain meaning of its published text, how could citizens be on notice about the law which they are to follow? **[*WAR OF THE WORDS: HOW COURTS CAN USE DICTIONARIES IN ACCORDANCE WITH TEXTUALIST PRINCIPLES*, Phillip A. Rubin, Duke Law Journal Vol 60, page 167 at 168]**

The word 'stipend' has not been defined in the Civil Procedure Code and its exact meaning has not been judicially interpreted. In ***Ibrahim Saibo et al. v. Philips*** **(39 N.L.R. 551)** all what was held is that the word is inseparable from the notion of periodical payments and cannot therefore embrace a lump sum. The decisions in ***Ambalavanar v. Kandappar*** **(31 N.L.R. 85)** and ***Goul v. Concecion*** **(36 N.L.R. 73)** are of little assistance on this issue.

When any word is statutorily defined or judicially interpreted, there is no scope for looking at the dictionary meaning; however, in the absence of such definition or interpretation, the court may seek aid of dictionaries to ascertain the meaning of a word in common parlance **[*N.S. Bindra's Interpretation of Statutes*, 10th ed., (2007) Lexis Nexis Butterworths page 927]**.

Nevertheless, Court should not have recourse to any dictionary. If the court is concerned with the contemporary meaning of a word at the time the Act was passed, it should consult a dictionary of that period (***Hardwick Game Farm v. Suffolk Agricultural and Poultry Producers Association Ltd.*** **[1966] 1 WLR 287, 324: *R v. Bouch* [1982] 3 WLR 673, 677**) **[*Bennion on Statute Law*, 3rd ed., (1990) page 194]**.

The Civil Procedure Code was enacted in 1889. The dictionary closest in time to this period found after much effort is the "The Oxford English Dictionary" published in Oxford at the Clarendon Press in 1933, where the word '*stipend*' is defined as a "*a fixed periodical payment of any kind, e.g., a pension or allowance*".

Hence, I hold that the word 'stipend' as used originally in 1889 in section 218(g) of the Civil Procedure Code is synonymous with the words 'pension' or 'allowance'.

There is no impact on this conclusion by the amendment made in 1949. Prior to it, the word used was "stipends". By the Civil Procedure Code (Amendment) Act No. 43 of 1949, with the addition of the phrase "*the cost-of-living allowance*", the word "stipends" was amended to read as "The stipend". This remained unaltered by the Civil Procedure Code (Amendment) Act No. 24 of 1961 and the section now reads as "*the stipend, the cost-of-living allowance and the special living allowance of a naval, military, air force, civil or political pensioner of the Government*;".

The fact that there are other allowances paid to a public servant upon retirement in addition to the pension is clear upon an examination of the Minutes on Pension which regulates the payment of pension to public officers. Section 2 of Ordinance No. 2 of 1947 makes the Minutes on Pensions part of the "written law "of Sri Lanka from 1901 and hence Court can take judicial notice of it although it was not produced in the lower court. Clause 2 refers to the award of a pension to specified public servants. Clause 8(1) specifies that the pension or gratuity awarded to a public servant shall be computed upon the salary drawn by him at the time of his retirement. Clause 12 (1) permits the withholding or reduction of certain sums from any pension, gratuity or other allowance payable to a public servant. Clause 15 refers to situations where a public officer is paid a pension, gratuity or other allowance. Clause 19 refers to the pension or retiring allowance.

'The' is the word used before nouns, with a specifying or particularizing effect as opposed to the indefinite or generalizing force of 'a' or 'an'. It determines what a particular thing is meant, that is, what particular thing we are to assume to be meant. 'The' is always mentioned to denote a particular thing or a person **[*N.S. Bindra's Interpretation of Statutes*, 10th ed., (2007) Lexis Nexis Butterworth, page 1724]**.

Accordingly, the term 'the stipend' refers to a particular payment. This conclusion is supported by the Minutes on Pension which regulates the payment of pension to public officers. Clause 8(1) specifies that the pension or gratuity awarded to a public servant shall be computed upon the salary drawn by him at the time of his retirement.

I hold that the amendment of the word 'stipends' as 'The stipend' and the inclusion of the words 'the cost-of-living allowance' and 'the special allowances' reveals the intention of the legislature to distinctly identify the pension, 'the cost-of-living allowance' and 'the special allowances' from other allowances that are paid to government pensioners and clearly exempt the pension, 'the cost-of-living allowance' and 'the special allowances' from seizure.

This becomes clearer when one considers section 218(h) of the Civil Procedure Code. It originally exempted the salary of a public officer or servant from seizure. By the amendment made in 1949, even the cost-of-living allowance paid to a public officer was also excluded.

Moreover, the context in which public servants in Sri Lanka (Ceylon as it was then) were awarded a pension justifies the legislative intent of excluding the pension of a public servant from seizure in terms of section 218(g) of the Civil Procedure Code.

P.D. Kannangara in "*The History of the Ceylon Civil Service 1802-1833*, A Study of Administrative Change in Ceylon" [Tisara Prakasakayo, 1966, page 169] explains the historical reasons as follows:

> *"At the time of the formation of the Civil Service, the gift of the Colonial Office to what it considered inadequate salaries was a favourable retirement and pension scheme. Dundas, who originated the idea, specifically stated that considering the small scale on which it was proposed to regulate the salaries of Civil Servants, some arrangement ought to be made with a view to making a provision for their retreat. He also thought that to induce Civil Servants to look forward to a 'certain and competent independence' after a given number of years of service, was the best security against abuse. Pensions were to be proportionate to the duration and importance of the services rendered."*

This rationale for the grant of a pension to a public servant may well have been the reason for Moseley J. to concede in ***Ibrahim Saibo et al. v. Philips*** **(Supra. page 552)** that the object of paragraph 218(g) of the Civil Procedure Code is to protect pensions payable to Government officers. Indeed, that intention is clear upon a reading of the paragraph. Government servants are not compensated at the same level as in the private sector. One of the main incentives to join the public service is the pension a public servant receives upon retirement. The object behind the exemption of the pension from seizure is that a public servant pensioner should not be left high and dry and should have some financial means to carry on in old age when the need of the pensioners is greatest.

The learned counsel for the Respondent submitted that the Appellant will be unjustly enriched if her pension is exempted from seizure. However, as held in ***Ibrahim Saibo et al. v. Philips*** **(Supra.)**, the commuted gratuity payable to the Appellant is liable for seizure towards satisfaction of the money decree the Respondent has obtained against the Appellant. It is observed that there is no evidence on record to show that there are no other assets of the Respondent which can be seized. In any event, where the legislature has specified that certain amounts are exempt from seizure, the question of unjust enrichment does not arise.

For all the foregoing reasons, I hold that the pension of the Appellant cannot be seized under section 218(g) of the Civil Procedure Code for the purpose of satisfying the money decree. However, her commuted gratuity is liable to be seized for the satisfaction of the money decree obtained by the Respondent.

Accordingly, I answer the questions of law as follows:

1. Has the High Court of Civil Appeal erred in Law in allowing the seizure of the Defendant's pension including her commuted gratuity?

   The High Court of Civil Appeal erred in law in allowing the seizure of the Defendant's pension. Her Commuted Gratuity is liable for seizure.

2. If the entirety of the Petitioner's pension is exempted from seizure would the Petitioner be unjustly enriched at the expense of the Respondent?

   No.

3. If the answer to the aforesaid issue is in the affirmative ought the Petitioner's appeal be dismissed?

   Does not arise.

Accordingly, I set aside the order of the High Court of Civil Appeal of the Western Province holden in Colombo dated 27.01.2016 and affirm the order of the learned Additional District Judge of Colombo dated 20.11.2013.

Parties shall bear their costs.

Appeal partly allowed.

Judge of the Supreme Court

E.A.G.R. Amarasekara, 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 for Leave to Appeal in terms of Section 5C(1) of the High Court of the Provinces (Special Provisions) Act No.54 of 2006.

SC Appeal No: 146/2015

SC. HCCA.LA No. 67/2015.
WP/HCCA/GAM/76/2008(F).
D.C. Gampaha No.34855/L

Gurunnanselage Dona Sandya Manohari Wimalatunga of
No.32, Elapitiwala,
Ragama.

PLAINTIFF

-VS-

Rajathewa Mohotti Appuhamilage Nihal Seneviratne of
Thiriwanegama,
Kalagedihena.

DEFENDANT

AND BETWEEN

Rajathewa Mohotti Appuhamilage Nihal Seneviratne of

Thiriwanegama,
Kalagedihena.

DEFENDANT-APPELLANT

-VS-

Gurunnanselage Dona Sandya Manohari Wimalatunga of
No.32, Elapitiwala,
Ragama.

PLAINTIFF -RESPONDENT

AND NOW BETWEEN

Gurunnanselage Dona Sandya Manohari Wimalatunga of
No.32, Elapitiwala,
Ragama.

PLAINTIFF-RESPONDENT-APPELLANT

-VS-

Rajathewa Mohotti Appuhamilage Nihal Seneviratne of
Thiriwanegama,
Kalagedihena.

DEFENDANT-APPELLANT

RESPONDENT

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

S. THURAIRAJA, PC, J.

ACHALA WENGAPPULI, J.

COUNSEL : V. Kulathunga for the Plaintiff- Respondent-Appellant.

S.N. Vijithsingh for the Defendant- Appellant- Respondent.

ARGUED ON : 12th November 2021.

WRITTEN SUBMISSIONS : Plaintiff- Respondent-Appellant on the 12th of October 2015.

Defendant- Appellant- Respondent on the 30th November 2015.

DECIDED ON : 22nd July 2022.

S. THURAIRAJA, PC, J.

This is an appeal filed by the Plaintiff-Respondent-Appellant (hereinafter sometimes referred to as Plaintiff) arising from the judgment of the Provincial High Court of the Western Province (Colombo), delivered in an appeal from the judgement of the District Court of Gampaha. This matter was supported before this Court on 31.08.2015 and leave was granted on the following questions of law referred to in paragraph 11(b) to (f) of the Petition dated 27.02.2015 as follows:

b) The Learned High Court Judges have failed to consider the fact that the Licensed Surveyor has very clearly stated that he has correctly identified the land morefully described in the schedules to the plaint, by the Plan marked P6 and the Report marked P7.

c) The Learned High Court Judges have failed to consider the fact that the Licensed Surveyor has superimposed the plans marked P1 and P2 appearing in the plaint and came to the correct conclusion that Lot No. 1 to 18 are the extent in the lands described in the schedules of the plaint.

d) The Learned High Court Judges have failed to consider the plan marked P6 and its Surveyor's evidence with regard to the identification of the land morefully described in the schedules of the plaint and its effect.

e) The Honorable High Court Judges have erred in law by disregarding the amicable partition by plan no.1286 marked P1 and the operative part of the deed marked P3 and P5.

f) The Honorable High Court Judges have been misdirected and set aside the entire judgement of the District Court of Gampaha whereas the Defendant has not claimed any title to the land morefully described in the 2nd schedule to the plaint.

Further, the Counsel for the Defendant-Appellant-Respondent (hereinafter sometimes referred to as Defendant) raised incidental questions on the basis of which special leave to appeal has been granted by this Court, are set out below;

1. Whether there was an issue before the District Court about the amicable partition.
2. Whether the land which is the subject matter of this application has been properly identified.

In answering this question of law, I find it pertinent to lay out the facts of the case followed by an examination of the relevant provisions and concepts of law.

The Facts

The Plaintiff instituted this action bearing no. 34855/L in the District Court of Gampaha on 13th February 1992 mainly for a declaration of title to the lands morefully described in the 1st to 3rd schedules to the Plaint, for the ejectment of the Defendant and for damages. Plaintiff stated by his Plaint as follows:

I. The Plaintiff asked for a declaration of title and ejectment of the Defendant from the Lot No. 2 and 5 of "Nagahawatta" shown in plan no. 1286 marked as 'P1' appears at page 183 of the brief marked as 'X'.

II. The Plaintiff also prayed for a declaration of title and ejectment of the Defendant from the paddy field called "Pokune Kumbura Pillewa and Wewekumbura" of plan no. 1278 marked as 'P2' appears at page 185 of the brief marked as 'X'.

III. The Plaintiff stated that father of the Plaintiff, Mr. Mithreepala alias Mahinda Nanayakkara became the owner of Lot No.2 of the said plan bearing no. 1286, land morefully depicted in the said plan no.1278 and the Lot no. 5 of the plan marked bearing no.1286 by Deeds marked P3, P4 and P5 respectively.

IV. The said Mahinda Nanayakkara has died in 1984 and his estate was administrated in the District Court of Colombo case bearing no. 29660/T and his title devolved on the heirs of the deceased.

V. Thereafter the legal heirs of the said Mahinda Nanayakkara has transferred their shares to the Plaintiff by deed marked P10.

VI. Then the Defendant unlawfully entered in to the lands on 15th of November 1991 morefully described in the 1st, 2nd and 3rd Schedules of the Plaint.

As discussed above, the Plaintiff set out her title to the said lands emanating from said Mahinda Nanayakkara and claimed that the Defendant together with his parents and family had entered the land in or about 1991 and constructed a house thereon and is in illegal and unlawful possession of the land since such time.

The Defendant filed answer denying the averments contained in the Plaint and set out his chain of title to the said land by pleading inter alia that his father Rajathewa Mohotti Appuhamilage Wijesinghe had derived title from the deeds marked V3 to V7 commencing from the years 1961 to 1976 to the land, which is morefully described in the schedule to the answer, and after demise of his father, he together with his family members inherited the same. The Defendant also claimed that he had acquired a prescriptive title and prayed for a dismissal of the Plaintiff's action.

Thereafter the case was fixed for trial and after the trial the learned Judge of the District Court answered the issues in favour of the Plaintiff and entered the judgment accordingly.

Thus the Defendant had preferred an appeal to the Provincial High Court of the Western Province (Civil Appeals) holden at Gampaha. The learned High Court Judges delivered the judgment on 19.01.2015 dismissing the Plaintiff's action based on the non-identification of the land, differences in the superimposition, amicable partition of the land among other such grounds.

Being aggrieved by the judgment of the Provincial High Court of the Western Province (Civil Appeals) Holden at Gampaha the Plaintiff has filed a Petition dated 27th February 2015 before this Court, and leave was granted as has been specified above.

Questions of Law raised

Upon perusal of the facts, I find it pertinent to summarize the Questions of law raised in this case into two main issues as identification of the corpus and the issue of amicable partition.

However as there are five specific questions of law, I find it pertinent to answer each question of law giving due consideration to the circumstances pertaining to each, in this case this can more comprehensively achieved by firstly answering the 4th question of law.

In a declaration of title or *rei vindicatio* action, if the subject matter is admitted no further proof of the identity of the corpus is required, for no party is burdened with adducing further proof of an admitted fact. The subject matter of this action is set out in the plaint and the Defendant in his answer sought a declaration of title in his favour for the premises from which the Plaintiff wanted him ejected.

The Plaintiff in this case prayed for a declaration of title to three contiguous allotments of lands described in the 1st, 2nd and 3rd schedules to the Plaint. These three contiguous lands are described and depicted in two plans bearing No.1286 dated 12.4.1983 prepared by T.A. Ranasinghe Thambugalla Licensed Surveyor, which was marked as P-1 and Plan No.1278 dated 16.3.1983 prepared by T.A. Ranasinghe Thambugalla Licensed Surveyor, which was marked as P-2 in the course of the trial. Lands described in the 1st and 3rd Schedules to the Plaint refers to Plan P-1 (depicted as Lot 2 and 5 respectively) and the land in the 2nd Schedule refers to Plan marked P-2.

Plaintiff stated that the Plaintiff's predecessor, Mahinda Nanayakkara obtained title to the said three allotments of land from three different deeds. Title to the land described in the first schedule to the plaint, namely Lot No. 2 in Plan marked P-1 was obtained by Deed No.4007 marked as P-3 and the title to the land described in the second schedule in P-2 was obtained by Deed No.4004 marked as P-4. Title to the land described in the third schedule namely Lot 5 in P-1 was obtained by Deed No.4006 marked as P-5.

Accordingly, the said three contiguous allotments of land were owned by the said Mahinda Nanayakkara in 1983 by the said three deeds marked P-3, P-4 and P-5,

all executed in the same year. As per the said Deeds, the vendors in Deed P-3 and P-5 had amicably partitioned the land described in the first schedule in both deeds and Lot 2 had been allotted to one Raja Thewa Mohotti Appuhamilage Edwin Singho in lieu of his undivided 31/72 shares and Lot 5 in that plan which was allotted to 8 persons having undivided shares, being heirs of one Raja Thewa Mohotti Appuhamilage Don Juanis Appuhamy, was later turned into a divided and defined allotment as a result of the amicable partition done by the said Plan P-1. Hence, Plaintiff claimed that common ownership had been terminated since 1983.

Defendant in his answer pleaded title to a land called "Nagahawatte" described in the schedule to the Answer which described as follows;

> ''බස්නාහිර පළාතේ ගම්පහ දිස්ත්‍රික්කයේ සියනෑ කෝරළේ මැද පත්තුවේ කිරිවානේගම යන ගම තිබෙන නාගහවත්ත කියන වී බුසල් දෙකක පමණ වපසරියට මායිම්;
>
> උතුරට ගී කියන අප්පු සිට සහ තව අයට අයිති ඉඩමද, නැගෙනහිරට එම අප්පු සිංඤෝ ට අයිති පොකුනේ කුඹුරද, දකුණට අඹගොඩ ලියනගේ ලවනිස් අප්පුට සහ තව අයට අයිති වත්තද, බස්නාහිරට ගී කියන අප්පු සිංඤෝට අයිති වත්තද, යන මේ තුල පිහිටි ගහකොළ පලතුරු ආදී සියලු දේත් වේ. ''

For the purpose of reference, the English translation of the above paragraph is reproduced as follows;

> *"Nagahawatta in the village of Kiriwanegama in the middle of Siyane Korale in the Gampaha District of the Western Province borders about two bushels of paddy; trees and plantations standing thereon and bounded as;*
>
> *on the North by land of Geekiyanage Appusingho and others, East by Pokunekumbura of the said Appusingho, South by land of Ambegoda Liyanage Lawanis Appu and others, West by land of Geekiyanage Appu Singho.."*

According to the said description of the land, Nagahawatte is a land of about 2 Bushels paddy sowing and the original owner to the same land had been one Raja Thewa Mohotti Appuhamilage Baron Seneviratne alias Appuhamy who was the paternal grandfather of the Defendant.

Plaintiff in order to establish the chain of title to the land called Nagahawatte adduced the Deed marked P-3 which had been executed in 1983 and the part A of the Schedule therein describes a land of two Bushels as follows.

> "*The land called Nagahawatta situated at Thiriwanegama in Meda Pattu of Siyane Korale in the District of Gampaha (Formerly District of Colombo) Western Province and bounded on the North by land of Geekiyanage Appusingho and others, East by Pokunekumbura of the said Appusingho, South by land of Ambegoda Liyanage Lawanis Appu and others, West by land of Geekiyanage Appu Singho, containing in extent about two Bushels of Paddy sowing ground and registered under E 205/106. "*

With these translations, it appears that the land claimed by the Defendant based on his title deeds in the answer is almost identical to the land claimed by the Plaintiff morefully described in the 2nd schedule to the Plaint, albeit in a different language.

In the recitals of P-3 it describes the Vendor's title and pedigree as follows;

> *"I, Raja Thewa Mohotti Appuhamilage Edwin Singho of…… (……. vendor) am the owner of an undivided 31/72 share of the land and premises described in the Schedule A hereto under and by virtue of Deed of Gift No.6800 dated 31st October 1961 attested by D.F.S. Wijayasinghe Notary Public.*
>
> *Whereas I the said Vendor have amicably partitioned the said premises described in Schedule A hereto with the other co-owners of*

the said premises according to Plan No. 1286 dated 12th April 1983 made by T.A. Ranasinghe Thambugala Licensed Surveyor.

And whereas I the said Vendor for and in lieu of my 31/72 share of the said premises described in the schedule A hereto have been allotted and am in possession of Lot 2 depicted in the said Plan of the said premises which said Lot 2 is described in the schedule B hereto and is hereinafter referred to as the said premises: "

Part B of the Schedule of the said Deed marked P-3 depicts the transferred property to the predecessor of the Plaintiff as follows.

"All that Lot 2 depicted in the said Plan No.1286 dated 12th April 1983 made by T.A. Ranasinghe Thambugala Licensed Surveyor of the land called Nagahamulawatta described in the Schedule Schedule A hereto and situated at Thiriwanegama aforesaid which said Lot 2 is bounded according to the said Plan on the North-East by Lot 1, South-East by field of R.M.A. Wijesinghe and others, South-West by Lots 5,4 and 3, North-West by land of R.N.A. Karunaratne, containing in extent one rood and five decimal eight five perches (A.0-R.1-P.05.85). "

As per the above mentioned facts it can be observed that the land described in the Answer of the Defendant is identical to the land described and claimed by the Plaintiff as per the Deed marked P-3 in boundaries as well as in extents. Further, the vendor of the said P-3 had only transferred a lesser extent which is described in the Part B of the Schedule to the P-3 on the basis that in lieu of his undivided share, he together with the other co-owners had amicably divided the land and he had become entitle to Lot 2 of Plan P-1.

However, it must be noted that there was no deed produced to establish the fact that the co-ownership had come to an end in the year 1983 and there was hardly

any time for the said portion of the land to be acquired by a separate entity at the time of instituting the action as the action had been instituted in the year 1992 before a ten years' period had lapsed.

As per the page 81 of the brief, T.A. Ranasinghe Thambugalla Licensed Surveyor was called as a witness to give evidence in the trial. In his evidence he was questioned regarding Survey Plan No.1286 dated 12.4.1983 (P-1) prepared by him and he specifically stated that he does not possess any document to prove that the other co-owners have given their consent for the preparation of P-1 or the other co-owners were present when the amicable partition was done. The relevant portion was re-produced as follows;

ප්‍ර : නමුත් ඒ පාර්ශවකරුවන් මේ ඉඩම බෙදා වෙන් කර ගන්න කැමතියි කියලා, කිසිම අත්සනක් සඳහන් වෙලා නැහැ?

උ : නැහැ.

ප්‍ර : පාර්ශවකරුවන්ගේ එකගත්වය උඩ එකඟවුනා කියලා මොනම සාක්ෂියක්වත් නැහැ.

උ : නැහැ.

For the purpose of reference, English translation of the above paragraph is as follows;

Q- But there is no signature that those parties want to divide this land?

A-No.

Q- There is no evidence that the parties agreed on the agreement.

A-No.

With the said testimony, it is irrelevant to apply the amicable partition entered between the parties by Plan no.1286 marked P1 and the operative part of the Deed marked P3 and P5 as these were entered without the representation of all co-owners

who are legally entitle to the ownership of this land. Hence, I answer the 4th question of law negatively.

The Defendant in his answer averred that he is in possession of the said land described in the schedule to his answer and that the original owner of it was one Raja Thewa Mohotti Appuhamilage Don Baron Seneviratne who transferred an undivided 31/72 share to one R.M.A. Wijesinghe (Defendant's father) by Deed No. 6814 dated 6.11.1961 (V-3), who in turn transferred same to one K.P. Somapla by Deed No.15562 dated 10.12.1969 (V-4) and said Somapala re-transferred same to said R.M.A. Wijesinghe (Defendant's father) by Deed of Transfer No.475 dated 10.8.1970 (V-5). Said Wijesinghe by Deed of Transfer No.476 dated 10.8.1970 (V-6) transferred the same to the said Somapala and said Somapla by Deed No. 5327 dated 2.11.1976 (V-7) to the Defendant's father R.M.A. Wijesinghe who died intestate without any further transfers and hence the property was inherited by his wife and his children including the Defendant and four others as legal heirs of the said deceased Wijesinghe. Defendant further claimed that he was in possession of that land, and averred that the Plaintiff's action be dismissed with costs.

In the course of the trial Plaintiff's brother namely, Gurunnaselage Vijith Priyantha Wimalathunga gave evidence since he was the person who looked after the land described in the 1st-3rd schedules to the Plaint. Title Deeds which were discussed above were marked and the Survey Plan bearing No. 1333 dated 12.03.1997 prepared by R.M.J. Ranasinghe Licensed Surveyor was marked as P-6 where both lands depicted in P-1 and P-2 were surveyed and superimposed. Under cross-examination R.M.J. Ranasinghe Licensed Surveyor had admitted the fact that he could not identify the lands which are described in the schedule to the Plaint, but he had depicted a land which was shown to him by the Plaintiff (page 73 of the brief).

ප්‍ර : ඔබගේ වාර්තාව බලන්න. ඒ වාර්තාවේ 6 වෙනි අනුඡේදයේ තිබෙනවා. (පැ 7 වාර්තාවේ එම ඡේදය කියවයි). අධිෂ්ඨාපනය කර පිඹුරක් සෑදීම කියලා තියෙනවා?

උ : ඔව්.

(එකී ඡේදය''වි - 1' වශයෙන් ලකුණු කරයි).

ප්‍ර : ඊට පස්සේ ඔබ කියලා තිබෙනවා පැමිණිලිකරුවන් පෙන්වූ අන්දමට එම ඒකාබද්ධ වූ ඉඩම ..... (කියවයි)

උ : ඔව්.

ප්‍ර : ඔබ කරලා තිබෙන්නේ පැමිණිලිකරුවන් පෙන්වූ අන්දමට තමයි.

උ : ඔව්.(එම කොටස් වි- 2 වශයෙන් ලකුණු කරයි.)

ප්‍ර : ඔබගේ වාර්තාව අනුව අධිෂ්ඨාපනය කරලා නෑ.

උ : ඔව්.

For the purpose of reference, the English translation of the above paragraph is as follows;

Q- Look at your report. That is in paragraph 6 of the report. (Reads that paragraph in P-7 of the report).

It states that you determined to superimpose and prepare a plan?

A-Yes.

(The passage is marked as "V-1").

Q- Then you have said that as shown by the plaintiffs that the combined land..... (Reads)

A-Yes.

Q- You have done as the plaintiffs have shown.

A-Yes. (Those parts are marked as V-2.)

In this context, though the Plaintiff relied on the P6 and P7, I am of the view that the Licensed Surveyor has not correctly identified the land morefully described in the schedules to the Plaint, by the Plan marked P6 and the Report marked P7.

The action for a declaration of title has been considered in several landmark decisions in Sri Lanka. As it was held in **Wanigaratne Vs. Juwanis Appuhamy (65 NLR 167)**, "*it is trite law that Plaintiff should set out his title on the basis on which he claims a declaration of title to the land. The burden rests on the Plaintiff to prove that title*".

Further, **in Jamaldeen Abdul Latheef and V. Abdul Majeed Mohamed Mansoor and Another (2010 2SLR 333) it was held as follows;**

> *"It is trite law that the identity of the property with respect to which a vindicatory action is instituted is a fundamental to the success of the action as the proof of the ownership (dominion) of the owner (dominus). Where the property sought to be vindicated consists of a land, the land sought to be vindicated must be identified by reference to a survey plan or other equally expeditions method. In a rei vindicatio action, it is not necessary to consider whether the defendant has any title or right to possession, where the plaintiff has failed to establish his title to the land sought to be vindicated, the action ought to be dismissed without more."*

As enumerated above to succeed in a rei vindication action, 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. The identity of the land is fundamental for the purpose of attributing ownership, and for ordering ejectment. In the present case, I am of the view that the Plaintiff has failed to prove his title of the property to the subject matter in dispute. Hence, I answer the 2nd and 3rd questions of law negatively.

Further, R.M.J. Ranasinghe Licensed Surveyor further states in his evidence that the land surveyed by him is in excess of 2 Roods and 11 Perches.

ප්‍ර : ඔබ විස්තර කරල තිබෙන ඉඩම අක්කර 1 රූඩ් 2 පර්චස් 32.53 ක්.

උ : ඔව්.

ප්‍ර : රූඩ් දෙකයි පර්චස් 11ක් විතර ඔබගේ පිඹුරේ වැඩියි ඉඩම් කොටස?

උ : ඔව්.

For the purpose of reference, the English translation of the above paragraph is as follows;

Q- The land you have described is 1 Acre 2 Roods and 32.53 Perches.

A-Yes.

Q- Do you have more than 2 Roods and 11 Perches of land in your plan?

A-Yes.

In this context Plaintiff has failed to prove how the extent increased by a substantial amount at a time when there was a plan prepared 9 years ago (i.e., 1983). Further as per the Plaintiff's Predecessor's Testamentary proceedings before the District Court of Colombo, the Inventory filed on behalf of the late Mr. Mahinda Nanayakkara listed three immovable properties under the list of property described as follows:

1. කළගෙඩිහේන (අ.0-රූ.0-ප.3.38)- Kalagedihena (A0-R0-P3.38)
2. නාගහවත්ත (අ.0-රූ.0-ප.11.75)-Nagahawatta (A0-RO-P11.75)
3. නාගහවත්ත (අ.0-රූ.1-ප.5.85)-Nagahawatta (A0-R1-P5.85)

Hence, there is a clear difference in between the Survey Plan bearing No. 1333 dated 12.03.1997 prepared by R.M.J. Ranasinghe Licensed Surveyor and the Inventory

filed on behalf of the late Mr. Mahinda Nanayakkara. In this context I answer the 1st question of law negatively.

Finally, I find that the 5th question of law cannot stand upon answering all above questions in the negative. Ultimately, as all necessary elements for a remedy have failed, there is no salvageable section of the District Court Judgment that the High Court could have preserved in favour of the Defendant. As such I answer the 5th question of law negatively.

Prescription

In view of my answers to the substantive questions of law raised on which special leave has been granted by this Court, it is unnecessary to decide which is whether learned District Judge has not duly evaluated the evidence on the question of prescription as stated in the 8th paragraph of his Answer adduced by the Defendant. Further issue of prescription has not been raised as a substantive question of law before this Court when this matter was considered for granting of leave. I therefore do not wish to go into this question in depth. In a *rei vindicatio* action, it is not necessary to consider whether the defendant has any title or right to possession, where the plaintiff has failed to establish his title to the land sought to be vindicated and the action ought to be dismissed without more.

Decision

In all the circumstances of this case, I dismiss the appeal answering negatively, for the substantive questions 1, 2, 3, 4 and 5 on which special leave had been granted by this Court. I am of the view that the learned trial judge had misdirected herself when she arrived at the conclusion that the Plaintiff had established the chain of title to the land and therefore, the judgment is erroneous. Hence, I am of the view that the judgment entered in the High Court dismissing the Plaintiff's action is correct in law in a context where the Plaintiff has failed to prove his title to the land which he claimed.

In these circumstances I affirm the judgment of the High Court of Civil Appeal and dismiss this Appeal with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.
I agree

JUDGE OF THE SUPREME COURT

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 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka, read with Section 9(a) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 and Section 31DD(1) of the Industrial Disputes Act.

SC Spl LA No. 86/2020
HC Colombo No. HCALT 81/2018
LT Ratmalana No. 32/RM/31/2014

D.H. Waruna Priyanka,
No. 03, Sri Naga Vihara Road,
Pagoda, Nugegoda.

Applicant

vs.

Commercial Bank of Ceylon PLC,
Commercial House,
No. 21, Sir Razik Fareed Mawatha, Colombo 01.

Respondent

And between

D.H. Waruna Priyanka
No. 03, Sri Naga Vihara Road,
Pagoda, Nugegoda.

Applicant – Appellant

vs.

Commercial Bank of Ceylon PLC,
Commercial House,
No. 21, Sir Razik Fareed Mawatha, Colombo 01.

Respondent – Respondent

And now between

D.H. Waruna Priyanka,
No. 03, Sri Naga Vihara Road,
Pagoda, Nugegoda.

Applicant – Appellant – Petitioner

vs.

Commercial Bank of Ceylon PLC,
Commercial House,
No. 21, Sir Razik Fareed Mawatha, Colombo 01.

Respondent – Respondent – Respondent

Before: **E.A.G.R. Amarasekara, J**
Achala Wengappuli, J
Arjuna Obeyesekere, J

Counsel: Shammil J. Perera, PC with Lahiru Abeysekera and Duthika Perera for the Applicant – Appellant – Petitioner

Uditha Egalahewa, PC with Vishva Vimukthi for the Respondent – Respondent – Respondent

Supported on: 5th September 2022

Written Submissions: Tendered on behalf of the Applicant – Appellant – Petitioner on 20th September 2022

Tendered on behalf of the Respondent – Respondent – Respondent on 20th September 2022

Decided on: 12th December 2022

Obeyesekere, J

This order relates to the preliminary objection raised by the learned President's Counsel for the Respondent – Respondent – Respondent [*the Respondent*], that this application of the Applicant – Appellant – Petitioner [*the Petitioner*] seeking leave to appeal in terms of Article 128 of the Constitution against the judgment of the Provincial High Court of the Western Province holden in Colombo has been filed out of time, and moving that this application be dismissed *in limine.*

The facts of this matter very briefly are as follows.

The Petitioner had joined the Respondent on 19th March 1990 as a Clerk. In September 2012, while serving as the Manager of the Kirulapona Branch of the Respondent, the Petitioner had been served with a charge sheet containing twenty charges relating to incidents that had occurred during the period the Petitioner served as the Manager of the Nattandiya Branch. Pursuant to being found guilty of all such charges at a domestic inquiry, the services of the Petitioner were terminated by the Respondent on 24th January 2014.

The Petitioner had thereafter filed an application before the Labour Tribunal against the said termination of his services as provided for by Section 31B(1) of the Industrial Disputes Act. After a lengthy inquiry where the Petitioner too had given evidence, the Labour Tribunal by its order dated 6th July 2018 had dismissed the said application. Aggrieved by the said order, the Petitioner had filed an appeal before the Provincial High Court as provided for by Section 31D(3) of the Act. By its judgment delivered on 25th February 2020, the High Court had dismissed the said appeal of the Petitioner.

Section 31DD(1) of the Industrial Disputes Act, as amended stipulates that, "*Any workman, trade union or employer who is aggrieved by any final order of a High Court established under Article 154P of the Constitution, in the exercise of the appellate jurisdiction vested in it by law or in the exercise of its revisionary jurisdiction vested in it by law, in relation to an order of a labour tribunal, may appeal therefrom to the Supreme Court with the leave of the High Court or the Supreme Court first had and obtained*."

This application seeking leave of this Court has accordingly been filed by the Petitioner on 29th June 2020.

While provisions relating to applications for special leave to appeal to the Supreme Court from judgments of the Court of Appeal are contained in Part 1A of the Supreme Court Rules (1990) made under Article 136 of the Constitution, provisions relating to leave to appeal applications from other Courts including the High Court are found in Part 1C thereof.

Rule 7, which comes under Part 1A, stipulates 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.*" However, Part 1C of the aforementioned Rules, which applies to this application, does not specify a time period for the filing of leave to appeal applications. An issue similar to what has arisen in this application arose in **Asia Broadcasting Corporation (Private) Limited vs Kaluappu Hannadi Lalith Priyantha** [SC/HC/LA No. 50/2020; SC Minutes of 7th July 2021], where an objection that the application from the High Court had been filed out of time was sought to be resisted on the basis that the impugned application was seeking leave to appeal from a judgment of the Provincial High Court and that as it was an application made under Part 1C, Rule 7 and the time period stipulated therein, had no application.

Surasena, J, having considered the long line of cases where this Court has held that the time period specified in Rule 7 would nonetheless apply in respect of a leave to appeal application filed in terms of Part 1C and Section 31DD(1) of the Industrial Disputes Act, held that, "… *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*."

It was therefore the position of the learned President's Counsel for the Respondent that any application seeking leave to appeal must be filed within six weeks of the judgment of the High Court. He submitted further that with the judgment of the High Court having been delivered on 25th February 2020, this application ought to have been filed in the Registry of this Court on or before 7th April 2020. As I have noted earlier, this application had been filed only on 29th June 2020, which, *on the face of it*, is clearly outside the six-week time period stipulated in Rule 7 of the Supreme Court Rules.

The learned President's Counsel for the Respondent, relying on the judgment of this Court in **Priyanthi Chandrika Jinadasa v Pathma Hemamali and Others** [(2011) 1 Sri LR 337] submitted that the time period of six weeks is mandatory and that failure to file the application within the said period of six weeks means that the application must be dismissed *in limine*. In **Jinadasa**, Chief Justice Bandaranayake, having considered the provisions of Rule 7, had held as follows at page 346:

> "*As clearly stated in L.A. Sudath Rohana v Mohamed Zeena and Others [SC HC CA LA No. 111/2010 – SC Minutes of 17.3.2011] Rules of the Supreme Court are made in terms of Article 136 of the Constitution, for the purpose of regulating the practice and procedure of this Court. Similar to the Civil Procedure Code, which is the principal source of procedure, which guides the Courts of civil jurisdiction, the Supreme Court Rules regulates the practice and procedure of the Supreme Court.*
>
> *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.*"

The learned President's Counsel for the Petitioner did not dispute the applicability of Rule 7 to this application and that the time period allowed for the filing of a leave to appeal application from the High Court is six weeks. Neither did he dispute the fact that, *on the face of it*, this application has been filed out of time. He however drew the attention of

this Court to paragraph 19 of the petition, where the Petitioner has stated that he "*was unable to file the petition within the stipulated time due to situation prevailed in the country and also the delay in obtaining a certified copy of the judgment marked P3.*"

It is common ground that the entire country was under a lockdown owing to the Covid-19 pandemic for almost six weeks from 16th March 2020. While Courts across the country, including this Court, did not function during that period, the sittings of this Court resumed on 11th May 2020. It was therefore clear that a large group of litigants would suffer irreparable harm unless the above period was excluded, thereby granting an extension of the time periods available for the filing of legal proceedings, pleadings etc.

As a solution to those applications to which Rule 7 applied, His Lordship the Chief Justice and three other Judges of this Court, acting in terms of Article 136 of the Constitution, issued the Supreme Court (Temporary Provisions) Rules 2020, which were published in the Extraordinary Gazette No. 2174/4 dated 6th May 2020.

Rule 2 thereof provided that:

> "*Notwithstanding anything to the contrary in Rule 7 of the Supreme Court Rules 1990 published in the Gazette Extraordinary No. 665/32 of June 7, 1991, the period beginning with March 16, 2020 and ending on May 18, 2020 shall not be taken into account in computing the period of six weeks referred to in Rule 7*."

A similar rule was made in respect of (a) the period beginning with 24th October, 2020 and ending on 31st January, 2021 – *vide* Supreme Court (Temporary Provisions) Rules, 2021 published in the Extraordinary Gazette No. 2211/56 dated 21st January 2021, and (b) the filing of appeals and application from the High Court to the Court of Appeal.

Thus, with the period between 16th March 2020 to 7th April 2020 [i.e., the balance period of time that was available for the Petitioner to file this application at the time the lockdown was imposed] having been excluded by Rule 2, the six-week time period available to the Petitioner for the filing of this leave to appeal application stood extended until 10th June 2020, with the result that the Petitioner had time until 10th June 2020 to

file this application in the Registry of this Court. It is admitted that the Petitioner failed to do so, with this application having been filed only on 29th June 2020. It is in these circumstances that the learned President's Counsel for the Respondent submitted that in spite of the exclusion of the time period between 16th March 2020 to 18th May 2020 in terms of Rule 2, this application is still out of time.

As I have already observed, the lockdown resulting from the pandemic affected not only the timely filing of those applications to which Rule 7 applied but the filing of all other actions, petitions, legal proceedings etc. that were due to be filed in other Courts and Tribunals, the time periods for which were regulated by the provisions of the Civil Procedure Code or the Prescription Ordinance. The solution to curing any delay arising due to the pandemic in respect of the latter category of cases was provided by the Legislature by way of the Coronavirus Disease 2019 (Covid-19) (Temporary Provisions) Act No. 17 of 2021 [the Act], which was certified on 23rd August 2021.

Section 2(1) of the said Act reads as follows:

> "*Where any court, tribunal or any other authority established by or under any law* ***is satisfied*** *that, a person was prevented from –*
>
> *(a) instituting or filing any action, application, appeal or other legal proceeding, as the case may be, within the period prescribed by law for such purpose; or*
>
> *(b) performing any act which is required by law to be done or performed within a prescribed time period,*
>
> *due to any Covid-19 circumstance,* ***it shall be competent for such court****, tribunal or any other authority established by or under any law* ***to allow, admit or entertain an action, application, appeal, other proceeding or act****, referred to in paragraph (a) or (b),* ***notwithstanding the lapse of the time period prescribed by law for such purpose*** *and subject to the provisions of section 9, the period within which such person was subject to such Covid-19 circumstance shall be excluded in calculating the said prescribed time period*" [emphasis added].

Section 8 of the Act has defined a Covid-19 circumstance "*to include – (a) Covid-19; or (b) any other circumstance arising out of or consequential to the circumstances referred to in paragraph (a)*."

Thus, while all applications to this Court to which Rule 7 applied were provided with an automatic exclusion of time from 16th March 2020 to 18th May 2020, a party who had failed to institute legal proceedings in any Court within the period prescribed by law due to a Covid-19 circumstance was required by Section 2(1) to satisfy that Court that he was prevented from acting in terms of the law due to a Covid-19 circumstance, and seek that such period be excluded in calculating the prescribed time period.

Section 6 of the Act clearly specified that the burden of proving that a person was prevented from complying with the prescribed time period was due to any Covid-19 circumstance shall be on the party making such application. Section 7(1) provided further that, "*Any guideline, direction, circular, notice or decision whether in the printed or electronic form, made by the Government in relation to any Covid-19 circumstance shall be admissible as prima facie evidence in any action, application, appeal or other legal proceeding instituted or made under this Act, without further proof*."

The learned President's Counsel for the Petitioner presented two arguments to support his position that the Petitioner is entitled to a further exclusion of time to file this application, and that this application is therefore not liable to be rejected *in limine.*

The first argument was that the Petitioner is entitled to further time in terms of Section 2(1) of the Act. Although the Petitioner had not filed with his petition any material permitted by Section 7 to satisfy this Court that he was in fact prevented by a Covid-19 circumstance, the Petitioner, having obtained permission of Court, had tendered together with his written submissions, copies of circulars and news releases in support of his position.

The question that I must consider in relation to the first argument is whether the provisions of Section 2(1) would apply to this application. The answer to this question is found in Section 2(2) of the Act, which reads as follows:

"*Any relief granted under subsection (1)* ***shall not apply*** *in relation to any application or appeal –*

(a) to which the following rules apply –

(i) the Supreme Court (Temporary Provisions) Rules, 2020 published in the Gazette Extraordinary No. 2174/4 of May 6, 2020;

(ii) the Supreme Court (Temporary Provisions) Rules, 2021 published in the Gazette Extraordinary No. 2211/56 of January 21, 2021;

(iii) the Court of Appeal (Procedure for Appeals from High Courts established by Article 154P of the Constitution) (Temporary Provisions) Rules, 2020 published in the Gazette Extraordinary No. 2175/2 of May 12, 2020; or

(iv) the Court of Appeal (Procedure for Appeals from High Courts established by Article 154P of the Constitution) (Temporary Provisions) Rules, 2021 published in the Gazette Extraordinary No. 2211/56 of January 21, 2021;

(b) to which any Supreme Court Rule or Court of Appeal Rule as ***may be made*** *under Article 136 of the Constitution within the period of operation of this Act, granting any exclusion of time period as a relief in respect of any Covid-19 circumstance, apply*" [emphasis added].

It was common ground that no further Rules granting an exclusion of time for the purpose of filing applications to this Court where Rule 7 applied have been made, as provided for by Section 2(2)(b).

It is clear from Section 2(2) that it acts as an exception to Section 2(1). The intention of the Legislature as reflected by Section 2(2) is that a person prevented from instituting legal proceedings due to a Covid-19 circumstance shall be entitled to relief either under Section 2(1) or Section 2(2), but not both. Thus, while in respect of applications falling under Section 2(1), the period of exclusion that could be granted is within the discretion

of the relevant Court, subject to that Court being satisfied on the facts and circumstances of that case that an exclusion of time should be granted, no such discretion is available to this Court in respect of applications that fall within Section 2(2)(a)(i) or (ii), as the period of the exclusion has been specified by way of Rules made under Article 136. I have already observed that the Petitioner was entitled to an exclusion of time in terms of the Rules published in the Gazette of 6th May 2020, and therefore, I am of the view that the Petitioner is not entitled to seek any further exclusion of time in terms of Section 2(1).

The second argument of the learned President's Counsel for the Petitioner was that the Petitioner is entitled to the granting of an exclusion of the time period under and in terms of Section 2(2)(b) of the Act. Any entitlement to further time in terms of the said Section is a matter that must be decided by His Lordship the Chief Justice and three other Judges of this Court by way of Rules promulgated under and in terms of Article 136 of the Constitution. Section 2(2)(b) does not provide for this Court exercising jurisdiction under Article 128 of the Constitution to exclude any period of time within which this application should have been filed.

To do so would be to disregard the words of the Act when they are, and by extension the Legislature's intention, is amply clear. Even if one were to look at the purpose behind the Act, it was, as per its long title, to "*make temporary provisions in relation to situations where persons were unable to perform certain actions required by law to be performed within the prescribed time periods due to Covid-19 circumstances …*". In its wisdom, the Legislature in Section 2(2) has decided that such temporary provisions "*shall not apply*" if Rules have already been made to achieve the same objective. One cannot argue that the long title should be considered in a vacuum to discern the purpose of the Act, and that Section 2(2) is not indicative of its purpose. Taking both together, the natural conclusion is that the Act intended to provide for an exclusion of time if Rules had not already been made with the same aim in mind.

Although the learned President's Counsel for the Petitioner pleaded that a purposive interpretation should be adopted, as pointed out in Singh's **Principles of Statutory Interpretation** [14th ed., 2020], which cites **Shri Ram Saha v State** [AIR 2004 SC 5080 at page 5089]:

> "*In applying a purposive construction a word of caution is necessary that the text of the statute is not to be sacrificed and the court cannot rewrite the statute on the assumption that whatever furthers the purpose of the Act must have been sanctioned*."

This issue was in fact addressed in the Determination of this Court in the **Coronavirus Disease 2019 (Covid–19) (Temporary Provisions) Bill** [SC SD Application No. 24/2021] where, referring to the said provision, it was held as follows:

> "*However, we observe that this sub-clause is an integral part of Clause 2(2) of the Bill. It specifically ensures that the relief granted with regard to exclusion of the time limits under Clause 2(1) shall not apply in relation to any application or appeal for which the Supreme Court Rules and the Court of Appeal Rules (more fully referred to in Clause 2(1)(i) to (iv) of the Bill) have already been formulated (by virtue of Article 136 of the Constitution) and relief granted. The said Supreme Court and Court of Appeal Rules refer to the time periods, 16.03.2020 to 18.05.2020 and 24.10.2020 to 31.01.2021 only.*
>
> *Clause 2(2)(b) of the Bill, on the other hand makes provision for further exclusion of time periods by way of Supreme Court or Court of Appeal Rules to be formulated, under Article 136 of the Constitution but within the period of the operation of the Act, as relief to a party affected in respect of any 'Covid-19 circumstances.' This provision in our view, only ensures further grant of relief to a party affected, by way of exclusion of time, in addition to the periods referred to in the Supreme Court and Court of Appeal Rules already promulgated and more fully referred to in Clause 2(1) of the Bill.*"

In the above circumstances, I am of the view that:

(a) Where an application falls within Section 2(2)(a)(i) of the Act, the relief available under Section 2(1) is not available;

(b) The Petitioner cannot seek further exclusions of time in terms of Section 2(2)(b) of the Act;

(c) Even after granting the Petitioner the full benefit of the exclusion of the time period stipulated in Rule 2, this application has been filed outside the time period set out in Rule 7 and this application must therefore be rejected *in limine*.

I therefore uphold the preliminary objection raised by the learned President's Counsel for the Respondent that this application has been filed outside the time period stipulated in Rule 7 of the Supreme Court Rules. Leave to appeal is accordingly refused and this application is dismissed. I make no order with regard to costs.

JUDGE OF THE SUPREME COURT

E.A.G.R. Amarasekara, 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 a Leave to Appeal in terms of Article 127, 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.

Christhombu Wasangalwadu Lakshman Jayasiri Wijeratne,
No. 126/2A, Galwala Road,
Dehiwala.

Plaintiff

SC Appeal No: 03/2020
SC/HCCA/LA/ 377/2018
WP/HCCA/MT/ 33/2016 (F)
DC Mount Lavinia Case No. 207/97/P

Vs.

1. Colombage Nandawathie De Silva Wijeratne,
   No. 126/2A, Galwala Road,
   Dehiwala.

1a. Christhombu Tasan Galwaduge Ishara Deepthi Kanchana Wijeratne,
No. 126/2A, Galwala Road,
Dehiwala.

2. Mohammad Haneefaa Ahamad Jamaldeen,
   No. 58, Marikkar Place,
   Colombo 10.

3. Christhombu Galwadu Saranadasa De Silva Wijeratne,
   No. 126/2A, Galwala Road,
   Dehiwala.

4. Nimala Theressa Atapattu alias Nimala Theressa Chandrapala,
   No. 126/2A, Galwala Road,
   Dehiwala.

Defendants

And

Christhombu Wasangalwadu Lakshman Jayasiri Wijeratne,
No. 126/2A, Galwala Road,
Dehiwala.

Plaintiff-Appellant

Vs.

1. Colombage Nandawathie De Silva Wijeratne,
   No. 126/2A, Galwala Road,
   Dehiwala.

1a. Christhombu Tasan Galwaduge Ishara Deepthi Kanchana Wijeratne,
   No. 126/2A, Galwala Road,
   Dehiwala.

2. Mohammad Haneefaa Ahamad Jamaldeen,
   No. 58, Marikkar Place,
   Colombo 10.

3. Christhombu Galwadu Saranadasa De Silva Wijeratne,
   No. 126/2A, Galwala Road,
   Dehiwala.

4. Nimala Theressa Atapattu alias Nimala Theressa Chandrapala,
   No. 126/2A, Galwala Road,
   Dehiwala.

Defendant-Respondents

And Now Between

Christhombu Wasangalwadu Lakshman Jayasiri Wijeratne,
No. 126/2A, Galwala Road,
Dehiwala.

Plaintiff-Appellant-Petitioner-Appellant

Vs.

1. Colombage Nandawathie De Silva Wijeratne,
   No. 126/2A, Galwala Road,
   Dehiwala.

1a. Christhombu Tasan Galwaduge Ishara Deepthi Kanchana Wijeratne,
   No. 126/2A, Galwala Road,
   Dehiwala.

2. Mohammad Haneefaa Ahamad Jamaldeen,
No. 58, Marikkar Place,
Colombo 10.

3. Christhombu Galwadu Saranadasa De Silva Wijeratne,
No. 126/2A, Galwala Road,
Dehiwala.

4. Nimala Theressa Atapattu alias Nimala Theressa Chandrapala,
No. 126/2A, Galwala Road,
Dehiwala.

4a. Anuraj Narendra Palliyaguruge,
No. 73, Sri Gnanegra Road,
Ratmalana.

Defendant-Respondent-Respondent-Respondents

Before: **Chief Justice Jayantha Jayasuriya, PC**

Justice L.T.B. Dehideniya

Justice A.L. Shiran Gooneratne

Counsel: Rohan Sahabandu, PC with Nathasha Fernando and Chathurika Elvitigala for the **Plaintiff-Appellant-Petitioner-Appellant.**

Jagath Wickramanayake, PC with Pujanee de Alwis instructed by Renuka Edirisinghe for the substituted **4a Defendant-Respondent-Respondent-Respondents**.

Argued on: 07/09/2022

Decided on: **28/11/2022**

A.L. Shiran Gooneratne J.

The Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the Appellant) instituted the instant action in the District Court of Mount Lavinia against the 1- 4 Defendant-Respondent-Respondents to partition the land called "Kongahawatte" in extent of 14.76 perches, morefully described in the 2nd Schedule to the Plaint. The 1-3 Respondents as co-owners, acquiesced to the said partition between the Plaintiff (undivided 5/15 share, subject to the life interest of 1st and 3rd Respondents), the 1st Defendant-Respondent (undivided 7/15 share) and the 2nd Respondent (undivided 3/15 share), on Deeds. The Appellant claimed that the 4th Defendant-Respondent (hereinafter referred to as the 4th Respondent) has no title to the land claimed in extent of 4.64 perches as shown in Plan No. 748, and building (Assessment No. 126/2C), morefully described in the 3rd Schedule to the Plaint and pleaded that the 4th Respondent is in illegal possession of the said premises.

The 4th Respondent in her statement of claim is seeking, *inter alia*, to exclude Lot No. 1 of the Preliminary Plan No. 2517 (Plan 'X'), including Premises No. 126/2C (the land shown as lot 1 in Plan 2517), the property described in the Deed of Disposition No. 15935 (marked 'X8'), and identified as Lot 1 in title Plan No. 748 (marked '4V2'), in extent of 4.64 perches, which is shown as part of the corpus to be partitioned in extent of 14.76 perches as described in the 2nd Schedule.

At the conclusion of the trial the learned District Judge by Judgment dated 08/01/2016, dismissed the Appellant's action stating that the Appellant has not established the rights of the co-owners, including himself, but permitted the 4th Respondent's claim to exclude the land depicted in the said lot 1 of Preliminary Plan No. 2517.

Aggrieved by the said Judgment, the Appellant by Case No. WP/HCCA/MT/33/2016 (F) preferred an appeal to the Civil Appellate High Court of Mount Lavinia. The appellate court by its Judgment dated 03/10/2018, held that the Appellant has failed to establish his rights to the land and that of the co-owners and therefore, is not entitled to a Judgment in terms of Section 26(2) of the Partition Act and accordingly dismissed the action. However, the Court was of the view that the 4th Respondent was successful in establishing her entitlement to exclude the said Lot 1 of the said corpus as decided by the trial judge.

The Appellant is before this Court challenging the said Judgement dated 03/10/2018.

This Court by Order dated 13/01/2020, granted Leave to Appeal on the question of law stated in sub paragraph (3) in paragraph 22 of the Petition of Appeal dated 12/11/2018, which states as follows;

"Did the learned High Court Judges err in law and fact in not considering the strict burden of proof is on the 4th Defendant who claim for an exclusion of the portion of the Lot 1 in his title Plan No. 748."

At this stage it is pertinent to place on record that the Plaintiff's action was dismissed by the learned District Court Judge by Judgment dated 19/11/2014, prior to the impugned Judgment dated 08/01/2016. Being aggrieved by the said Judgment dated 19/11/2014, the Plaintiff preferred an Appeal Bearing No. WP/HCCA/MT/62/11 (F) to the Civil Appeal High Court. Having considered submissions of both Counsel, the appellate court by Judgment dated 19/11/2014, sent the case for *trial de novo* for the limited purpose of re-considering Plan No. 1015, and if necessary to record further evidence. When the matter was taken up before the District Court both parties agreed to accept the evidence and without any further evidence led, invited the learned Trial

Judge to enter Judgement. Thereafter, the learned Trial Judge entered the impugned Judgment dated 08/01/2016, which is now sought to be challenged before this Court.

The Appellant raised two consequential issues before the trial court against the 4th Respondent challenging the validity of the transfer and the rightful ownership of the corpus by the 4th Defendant by Deed of Transfer No.15935 by the Commissioner of National Housing. The premises bearing Assessment No. 126/2C, in lot 1 depicted in Plan Bearing No. 748 was vested with the Commissioner of National Housing under and in terms of the Ceiling on Hosing Property Law No. 1 of 1973.

The Appellant denies that the 4th Respondent is entitled to any share in the land in suit. The learned Presidents Counsel for the Appellant argues that even if the 4th Respondents title by Deed of Disposition No. 15935, dated 13/05/1995 (marked '4V6'), by the Commissioner of National Housing making the 4th Defendant the absolute owner of premises bearing Assessment No. 126/2C, in lot 1 in Plan No. 748 (marked '4V2'), or Lot 1 in Preliminary Plan No. 2517 is admitted, it only proves the ownership of the land but the location of the land remains unidentified. The Appellant's position simply is that having a deed or a plan will only prove title but not where the land is located. In this premiss it is contended that Plan No. 748 does not refer to Plan 2517 marked 'X1' and in the absence of a superimposition of the 4th Respondent's title Plan No. 748 on the Preliminary Plan No. 2517, the location of the 4th Respondents land cannot be identified for the purpose of exclusion. It is also contended that there is not even a reference in Plan No. 748 to Plan No.1015, which is the Title Plan of No. 2517, where lot B, the land to be partitioned came into existence.

It was the position of the 4th Respondent that she claims only the exclusion of lot 1 in Plan 748 (4V2) described in the 3rd Schedule to the Plaint and in the schedule to the 4th

Respondent's statement of claim. It is contended that the said lot 1 according to the boundaries and extent is identical with the boundaries of lot 1 in the Preliminary Plan No. 2517 (Plan X).

It is revealed that after the demise of the original owner of the land in the 1st Schedule to the Plaint, the said land was subdivided into two lots A and B by his heirs as described in Plan No. 1015, dated 29/03/1953. Lot B, described in the 2nd Schedule to the Plaint was sold to the 1st Respondent. The husband of the 4th Respondent one Wilmet Chandrapala was a tenant of the house standing on a part of Lot B and had come into occupation by Deed of Disposition No. 15935 issued by the Department of National Housing. The said Wilmet Chandrapala gifted the said property to his wife the 4th Respondent by Deed No. 98, dated 07/09/1995 which is pleaded as part of the corpus that is sought to be partitioned, described in the 3rd Schedule to the Plaint.

In this context, the learned Presidents Counsel for the 4th Defendant has drawn attention of Court to the 2nd Schedule to the Plaint which describes the corpus in the following manner;

"....අංක 1015 දරණ පිඹුරේ කැබලි අංක බී දරණ ඉඩමට මායිම්...."

And the 3rd Schedule to the Plaint which describes the portion which the 4th Defendant is allegedly in wrongful possession as;

"....වරිපනම් අංක 25 (පෙරදී 126/2සී) දරන්නා වූ දේපලට ඒ.ඩී.එම්.ජේ. රූපසිංහ බලයලත් මිනින්දෝරු තැන විසින් වර්ෂ 1993 ක් වූ ජූලි මස 22 වන දින මැන සාදන ලද අංක 748 දරණ පිඹුරේ කැබලි අංක 1ට මායිම් උතුරට ඉහත කී සැලැස්මේ වරිපනම් අංක 126/1 ගල්වල පාර, නැගෙනහිරට කුසලඥාන මාවත, දකුණට ඉහත කී සැලැස්මේ වරිපනම් අංක 126/2ඒ, ගල්වල පාර සහ බස්නාහිරට වරිපනම් අංක 124, ගල්වල පාර යන මායිම් තුළ පිහිටි .... පර: 4.64 විශාල ඉඩම...."

The 4th Respondent claims that the portion of land to be excluded is well defined and identified in her Statement of Claim and therefore, contends that the said allotment was wrongfully included by the Plaintiff in the corpus to be partitioned.

As contended by the learned Counsel for the 4th Respondent, it is clearly seen that Lot 1 depicted in Plan No. 748 was a part of Lot B depicted in Plan No. 1015 as described in the 2nd Schedule to the Plaint. It is also seen that the boundaries of Lot 1 in Plan No. 748 and Lot 1 in Preliminary Plan No. 2517 are one and the same and therefore one cannot entertain a doubt regarding the location of Lot 1 in the Preliminary Plan No. 2517.

According to the surveyor report marked 'X1', Lots 1, 2 and 3 in the Preliminary Plan No. 2517, is the corpus to be partitioned, as claimed by the Appellant and the 1-3 Respondents, described in the 2nd Schedule to the Plaint. The 4th Respondent is in possession of Lot 1 in extent of 4.64 perches and the attached building depicted as C, in the said Preliminary Plan. The return to the surveyor's commission states that the Appellant had initially identified Lot 2 and Lot 3 as depicted in the Preliminary Survey Plan No. 2517 as 5.82 perches and 3.58 perches respectively. Thereafter the 4th Respondent had identified the boundaries of the allotment in possession which is Lot 1 in the said plan in extent of 4.64 perches. Accordingly, the 4th Respondent's position in seeking an exclusion of the allotment Lot 1 in Plan No. 748 and Plan No. 2517 (Plan 'X') from the corpus is that it is a divided and a separate allotment and not a part of an undivided land and should not be included in the division of the land of the Appellant nor the co-owners.

The boundaries of Lot No. 1 given in the Deed of Disposition No. 15935, dated 13/05/1995 (marked '4V6') are as follows;

North by Assessment No. 126/1, Galwala Road, as depicted in Plan No. 748

East by Kusalagnana Mawatha

South by Assessment No. 126/ 2A, Galwala Road, as depicted in Plan No. 748

West by Assessment No. 124, Galwala Road

The afore-stated description is identical to the description given by the Appellant in the 3rd Schedule to the Plaint.

It was argued by the learned Counsel for the Appellant that to prove exclusion of the said Lot 1 from the corpus, a superimposition of Plan No. 748 on Plan No. 2517 is necessary to identify with accuracy the lot disposed.

The District Court trial concluded after the evidence of the Appellant and the 4th Respondent was recorded. On the question of possession, it was conceded by the Appellant that the 4th Respondent is in long possession of Lot 1. The said Deed No. 15935 pleaded by the 4th Respondent takes in the exact metes and bounds of the land in possession of the 4th Respondent as described in the 3rd Schedule to the Plaint. The Appellant nor his predecessors in title do not appear to have been in possession of the said Lot 1, once again establishing the 4th Respondent's title to the land and must be taken into consideration. Although the surveyor was not called to give evidence by the 4th Defendant on Plan No. 748, the trial court was possessed with oral evidence, Deeds, documentary evidence and other physical demarcations sufficient to identify the boundaries of the land in deciding on the legal rights of the 4th Respondent.

Assuming that the evidence in relation to the superimposition of Plan No. 748 on Plan 2517 (Plan 'X') was available to the trial court, still it would not have made any

deference to the Appellant's case or have availed the Appellant to dispossess the 4th Respondent from the allotment she claims.

The execution of Deed No. 15935 in respect of the allotment of land Lot 1 in Plan No. 748 is an acknowledgement of the existence of a divided and a defined allotment within the metes and bounds of the corpus to be partitioned, as described in the 2nd Schedule to the Plaint. According to the scheme of distribution set out in paragraph 12 of the Plaint, the Appellant sought to partition the land described in the 2nd Schedule and to eject the 4th Respondent from possession of the land described in the 3rd Schedule. In paragraph 13 of the Plaint, it is clearly stated that the partition of the said land is necessitated due to frequent boundary disputes with the 4th Respondent in possession of the land described in the 3rd Schedule. The issues against the 4th Respondent related only to the issue of legality of Deed bearing No. 15935. As observed earlier, the Appellant in the 3rd Schedule to the Plaint has clearly stated and acknowledged the precise boundaries claimed by the 4th Respondent by the said Deed No. 15935.

Rightfully so, the trial court did not enter interlocutory decree to exclude 'Lot 1' of Preliminary Plan No. 2517 (Lot 1 of Plan No. 748) from the corpus. The learned Trial Judge, answered Issue No. 15 in favour of the 4th Respondent, affirming the 4th Respondent's right to exclusion of Lot 1, dismissed the Plaint and ordered to enter a decree effecting dismissal of the action due to the Appellant's failure to establish the rights of the co-owners, and himself. Having considered the afore-stated circumstances, the trial court held in *obiter*, that the 4th Respondent was entitled to the exclusion of allotment 'Lot 1' from the corpus to be partitioned.

Accordingly, we hold that the 4th Respondent has discharged her burden of proof in establishing that a divided and defined separate allotment of land ('Lot 1' of Plan No.

748) was vested with her by the Commissioner of National Housing by operation of the law, which did not authorize the court to partition or make an order relating to right, title, or interest affecting the said land.

It was also the position of the Plaintiff that on perusal of Plan No. 748, there is a vacant area to the East of the house and the appurtenant land, which must be determined by the Commissioner in terms of the Ceiling on Housing Property Law No. 1 of 1993. It is observed that Deed No. 15935 clearly refers to the house and the land appurtenant thereto, at the time of vesting as described in the 3rd Schedule.

Accordingly, the only issue raised by the Appellant is answered in the negative.

When making submissions before this Court the learned Counsel for the Appellant also brought in a further question of law which reads as follows;

"when in a partition action, if the trial judge dismisses the Plaint and the action is dismissed, can he exclude a part after dismissing the action to partition the land."

The learned Counsel for the 4th Respondent did not object to the said issue been considered. The afore-stated issue was raised on the basis that when a court dismisses the action filed by the Plaintiff to partition a corpus, there is no corpus to be partitioned and an Interlocutory Decree does not follow and no share can be excluded.

The Appellant in his Plaint and in his evidence before the trial court has clearly acknowledged the existence of a divided and a defined allotment within the Preliminary Surveyor Plan 2517, as 'Lot 1' and the Assessment No. 126/2C within the metes and bounds of the corpus described in the 2nd Schedule to the Plaint.

The Plaintiff when testifying before the trial court stated as follows;

"ප්‍ර : කොයි කොටසේද ඔහු සිටින්නේ? (නඩු වාර්තාවේ ඇති පිඹුර පෙන්වා සිටී.)

උ : 126/2/සී කොටසේ.

ප්‍ර : 'X' දරණ සැලැස්ම ගරු අධිකරණයට පෙන්වා සිටී.

('X' පිඹුර පෙන්වා සිටී.)

ප්‍ර : *සාක්ෂිකරු පරීක්ෂා කර බලයි. පෙන්වා සිටීමට නොහැකි බව කියා සිටී.*

ප්‍ර : පේන විදියට කියන්න.

උ : (වෙන කොටසක් පෙන්වා සිටී.)

ප්‍ර : එහි විස්තර කරන්නේ කෙසේද?

උ : X දරණ කොටසේ කැබලි අංක 1 වශයෙන්.

ප්‍ර : තමන්ට එය නිශ්චිතව පැහැදිලිව තේරුම්ගන්න පුළුවන් X දරණ සැලැස්ම පරිදි?

උ : ඔව්.

ප්‍ර : එසේ බලා තේරුම්ගන්න හැකියාව තිබෙන්නේ කැබලි අංක 1හි නිශ්චිත මායිම් තිබෙන නිසා?

උ : මායිම් වෙන්කර නැහැ.

ප්‍ර : මායිම් වෙන්කර නැහැ කියා කෙසේද ගරු අධිකරණයට කියන්නේ?

උ : වෙන්කර තිබෙනවා.

ප්‍ර : දැන් කියන්න කොයි එකද හරි? වෙන්කර තිබෙනවාද කැබලි අංකයක්?

උ : ඔව්."

In the instant case the Court is not called upon to decide whether the 4th Respondent is entitled to a share or whether she has proved her entitlement to a share to the corpus to be partitioned. As observed above, the allotment of land 'Lot 1' in the Preliminary Plan

No. 2517 in Deed No. 15935 was acknowledged by the Appellant as a divided and a defined allotment in his Plaint as well as in the evidence given in the trial court.

In ***Dionis vs. William Singho, 77 NLR 103,*** the Supreme Court held that; *"In partition action, once a certain land has been excluded from the corpus sought to be partitioned, the court has no authority under the Partition Act to determine the right, title and interest of any person who claims to be entitled to the land that has been excluded, or to the plantations, buildings or other improvements on it."*

The learned Presidents Counsel for the Appellant has drawn attention of Court to the orders that a court could make under Section 26 (2) of the Partition Act in order to demonstrate that an Interlocutory Decree cannot have an order to exclude an entitlement to a share. At this point it must be reiterated that in the findings of the Judgment delivered by the trial court, there was no Interlocutory Decree entered to exclude a share or portion of the land but only an order to dismiss the Plaint and to enter a decree effecting dismissal of the action.

In ***Udalagama and Others vs. Kempitiya (2002) 3 SLR 1*** (a Judgment of the Court of Appeal), the Presidents Counsel who appeared for the Appellant argued that the Partition Law did not authorize a court to partition or to make an order relating to right, title, or interest in a land that fell outside the corpus. The issue in contention was whether the Plaintiff-Respondent was entitled to a cartway which fell across the lands of the 2nd and 3rd Defendant-Appellants.

Dissanayake, J. with T.B. Weerasuriya, J. (P/CA) (as their lordships then were), agreeing, considered the old Partition Act, No. 16 of 1951 and the present Partition Law No. 21 of 1977, referred to the settled precedents and made the following observation;

"The rights of parties whose land fell outside the land to be partitioned and the scope of Section 2 of the old Partition Act No. 16 of 1951, and the orders that can be made by a District Court in an Interlocutory Decree under Section 26 of the old Partition Act which are on the same lines as Sections 2 and 26 of the present Partition Law No. 21 of 1977 has been dealt with in detail in the case of ***A.D. Dionis vs. A. William Singho (supra)*** *Pathirana, J. at page 105 quoting* ***Thambiah, J in Hewavitharana vs. Themis de Silva 63 NLR 68****, had stated thus;*

"There is no provision in the Partition Act that the Court is obliged to make any of the orders set out in Section 26 (2), in respect of the land that is described in the plaint. Nor is there any provision in the Act providing for the declaration of title to a land solely owned by a person, which has been wrongly included in the corpus sought to be partitioned. In such cases the practice hitherto has been to exclude the land which is outside the subject-matter of the partition action and which is proved to have been the property of a person who is not a party to the proceedings. It is not uncommon for a Plaintiff to include small portions of land in the corpus belonging to other persons. In all such cases if the Court has to adjudicate also on the title of the owners of those lands, then the Court will be obliged to investigate the title of lands which do not come within the purview and scope of Section 2 of the Partition Act. Further, if the Court has to examine the title of persons whose lands have been wrongly included in the corpus, great inconvenience and hardship may be caused to persons who may be quite content to possess such lands in common or if it happens to be the land of a single individual, to possess it by himself. In our view it is not the intention of the legislature in passing the Partition Act that the Court should partition any lands other than those that came within the ambit of Section 2 of the Act."

Accordingly, the trial court was correct in affirming the 4th Respondents right to exclusion of 'Lot 1', from the corpus to be partitioned and the order to enter a decree effecting dismissal of the action due to the Appellant's failure to establish the rights of the co-owners, and himself.

Therefore, we hold that 'Lot 1' in Plan No. 748 (4V2) described in the 3rd Schedule to the Plaint is a separate, clearly identifiable and a defined allotment of the corpus to be partitioned, which the 4th Respondent is entitled for exclusion. Accordingly, we see no reason to interfere with the Judgments delivered by the learned District Judge or the Judges of the Civil Appeal High Court.

Appeal dismissed. No costs ordered.

Judge of the Supreme Court

Jayantha Jayasuriya, PC. CJ.

I agree

Chief Justice

L.T.B. Dehideniya J.

I agree

Judge of the Supreme Court

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

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

Supreme Court Case No: SC Appeal 20/2021

High Court of Panadura Case No:
31/2018

Magistrate Court of Moratuwa
Case No:28151

Officer-In-Charge,

Special Crime Investigation Unit,

Police Station, Moratuwa.

Complainant

Vs.

Rasika Deepal Bandara Dissanayake,

No. 154, Uduwerella,

Gampaha.

Accused

AND NOW

Rasika Deepal Bandara Dissanayake,

No. 154, Uduwerella,

Gampaha.

Accused-Appellant

Vs

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

Respondent

2. Officer-In-Charge,
   Special Crime Investigation Unit,
   Police Station, Moratuwa.

Complainant-Respondent

AND NOW BETWEEN

Rasika Deepal Bandara Dissanayake,

No. 154, Uduwerella,

Gampaha.

Accused-Appellant-Appellant

Vs

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

Respondent-Respondent

2. Officer-In-Charge,
   Special Crime Investigation Unit,
   Police Station, Moratuwa.

Complainant-Respondent-Respondent

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

COUNSEL : Shehan De Silva with Hemal Seneviratne for the Accused-Appellant- Appellant.
Sajith Bandara, SC for the Hon. Attorney General

WRITTEN SUBMISSIONS: Accused- Appellant -Appellant on 6th July 2021 and 1st and 2nd Respondents-Respondents on 23rd of June 2021.

ARGUED ON: 6th May 2022.

DECIDED ON: 30th September 2022.

S. THURAIRAJA, PC, J.

The Accused–Appellant-Appellant namely, Rasika Deepal Bandaranayake Dissanayake (hereinafter referred to as the "Appellant") preferred an appeal from the order of the High Court of Panadura, case bearing No. 31/2018.

Facts in brief

The Appellant was attached to a firm called Puwakaramba Agencies as a Debt Recovery Officer. It is alleged that he had collected Rs.805,513/- from the debtors and the same was not returned to the Company. A complaint was made to the Police Station of Moratuwa and a charge sheet was filed at the Magistrate Court of Moratuwa under S.391 and S.386 of the Penal Code. After an extensive trial the Appellant was found guilty and the Learned Magistrate had imposed 6 months imprisonment and a fine of Rs. 1,500/-, in default 1 month imprisonment for the first count. In addition to the above the Learned Magistrate had imposed to pay Rs. 100,000/- to be paid as compensation to the virtual complainant in default 6 months imprisonment. Further for the second count the Appellant was found guilty and the Magistrate had imposed 6 months imprisonment and a fine of Rs. 1,500/-, in default 1 month imprisonment.

Being aggrieved with the said judgement the Appellant had appealed to the High Court of Panadura under case bearing no. 31/2018. After the appeal the Learned High Court Judge affirmed the conviction and the sentence and dismissed the appeal. Being aggrieved by the judgement of the High Court the Appellant preferred an appeal to this Court, and the Court granted special Leave to Appeal on 22/02/2021. When the

case was taken up for argument the Counsel for the Appellant submitted that there was a civil case filed against the Appellant to recover the said money at the District Court of Moratuwa and to reconsider the sentence imposed on the Appellant.

The AAL for the Appellant filed a motion dated 24/06/2022 and submitted a copy of the order delivered by the Learned District Judge of Moratuwa in case no. DMR/3534/18 which was marked as X, and filed of record. According to the said order, both parties have agreed to settle the dispute on following conditions:

1. Rs. 850,513.28/- to be paid in open court to the Complainant. The balance of Rs. 300,000 to be paid in 20 instalments of Rs. 15,000/-. (sic)
2. If there is any default, the procedure to be followed is set out by the Learned District Judge in the said settlement order, X.

The Counsel for the Appellant brings to our notice the submissions made by the Counsel who appeared at the Magistrate Court to mitigate the sentence of the Appellant. Further the Counsel submits that the Appellant is the First time Offender and he repents and regrets the offence which he committed and he prayed for mercy of the Court.

After careful consideration of the submissions made in mitigation of the sentence at the Magistrate Court, the judgements of the Magistrate Court and the High Court and all other circumstances of this case, I affirm the conviction of the Appellant.

Regarding the sentence for the first count, the sentence imposed was 6 months rigorous imprisonment and a fine of Rs. 1,500/- and in default 1 month imprisonment is affirmed and I suspend the said sentence for a period of 10 years from today. Considering the settlement at the District Court of Moratuwa under case no. DMR/3534/18 I set aside the order for payment of compensation (Rs. 100,000/-) ordered by the Magistrate.

For the second count, I affirm the sentence of 6 months rigorous imprisonment and a fine of Rs. 1,500/- in default 1 month imprisonment and hereby I suspend the said sentence for a period 10 years from today.

For the purpose of clarity, I reproduce the sentences as follows:

First count: 6 months rigorous imprisonment and a fine of Rs. 1,500/- in default 1 month simple imprisonment. The said 6 months imprisonment is suspended for a period of 10 years from today.

Second count: 6 months rigorous imprisonment and a fine of Rs. 1,500/- in default 1 month simple imprisonment. The said imprisonment is suspended for a period of 10 years from today.

Both sentences to run concurrently.

The Magistrate is hereby directed to pronounce these sentences and to take appropriate steps to record the conviction and the sentences accordingly.

Appeal partly allowed.

JUDGE OF THE SUPREME COURT

B. P. ALUWIHARE, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

MURDU N. B. FERNANDO PC, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Leave to Appeal under Section 5C 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. 44/2019
SC/HCCA/LA No. 267/2018
WP/HCCA/LA/GAM No. 65/2017
D.C. Pugoda Case No. 1245/L

1. Dilipan Thyagarajah,
   No.92, Kynsey Road,
   Colombo 08.

2. Dhara Levers alias Dhara Alycia Levers,
   No. 47, Graham Heights,
   Kingston 08,
   Jamaica.

Plaintiffs

Vs.

1. Liyanage Dilshan Keerthi Prasanna,
   No. 40,44, Church Road,
   Colombo 02.

2. Merennage Kingsley de Costa,
   No. 6, Somadevi Road,
   Kirulapone Avenue,
   Colombo 05.

3. Niluka P. Withanachchi,
   The Registrar of Lands,

Land Registry,
Gampaha.

Defendants

And

1. Dilipan Tyagarajah,
   No.92, Kynsey Road,
   Colombo 08.

2. Dhara Levers alias Dhara Alycia Levers,
   No. 47, Graham Height,
   Kingston 08,
   Jamaica.

Plaintiff-Petitioners

Vs.

1. Liyanage Dilshan Keerthi Prasanna,
   No. 40,44, Church Road,
   Colombo 02.

2. Merennage Kingsley de Costa,
   No. 6, Somadevi Road,
   Kirulapone Avenue,
   Colombo 05.

3. Niluka P. Withanachchi,
   The Registrar of Lands,
   Land Registry,
   Gampaha.

Defendant-Respondents

And Now Between

1. Dilipan Tyagarajah,
   No.92, Kynsey Road,
   Colombo 08.

2. Dhara Levers alias Dhara Alycia Levers,
   No. 47, Graham Height,
   Kingston 08,
   Jamaica.

Plaintiff-Petitioner-Petitioners

Vs.

1. Liyanage Dilshan Keerthi Prasanna,
   No. 40,44, Church Road,
   Colombo 02.

2. Merennage Kingsley de Costa,
   No. 6, Somadevi Road,
   Kirulapone Avenue,
   Colombo 05.

3. Niluka P. Withanachchi,
   The Registrar of Lands,
   Land Registry,
   Gampaha.

Defendant-Respondent-Respondents

Before: **Justice Buwaneka Aluwihare, PC**

Justice A.H.M.D. Nawaz

Justice A.L. Shiran Gooneratne

Counsel: Harsha Soza, PC with Anuruddha Dharmaratne **for the Plaintiff-Petitioner-Appellants.**

Upali Abeywickrema with Kithsiri Liyanage **for the 2nd Defendant-Respondent-Respondent.**

Argued on: 01/12/2021

Decided on: **16/06/2022**

A.L. Shiran Gooneratne J.

The Plaintiff-Petitioner-Petitioners (hereinafter sometimes referred to as "the Plaintiffs"), by Plaint dated 10/10/2013 and later an Amended Plaint dated 23/01/2014, filed action in the District Court of Pugoda, No. 1245/L, *inter-alia*, seeking a declaration of title in respect of the property described in the schedule to the Plaint, in favour of the estate of the deceased Kumaraj Chitranjan Nadarajah, ejectment of the Defendant-Respondent-Respondents (hereinafter referred to as "the Defendants"), their servants and agents from the estate of the deceased, and an annulment of Deed No. 3496 dated 03/08/2009 and Deed No. 175 dated 08/08/2011, which the Plaintiffs claim to be fraudulently executed. The Defendants raised preliminary objections to the maintainability of the action on the basis that 2nd Plaintiff had failed to file a valid Power of Attorney. Thereafter, the Plaintiffs filed an Amended Plaint dated 26/01/2017.

The learned District Judge, who overruled the objections raised by the Defendants and accepted the said Amended Plaint dated 26/01/2017, however, made order dated 23/10/2017 striking out the name of the 2nd Plaintiff from the action, on the basis that no cause of action has accrued to the 2nd Plaintiff. The said Order of the District Judge was upheld by the Judges sitting in appeal by order dated 05/07/2018 in WP/HCCA/LA/GAM/65/2017. Aggrieved by the said Order, the Plaintiffs are seeking,

inter alia, to set aside the said judgment of the Gampaha High Court of Civil Appeal dated 05/07/2018 and the Order dated 23/10/2017 made by the learned District Judge of Pugoda and to permit both Plaintiffs to participate at the trial and prosecute their case. It is contended that the 2nd Plaintiff is a necessary party to this action for the complete and effectual adjudication of all questions of law and fact, involved in this case and to prevent a multiplicity of actions, and any injustice and prejudice being caused to the 2nd Plaintiff.

This Court by its Order dated 06/02/2019, granted Leave to Appeal on the questions of law stated in paragraph 16 (a), (b) and (c) of the Petition of Appeal dated 08/08/2018, which are set out below-

" a) Have the learned Judges of the High Court of Civil Appeals of the Western Province Holden in Gampaha erred in law by failing to appreciate and consider that an executor's conveyance was not necessary for the 2nd Plaintiff-Petitioner to jointly institute this case with the 1st Plaintiff-Petitioner?

b) Did the learned Judges of the High Court of Civil Appeals of the Western Province Holden in Gampaha err in failing to appreciate and consider that the admission of the said Last Will No. 1890 to probate vested the 2nd Plaintiff-Petitioner with title to the property in suit?

c) Did the learned Judges of the High Court of Civil Appeals of the Western Province Holden in Gampaha err in not considering that the 2nd Plaintiff-Petitioner is a necessary party to this case for the complete and effectual adjudication of all questions involved in this case?"

District Court Colombo Case No. DTS/00315/10, was filed in the matter of the Last Will No. 1890 of the said deceased Kumaraj Chitranjan Nadarajah. The parties to the present action are not at variance that the said Last Will No. 1890 was proved and admitted to probate and that the property in question formed part of the estate of the deceased testator. The 2nd Plaintiff, the niece of the deceased Kumaraj Chitranjan

Nadarajah, is said to be the beneficiary of the property in question, probated under the Last Will No. 1890. The District Court issued probate of the Will to the executor, the 1st Plaintiff, to administer the estate of the deceased Kumaraj Chitranjan Nadarajah. (A copy of the said Last Will No. 1890 has not been produced, while a copy of the said probate dated 23/06/2011 is in the Brief in this case).

The Court sitting in appeal in WP/HCCA/GAM/65/2017 held that the identity of the 2nd Plaintiff has been settled before the trial judge and that the proceedings of the said testamentary case are ongoing and as such it is the duty of the probate holder to protect and administer the estate. However, due to the absence of an executor's conveyance in favour of the 2nd Plaintiff, that Court held that there is no cause of action arising to the 2nd Plaintiff against the 1st and 2nd Defendants and therefore, the 2nd Plaintiff is not a necessary party to this case. That Court also held that the 1st Plaintiff as the executor, could alone protect and safe guard the interests of the 2nd Plaintiff.

The position of the Plaintiffs is that an executor's conveyance is not necessary for the 2nd Plaintiff to jointly institute the case with the 1st Plaintiff and that the admission of the said Last Will No. 1890 to probate vests the 2nd Plaintiff with title to the property in suit.

In ***Malliya vs. Ariyaratne 65 NLR 145***, having analyzed the scope of the applicability in Ceylon of the English law of executors and administrators, and cited the earlier dicta in extenso in order to show the development of the law, Basnayake, C.J. stated (at page 154)-

" a) that the executor has power over both movable and immovable property and may sell the property left by the testator in accordance with the directions in the Will.

b) that the immovable property specially devised vests not in the executor but in the heir to whom it is devised subject to the executor's right to have recourse to it in its due order for the payment of the testator's debts.

c) that the executor's assent or a conveyance by him is not necessary to pass title to heirs appointed in the will or the heirs at law.
d) that the executor has power to sell the property left by the testator for the payment of his debts, but that power must be exercised with due regard to the provisions of our law."

Prior to the aforesaid judgment; in ***Silva vs. Silva (1907) 10 NLR 234***, the Supreme Court, in a case of an intestacy, held, that,

> *"Title to immovable property belonging to the estate of a deceased person does not vest in the administrator of the estate of such person; and a conveyance by the heir of the deceased without the concurrence or assent of the administrator is valid, subject to the right of the administrator to deal with the property for purposes of administration".*

In this case, Hutchinson C.J., observed that, *"the personal representative retains the power to sell the property for the purposes of administration but his non-concurrence in the conveyance by the heirs does not otherwise affect its validity".*

This position was reiterated in ***Horne vs. Marikar (1925) 27 NLR 185***, where Schneider J. held (at page 188), that, *"It is settled law that title to immovable property belonging to the estate of a person dying intestate does not vest in the administrator but passes to his heirs, but that the administrator retains the power to sell the property for the purposes of administration. See Gopalsamy vs. Ramasamy Pulle (1911) 14 N. L. R. 238 and Silva vs. Silva (Full Bench). (1907) 10 N. L. R. 234"*

Accordingly, it is clear that the grant of probate does not confer title of the property of the deceased testator on the executor appointed by order of Court to administer the property of the deceased testator. The title of the property of the deceased testator vests with the heirs and a conveyance by the executor is not essential to pass title of the property owned by the deceased to his devisee under his Last Will.

Therefore, the trial Court and the Court sitting in appeal erred in law in their finding that an executor's conveyance is necessary to pass title to the 2nd Plaintiff, as a devisee under the Last Will of the deceased.

Accordingly, the questions of law stated in paragraph 16(a) and (b) are decided in favour of the Plaintiff-Petitioner-Petitioners.

The Appeal Court in its impugned Order dated 05/07/2018, finds that, even though the probate has been issued, title to the properties have not been transferred to the beneficiaries listed in the Last Will and therefore, only the executor appointed therein has the right to file and seek remedies from the Defendants. This seems to be the basis in which the Court decided that there is no cause of action accrued to the 2nd Plaintiff against the Defendants and therefore, the 2nd Plaintiff's name should be struck off and the case be allowed to proceed.

As observed earlier an executor's conveyance is not necessary to pass title to the devisee to whom the property is devised. The averments in the Plaint are for a declaration of entitlement to the testator's estate admitted to probate, the annulment of the aforesaid deeds and to evict the Defendants from possession of the probated land.

The definition of cause of action contained in Section 5 of the Civil Procedure Code, *"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 fulfil an obligation, the neglect to perform a duty and the infliction of an affirmative injury".*

The Plaintiffs filed action in the District Court of Pugoda, *inter alia*, seeking, to assert their status in the estate of the deceased, in accordance with the said Last Will No. 1890 and the probate order granted by Court. The 2nd Plaintiff is a necessary party to fully enforce the obligations vested in the executor and the rights claimed in this case. Also, the 2nd Plaintiff is entitled to be a party to the action to evict the Defendants in possession and to recover the land in suit, more fully described in the schedule to the Plaint. Therefore, the 2nd Plaintiff is a necessary party in this case.

Accordingly, the question of law as set out in paragraph 16 (c) is also decided in favour of the Plaintiff-Petitioner-Petitioners.

As such, the decision to strike off the name of the 2nd Plaintiff-Petitioner-Petitioner, by the Judgment of the High Court of Civil Appeal dated 05/07/2018, and the Order of the District Judge of Pugoda dated 23/10/2017, are set aside. The learned District Judge is directed to accept the Amended Plaint dated 26/01/2017 and allow both Plaintiff-Petitioner-Petitioners to participate at the trial and to prosecute their case.

Appeal allowed. No costs ordered.

Judge of the Supreme Court

Buwaneka Aluwihare 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

In the matter of an application for Special Leave to Appeal in terms of Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka

Kerewgoda Dona Shiromi,
No. 56, St. Sebastian Mawatha,
Kandana.

Plaintiff

SC/ Appeal No. 88/2017
SC/ HCCA/ LA No. 196/2015
WP/ HCCA/ GPH
No. 145/2008 (F)
DC Negombo Case No. 5586/L

Vs,

1. Hanwellage Don Francis,
   No. 1/56,
   St. Sebastian Mawatha,
   Kandana.

2. Hettige Don Newton Donatus,
   No. 1/56,
   St. Sebastian Mawatha,
   Kandana.

Defendants

1. Hanwellage Don Francis,
   No. 1/56,
   St. Sebastian Mawatha,
   Kandana.

2. Hettige Don Newton Donatus,
   No. 1/56,
   St. Sebastian Mawatha,
   Kandana.

Defendant-Appellants

Vs,

Kerewgoda Dona Shiromi,
No. 56, St. Sebastian Mawatha,
Kandana.

Plaintiff-Respondent

-And Now Between-

Kerewgoda Dona Shiromi,
No. 56, St. Sebastian Mawatha,
Kandana.

Plaintiff-Respondent-Appellant

Vs,

1. Hanwellage Don Francis,
   No. 1/56,
   St. Sebastian Mawatha,
   Kandana.

2. Hettige Don Newton Donatus,
   No. 1/56,
   St. Sebastian Mawatha,
   Kandana.

Defendant-Appellant-Respondents

Before: **Justice S. Thurairaja, PC**
Justice A.L. Shiran Gooneratne
Justice Mahinda Samayawardhena

Counsel: Sanjeewa Dasanayake with Nilum Devapura **for the Plaintiff-Respondent-Appellant.**

Dr. Sunil Cooray with Sudarshani Cooray **for the Defendant-Appellant-Respondents.**

Argued on: 27/10/2021

Decided on: **15/09/2022**

A.L. Shiran Gooneratne J.

The Plaintiff-Respondent-Appellant (hereinafter sometimes referred to as "the Plaintiff"), by Plaint dated 22/01/1999, filed action in the District Court of Negombo, Case No. 5586/L, seeking *inter alia*:

a) a declaration of title to the land morefully described in the first schedule to the Plaint.
b) that the said land is held and possessed by the Plaintiff without any encumbrance of a servitude of right of way attached.
c) damages in a sum of Rs. 50,000/- together with continuing damages at the rate of Rs. 5,000/- per month.

The Plaintiff's claim in brief is that she is the direct and only successor in title to the land in the first schedule to the Plaint which was held and possessed by her on reaching the age of 18 years in October 1990. The Defendant-Appellant-Respondent's (hereinafter sometimes referred to as the "defendants") were using a footpath across the said land, having obtained leave and license from the Plaintiff. Later in 1998 the Defendants had unlawfully demolished a toilet constructed by the Plaintiff, widened the foot path to an 8-foot-wide roadway and had forcibly tried to take a vehicle on the disputed road claiming the existence of a 10 feet wide roadway. The Plaintiffs ownership to the land was also disputed.

The Defendants in their answer dated 24/08/2001, *inter alia*, sought;

A declaration that the Defendants are entitled to a servitude of right of way and/ or a right of necessity of a 10 feet wide roadway over the Plaintiff's land to access the Defendants land morefully described in the second schedule to the Plaint.

In their answer, the Defendants pleaded, *inter alia*, that they have been using the 10 feet wide roadway over the Plaintiff's land for more than 10 years and therefore, they have prescribed to the said roadway and also contended the use of the said road by way of necessity.

After the conclusion of the trial, the learned District Judge, by Judgment dated 28/11/2008, granted relief to the Plaintiff as prayed for in the said Plaint. In the said Judgment the learned District Judge dismissed the claim seeking a right of way over the subject matter and also on the entitlement claimed by way of necessity. The learned District Judge granted the said relief on the basis that the case was filed in 1998, the Plaintiff has attained the age of maturity in the year 1990 and therefore, there is no continuous and uninterrupted possession of a minimum of 10 years required from that date, to claim a servitude of right of way by the Defendants.

Aggrieved by the said Judgment, the Defendants appealed to the Gampaha High Court of Civil Appeal seeking, *inter alia*, to set aside the said Judgment dated 28/11/2008. The learned Judges of the High Court of Civil Appeal by their Judgment dated 07/05/2015 held, *inter alia*, that the Plaintiff has failed to prove that she is the sole owner of the land in question. The Appeal Court while acknowledging that the Defendant's entitlement to access their land through the Plaintiff's land was not granted by their predecessors in title, held that due to necessity, the footpath which was in existence since 1976 had gradually widened to a 10 feet wide road which the Defendants have lawfully possessed and prescribed. The Plaintiffs Appeal to this Court arises out of the said Judgment.

This Court by its Order dated 30/03/2017, granted Leave to Appeal on the questions of law stated in paragraph 17 (a), (b) and (d) and a consequential question of law which

was raised on the ground of necessity, on that date. However, when this case was taken up for argument on 27/10/2021, the said consequential issue raised by the Defendants was abandoned and the question of law pleaded in paragraph 17 (d) was amended to read as stated below. Parties consented to the said questions of law, which are reiterated in their written submissions tendered after the hearing -

1. that their Lordships erred in law and in fact in coming to the conclusion that the Defendant-Appellant-Respondents have acquired a prescriptive title to the right of way in question.
2. that their Lordships erred in law in not finding out the date of commencement of the prescriptive user of the said right of way by the Defendant-Appellant-Respondents for the purpose of calculating the prescriptive user.
3. whether the Plaintiff-Respondent-Appellant is qualified under Section 13 of the Prescriptive Ordinance when calculating the prescriptive period.

In deciding whether the Defendants had acquired a right of way by prescriptive possession, the Civil Appeals High Court observed that the disputed roadway was used as a footpath in 1976 and over time, owing to necessity, has expanded to a 10 feet wide roadway. The Court also observed that the Plaintiff reached the age of 18 in 1990, however, was of the view that the Defendants were using the disputed roadway adverse to the interest of the Plaintiff and also her predecessors in title long before 1990.

The Plaintiff states that she observed a footpath across her land prior to building her house in 1991. The position of the Plaintiff is that the said footpath was used by the Defendants with her permission. Documents marked ‘P2’ and ‘P6’ were tendered in the proceedings instituted in terms of Section 66 of the Primary Court Procedure Act in the Magistrates Court of Wattala in April 1998. Therein, the Defendants have sought

permission of the Plaintiff to use the said right of way and also agreed to purchase the subject matter. In Plan No. 3645 dated 05/04/1976, marked ‘P5’, there is reference to a foot path towards the southern boundary of the Plaintiff’s land. The predecessor in title of the Defendant’s land in his affidavit tendered to the Magistrates Court, marked ‘P2a’, also states that he used the said road to reach the main road.

The Plaintiff in her evidence in the trial court stated that in October 1997, she cut down a coconut tree towards the southern boundary which was within the disputed right of way. The tree trunk had been trimmed down to the ground level by the Defendants prior to the institution of the case in the Magistrates Court. The Plaintiff answering a question posed by the District Court stated that the roadway was expanded by the Defendants a few days prior to the institution of the Magistrates Court action in 1998.

At the instance of the Plaintiff, the Court issued a commission on W.S. Senaka Perera, Licensed Surveyor to survey the disputed land and accordingly, Plan No. 4403 dated 27/04/2000 was tendered by the Plaintiff marked ‘P1’, and the surveyor report marked ‘P1a’. The disputed roadway across the Plaintiff’s land is marked as Lot 2 in the said plan. According to the evidence given by the surveyor it was revealed that in October 1997, a coconut tree within the said roadway had been cut down by the Plaintiff. The root of the said tree is depicted in the said plan. When the surveyor had inquired from the Defendants regarding the position taken by the Plaintiff of cutting down the coconut tree, the Defendants had remained silent. According to the surveyor the northern boundary had not been clearly demarcated and the 10 feet wide roadway had been identified from the parapet wall towards the southern boundary. And as stated below the Defendants admitted that there was no indication on the land that a 10 feet wide roadway was used prior to the demarcation by the surveyor.

ප්‍ර: අඩි 10ක පාරක් පාවිච්චි කළා කියා කුඤ්ඤු ගැසුවාට අමතරව, පාරක් පාවිච්චි කළා කියා පෙන්නුම් කරන්න ලකුණු පේනවාද?

උ: නැහැ.

The Defendant relies on the existence of a roadway in Plan No. 4896 dated 02/05/2001 made by W.D. Nandana Seneviratne, Licensed Surveyor, tendered to Court marked 'V1' and the surveyor report marked 'V1a'. The said report states that a 3 feet wide roadway is depicted in Lot 3 in Plan No. 8814 dated 21/02/1986, made by Licensed surveyor, M.D.J.V. Perera. According to the Surveyor report marked 'V1a', the roadway depicted as Lot 3 was the earlier roadway and as at the date of Plan No. 4896, the disputed roadway towards the southern boundary is depicted in Lot 3 and 4 as shown to the surveyor by the Defendants. The present road across the Plaintiff's land depicted in Lots 3 and 4 together, is an open space except for the boundary wall on the southern boundary. In his evidence before the trial court the said Surveyor could not specifically state whether Lot 3 and Lot 4 consisted of a 10 feet wide roadway.

The 2nd Defendant in his evidence before the District Court stated that long before he purchased the land in 1980, he was personally aware of the existence of a roadway across the land belonging to the Plaintiff. He further stated that having purchased the said land in 1980, he transported raw material for construction of their house through the disputed roadway. In their written submissions, the Defendants state that they had been using a three-wheeler and a van by that time meaning before 1998. However, under cross examination before the trial court it was very specifically stated that prior to the institution of the Magistrates Court case in 1998, a vehicle was not taken on the disputed roadway and the Defendants had no right to do so, as envisaged in the evidence cited below.

ප්‍ර: ආරවුලක් ඇති වුනා නම්, ප්‍රවේශ මාර්ගය පිළිබඳව ඒ ඇති වුනේ මහත්තයා වාහනය අරගෙන යන්න එන්න පටන් ගත්තාම?

උ: එහෙමයි.

ප්‍ර: ඒ මත තමයි මහේස්ත්‍රාත් අධිකරණයේ 66 වෙනි වගන්තිය යටතේ නඩු පැවරුවේ?

උ: එතකොට ඒ පාරේ වාහන ගෙන යාමට කිසිම අයිතියක් තිබුණේ නැහැ?

උ: එහෙමයි.

In ***Priyangika Perera vs. Gunasiri Perera (SC Appeal No. 59/2012),*** Prasanna Jayawardena PC, J. observed that;

"a plaintiff who claims a right of way by prescription must establish the requisites stipulated in section 3 of the Prescription Ordinance. This means that, as set out in section 3, the Plaintiff has to prove that: he has had undisturbed and uninterrupted possession and the use of the right of way for a minimum of ten years and that such possession and use of the right of way has been adverse to or Independent of the owner of the land and without acknowledging any right of the owner of the land over the use of that right of way".

It is in evidence that the dispute arose when the Defendants tried to widen the road to take a vehicle contrary to and defeating the right given to them to use a foot path. Further, as disclosed in evidence, it is unlikely that the Defendants used a vehicle prior to cutting down the coconut tree, as it stood in the disputed roadway. In the complaint made to the Police dated 23/04/1998, marked 'P2a', the Plaintiff admits to the existence of a 3 feet wide roadway since coming to reside in the land in 1991. The first Defendant's wife in her police complaint dated 18/04/1998, in proceedings before the Magistrates Court states that, the Plaintiff had promised to sell the disputed roadway

for lawful consideration. The Plaintiff in her pleadings before the trial court has also clearly stated that the Defendant sought to use a footpath across her land and continued to use the said foot path with her permission.

In ***De Soysa vs. Fernando 58 NLR 501***, it was held that,

"When a user of immovable property commences with leave and license the presumption is that its continuance rests on the permission originally granted. Clear and unmistakable evidence of the commencement of an adverse user thereafter for the prescriptive period is necessary to entitle the licensee to claim a servitude in respect of the premises.

As observed earlier, the existence of a roadway which widened over time at least to 8 to 10 feet is questionable due to the coconut tree which stood towards the southern boundary within the disputed right of way until 1997, the existence of which is admitted by the Defendants. At the time the survey was carried out, the coconut tree root stood three feet three inches from the southern boundary. Therefore, it is unlikely that the Defendants had used a 10 feet wide road prior to 1997. Accordingly, the evidence before Court does not establish the use of a 10 feet wide road across the Plaintiff's land as claimed prior to 1997. However, when the evidence is examined, the existence of a foot path across the Plaintiff's land cannot be denied.

Therefore, in the facts and circumstances of this case, it is right to inquire as to whether the Defendants prescribed to a right of way over the Plaintiff's land. Accordingly, it is important to establish the date of commencement of the right of the prescriptive user.

Section 13 of the Prescription Ordinance states as follows;

"Provided nevertheless, that if at the time when the right of any person to sue for the recovery of any immovable property shall have first accrued, such person shall have been under any of the disabilities hereinafter mentioned, that is to say-

(a) Infancy,

(b) Idiocy,

(c) Unsoundness of mind,

(d) Lunacy, or

(e) Absence beyond the seas

Then and so long as such disability shall continue the possession of such immovable property by any other person shall not be taken as giving such person any right or title to the said immovable property, as against the person subject to such disability or those claiming under him, but the period of ten years required by section 3 of this Ordinance shall commence to be reckoned from the death of such last-named person, or from the termination of such disability, whichever first shall happen; but no further time shall be allowed in respect of the disabilities of any other person;

Provided also that the adverse and undisturbed possession for thirty years of any immovable property by any person claiming the same, or by those under whom he claims, shall be taken as conclusive proof of title in manner provided by section 3 of this Ordinance, notwithstanding the disability of any adverse claimant."

The Plaintiff in her evidence before the trial court has admitted that the Defendant was resident in their land since 1980, the year the Defendants claim to have prescribed to the disputed right of way and further states that she was resident in the premises until

her father's death in May 1986. When she turned 14 years of age and since then, she had not lived in the said premises. After her marriage in 1991, the Plaintiff returned to her property, at the age of 19. The instant case was instituted in 1999. According to the birth certificate of the Plaintiff marked 'P3', the Plaintiff was born on 31/10/1972.

On the available evidence, the learned District Judge came to a definite finding that the Plaintiff born in 31/10/1972, reached the age of maturity on 31/10/1990, and since the instant action was instituted on 22/01/1999, the Defendant could not have prescribed to the disputed right of way. On this issue the Judges of the Civil Appeal High Court were of the view that eventhough the Plaintiff came into the land at the completion of 18 years on 31/10/1990, the Defendants were using the disputed roadway long before 1990 and therefore has prescribed to a right of way not only against the Plaintiff but also against her predecessors in title. When deciding on the prescriptive title to the right of way in question, the learned Judges did not make any reference to Section 13 of the Prescription Ordinance but made a broad statement that such was decided on evidence led in the case. However, it is observed that the Civil Appeal High Court failed to examine the relevant evidence led before the trial court before coming to the said finding.

In this Court the Defendants takes up the position that the Plaintiff born in 1972 is claiming rights to the land through her father and not claiming independent of her father and therefore, prescription will run since her claim is through her father. The Defendant is not disputing the fact that the Plaintiff reached the age of maturity in 1990 and the applicability of Section 3 of the Prescription Ordinance in such an instance. Gratiaen J. in ***Chelliah vs. Wijenathan 54 NLR 337***, held that;

"*Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights".* Same was cited in ***Ganemulla Gamage Suraji vs. P.K. Sunil Samarasekara, SC Appeal 33/2010 decided on 05/07/2018.***

The Defendant's position is that,

Firstly: at the time of demise of the Plaintiff's father in 1986, the roadway which was a footpath had been widened to at least to a 8 to 10 feet roadway and by now has been prescribed by the Defendants.

Secondly: since the Plaintiff inherited a land with a right of way prescribed by the Defendants, the said time would run against the Plaintiff through her father.

It is in evidence that the Defendant with the permission of the Plaintiff had used a footpath over the Plaintiff's land. It is also in evidence that prior to 1998, the Defendants negotiated with the Plaintiff to acquire title to the said property on valuable consideration. When cross examined on document marked 'P5', the Plaintiff admitted that there had been a footpath across the Plaintiff's land since 1976. However, there is no cogent evidence to establish that the said footpath was widened over time to an 8 to10 foot roadway or that the Defendant's predecessors in title used the disputed right over the said land, since the demise of the Plaintiff's father in 1986.

In **D.R. Kiriamma vs. J.A. Podibanda 2005 (BLR) 9,** Udalagama, J. made reference to the following passage in Walter Perera's "Laws of Ceylon", 2nd Edn. 396, which reads as follows,

"A*s regards to the mode of proof of prescriptive possession, mere general statements of witnesses that the Plaintiff ---- have possessed the land for a number of years exceeding the prescriptive period are not evidence of uninterrupted and adverse possession to support a title of prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided by court".*

The Defendants placed reliance on Plan No. 3645 dated 05/04/1976, marked 'P5', in support of their contention of the existence of a footpath as far back as 1976. In the absence of legal title, it is an absolute necessity that witnesses speak in proof of possession, adverse and independent against that of the claimant, at least ten years prior to bringing of such action. The mere use of a footpath for over 10 years does not give the Defendant a prescriptive title as set out in Section 3 of the Prescription Ordinance. It was observed that,

*"Person who entered property in a subordinate character cannot claim prescriptive rights till he changes his character by an overt act. The proof of adverse possession is a condition precedent to the claim for prescriptive rights", [**Seeman vs. David (2000) 3 SLR 23].***

In **Naguda Marikar vs. Mohammadu 7 NLR 91,** the Judicial Committee of the Privy Council held that;

"where a person enters on another's land as his agent he cannot claim a title by prescription, unless he can show that he has changed his character from agent to owner, and that he had possession as such owner for a period of ten years".

Justice Grenier A.J. cited with approval the above finding in **Lebbe Marikar vs. Sainu 10 NLR 339** and opined; *"I must confess that my sympathies are with the plaintiff, but the law is clearly against him."*

This principle was followed in several other judgments delivered by this Court, *Orloff vs. Grebe 10 NLR 183, Lebbe Marikar vs. Sainu 10 NLR 339, Thilakaratne vs. Bastian 21 NLR 12, Navarathne vs. Jayathunge 44 NLR 517, De Soysa vs. Fonseka 58 NLR 501, Corenelis vs. Fernando 65 NLR 93, De Silva vs. Commissioner General of Inland*

Revenue 80 NLR 292 and more recently in *Ganemulla Gamage Suraji vs. P.K. Sunil Samarasekara,* SC Appeal 33/2010 (SC minutes dated 05/07/2018).

Even though the Civil Appeal High Court came to a finding that the Defendants used the disputed roadway since 1976, a change in character of the Defendants using a footpath from that of not being adverse to that of being adverse, with an intent to possess the land in detriment to the interest of the true owner's rights, has not been established in evidence. Therefore, in the absence of evidence of an overt act, adverse and independent to that of the Plaintiff's predecessor in title, the Defendants cannot claim a right by prescription over the said land, prior to 1986.

Accordingly, the 1st and 2nd questions of law are answered in the affirmative.

In the absence of a right of way conveyed in Deed No. 16358 dated 08/11/1980 (V6), the Defendants did not call their predecessors in title to establish that their predecessors had used the disputed right of way adversely to the interest of the land owner. Therefore, it can be safely concluded that when the Plaintiff became an heir to her father's land in 1986, the Plaintiff did not inherit a land with a right of way prescribed to by the Defendants or their predecessors in title, thus defeating the claim of the Defendant's in justifying possession by prescription. Therefore, finding out whether the plaintiff was qualified under Section 13 of the Ordinance for the purpose of calculating the prescriptive period would be redundant, in the facts and circumstances of this case.

Accordingly, answering the 3rd (as amended), question of law can be dispensed with.

In the circumstances issue No. 5, 6, 7a, 7b and 8 raised in the District Court should be answered in the affirmative.

Therefore, in all the above circumstances, the Judgment of the Civil Appeal High Court dated 07/05/2015 is set aside and the appeal is allowed.

Subject to the above variation, the Judgment dated 28/11/2008, made by the learned District Judge is affirmed.

Appeal allowed. No costs ordered.

Judge of the Supreme Court

S. Thurairaja, 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

Juwan Hettige Sriyalatha Silva,
No.19/80, New Neegrodharama
Road, Kalutara North.
Plaintiff

SC APPEAL NO: SC/APPEAL/6/2021
SC LA NO: SC/HCCA/LA/133/2020
HCCA NO: WP/HCCA/KAL/179/2013/F
DC KALUTARA NO: 7890/P

Vs.

Meemanage Duneetha
Chandrakanthi Silva,
No. 19/80, New Neegrodharama
Road, Kalutara North.
Defendant

AND BETWEEN

Juwan Hettige Sriyalatha Silva,
No.19/80, New Neegrodharama
Road, Kalutara North.
Plaintiff-Appellant

Vs.

Meemanage Duneetha
Chandrakanthi Silva,
No. 19/80, New Neegrodharama
Road, Kalutara North.
Defendant-Respondent

AND NOW BETWEEN

Meemanage Duneetha
Chandrakanthi Silva,
No. 19/80, New Neegrodharama
Road, Kalutara North.
Defendant-Respondent-Appellant

Vs.

Juwan Hettige Sriyalatha Silva,
No.19/80, New Neegrodharama
Road, Kalutara North.
Plaintiff-Appellant-Respondent

Before: L.T.B. Dehideniya, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Shyamal A. Collure with Prabath S. Amarasinghe, A.P. Jayaweera and Raveendra Silva for the Defendant-Respondent-Appellant.

Dr. Thashira Gunatilake for the Plaintiff-Appellant-Respondent.

Argued on: 17.11.2021

Written submissions:

by the Defendant-Respondent-Appellant on 04.04.2021.

by the Plaintiff-Appellant-Respondent on 26.07.2021.

Decided on: 20.01.2022

Mahinda Samayawardhena, J.

There is no corpus or pedigree dispute in this partition action. The plaintiff in the plaint itself concedes that she and the defendant are entitled to equal shares in the corpus. In the prayer to the plaint the plaintiff sought the partition of the land and then stated that, if the court finds the partition inexpedient, an order can be made for the sale of the land in lots in terms of the Partition Law, No. 21 of 1977. According to the preliminary plan, the extent of the land to be partitioned is only 1.86 perches and the defendant is living in the house standing on the land. The plaintiff had made no claim to the house at the preliminary survey. There is no plantation on the land because the whole land is occupied by the house.

After trial the District Judge held that the plaintiff and the defendant are each entitled to a ½ share in the corpus and the defendant is additionally entitled to the improvements, i.e. the house. It was further held that due to the trivialness of the extent of the land, it is inexpedient to allot divided portions as it would be less than the minimum extent required by law regulating the subdivision of land for development purposes. Hence, in terms of section 26(3) of the Partition Law, the District Judge instead of allotting divided portions of the land to the plaintiff and the defendant, ordered the sale of the plaintiff's ½ share to the defendant, who is in possession of the house, upon a valuation by the court commissioner.

On appeal, the High Court set aside the part of the judgment whereby the District Judge ordered that the plaintiff's undivided ½ share be sold to the defendant on the basis that "*the learned District Judge misdirected herself in ordering a sale of the plaintiff's share to the defendant despite that there was evidence to the effect that the plaintiff is also interested in soil rights as the owner of the adjacent land. And also, without considering the evidence adduced on behalf of the plaintiff to show her intention to expand her roadway with her due share*."

It is from this judgment of the High Court that the plaintiff preferred the present appeal to this court.

There is no issue that the plaintiff is entitled to a ½ share of the soil rights of the land. However, the fact that the plaintiff is the owner of the adjoining land is beside the point in order to determine the rights of the parties in respect of the land to be partitioned in this action. As I stated previously, the plaintiff

herself prayed in the prayer to the plaint that in the event partition is inexpedient, the court can order the sale of the land.

The orders the District Judge is empowered to make after trial in a partition action are listed in section 26(2) of the Partition Law. This section runs as follows:

> *The interlocutory decree may include one or more of the following orders, so however that the orders are not inconsistent with one another:-*
>
> *(a) order for a partition of the land;*
> *(b) order for a sale of the land in whole or in lots;*
> *(c) order for a sale of a share or portion of the land and a partition of the remainder;*
> *(d) order that any portion of the land representing the share of any particular party only shall be demarcated and separated from the remainder of the land;*
> *(e) order that any specified portion of the land shall continue to belong in common to specified parties or to a group of parties;*
> *(f) order that any specified portion of the land sought to be partitioned or surveyed be excluded from the scope of the action;*
> *(g) order that any share remain unallotted.*

This list is not exhaustive: the words used in the section are "may include", not "shall include". *(Hewavitharana v. Themis Silva (1961) 63 NLR 68)*

It is clear from this section that after trial, the District Judge can order the sale of the land in whole instead of partitioning the land.

He can *inter alia* order the sale of part of the land and partition the remaining portion. It was held in *Ferdinands v. De Alwis (1957) 59 NLR 253* that "*paragraphs (c) and (e) of section 26 of the new Partition Act read together authorise the court to allot one portion of a land to a party or a set of parties and to order the sale of another portion and the division of the proceeds of the sale among other parties alone or among them and some or all of the parties to whom the former portion is allotted.*" In the Privy Council case of *Ceylon Theatres Ltd v. Cinemas Ltd (1968) 70 NLR 337*, the subject matter of partition was the land almost entirely occupied by the Tower Hall Theatre in Maradana. The District Court ordered the sale of the land, as no physical partition of the property was practicable, but subject to the life interest in favour of the 2nd defendant in respect of 1/3 share of the soil and buildings. This was held to be in consonance with the Partition Law.

Section 26(3), which the District Judge relied upon in the instant case to order the sale of the plaintiff's undivided ½ share (i.e. 0.93 perches) to the defendant, reads as follows:

> *Where by virtue of an order made under subsection (1), a person is entitled to an undivided extent of land which, by reason of its trivialness in extent or value or of it being less than the minimum extent required by any written law regulating the subdivision of land for development purposes, the court considers it inexpedient to allot to that person a divided portion, the court may, in lieu of ordering the allotment of a divided portion of the land to that person and on the payment to that person of such compensation as may be determined by court, allot that extent to any other person*

who is entitled to an undivided extent of the land to which the action relates.

I might add that even if the District Judge does not order the sale of the land in the judgment, such a sale can still be ordered after the scheme inquiry which is held after the judgment but before the final decree of partition is entered. *(Leelawathie v. Abeykoon [2005] 3 Sri LR 127)* Section 36(1)(b) of the Partition Law states that after the scheme inquiry, the court may "*order the sale of any lot, in accordance with the provisions of this Law, at the appraised value of such lot given by the surveyor under section 32, where the commissioner has reported to court under section 32 that the extent of such lot is less than the minimum extent required by written law relating to the subdivision of land for development purposes and shall enter final decree of partition subject to such alterations as may be rendered necessary by reason of such order of sale*."

It is clear that the District Judge's order is in accordance with the Partition Law. The plaintiff does not complain of the procedure for sale. Her complaint is in respect of the order for sale.

At the argument, learned counsel for the plaintiff defended the judgment of the High Court stating that the plaintiff is entitled to one half of the house. This claim has been rejected by the District Judge in her judgment and the High Court in appeal has not reversed that finding. There is no appeal by the plaintiff against the judgment of the High Court. The submission of learned counsel is in any event unsupported by evidence and is therefore unsustainable.

This court granted leave to appeal against the judgment of the High Court on the following two questions of law:

(a) Does the judgment of the High Court defeat the purpose of section 26(3) of the Partition Law?

(b) Has the High Court erred in law by failing to appreciate that the District Judge has answered issue Nos. 9 and 10 correctly?

By the answers to issue Nos. 9 and 10, the District Judge came to the conclusion that an order for sale of the plaintiff's share to the defendant is the most practical way of terminating the co-ownership of this land.

I answer both questions in the affirmative and set aside the judgment of the High Court and restore the judgment of the District Court. The appeal is accordingly allowed but without costs.

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 under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No: 13/2019
HC Appeal No: HCALT 40/2016
LT Application No: 13/52/2013

R.A. Dharmadasa,
No. 72/2/C 'Sandamali,'
Parakandeniya Road,
Pahala Imbulgoda, Imbulgoda.

APPLICANT

Vs.

Board of Investment of Sri Lanka,
World Trade Centre,
26th Floor, West Tower,
Bank of Ceylon Mawatha, Colombo 1.

RESPONDENT

And between

Board of Investment of Sri Lanka,
World Trade Centre,
26th Floor, West Tower,
Bank of Ceylon Mawatha, Colombo 1.

RESPONDENT – APPELLANT

Vs.

R.A. Dharmadasa,
No. 72/2/C 'Sandamali,'
Parakandeniya Road,
Pahala Imbulgoda, Imbulgoda.

APPLICANT – RESPONDENT

And Now Between

R.A. Dharmadasa,
No. 72/2/C 'Sandamali,'
Parakandeniya Road,
Pahala Imbulgoda, Imbulgoda.

APPLICANT – RESPONDENT – APPELLANT

Vs.

Board of Investment of Sri Lanka,
World Trade Centre,
26th Floor, West Tower,
Bank of Ceylon Mawatha, Colombo 1.

RESPONDENT – APPELLANT – RESPONDENT

Before: **E.A.G.R. Amarasekara, J**
A.L. Shiran Gooneratne, J
Arjuna Obeyesekere, J

Counsel: Dulindra Weerasuriya, PC, for the Applicant – Respondent – Appellant

Janaprith Fernando with D.D.P. Dissanayake and Namal Rajamuni for the Respondent – Appellant – Respondent

Argued on: 24th January 2022

Written Submissions: Tendered on behalf of the Applicant – Respondent – Appellant on 10th July 2019 and 7th March 2022

Tendered on behalf of the Respondent – Appellant – Respondent on 23rd October 2019 and 7th March 2022

Decided on: 16th June 2022

Arjuna Obeyesekere, J

The Applicant – Respondent – Appellant [*the Appellant*] joined the Board of Investment of Sri Lanka – i.e. the Respondent – Appellant – Respondent [*the Respondent*], on 2nd July 1985 as a Management Trainee. He was confirmed in service on 1st April 1986, and received several promotions thereafter, including to the post of Accountant (Grade M3) in October 1990, Accountant (Grade M2) in April 1994 and Senior Manager, Internal Audit (Grade 1) in March 2000. In February 2003, the Appellant had been assigned to the Regional Economic Development Commission [*REDC*]. By letter dated 7th October, 2003, he had been appointed as the Director (Corporate Services) of the Regional Office of the Respondent situated in the North Western Province with effect from 10th October 2003. The claim of the Appellant that he had an unblemished record of service until this appointment has not been disputed by the Respondent.

Interdiction, the issuance of a charge sheet and termination of services

By letter dated 28th July 2005, the Appellant was placed under interdiction due to irregularities that the Appellant is said to have committed with regard to his claim for the rent allowance, use of the official vehicle, the tender relating to the provision of transport services to employees of the North Western Provincial Office of the Respondent and encashment of cheques issued to the provider of the said transport services. The Appellant had thereafter been issued with a charge sheet on 19th September 2005. While the first seven charges were in relation to the above incidents, the last two charges were whether the Respondent has lost trust and confidence in the Appellant and whether the Appellant has brought disrepute to the Respondent, as a result of the irregularities which were the subject matter of the first seven charges.

Pursuant to the response of the Appellant to the said charge sheet, the Respondent had initiated a domestic inquiry in relation to the above charges and appointed as Inquiry Officer a person recommended by the Ministry of Public Administration. Having requested several postponements, the Appellant had informed the Inquiry Officer that he would not be participating in the inquiry as he believed that it was not being conducted in an impartial manner. The inquiry had thereafter proceeded *ex parte*. Upon the

Appellant being found guilty of all charges, his services had been terminated by letter dated 13th March 2008.

Application to the Labour Tribunal and appeal to the High Court

Aggrieved by the said decision, the Appellant had filed an application before the Labour Tribunal in terms of Section 31B(1)(a) of the Industrial Disputes Act [*the Act*]. While the Respondent had led the evidence of five witnesses, the Appellant had given evidence on his own behalf. By its order delivered on 6th July 2016, the Labour Tribunal had held that the charges against the Appellant have not been proved and therefore, the termination of the services of the Appellant was unjustified. The Labour Tribunal, while not ordering reinstatement due to an ambiguity with regard to the age of retirement, had directed the Respondent to pay the Appellant a sum of Rs. 3,627,900 as compensation.

On appeal, the Provincial High Court of the Western Province, holden at Colombo set aside the said order of the Labour Tribunal. This appeal arises from the said judgment of the High Court.

Questions of Law

On 9th January 2019, this Court granted the Appellant leave to appeal on the following questions of law:

(1) Can a learned High Court Judge in an appeal from the judgment/order of a Labour Tribunal made on a just and equitable basis taking all the circumstances relevant to the issue, reverse and set aside the same on a technical issue strictly interpreting one document without considering the circumstances on which the said document came into existence?

(2) Is the judgment of the High Court in an appeal against the judgment of a Labour Tribunal valid without giving reasons for the same?

While the first question of law relates to Charge No. 1 preferred against the Appellant, the second question of law would apply in respect of all charges.

During the course of the hearing, the learned President's Counsel for the Appellant submitted that a Labour Tribunal is required to take into consideration all the circumstances of the case and make an order which is just and equitable, and that in doing so, a Labour Tribunal has a wide discretion with the relief that it could grant an employee. He stated further that for this reason, (a) an appeal against an order of a Labour Tribunal lies only on a question of law – *vide* Section 31D(3) of the Act – (b) the High Court, in exercising its appellate jurisdiction must not interfere with the findings of fact reached by the Labour Tribunal. The learned President's Counsel for the Appellant however did concede that an order of the Labour Tribunal can be set aside where the findings of fact are perverse, but submitted that it was not the case in this appeal, and that the High Court erred when it set aside the order of the Labour Tribunal.

Just and equitable jurisdiction of a Labour Tribunal

In terms of Section 31C(1) of the Act, "*Where an application under section 31B is made to a Labour Tribunal, it shall be* ***the duty of the tribunal*** *to* ***make all such inquiries*** *into that application and* ***hear all such evidence*** *as the tribunal may consider necessary, and thereafter make not later than six months from the date of such application, such order as may appear to the tribunal to be* ***just and equitable***" [emphasis added].

While S.R. de Silva, in his book titled '**The Law of Dismissal**' (3rd ed., 2018) has noted at pages 279-80 that the phrase *just and equitable* does not lend itself to precise definition, in **Peiris v Podi Singho** [78 CLW 46 at 48] it was held that, *"the test of a just and equitable order is that those qualities would be apparent to any fair-minded person reading the order*". In **Ceylon Transport Board v Ceylon Transport Workers Union** [71 NLR 158 at 163], Tennekoon, J (as he then was) referring to Section 31C(1) stated as follows:

> "*This section must not be read as giving a labour tribunal a power to ignore the weight of evidence or the effects of cross-examination on the vague and insubstantial ground that it would be inequitable to one party so to do. There is no*

equity about a fact. The tribunal must decide all questions of fact "solely on the facts of the particular case, solely on the evidence before him and apart from any extraneous considerations" (see R. v. Manchester Legal Aid Committee Ex parte Brand & Co. Ltd. [(1952) 1 All ER 480]). In short, in his approach to the evidence he must act judicially."

In **The Caledonian (Ceylon) Tea and Rubber Estates Ltd. v J.S. Hillman** [79 (1) NLR 421 at 430] Sharvananda, J (as then was) observed as follows:

"*In the course of adjudication, a Tribunal must determine the 'rights' and 'wrongs' of the claim made, and in so doing it undoubtedly is free to apply principles of justice and equity, keeping in view the fundamental fact that its jurisdiction is invoked not for the enforcement of mere contractual rights, but for preventing the infliction of social injustice. The goals and values to be secured and promoted by Labour Tribunals are social security and social justice. The concept of social justice is an integral part of Industrial Law, and a Labour Tribunal cannot ignore its relevancy or norms in exercising its just and equitable jurisdiction. Its sweep is comprehensive as it motivates the activities of the modern welfare state. It is founded on the basic ideal of socio-economic equality. Its aim is to assist in the removal of socio-economic disparities and inequalities. It endeavours to resolve the competing claims of employers and employees by finding a solution which is just and fair to both parties, so that industrial disputes can be prevented*…"

Although Labour Tribunals have a wide discretion in the relief that they could grant, this Court has consistently cautioned that such discretion must be exercised within the four corners of the law. T.S. Fernando, J, in **Richard Pieris & Co. Ltd. v Wijesiriwardena** [62 NLR 233 at 235] observed 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 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*."

In **The Ceylon Estates Staffs' Union v The Superintendent, Meddecombra Estate, Watagoda and Another** [73 NLR 278 at 282] Weeramantry, J stated 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 contended employers*."

It is therefore clear that while Section 31C(1) has circumscribed the role of a Labour Tribunal, it has drawn a nexus that the Tribunal must maintain between the material that is placed before it and the just and equitable award that it would eventually make.

In **Ceylon Transport Board v Gunasinghe** [72 NLR 76 at 83], Weeramantry, J, while recognising that a Labour Tribunal must act judicially, went onto hold that Labour Tribunals do not have:

> "*… a free charter to act in disregard of the evidence placed before them. They are,* ***in arriving at their findings of fact, as closely bound to the evidence adduced before them and as completely dependent thereon as any Court of law. Findings of fact which do not harmonise with the evidence underlying them lack all claims to validity****, whatever be the Tribunal which makes them.*
>
> *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. I am strengthened in the conclusion I have formed by a perusal of the judgment already referred to, of my brother Tennekoon [Ceylon Transport Board v. Ceylon Transport Workers' Unions (1968) 71 NLR 158; 75 CLW 33], who has observed that* ***it is only after the ascertainment of the facts upon a judicial approach to the evidence that a Labour Tribunal can pass on to the next stage of making an order that is fair and equitable having regard to the facts so found***" [emphasis added].

A similar requirement to make an award as may appear to him just and equitable has been imposed by Section 17(1) of the Act on an arbitrator appointed in terms of Section 4(1). In **Municipal Council Colombo v Munasinghe** [71 NLR 223 at 225] Chief Justice H.N.G. Fernando held that:

> "*… when the Industrial Disputes Act confers on an Arbitrator the discretion to make an award which is 'just and equitable,' the Legislature did not intend to confer on an Arbitrator the freedom of a wild horse. An award must be 'just and equitable' as between the parties to a dispute; and the fact that one party might have encountered 'hard times' because of personal circumstances for which the other party is in no way responsible is not a ground on which justice or equity requires the other party to make undue concessions. In addition, it is time that this Court should correct what seems to be a prevalent misconception. 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. An Arbitrator holds no licence from the Legislature to make any such award as he may please, for nothing is just and equitable which is decided by whim or caprice or by the toss of a double-headed coin*."

This position has been upheld by this Court in **Standard Chartered Grindlays Bank Limited v The Minister of Labour** [SC Appeal No. 22/2003; SC Minutes of 4th April 2008] and **Singer Industries (Ceylon) Limited v The Ceylon Mercantile Industrial and General Workers Union and Others** [2010 (1) Sri LR 66]. In the latter case, it was held at page 84 that:

> "*It is a cardinal principle of law that in making an award by an arbitrator there must be a judicial and objective approach and more importantly the perspectives both of employer as well as the employee should be considered in a balanced manner and undoubtedly just and equity must apply to both these parties*."

Thus, it is clear that in the guise of making a just and equitable order, the Labour Tribunal cannot discriminate between the parties. It must consider the cases put forward by both parties in a balanced manner, and its decision must be supported by evidence. It is only then that the order of a Labour Tribunal would be truly just and equitable.

The jurisdiction of the High Court in respect of appeals from the Labour Tribunal

While in terms of Section 31D(2) of the Act, "*an order of a labour tribunal shall be final and shall not be called in question in any court,*" this is subject to the provisions of Section 31D(3) of the Act which reads as follows:

> "*Where the workman who, or the trade union which, makes an application to a labour tribunal, or the employer to whom that application relates is dissatisfied with the order of the tribunal on that application, such workman, trade union or employer may, by written petition in which the other party is mentioned as the respondent, appeal from that order* ***on a question of law****, to the High Court established under Article 154P of the Constitution, for the Province within which such Labour Tribunal is situated*" [emphasis added].

It would therefore be important to understand what is *a question of law*, in the context of the provisions of the Act. In **The Caledonian (Ceylon) Tea and Rubber Estates Ltd. v J.S. Hillman** [supra; at 425], it was held as follows:

> "*Under Section 31D(2) of the Industrial Disputes Act, an appeal to the Supreme Court lies from an order of a Labour Tribunal only on a question of law.* ***Parties are bound by the Tribunal's findings of fact****,* ***unless*** *it could be said that* ***the said findings are perverse and not supported by any evidence****. With regard to cases where an appeal is provided on questions of law only, Lord Normand in Inland Revenue v. Fraser, [(1942) 24 Tax Cases p. 498], spelt the powers of Court as follows:*
>
> > *'In cases where it is competent for a Tribunal to make findings of fact which are excluded from review, the Appeal Court has always jurisdiction to intervene if it appears… that the Tribunal has made a finding for which there is no evidence, or which is inconsistent with the evidence and contradictory of it.'*
>
> *In this framework, the question of* ***assessment of evidence is within the province of the Tribunal****, and,* ***if there is evidence on record to support its findings****, this Court*

cannot review those findings even though on its own perception of the evidence this Court may be inclined to come to a different conclusion. 'If the case contains anything ex facie which is bad in law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances too, the Court must intervene' – per Lord Radcliffe in Edwards v. Bairstow (1956) 3 All ER 57. ***Thus, in order to set aside a determination of facts by the Tribunal, limited as this Court is only to setting aside a determination which is erroneous in law, the appellant must satisfy this Court that there was no legal evidence to support the conclusion of facts reached by the Tribunal, or that the finding is not rationally possible and is perverse having regard to the evidence on record****. Hence, a heavy burden rested on the appellant when he invited this Court to reverse the conclusion of facts arrived at by the Tribunal*" [emphasis added].

In **Ceylon Transport Board v Gunasinghe** [supra; at 80] it was held that, "*Where a statute makes an appeal available only in respect of questions of law, the Appellate Court is not without jurisdiction to interfere where the conclusion reached on the evidence is so clearly erroneous that no person properly instructed in the law and acting judicially could have reached that particular determination [Edwards, Inspector of Taxes v. Bairstow another (1955) 3 All ER 48]. It is true that Courts will be more ready to find errors of law in erroneous inferences from facts than in erroneous findings of primary fact, but it has been repeatedly held that a Tribunal which has made a finding of primary fact that is wholly unsupported by evidence has erred in point of law [De Smith, Judicial Review of Administrative Action, pp. 86-7]."*

In **Jayasuriya v Sri Lanka State Plantations Corporation** [(1995) 2 Sri LR 379; at 391] Amerasinghe, J. considered a long line of jurisprudence on this matter, and held as follows:

"*The Industrial Disputes Act No. 43 of 1950 states in section 31D that the order of a Labour Tribunal shall be final and shall not be called in question in any Court except*

on a question of law. While appellate courts will not intervene with pure findings of fact (e.g. Somawathie v. Baksons Textile Industries Ltd [(1973) 79(1) NLR 204], Caledonian (Ceylon) Tea and Rubber Estates Ltd v. Hillman [(1977) 79(1) NLR 421], Thevarayan v. Balakrishnan [(1984) 1 Sri LR 189], Nadarajah v. Thilagaratnam [(1986) 3 CALR 303]), yet if it appears that the Tribunal has made a finding:

- ***wholly unsupported by evidence*** *(Ceylon Transport Board v. Gunasinghe [(1973) 72 NLR 76], Colombo Apothecaries Co. Ltd v. Ceylon Press Workers' Union [(1972) 75 NLR 182], Ceylon Oil Workers' Union v. Ceylon Petroleum Corporation [(1978-9) 2 Sri LR 72]), or*

- ***which is inconsistent with the evidence and contradictory of it*** *(Reckitt & Colman of Ceylon Ltd v. Peiris [(1978-9) 2 Sri LR 229]), or*

- ***where the Tribunal has failed to consider material and relevant evidence*** *(United Industrial Local Government & General Workers' Union v. Independent Newspapers Ltd [(1973) 75 NLR 529]), or*

- ***where it has failed to decide a material question*** *(Hayleys Ltd v. De Silva [(1963) 64 NLR 130]), or*

- ***misconstrued the question at issue and has directed its attention to the wrong matters*** *(Colombo Apothecaries Co. Ltd v. Ceylon Press Workers' Union [supra]), or*

- ***where there was an erroneous misconception amounting to a misdirection*** *(Ceylon Transport Board v. Samastha Lanka Motor Sevaka Samithiya [(1964) 65 NLR 566]), or*

- ***where it failed to consider material documents or misconstrued them*** *(Virakesari Ltd v. Fernando [(1965) 66 NLR 145]), or*

- ***where the Tribunal has failed to consider the version of one party or his evidence*** *(Carolis Appuhamy v. Punchirala [(1963) 64 NLR 44], Ceylon Workers' Congress v. Superintendent, Kallebokke Estate [(1962) 63 NLR 536]), or*

- ***erroneously supposed there was no evidence*** *(Ceylon Steel Corporation v. National Employees' Union [(1969) 76 CLW 64]),*

the finding of the Tribunal is subject to review by the Court of Appeal" [emphasis added].

The judgment in **The Caledonian (Ceylon) Tea and Rubber Estates Ltd. V J.S. Hillman** [supra] has been consistently followed by this Court – see **Hatton National Bank v Perera** [(1996) 2 Sri LR 231], **Shanthi Sagara Gunawardena v Ranjith Kumudusena Gunawardena and Others** [SC Appeal No. 89/2016; SC Minutes of 2nd April 2019] and **Kotagala Plantations Ltd. and Lankem Tea and Rubber Plantations (Pvt) Ltd. v Ceylon Planters Society** [(2010) 2 Sri LR 299]. In the latter case, Chief Justice J.A.N de Silva held as follows at page 303:

"*An appeal lies from an order of a Labour Tribunal only on [a] question of law. A finding on facts by the Labour Tribunal is not disturbed in appeal by an Appellate Court unless the decision reached by the Tribunal can be considered to be perverse. It has been well established that* ***for an order to be perverse the finding must be inconsistent with the evidence led or that the finding could not be supported by the evidence led*** *(vide Caledonian Estates Ltd. v. Hillman 79 (1) NLR 421)*" [emphasis added].

Thus, even though a Labour Tribunal has been conferred with a wide discretion and is required to make an order which is just and equitable, that does not mean that it has the freedom of a wild horse and could make any order at its whim and fancy. The order of a Labour Tribunal must be based on the evidence placed before it and its conclusions must be supported by the said evidence. Although the jurisdiction of the appellate Court to interfere with an order of a Labour Tribunal has been limited by Section 31D(3) to questions of law, the long series of judicial decisions referred to by me have justified

intervention with an order of a Labour Tribunal where its findings *inter alia* have been reached without considering the evidence placed before it, or where its findings are not supported by such evidence.

I am therefore of the view that while the appellate Court can engage in a review of the evidence, it should exercise caution:

(a) when analysing the evidence and findings of a Labour Tribunal so as to ensure that it does not substitute its views with that of the Labour Tribunal;

(b) in determining whether its analysis should culminate in reversing the findings of fact reached by a Labour Tribunal.

This being the present legal position, I shall now consider the evidence placed before the Labour Tribunal in respect of each charge, whether the Labour Tribunal has correctly understood the gravamen of each charge, the findings of the Labour Tribunal in respect of such charge and whether its findings are supported by the material before it. I shall thereafter consider the findings of the High Court, in order to determine if the High Court acted within its jurisdiction when it set aside the order of the Labour Tribunal.

Charge No. 1

The Appellant was appointed as the Director (Corporate Services) of the Regional Office of the Respondent situated in the North Western Province by letter dated 7th October, 2003. The said letter of appointment provided *inter alia* that, "*you are required to reside within [a] 15 km radius to the Office of the North Western Regional Office in view of your appointment to the above post.*"

Charge No. 1 which is centered on the above condition, reads as follows:

"ඔබ වයඹ ප්‍රාදේශිය කාර්යාලයේ අධ්‍යක්ෂ (ආයතනික සේවා) වශයෙන් පත් කරමින් ශ්‍රී ලංකා ආයෝජන මණ්ඩලයේ සභාපති/අධ්‍යක්ෂ ජනරාල් විසින් ඔබ වෙත නිකුත් කර ඇති අංක ඊසී/පී/ආර්/517 සහ 2003.10.07 වන දින දරණ පත්වීමේ ලිපියේ 04 වන ඡේදය අනුව ඔබ වයඹ ප්‍රාදේශිය කාර්යාලයේ සිට කිලෝ මීටර් 15

ක් ඇතුළත පදිංචි වී සිටිය යුතු වුවත්, **එසේ පදිංචි වී නොසිට**, පත්කිරීමේ බලධරයාගේ විධිමත් පූර්ව අවසරයක් ලබා නොගෙන සේවා ස්ථානයට කිලෝ මීටර් 35 ක් හෝ ඊට ආසන්න දුර ප්‍රමාණයක් පිහිටි කුලී නිවසක පදිංචි සිටීමෙන් පත්වීමේ ලිපියේ 04 වන ඡේදයේ සඳහන් කොන්දේසිය කඩ කිරීම" [emphasis added].

The essence of Charge No. 1 is that the Appellant did not take up residence at a place situated within 15 km from the North Western Regional Office, as required by the letter of appointment, and that the Appellant had thereby breached the condition stipulated in his letter of appointment.

In his response to the charge sheet, the Appellant admitted that he did not take up residence as stipulated by the letter of appointment, but pleaded not guilty to Charge No. 1. In his evidence before the Labour Tribunal, he stated that although this condition was imposed on all those appointed to Regional Offices, the said condition was not practical as it was difficult to find a house within the said distance for the rent allowance that was paid, and for that reason, the said requirement was not enforced by the Respondent.

The Appellant has stated that representations were made to remove this condition and that at a meeting held on 27th June 2005 with the Director General of the Respondent, the following decision was taken:

> "*North East Region raised the question over the compulsory rule of BOI Staff residing within 15 km radius.*
>
> *Director General stated that it is practically not happening. As such that condition to be treated as withdrawn. Director General further stated that the Government Regulation of 40 km maximum distance will apply to the Regional Offices too in addition to the Head Office.*"

The minutes of the above meeting were marked by the Appellant and is the document that forms the basis for the first question of law raised in this appeal.

The Respondent, while admitting that the above decision was taken, submitted that:

(a) Disciplinary proceedings had commenced by the time the said decision was taken;

(b) The said decision was prospective and that the breach of the said condition on the part of the Appellant remained.

Having considered the above, the Labour Tribunal held as follows:

(a) The Respondent, by changing the requirement in June 2005, has acknowledged that the said requirement imposed in the letter of appointment is not practical;

(b) The said decision is silent with regard to the date from which it is to apply, and therefore, it applies with retrospective effect;

(c) The Appellant is therefore not guilty of the matters referred to in Charge No. 1.

The High Court has pointed out that a decision, once taken, applies with prospective effect, and that there is no necessity to state that it applies with retrospective effect, unless that is the intention of the decision maker. The High Court has gone on to hold that in view of the admission by the Appellant that the place of residence was outside the 15 km radius, it is clear that the Appellant has breached the condition stipulated in the letter of appointment, and is therefore guilty of Charge No. 1. It is perhaps significant that even though the Labour Tribunal had ignored the admission by the Appellant and misconstrued the issue before it, in the written submissions filed before this Court, the Appellant has stated that, "*If at all the High Court could have held that when the Appellant did not reside within 15 km of his office as per his letter of appointment, disciplinary action could have been taken for violating a condition of his letter of appointment*." This is exactly what the Respondent has done in Charge No. 1.

The Appellant has not left the High Court with any other option but to arrive at a finding that the Appellant is guilty of Charge No. 1, by virtue of his admission that he has not adhered to the terms of the letter of appointment. I therefore agree with the conclusion reached by the High Court that the Appellant has breached the aforementioned condition in his letter of appointment.

What remains to be considered is whether the mitigatory circumstances pleaded by the Appellant can be accepted.

Even if I accept the position of the Appellant that the requirement imposed by the letter of appointment is not practical, the fact remains that the Appellant, as a Senior Officer with almost 20 years of service with the Respondent and who had at one time functioned as the Senior Manager of Internal Audit, ought to have made representations in that regard and sought permission to reside outside the 15 km requirement. The position of the Appellant that this was an issue that affected all those serving in the Regional Offices of the Respondent means that this was common knowledge among the employees of the Respondent and would therefore have been known to the Appellant at the time of the appointment. The Appellant could therefore have refused to accept the said appointment or else, made representations prior to accepting the same, or sought a waiver of that condition while informing the Respondent that not being resident within the said distance would not affect the discharge of his duties. Not having done any of these, I am of the view that the Appellant cannot now shield himself by stating that the said condition is not practical and must therefore face the consequences of his actions.

The next question to be considered is whether the aforementioned decision should apply with retrospective effect. If it was the intention of the Director General of the Respondent that the said condition should apply with retrospective effect, then, there should have been a specific reference to that effect, which is not the case. The fact that it is "*practically not happening*" or is not being adhered to, does not mean that its withdrawal is retrospective. In my view, there was no evidence before the Labour Tribunal that would have enabled the Labour Tribunal to arrive at the conclusion that the decision was retrospective, and hence, it is clear that the Labour Tribunal misdirected itself when it held so.

There is one other matter that I must refer to. In a memorandum dated 20th December 2005, the Acting Secretary General of the Respondent had recommended to the Director General that no further inquiry is needed in this regard against the Appellant in view of

the above decision of 27th June 2005. The Director General, having considered the preliminary inquiry report and the said recommendation, had decided that the inquiry must proceed and that the Respondent must act on the findings of the Inquiry Officer. This, together with the fact that the Appellant was interdicted only after the above decision was taken on 27th June 2005 is to my mind, a confirmation that the said decision was to apply with prospective effect, and that the said decision did not affect the culpability of the Appellant, a fact which the Labour Tribunal has not considered. Taking into consideration all of the above circumstances, I agree with the findings of the High Court that the said decision was to apply with prospective effect.

This brings me to the question of whether the High Court acted in terms of Section 31D(3) of the Act when it overruled the decision of the Labour Tribunal on Charge No. 1. To start with, the Labour Tribunal has completely lost sight of the gravamen of the charge, and has failed to consider the admission of the Appellant that he did not reside within the 15 km requirement, thereby misdirecting itself and misconstruing the issue before it. In considering the explanation of the Appellant, the Labour Tribunal has forced itself to state that the decision was retrospective, when not only was there was no evidence to support such a finding, but such a finding was contrary to the evidence that was before it. The findings of the Labour Tribunal are therefore perverse. In these circumstances, I am satisfied that the High Court has not exceeded its jurisdiction when it set aside the findings of the Labour Tribunal on Charge No. 1.

Taking into consideration all the circumstances relating to Charge No. 1, I would answer the first question of law – i.e., "Can a learned High Court Judge in an appeal from the judgment/order of a Labour Tribunal made on a just and equitable basis taking all the circumstances relevant to the issue, reverse and set aside the same on a technical issue strictly interpreting one document without considering the circumstances on which the said document came into existence?" – as follows:

"The High Court can set aside a judgment of a Labour Tribunal on a question of law, as provided by Section 31D(3) of the Act and as interpreted by this Court on previous occasions. In this appeal, the High Court has proceeded on the basis of the admission to

the charge, and has rejected the explanation given in mitigation, for the reasons which I have already adverted to. The judgment of the High Court is based on the totality of the evidence led in respect of Charge No. 1. Its findings are not based solely on the minutes of the meeting held on 27th June 2005, nor can it be said that the High Court has set aside the findings of the Labour Tribunal on a technicality. I am therefore of the view that the decision of the High Court is correct and is in terms of the law."

Charge No. 2

I shall now consider Charge No. 2, which flows from Charge No. 1.

The Respondent states that in order to facilitate the aforementioned requirement that the Appellant should take up residence within a distance of 15 km, the Appellant was entitled to the payment of a rent allowance of 30% of his basic salary. Accordingly, by an internal memorandum dated 6th April 2004, the Appellant informed the Executive Director of the North Western REDC that he has taken on rent a house at Nelundeniya at a monthly rental of Rs. 8500, and sought reimbursement of a sum of Rs. 51,000 being the rental advance of six months that the Appellant claimed he had paid the landlord, who incidentally was an employee of the Respondent.

Charge No. 2 reads as follows:

"ඔබ ඉහත චෝදනා අංක 01 හි සඳහන් විෂමාචාර ක්‍රියාව සිදුකර, ඔබ පදිංචි ස්ථානය හා වයඹ ප්‍රාදේශිය කායර්ාලය අතර, ආසන්න දුර ප්‍රමාණය සඳහන් නොකොට ගෙවල් කුලි වශයෙන් 2004.04.02 සිට 2005.03.21 දින දක්වා රු. 102,000/- (එක් ලක්ෂ දෙදහස) ක මුදලක් ශ්‍රී ලංකා ආයෝජන මණ්ඩලයෙන් ලබා ගැනීම."

The basis of Charge No. 2 is that even though the Appellant had claimed the rent allowance, he had not disclosed the distance between the place of residence and the Office at the time he made his claim by the aforementioned memorandum. I must stress at this stage that the charge was not that the Appellant had claimed the said allowance fraudulently or that the said claim was not in terms of the Circular issued by the

Respondent relating to the payment of a rent allowance, a fact which the Labour Tribunal has lost sight of.

The aforementioned internal memorandum submitted by the Appellant, which was available to the Labour Tribunal, was accompanied by a printed form consisting of twelve questions. While the Appellant had declared his permanent residence and the distance therefrom to Kurunegala, he had refrained from specifying the distance from the rented house to the REDC office at Kurunegala. The Appellant has admitted in his evidence before the Labour Tribunal that he had not disclosed this information in his application. In the written submissions filed on his behalf, the Appellant, while conceding that he kept the space blank, has taken up the position that he did convey this information over the telephone to the Director (Administration). While this is reflected in the aforementioned memorandum of the Secretary General of the Respondent, no evidence was elicited before the Labour Tribunal in this regard. Even though the Appellant had not duly completed his formal request for reimbursement, the claim had been approved by the Director (Administration) and payment made, with an endorsement that "*the application and connected papers are in order.*"

The Labour Tribunal has conceded that the failure to disclose the distance is a lapse on the part of the Appellant. The Labour Tribunal has however concluded that the Respondent could not have had any issue with it, for two reasons. The first is that the claim has been approved by the Director (Administration). The second is that if the granting of approval was irregular, the Respondent should have issued a warning letter to the said Director (Administration) who approved the claim.

Having observed that the above findings of the Labour Tribunal are biased, the High Court has gone on to hold that, by not duly completing the form, the Appellant has suppressed the fact that the place taken on rent is situated outside the 15 km distance, a matter which the Labour Tribunal has chosen to ignore.

In my view, the non-declaration of the said distance cannot be passed off as a mere omission on the part of the Appellant. The failure to disclose the distance is significant, when one considers the requirement in the letter of appointment to live within a distance

of 15 km, and the position of the Respondent that the entitlement to the rent allowance is linked to the said requirement. It is clear that the Appellant refrained from specifying the distance in the claim form he submitted, knowing fully well that if he does so, he would not be paid the rent allowance. In these circumstances, I am in agreement with the finding of the High Court that the Labour Tribunal has misinterpreted the documents and has misunderstood the nature of the allegation contained in Charge No. 2.

The next issue that I must consider is whether the High Court acted in terms of Section 31D(3) of the Act when it overruled the decision of the Labour Tribunal on Charge No. 2. The moment the Appellant admitted that he had not declared the distance, Charge No. 2 was proved. The Labour Tribunal, while acknowledging that this is a lapse on the part of the Appellant, has taken into consideration matters which were irrelevant to the charge in deciding that the Appellant is not guilty of the charge. The Labour Tribunal has misdirected itself and misconstrued the issue before it, thereby compelling the High Court to intervene and set aside its findings. Taking into consideration all of the above circumstances, I am in agreement with the findings of the High Court and hold that the High Court has not exceeded its jurisdiction when it set aside the findings of the Labour Tribunal on Charge No. 2.

Charge No. 3

Charge No. 3 preferred against the Appellant reads as follows:

"ඔබගේ තනතුරට අදාළව මෙම මණ්ඩලය මගින් ඔබට සපයා දී තිබුණ අංක 325-0010 දරණ නිලරථය ඔබ කායර්ාලයට පැමිණීමට සහ නැවත කායර්ාලයෙන් පිටව යාමට බොහෝ දිනක පාවිච්චි නොකර ඒ සඳහා මණ්ඩලයෙන් ගෙවනු ලබන ඉන්ධන දිමනා හා රියදුරු දිමනාව ලබා ගැනිම."

While the Labour Tribunal has found that the Appellant is not guilty of the said charge, the High Court has not considered the said charge in its judgment, prompting the learned President's Counsel for the Appellant to submit that the High Court has failed to give reasons – *vide* the second question of law raised in this appeal. In this background, the findings of the Labour Tribunal on Charge No. 3 shall stand.

Charge Nos. 4, 5, 6 and 7

The next four charges relate to the tender for the provision of transport services to employees of the North Western Provincial Office of the Respondent and the depositing of six cheques issued to the provider of the said transport services in the personal bank account of the Appellant.

According to the evidence of Sarathchandra Munasinghe, Senior Deputy Director of the Respondent who was attached to the North Western Provincial Office, a tender board comprising of the Appellant, himself and another had been appointed to select suitable persons to provide transport services to those employed at the said Office of the Respondent. This included a passenger bus service from Colombo to Kurunegala. Accordingly, tenders had been called in June 2004. Bids were received from three persons, including from a lady by the name of Ariyawathie, who had offered to provide bus bearing registration no. 61 – 2725 or 60 – 9443, and from her husband Jayaratne, who had offered another vehicle.

All bids had been referred to a Technical Evaluation Committee [*TEC*]. The TEC had invited bidders to produce their vehicles for inspection, but only Ariyawathie had complied by producing the bus bearing registration no. 61 – 2725. Having examined the said bus, the TEC had rejected it as there were certain shortcomings with it. The report of the TEC had been considered by the Tender Board who had decided to request Ariyawathie to rectify the shortcomings and supply the required service. Ariyawathie had later substituted the said bus with another bus bearing registration no. 62 – 8260, for which the recommendations of the TEC had not been obtained.

Monthly payments for the said services had been made by six cheques drawn in favour of Ariyawathie, in sums ranging from Rs. 70684 to Rs. 88820, for the period of October 2004 to March 2005. All except one cheque contained the signature of the Appellant. While two of the cheques were payable to Ariyawathie or its bearer, the other four cheques had been crossed as *'account payee only'* which meant that the cheques had to be cleared through an account maintained at a bank. Ariyawathie's subsequent request to cancel the crossing had been acceded to by the Respondent, with the Appellant being a signatory to

the said amendment. These six cheques had thereafter been deposited in account no. 191986, which was maintained in the name of the Appellant at the Borella Branch of the Bank of Ceylon. The Respondent had led the evidence of an Officer of the said branch who had confirmed that all six cheques were deposited in the said account of the Appellant, a fact which the Appellant too had admitted.

The four charges that relate to the above transaction [i.e., Charge Nos. 4 – 7] are re-produced below:

"4. කොළඹ සිට කුරුණෑගල හා කුරුණෑගල සිට කොලඹ අතර වයඹ ප්‍රදේශිය කාර්‍යාලයේ කාර්ය මණ්ඩලය ප්‍රවාහනය කිරීම සඳහා වාහන සැපයීම පිණිස වූ ටෙන්ඩර් පත්‍ර කැඳවීමේ දැන්වීම අනුව ටෙන්ඩර් පත්‍රයක් ඉදිරිපත් නොකල අංක 62-8260 දරන බස්රථය කාර්යාල මණ්ඩල ප්‍රවාහනය සඳහා යෙදා ගැනීම මගින් ටෙන්ඩර් කොන්දේසි උල්ලංඝනය නොවන බවට ඔබ විසින් විධායක අධ්‍යක්ෂ (වයඹ ප්‍රදේශිය කායර්‍යාලය) වෙත වැරදි උපදෙස් ලබාදීම.

5. කොළඹ සිට කුරුණෑගල හා කුරුණෑගල සිට කොලඹ අතර වයඹ ප්‍රාදේශිය කා කායර්‍යාලයේ කාර්ය මණ්ඩලය ප්‍රවාහනය කිරීම සඳහා වූ ටෙන්ඩරයේ සැපයුම්කාරිය වූ ආර්.ඒ. ආරියවති මහත්මිය තමාට "ආදායකයාගේ ගිණුමට පමණයි" යනුවෙන් රේඛණය කර නිකුත් කරන ලද පහත දැක්වෙන චෙක්පත් වල සියලු රේඛණයන් අවලංගු කර ලංකා බැංකුවේ ඔබට අයත් පුද්ගලික ගිණුමක තැන්පත් කිරීම.

චෙක්පත් අංකය	නිකුත් කල දිනය	මුදල
723546	2004.10.14	රු. 81,937.00
732861	2004.11.05	රු. 71,250.00
732934	2004.12.14	රු. 87,081.75
806842	2005.01.04	රු. 88,820.25

6. කොළඹ සිට කුරුණෑගල හා කුරුණෑගල සිට කොලඹ අතර වයඹ ප්‍රාදේශිය කායර්‍යාලයේ කාර්ය මණ්ඩලය ප්‍රවාහනය කිරීම සඳහා ටෙන්ඩරයේ සැපයුම්කාරිය වූ ආර්.ඒ. ආරියවති මහත්මිය තමාට නිකුත් කරන ලද පහත දැක්වෙන චෙක්පත බොරුල්ලේ ලංකා බැංකුවේ ඔබගේ අංක 191986 දරණ පුද්ගලික ගිණුමේ තැන්පත් කිරීම.

චෙක්පත් අංකය	නිකුත් කල දිනය	මුදල
806909	2005.02.03	රු. 72,200.00
816274	2005.03.03	රු. 70,684.75

7. ඉහත අංක 05 හා 06 චෝදනාවල දක්වා ඇති පරිදි කටයුතු කිරීම තුලින් ඔබ ඔබගේ පුද්ගලික කටයුතු හා රාජකාරි කටයුතු අතර ගැටීම් ඇතිවන ආකාරයට ක්‍රියා කිරීම."

Charge No. 4 was in relation to the tender process itself, and alleged that the Appellant has provided wrong advice to the Executive Director with regard to obtaining the services of a bus in respect of which there was never a bid. The Labour Tribunal has correctly pointed out that the Executive Director was never called as a witness, and that the said charge has not been proved. I have examined the evidence led before the Labour Tribunal and concur with its findings. The High Court has not interfered with the findings of the Labour Tribunal that the Appellant is not guilty of this charge. In the absence of any finding in this regard by the High Court, I agree with the finding of the Labour Tribunal; it would suffice to state that the decision to permit Ariyawathie to substitute the bus was in violation of tender procedure except that such a decision had been taken due to the exigency that had arisen, i.e., the non-availability of a suitable bus to provide the said transport service.

Charge Nos. 5 and 6 related to the depositing of the cheques issued to Ariyawathie in the personal account of the Appellant. As acknowledged in the written submissions of the Appellant, the thrust of Charge Nos. 5 and 6 is Charge No. 7. Charge No. 8 alleged that the Appellant has breached the trust placed in him by the Respondent, by committing the irregularities set out in Charge Nos. 1 – 7, and is consequential to the said charges.

It must be noted that the Respondent did not allege in the above charges that the Appellant had benefitted from the said transactions, although in cross-examination, it was suggested that the Appellant had acted fraudulently. In his explanation to the charge sheet, which was also the position taken up before the Labour Tribunal, the Appellant had admitted that the said cheques were in fact deposited in his account, thereby conceding to the matters alleged in Charge Nos. 5 and 6. The Appellant's defence to Charge No. 7 [and also 8] was that as Ariyawathie and her family are from the same village as he is and are part of the congregation ["දායක සභා"] of the village temple, he had agreed to the said cheques being cleared through his account as Ariyawathie had informed him that she does not have a bank account. The function of the Labour Tribunal therefore was to consider whether the circumstances pleaded in mitigation were acceptable.

The learned Counsel for the Respondent has raised four issues with this explanation, which he submitted the Labour Tribunal has failed to consider. The first is, the Appellant should not have served on the Tender Board if Ariyawathie was known to him, or else, he should have declared that fact, in order to avoid a conflict of interest. It is admitted that the Appellant did neither. The second is, two of the cheques had not been crossed as *'account payee only'* and were payable to Ariyawathie or the bearer. Hence, these two cheques could have been encashed across the counter as opposed to being cleared through an account, and there was no necessity to deposit these two cheques in the account of the Appellant. The third is, once the endorsement of *'account payee only'* is cancelled, the necessity to clear a cheque through an account no longer arises. Thus, there was no need for Ariyawathie to seek the assistance of the Appellant to clear the cheques and nor was there a necessity for the Appellant to accede to such request, especially since, having been a signatory to the cancellation of the said endorsement, the Appellant would have known that the cheques could be encashed across the counter. The fourth is that according to the evidence of an Officer from Sampath Bank, Ariyawathie had opened account no. 1005 5048 5405 at the Kiribathgoda Branch of the said Bank on 12th August 2004. Thus, by the time the first cheque was issued to her in October 2004, Ariyawathie already had a bank account, thus demonstrating that the version of the Appellant that he had only helped her as she did not have a bank account is not true. It is only after the preliminary inquiry into the above transaction commenced in March 2005 that a cheque issued in favour of Ariyawathie was deposited in her account.

The learned Counsel for the Respondent also drew the attention of this Court to the position of the Appellant that he had handed over the money to Ariyawathie after encashing the said cheques, and that he has not unduly benefitted by assisting her. I have examined the bank statements of the Appellant produced before the Labour Tribunal and observe that upon realisation of each cheque, the full value thereof has not been withdrawn from his account. The argument of the learned Counsel for the Respondent was that if the Appellant was merely assisting Ariyawathie, then, as soon as the cheques realised, cash equivalent to the value of each cheque should have been withdrawn by the Appellant. The explanation of the Appellant, on being cross-examined on this issue, was

that his wife operated two vans to transport school children, and that he had paid Ariyawathie from the monies that were available to him.

It is in the above factual background that I shall consider the order of the Labour Tribunal.

The Labour Tribunal has not considered any of the above four matters that were urged before this Court by the learned Counsel for the Respondent. Instead, the Labour Tribunal, while noting that the Appellant has admitted that the said cheques were deposited in his account, has accepted the evidence of the Appellant that there was no complaint by Ariyawathie that he did not give her the money or that he solicited any money from her for assisting her. Ariyawathie has in fact made a statement to the Respondent during the preliminary investigation that she received the full sum of money from the Appellant but she has not given evidence at the domestic inquiry. In any event, that was not the charge against the Appellant, a fact which the Labour Tribunal has chosen to ignore.

The Labour Tribunal has also held that the Respondent failed to call Ariyawathie as a witness to rebut the evidence of the Appellant. The High Court has correctly concluded that there was no necessity on the part of the Respondent to call Ariyawathie as a witness, and that the burden was on the Appellant to show that his actions did not give rise to a conflict of interest, and that he acted in good faith when he assisted Ariyawathie. Thus, it was the Appellant who should have called Ariyawathie to give evidence.

This brings me to the question whether the High Court erred when it set aside the findings of the Labour Tribunal in respect of Charge Nos. 5 – 7.

The High Court has correctly observed that the allegations in Charge Nos. 5 and 6 have not only been admitted by the Appellant but has been proved by the Respondent by leading the evidence of officials of the Bank of Ceylon and Sampath Bank. The High Court has also held that the Labour Tribunal has misinterpreted the crux of Charge Nos. 5 and 6, a conclusion with which I agree. It is indeed a matter of regret that the Labour Tribunal has wholly ignored the essence of the allegation in Charge Nos. 5, 6 and 7, in that the

allegation was not that the Appellant benefitted financially but that he permitted cheques signed by him and issued to a service provider of his employer to be deposited in his private bank account, thereby giving rise to an obvious conflict of interest.

In the above circumstances, I am satisfied that the Labour Tribunal has failed to consider the totality of the evidence led before it, and that the findings of the Labour Tribunal are not supported by the evidence and material placed before it. The Labour Tribunal could not have exonerated the Appellant on the material that was available to it and its decision is irrational and perverse. The decision of the High Court on these charges is therefore in line with Section 31D(3) of the Act.

Charge Nos. 8 and 9

Charge Nos. 8 and 9 relate to the Respondent losing confidence in the Appellant and the Appellant bringing discredit to the Respondent, respectively. The said charges read as follows:

"8. ඉහත අංක 01 හා 08 දක්වා වූ චෝදනාවන්හි අඩංගු වැරදි එකක් හෝ ඉන් කිහිපයක් හෝ සියල්ලම හෝ සිදු කිරීමෙන් අධ්‍යක්ෂ වරයෙකු ලෙස මණ්ඩලය ඔබ කෙරෙහි තබන ලද විශ්වාසය කඩ කිරීම.

9. ඉහත අංක 01 සිට 08 දක්වා වූ චෝදනාවන්හි අඩංගු වැරදි එකක් හෝ ඉන් කිහිපයක් හෝ සියල්ලම හෝ සිදුකිරීමෙන් පොදුවේ ශ්‍රී ලංකා ආයෝජන මණ්ඩලයේ අධ්‍යක්ෂවරයෙක් වශයෙන් ඔබ මෙම මණ්ඩලයේ දරණ ලද තනතුර අපකීර්තියට පත් කිරීම."

Having exonerated the Appellant of the first seven charges, there was no necessity for the Labour Tribunal to consider these two charges. These two charges however come to the forefront in view of the findings of the High Court in respect of Charge Nos. 1, 2 and 5 to 7, with the High Court holding that these two charges have been established in view of its findings on Charge Nos. 5 and 6.

In **Peiris v Celltel Lanka Limited** [SC Appeal No. 30/2009; SC Minutes of 11th March 2011], Tilakawardane, J, has quoted with approval the following excerpt from **Democratic Workers' Congress v De Mel and Wanigasekera** [CGG 12432 of 19th May, 1961 at para 24], at pages 8 and 9:

"*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 fulfil his obligations towards the other. Otherwise it would really mean an employer being compelled to employ a person in a position of responsibility even though he has no confidence in the latter*."

Peiris v Celltel Lanka Limited [supra] is a case where the appellant was an Assistant Manager (Credit Collection), a position which this Court described as being "*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, it was held as follows at page 8:

"*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."

At page 9, Tilakawardane, J summarised it in the following manner:

> *"In cases of employment which demand a high level of responsibility and autonomy, a lapse in integrity is the precise sort of moral turpitude that can result in a particularly devastating structural and managerial breakdown simply because of the reliance and expectation placed in the hands of such positions, and as such is the sort of transgressive behaviour for which termination of services can be justified."*

The Appellant was a senior employee of the Respondent, holding the post of Director and entrusted with a position of responsibility and trust. It is obvious that he was required to act with the highest level of integrity and in a manner that the Respondent would not lose the confidence that it had reposed in him. The Appellant could have acted with more responsibility with regard to the requirement in his letter of appointment that he resides within a distance of 15 km from the place of work. While the failure to do so would lead to an erosion of the confidence that the Respondent had in the Appellant, in my view, the said two charges do not, on its own, justify termination of the services of the Appellant.

The position, however, is different with regard to Charge Nos. 5 – 7. An employee cannot have any financial dealings with a service provider whose services were obtained by a tender board of which he was a member. The factual circumstances, to which I have referred earlier, can only lead to a complete loss of confidence that the Respondent had in the Appellant. Viewed objectively, these charges were of a serious nature and once established, would justify termination of the services of the Appellant. The High Court was therefore correct when it found the Appellant guilty of Charge Nos. 8 and 9, and held that the termination of the services of the Appellant was justified.

Taking into consideration all of the above circumstances. I would answer the second question of law on which leave to appeal was granted – i.e., "Is the judgment of the High Court in an appeal against the judgment of a Labour Tribunal valid without giving reasons for the same?", as follows:

"A High Court must give reasons for its judgment. In its judgment dated 25th July 2017, the High Court has given the reasons for setting aside the findings of the Labour Tribunal. I do not see any basis to interfere with the said judgment."

The appeal of the Appellant is accordingly dismissed, without costs.

JUDGE OF THE SUPREME COURT

E.A.G.R Amarasekara, 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 Special Leave to Appeal made under and in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No. 15/2019
SC SPLA Appl. No. 267/2016
Writ Appl No. 163/2013

1. M.S. Sithy Jawahira.
189, Hirimbura Cross Road
Karapitiya – Galle.

2. M.A.M. Riyas
189A, Hirimbura Cross Road
Karapitiya – Galle.

Petitioners-Appellants

Vs.

1. Janaka Bandara Tennakoon
Minister of Land and Land Development,
Govijana Mandiraya
80/5, Rajamalwatte Avenue
Battaramulla.

1(b) M.K.D.S. Gunawardena
Minister of Land and Land Development,
Govijana Mandiraya
80/5, Rajamalwatte Avenue
Battaramulla.

1(c) John Amarathunga MP
Minister of Land and Land Development,
Govijana Mandiraya
80/5, Rajamalwatte Avenue
Battaramulla.

2. Ravindra Hewawitharana
District Secretary-Galle
District Secretariat-Galle
Galle.

2(a) A.S.T. Kodikara
District Secretary-Galle
District Secretariat-Galle
Galle

3. Anusha Batawala Gamage
Divisional Secretary- Galle Four
Gravets, Divisional Secretariat- Galle

3(a) W.S. Sathyananda
Divisional Secretary- Galle Four
Gravets, Divisional Secretariat- Galle

4. Urban Development Authority
6th and 7th Floors
'Sethsiripaya' – Battaramulla.

Respondents-Respondents
(SC Appeal 15/2019)

SC Appeal No. 16/2019
SC SPLA Appl. No. 268/2016
Writ Appl. No. 164/2013

1. Mohamed Jaleel Samsuluha
169, Hirimbura Cross Road
Karapitiya – Galle.

2. Mohamed Jaleel Noorul Fareesa
169, Hirimbura Cross Road
Karapitiya – Galle

3. Abdul Hameed Sithy Sanooba
121, Hirimbura Cross Road
Karapitiya – Galle.

4. Abdul Hameed Pathumma
121, Hirimbura Cross Road
Karapitiya – Galle.

5. Abdul Cader Sithi Pathumma
131, Hirimbura Cross Road
Karapitiya – Galle.

6. Mohomed Haniffa Fathumma Hanoon
181, Hirimbura Cross Road
Karapitiya – Galle.

Petitioners-Appellants

Vs.

1. Janaka Bandara Tennakoon
Minister of Land and Land Development,
Govijana Mandiraya
80/5, Rajamalwatte Avenue
Battaramulla.

1(b) M.K.D.S. Gunawardena
Minister of Land and Land Development,
Govijana Mandiraya
80/5, Rajamalwatte Avenue
Battaramulla.

1(c) John Amarathunga MP
Minister of Land and Land Development,
Govijana Mandiraya
80/5, Rajamalwatte Avenue
Battaramulla.

And 03 others.

Respondents-Respondents
(in SC Appeal 16/2019)

SC Appeal No. 17/2019
SC SPLA Appl. No. 269/2016
Writ Appl. No. 166/2013

1. Mohamed Ilyas
117, Hirimbura Cross Road
Karapitiya – Galle.

2. Mohideen Bawa Sithy Nabeesa
129, Hirimbura Cross Road
Karapitiya – Galle.

Petitioners-Appellants

Vs.

1. Janaka Bandara Tennakoon
Minister of Land and Land Development,
Govijana Mandiraya
80/5, Rajamalwatte Avenue
Battaramulla.

1(b) M.K.D.S. Gunawardena
Minister of Land and Land Development,
Govijana Mandiraya
80/5, Rajamalwatte Avenue
Battaramulla.

1(c) John Amarathunga MP
Minister of Land and Land Development,
Govijana Mandiraya
80/5, Rajamalwatte Avenue
Battaramulla.

And 03 others.

Respondents (in SC Appeal 17/2019)

Before	:	Jayantha Jayasuriya, PC, CJ S. Thurairaja, PC, J. Yasantha Kodagoda, PC, J
Counsel	:	Faiz Musthapha , PC with Rushdie Habeeb for Appellants. Manohara Jayasinghe , SSC for Respondent-Respondents.
Argued on	:	23.03.2021, 04.06.2021 12.07.2021 and 29.11.2021
Written Submissions filed on	:	07.07.2020 and 06.01.2022 by the Respondent-Respondents 04.12.2020 and 20.01.2022 by the Petitioners-Appellants
Decided on	:	28.09.2022

Jayantha Jayasuriya, PC, CJ

This judgement is in relation to three appeals that were taken up together for argument. All three of these appeals arise from a single judgement of the Court of Appeal. Three writ applications filed in the Court of Appeal namely CA/Writ/163/2013, CA/Writ/164/2013 and CA/Writ/166/2013 had been taken up together with the agreement of all parties and a single judgment had been delivered by the Court of Appeal. Petitioners in all these three applications sought writs of Certiorari quashing an Order made by the Minister of Agriculture and Land under section 38(a) of the Land Acquisition Act. The impugned Order is dated 27 January 2000 and was published in the Government Gazette (Extra Ordinary) No 1117/20 dated 03 February 2000 (hereinafter referred to as 'section 38(a) order'). The said Order relates to fourteen lots of land more fully described therein and the petitioners in the three applications sought writs of Certiorari quashing the aforesaid Order under Section 38(a) of the Land Acquisition Act in relation to eight lots of land that were identified as Lots 4, 5, 7, 8, 9, 10, 13 and 14 in the Preliminary Plan PPG 3314. Petitioners in the said applications further sought writs of Mandamus compelling the Minister of Lands to divest the aforesaid lands. The Court of appeal by its judgment held that there is no merit in all three applications and dismissed all three of them. Petitioners (hereinafter called 'appellants') had been granted Special Leave to Appeal by this court on the following questions of law:

1. Did the Court of Appeal err in law in determining that it was necessary for the petitioners to establish *mala fides* on the part of the respondents?
2. Did the Court of Appeal err in law in determining that the public purpose has been disclosed as required under the law?
3. Did the Court of Appeal fail to take cognizance of the fact that there was no urgency to making of the said Order in terms of Section 38(2) of the Land Acquisition Act and as such the said Order is ultra vires in purview of the provisions of the said Act?

I will now proceed to consider the impugned judgment of the Court of Appeal in the context of the aforesaid three questions of law on which special leave was granted by this Court.

Did the Court of Appeal err in law in determining that it was necessary for the petitioners to establish *mala fides* on the part of the respondents?

Examination of the judgment of the Court of Appeal reveals that the main contention of the appellants before the Court of Appeal had been focused on the issue as to whether the failure to disclose the public purpose in the notice issued under section 2 of the Land Acquisition Act vitiates the entire acquisition process? In relation to this issue the appellants heavily relied on the judgement of this Court in **Manel Fernando and another v D.M.Jayarathne Minister of Agriculture and Lands and Others** [2000] 1 SLR 112. The Court of Appeal had considered this issue and had come to the conclusion that the facts of the application under consideration can be distinguished from the facts in **Manel Fernando** (supra). In the process of identifying the facts in relation to the three applications under consideration, the Court of Appeal had taken into account several factors including the exact content of the section 2 notice as well as a series of matters and events that had taken place after the said notice was issued. Such other factors taken into account by the Court of Appeal include the fact that the section 2 notice makes reference to an application of the Secretary of the Housing and Urban Development dated 05.01.1988 and the fact that the appellants had made a series of representations and appeals to several authorities after the acquisition process was initiated by the authorities. In the context of the appeals and the representations made by the appellants to administrative authorities, the Court *inter alia* observed that the appellants had failed to substantiate the following three factors in such appeals:

i. That the lands acquired were not suitable for the New Town Development in Karapitiya
ii. There is alternate or more suitable land available in the area for the said New Town Development work
iii. That the respondents acted in *mala fide* when they initiated the acquisition process.

It is apparent that the Court of Appeal had made this observation based on the real factual position and at no stage the Court of Appeal had held that there is a burden on the petitioners to establish *mala fides* if they were to succeed and obtain relief from the Court of Appeal. Therefore, I am of the view that the Court of Appeal had not erred and answer the first legal issue in the negative as the said Court had not concluded that proof of *mala fide* is a necessary factor for the appellants to have succeeded in the Court of Appeal.

In the context of the issue of *mala fides*, it is also pertinent to observe that one of the main initial submissions made on behalf of the appellants before this Court was that the impugned acquisition process is tainted with *mala fides and is discriminatory*. In fact the appellants, tendered additional material obtained on requests made under the Right to Information Act in support of such proposition. However, while the submissions were in progress and having considered all the material placed before this Court, including the further additional material submitted on behalf of the respondents with permission of Court, appellants retracted and abandoned the submission that the impugned acquisition process is discriminatory and tainted with *mala fides*. This Court observes that the initial assertion of the appellants based on *mala fides* lacks merit and the material tendered before this Court, does not reflect that the appellants were treated unequally or with malice based on ethnicity or any other factor.

I will now proceed to consider the other two legal issues on which, leave was granted by this Court.

Did the Court of Appeal err in law in determining that the public purpose has been disclosed as required under the law? ; and

Did the Court of Appeal fail to take cognizance of the fact that there was no urgency to make the said Order in terms of Section 38(2) of the Land Acquisition Act and as such is the said Order is ultra vires as per the provisions of the said Act?

In examining the aforesaid two questions of law, it is pertinent to observe that the notices issued under section 2 and proviso of section 38 (a) of the Act had been published on 22 June 1998 and on 03 February 2000, respectively. However, all the petitioners are in continued occupation of the respective lands and possession had not been handed over to the acquiring officer at any stage. Petitioners had invoked the jurisdiction of the Court of Appeal in the year 2013, fifteen years after the initial steps for acquisition. Taking into account the long time period that had elapsed from the initial steps on the impugned acquisition and the consideration of the appeal by this court and due to certain matters that were raised in the course of the submissions by the learned counsel for the appellants based on further material tendered to court by them in January 2021 this court directed the respondents to provide clarifications on matters identified by court. Such clarifications made on behalf of the respondents were tendered to court along with additional material in July 2021.

One of the main contentions on behalf of the appellants is that the notice issued under section 2 of the Land Acquisition Act is bad in law and therefore all subsequent steps that had been taken has no force of law.

It was submitted that the said notice fails to satisfy the legal requirements of a notice issued under section 2 of the Land Acquisition Act as determined by this Court. On behalf of the respondents, it was submitted that the impugned acquisitions were for a genuine public purpose and there is no material to establish that the authorities have acted illegally, unreasonably or failed to follow the procedure laid by law. Therefore, it was submitted that the Court of Appeal did not err when the appellant's applications for writs of certiorari and mandamus were refused. On behalf of the respondents it was further submitted that the law does not require reference to the specific public purpose in the section 2 notice and what is required is the availability of sufficient material to satisfy that a public purpose did in fact existed at the time such notice was published. In such an instance court should desist from granting discretionary remedies such as writs of certiorari or mandamus.

Both parties maintained aforementioned respective positions before the Court of Appeal too. The Court of Appeal in the impugned judgment had considered submissions made in this regard and had concluded that the absence of reference to the specific public purpose in the section 2 notice in the given situation does not warrant judicial intervention and refused the respondent's applications for writs of certiorari and mandamus.

Section 2 of the Land Acquisition Act reads as follows:

"(1) Where the Minister decides that land in any area is needed for any public purpose, he may direct the acquiring officer of the district in which that area lies to cause a notice in accordance with subsection (2) to be exhibited in some conspicuous places in that area.

(2) The notice referred to in subsection (1) shall be in the Sinhala, Tamil and English languages and shall state that land in the area specified in the notice is required for a public purpose and that all or any of the acts authorized by subsection (3) may be done on any land in that area in order to investigate the suitability of that land for that public purpose.

(3) After a notice under subsection (2) is exhibited for the first time in any area, any officer authorized by the acquiring officer who has caused the exhibition of that notice, or any officer acting under the written direction of the officer authorized as aforesaid, may enter any land in

that area, together with such persons, implements, materials, vehicles and animals as may be necessary, and-

(a) survey and take levels of that land,

(b) dig or bore into the subsoil of that land,

(c) set out the boundaries of that land and the intended line of any work proposed to be done on that land,

(d) mark such levels, boundaries and line by placing marks and cutting trenches,

(e) where otherwise the survey of that land cannot be completed and such levels taken and such boundaries and line marked, cut down and clear away any part of any standing crop, fence or jungle on that land, and

(f) do all other acts necessary to ascertain whether that land is suitable for the public purpose for which land in that area is required :

Provided that no officer, in the exercise of the powers conferred on him by the preceding provisions of this subsection, shall enter any occupied building or any enclosed court or garden attached thereto unless he has given the occupier of that building at least seven days' written notice of his intention to do so."

The aforesaid section appears in Part I of the Act, which is titled "Preliminary Investigation and Declaration of intended acquisition". Legislative scheme for land acquisition commences with the provisions in this part of the Act, the object being initially identifying and determining the suitability of a land to acquire for a public purpose. Under section 2 (2) the acquiring officer of the relevant district in which the land is situated is required to publish the stipulated notice upon receipt of a direction to that effect from the Minister. Required contents of such notice are further set out by sub section 2 of section 2 and the specific public purpose for which the land is to be acquired is not specifically identified as one such matter. The purpose of the publication of this notice is to authorize the relevant officers to conduct necessary investigations to determine the suitability of the land for the public purpose for which, the same is intended to be acquired. Subsection 3 of section 2 sets out the different acts that are authorized to be carried out for this purpose. However, this section requires a minimum of seven days written notice to the occupiers before any officer enters the land for such investigation. It is after such investigation, if the Minister considers that the land is suitable for the public purpose and needs to be acquired,

section 4(1) of the Act requires the Minister to direct the acquiring officer to inform the owners of the land on the intention to acquire the land for a public purpose and such notice gives a right to the owners of the land to raise any objections as provided under section 4(4) of the Act.

In **Manel Fernando** (supra) two petitioners invoked the jurisdiction of this court under Article 126 of the Constitution on the basis that their rights guaranteed under Article 12 were infringed. Petitioners in the said case alleged that the decision to acquire a land and the acquisition was arbitrary, capricious and unlawful. The court having examined all the material *inter alia* held that;

> *"The factual position immediately prior to the issue of the section 2 notice was as follows. The 2nd Respondent had made the 2nd Petitioner's occupation of the premises difficult, if not impossible; the 4th Respondent had then obstructed his efforts to sell his property. Thereupon, without any consideration by the Commissioner of Agrarian Services ("the Commissioner") of the need for a Govi Sevana Centre, or of the suitability of the Petitioner's land for such a Centre, without a request from him, and without even informing him, the 3rd Respondent had sought and obtained the 5th Respondent's approval for the acquisition; and only thereafter a proposal for acquisition had been prepared, and sent to the Commissioner, not for his approval but simply for transmission to the relevant Ministry. Not only did the 3rd and 4th Respondents act with remarkable speed - within days of the 2nd Petitioner advertising his property for sale - but both of them described the house as being unoccupied, without even a hint as to the circumstances in which the 2nd Petitioner had been forced to leave the premises,. There in no evidence that the Commissioner had decided that any land in the area - let alone the 2nd Petitioner's land - was needed for a Govi Sevana Centre or any other public purpose".*

The Supreme Court in the aforesaid case had further held that ;

> *"....the 1st Respondent had no material on which, objectively, it could reasonably have been concluded that the Petitioners' land was required for the stated public purpose of a Govi Sevana Centre; that he did not bona fide think that it was so required; and that he had misinformed the Hon. Prime Minister that the Commissioner had made a request for such acquisition. Further, although no formal order had been made under section 4 of the Land Acquisition Act, an inquiry was held into the 2nd Petitioner's objections to the acquisition, after which the inquiring officer (the Assistant Commissioner) had made a*

recommendation (which the Commissioner had subsequently approved), that the land should not be acquired: and that the 1st Respondent ignored or failed to consider. On the other hand, he placed undue reliance on the 5th Respondent's recommendation, which failed to take account of the relevant factors. I hold that in fact the Petitioners' land was not required for a public purpose, and that the acquisition was unlawful, arbitrary and unreasonable."

The Court having held that the decision to acquire under given circumstances had violated the right guaranteed under Article 12, proceeded to examine the lawfulness of the notice issued under section 2 of the Act. In my view the Court had to embark on this process due to the facts unique to the application under consideration.

In the said matter two petitioners invoked the jurisdiction of court and the 2nd Petitioner was the initial owner of the land relating to which the impugned decision to acquire was made. It appears that the owner, the 2nd Petitioner had at some point of time prior to the issuance of section 2 notice decided to sell the property in question and in fact published an advertisement to that effect. Therefore the Court had proceeded to examine the question *"Can it be said that if an owner wishes to sell his property, he cannot object if the State thereafter decides to acquire it ?".* Also it appears that the 2nd Petitioner at some point of time had transferred the property in question to the 1st Petitioner and the Court had to decide whether the fact that the 2nd petitioner transferred the land to the 1st petitioner did affect the rights of the 2nd petitioner to obtain relief from court.

It is in this background, Court examined several factors and the 2nd petitioner was granted relief on the basis that the section 2 notice was a nullity.

In reaching this conclusion the court considered several factors including the fact that the section 2 notice was issued in contravention of section 2(2) of the Act and a decision to acquire was reached even without an investigation being conducted as envisaged under section 3 of the Act. The court also proceeded to examine sections 2 and 4 of the Act and recognised that section 2 notice enables relevant officials initiating the investigation on the suitability of the land to be acquired for the public purpose and section 4 of the Act provides an owner to raise any objections relating to a proposed acquisition. In the context of the object of section 4 notice, the court correctly observed;

"that object would be defeated, and there would be no meaningful inquiry into objections, unless the public purpose is disclosed".

However, the court proceeded further to express the view that;

"If the public purpose has to be disclosed has to be disclosed at that stage, there is no valid reason why it should not be revealed at the section 2 stage",

and expressed the view that ;

"the scheme of the Act requires a disclosure of the public purpose, and its objects cannot be fully achieved without such disclosure. A section 2 notice must state the public purpose – although exceptions may perhaps be implied in regard to purposes involving national security and the like".

Therefore, when the aforementioned views regarding the need to disclose the public purpose in a section 2 notice was expressed in **Manel Fernando** (supra), the court had considered this aspect in the context of the main issues the court was focusing on. Main issues the court had to resolve in the said case were, whether the decision to acquire the property and the order issued under section 38 proviso (a) of the Act violated the Rights of the initial owner and whether he is entitled to any relief despite the fact that the property concerned had been transferred to a third party at a subsequent stage. The Court of Appeal in **Joseph Fernando v Minister of Lands** [2003] 2 SLR 294 followed the decision in Manel Fernando in deciding whether a section 4 notice issued under the Land Acquisition Law should disclose the public purpose. In **Mahinda Katugaha v Minister of Lands** [2008] 1 SLR 285, the Supreme Court followed **Manel Fernando** (supra) on the issue of the requirement to disclose the public purpose in notices issued under the Land Acquisition Act. The Court did not proceed to consider the facts that were peculiar to the said case when adopting the dicta. However, it is important to note that in **Mahinda Katugaha** (supra) the land of which the possession was handed over to the authorities had not been utilized for any purpose for nearly ten years and when it was vested on the UDA the UDA had allocated portions of the land to a private party. Based on these facts the court observed that

> *"this per se indicates that there was no public purpose urgent or otherwise at the time the Section 2 notice was made and indeed at the time the purported order under the proviso (a) to section 38 was gazette"* (at p 292).

In my opinion therefore that the view expressed in **Manel Fernando** should be considered in the context of facts peculiar to each case and should not be interpreted as a mandatory requirement applicable in relation to all notices issued under section 2 of the Act. However, the absence of the disclosure of the specific public purpose in section 2 notice can be one factor that the Court may take into account in deciding whether a decision to acquire in a given situation is lawful or not.

Therefore, in my view the Court of Appeal did not err when it proceeded to distinguish the facts of the matter under consideration and the facts in **Manel Fernando** (supra) in deciding whether the notice issued under section 2 of the Act is bad in law.

In **Kapugeekiyana v Hon Janaka Bandara Tennakone, Minister of Lands and others**, [2013] 1 SLR 192, Supreme Court having observed that a letter issued by the relevant Divisional Secretary several years after issuing the section 2 notice, clearly states that the land is required for the public purpose of 'urban development' came to the conclusion that *'that this purpose as a proportionately sufficient explanation for the acquiring of the land under the provisions of the Act".* (at page 199).

Furthermore, in **Seneviratne and others v Urban Council Kegalle and others** [2001] 3 SLR 105, respondents relied on the following passage in "Judicial Review of Administrative Action" by De Smith 5th edition 1995, in submitting that the applicants were not entitled to any relief ;

> *"If the applicant has not been prejudiced by the matters on which he relies then the Court may refuse relief even though he has succeeded in establishing some defect. The literal or technical breach of an apparently mandatory provision in a Statute may be so insignificant as not in effect to matter. In these circumstances the Court may in its discretion refuse relief."*

Justice Asoka De Silva, President Court of Appeal (as he then was) in the aforesaid case agreeing with the submissions of the respondents held that the absence of any reference to public purpose in a section 2 notice *per se* does not warrant such notice to be quashed, if the public purpose was known to the petitioners.

In **"Judicial Remedies in Public Law"** by Clive Lewis, (2000 – 2nd edition page 342 discusses the absence of prejudice as a factor that could be taken into account by judicial proceedings where a party seeks a discretionary remedy, as relief. It is stated

> *"The fact that the applicant has suffered no prejudice as a result of the error complained of may be a reason for refusing him relief. It is necessary to keep in mind the purpose of the public law principle that has technically been violated, and ask whether that underlying purpose has in any event been achieved in the circumstances of the case. If so, the courts may decide that the breach has caused no injustice or prejudice and there is no need to grant relief:*

Material presented before the Court of Appeal and the material placed before this Court in these proceedings reveal that at the time the acquiring officer issued the notice under section 2 of the Act, he was in possession of an initial application dated 05.01.1988 of Secretary Housing and Urban Development together with a plan depicting the lands in relation to which the said notice was issued. Thereafter during the period of thirteen years between the said notice and the application in the Court of Appeal series of discussions had taken place between the petitioners and officials relating to the proposed acquisition based on several complaints and or representations made on behalf of the petitioners. In the course of these discussions, issues on the need of the properties concerned for the public purpose as well as the mode of compensation including alternate property had been considered. Authorities had proposed to provide alternative housing accommodation as well as alternative commercial accommodation. Furthermore, the material tendered before this court as well as the Court of Appeal reveal that the Urban Development Authority had initiated steps in the year 1979, declaring the relevant area as a development area. Thereafter necessary applications had been made to acquire land for development of Karapitya town. It was subsequent to such steps the acquiring officer had published the notices under section 2 of the Act. Subsequent project proposals and plans tendered by the respondents reveal that steps are underway to develop the relevant area providing many facilities to the benefit of the public. Furthermore, proposed acquisition is not confined to the properties the appellants are in possession but includes properties of others who had already vacated those properties having handed over the possession to the acquiring officer. In my view, there is sufficient material available to conclude that a public purpose did exist in the context of acquisition of lands under consideration and such purpose is apparent to all relevant parties.

Therefore, taking into account the circumstances under which the Supreme Court made its decision in **Manel Fernando** (supra), the facts of the present appeals and the decision in **Seneviratne and others** (supra) I am of the view that the Court of Appeal had not erred when the application for writs of certiorari and mandamus were refused on the basis that no prejudice has been caused to the petitioners in the given situation.

In the context of alleged *ultra vires* in the notice issued under section 38 proviso (a) of the Act, petitioners mainly rely on the fact that the petitioners are still in occupation of the respective premises and claim that therefore no urgency exist. They contend that the fact that they are in continued possession negates the existence of any urgency for the authorities to have taken over vacant possession in the year 2000. However as enumerated hereinbefore, petitioners despite directions issued by authorities at various stages had not vacated the premises while engaging in discussions with authorities pursuing an amicable settlement based on the representations they made to different authorities including a Cabinet Minister whose subjects and functions did not include land acquisition or urban development. Therefore in my view the appellants cannot now rely on the concessions extended by the authorities to remain in possession while discussions were on foot, to substantiate their claim of non existence of an urgency.

Respondents claim that even after a period of more than two decades the concerned development project had not been completed due to the conduct of the appellants.

It is also pertinent at this stage to observe that the appellants had urged this Court not to consider material submitted by the respondents while the hearing was continuing on the basis that the rights of the parties must be determined as at the date of the institution of proceedings. The appellants relied on **Ponnamma v Arumugam** 8 NLR 223 and **Siththi Makeeena and others v Kuraisha and others** [2006] 2 SLR 341. The Privy Council in **Ponnamma** (supra) reiterated the rule on the construction of statutes that the *"rights of the parties must be decided according to the law as it existed when the action was commenced"*. In my view proceedings before this court does not breach the said rule. Furthermore in **Siththi Makeena and others** (supra) the question the court had to decide was whether an application to add parties should be allowed or not and the court observed that this issue should be decided based on the nature of the dispute that existed between the parties at the time the proceedings were instituted.

In my view the court taking cognizance of the material submitted by the respondents while the arguments were in progress does not change the nature of the issues and law that existed at the time proceedings were instituted but provides an opportunity for the court to make a

determination in the proper context, specially in a situation of this nature where the appellants invoked the jurisdiction of the Court of Appeal after a lapse of a period of thirteen years from the time of the impugned order and altogether more than two decades had lapsed between the impugned order and the judgment of this court. The appellants were not denied the right to contest and respond to the material tendered by the respondents. It is also pertinent to observe that the events that had taken place between the impugned order and the judgment of this court is relevant in determining whether there is prejudice caused to the appellants, a factor that a court is entitled to take into account in deciding whether a writ should be issued or not. The material so tendered to court includes plans and sketches of the area where the development project is being carried out. Such material not only depicts the nature of the project, the area where the properties are located and the benefit to the general public when the project is complete. Furthermore, these sketches and plans assist to comprehend the extent to which the completion of the project is adversely affected due to the continued failure on the part of the appellants to hand over the vacant possession of the portions of land for a period of more than two decades.

Respondents further contended that the unavailability of the vacant possession of lands in question had hindered the progress of the development project causing financial losses. Furthermore, a letter authored by the Minister of Urban Development, Housing and Construction in October 1999 reveal that the lands in question were acquired to carry out phase II of Karapitiya Development Programme. The said minister had recommended the Minister of Land to take steps to obtain possession under section 38(a) proviso of the Act.

It is also pertinent to observe during the period between section 38(a) order and the filing of applications in the Court of Appeal, steps have been taken to determine compensation as required under the Act and such funds were deposited in court as provided under section 17 of the Act enabling the appellants to establish their respective claims and obtain compensation. However, the voluntary inaction on the part of the appellants had delayed them obtaining lawful compensation after establishing their respective claims. By the year 2013, the Urban Development Authority had transferred Rupees forty six million to the Divisional Secretary for the purpose of paying compensation in relation to the acquisition of properties concerned.

It is also pertinent to observe that on behalf of the appellants it was submitted that granting of writ by this court quashing the section 38(a) order at this stage would not cause any adverse impact to the acquisition process initiated two decades ago but will only require the authorities to take necessary steps as required in relation to a non-urgent acquisition as provided under the Act.

Therefore it is claimed that issuing a writ at this stage will not adversely impact on the progress of the project. I am unable to agree with this submission. In this regard, I observe that already the authorities had taken steps as provided under the Act and had deposited the compensation in court having assessed as provided under the law enabling the appellants to obtain such compensation after establishing their rights. Therefore, forcing the authorities to recommence the acquisition process without resorting to obtain possession based on section 38(a) notice issued twenty years ago in my view would cause serious obstruction and impede the progress of the project, which is already stalled over a long period of time.

In **"Judicial Remedies in Public Law"** (supra) it is observed;

> *"The courts now recognize that the impact on the administration is relevant in the exercise of their remedial jurisdiction. Quashing decisions may impose heavy administrative burdens on the administration, divert resources towards re-opening decisions, and lead to increased and unbudgeted expenditure". (at page 347)*

The Supreme Court in **Heather Therese Mundy v Central Enviornmental Authority *et al***, SC Appeal 58-60/2003, SC minutes of 20th January 2004, considered whether the Court of Appeal erred when the court refused to grant writs of certiorari and mandamus. One of the criteria the Court of Appeal took into consideration in refusing relief was whether the court has the discretion in deciding whether to grant or refuse the remedy, in situations where the wider public interest is at stake, even if the impugned decision affects certain individuals. The Supreme Court having considered all the facts and circumstances held that the *"refusal of relief by way of writ, in the exercise of the Court's discretion was justified"*. (at page 16). However, the Supreme Court proceeded to grant compensation to the appellants on the basis that their was a breach of rights under Article 12(1) and the principles of natural justice.

Taking all the matters that were discussed herein before into consideration, I am of the view that the absence of any specific finding by the Court of Appeal in the judgment on the existence of urgency does not warrant issuing a writ of certiorari at this stage quashing the section 38(a) order by this Court, taking into account the delay that had taken place in completing a project that would be of great benefit to the general public and the adverse impact of such delay on the overall cost to be incurred to complete the said project.

It is pertinent to place on record that while oral submissions were in progress, in this matter, proceedings were adjourned enabling the parties to consider whether an amicable settlement

could be reached on terms and conditions acceptable to all parties, without prejudice to their right to pursue these appeals. On behalf of the appellants their main concern was the amount of compensation and the nature of alternate accommodation offered. On behalf of the respondents their main concern was the long time period that had been spent for the acquisition and the adverse impact such delay has on the completion of the project. Therefore, on behalf of respondents it was submitted that they may consider calculating compensation as per the value of the properties at the time the appellants initiated proceedings in the Court of Appeal namely by the year 2013, in the event an amicable settlement is reached. However, as no settlement was materialized, all parties were granted the opportunity to make full submissions in support of their respective cases and this judgment is delivered accordingly. However, this judgment does not preclude the appellants from pursuing compensation and or any appeals as provided by law. Appellants may proceed to establish their respective rights in court and obtain compensation as the authorities had already taken steps to deposit funds in court, as provided under the law.

In view of the foregoing, I am of the view that there is no merit in these appeals and all three appeals are dismissed.

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

Hettiarachchige Don Sugath
Nandana,
Meda Arambe,
Nawagamuwa,
Devalegama.
Plaintiff

SC APPEAL NO: SC/APPEAL/18/2021
SC LA NO: SC/HCCA/LA/477/17
HCCA KEGALLE NO: WP/HCCA/KEG/12/2016/F
DC KEGALLE NO: 6847/L

Vs.

Caroline Hewa Abewickrama,
Pussella,
Devalegama,
Kegalle.
Defendant

AND BETWEEN

Caroline Hewa Abewickrama,
Pussella,
Devalegama,
Kegalle.
Defendant-Appellant

Vs.

Hettiarachchige Don Sugath
Nandana,
Meda Arambe,
Nawagamuwa,
Devalegama.
Plaintiff-Respondent

AND NOW BETWEEN

Caroline Hewa Abewickrama,
Pussella,
Devalegama,
Kegalle.
Defendant-Appellant-Appellant

Vs.

Hettiarachchige Don Sugath
Nandana,
Meda Arambe,
Nawagamuwa,
Devalegama.
Plaintiff-Respondent-Respondent

Before: P. Padman Surasena, J.
Kumudini Wickremasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Dr. Sunil F.A. Coorey with Sudarshani Coorey for the Defendant-Appellant-Appellant.

Ranjan Suwandaratna, P.C., Shammil Perera, P.C., with Primal Ratwatte and Gimhani Gamage for the Plaintiff-Respondent-Respondent.

Argued on : 01.11.2021

Written submissions:

by the Defendant-Appellant-Appellant on 19.08.2021 and 15.02.2022.

by the Plaintiff-Respondent-Respondent on 27.04.2021 and 18.01.2022.

Decided on: 17.11.2022

Mahinda Samayawardhena, J.

Introduction

The plaintiff filed this action in the District Court of Kegalle seeking a declaration that he is the owner of the immovable property described in the schedule to the plaint by deed No. 6165 marked P2, ejectment of the defendant therefrom and damages. The defendant, who was the transferor of the property by deed P2 to the plaintiff, filed answer seeking dismissal of the plaintiff's action and a declaration that the plaintiff is holding the property by deed P2 in trust for the defendant. In the alternative, the defendant prayed that deed P2 be set aside on the ground of *laesio enormis*. After trial, the District Court entered judgment for the

plaintiff. On appeal, the High Court affirmed the said judgment. Hence this appeal by the defendant to this Court.

This Court granted leave to appeal on the question of law whether the District Court and the High Court erred in deciding that there was no evidence to prove that the defendant did not intend to part with the beneficial interest in the property when deed P2 was executed. On behalf of the plaintiff, a purported consequential question of law was raised to say that the defendant cannot raise trust and *laesio enormis* in the same action. In my view, the latter cannot be a consequential question since this Court did not grant leave to appeal to the defendant on the question of *laesio enormis*.

Constructive trust

The only question for decision in this appeal is whether deed P2 is an outright transfer or a transfer effected subject to a constructive trust.

A constructive trust is largely an equitable remedy for the benefit of the rightful owner of the property against the person holding the legal right to the property in an inequitable and unconscionable manner. Unlike in an express trust, in the case of a constructive trust, the intention of the parties is not apparent. Section 3(p) of the Trusts Ordinance, No. 9 of 1917 defining express trust states "*express trust means a trust that is created by the author of the trust generally in the form of an instrument in writing with certainty indicating the intention of the trust, but does not include a constructive trust or a de facto trust, whether charitable or not*".

Chapter IX of the Trusts Ordinance (sections 82-98) deals with categories of constructive trusts. What is relevant in the instant

case is the category described under section 83 of the Trusts Ordinance, which runs 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.*

If it can be inferred by Court, as stated in section 83, from "the attendant circumstances" (the circumstances which precede or follow the transfer) that the owner did not intend to dispose of the beneficial interest in the property when he transferred the legal interest to the transferee, an obligation in the nature of a constructive trust is considered to have been created. However, there is no general principle to determine "the attendant circumstances" on which a constructive trust can be held to have been established. Whether or not a constructive trust has been created is a question of fact. As the term "constructive trust" denotes, the Court construes that the defendant should be treated as the trustee of the property. In *Carl Zeiss Stiftung v. Herbert Smith (No 2) [1969] 2 Ch 276 (CA)*, Edmund-Davies L.J. stated "*English Law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague so as not to restrict the court by technicalities in deciding what the justice of a particular case might demand*." The onus of proof of a constructive trust is on the person who claims such a trust. The test is objective as opposed to subjective (*De Silva v. Silva (1956) 58 NLR 145, Wijeyaratne v. Somawathie [2002] 1 Sri LR 93).*

As held in the case of *Piyasena v. Don Vansue [1997] 2 Sri LR 311*:

> *The trust is an obligation imposed by law on those who try to camouflage the actual nature of the transaction. When the attendant circumstances point to a loan transaction and not a genuine sale transaction the provisions of section 83 of the Trust Ordinance apply.*

Section 96 quoted below, which falls within Chapter IX of the Trusts Ordinance, is a residuary section without limitation (*Seelachchi v. Visuvanathan (1922) 23 NLR 97*).

> *In any case not coming within the scope of any of the preceding sections where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.*

Acceptance of parol evidence notwithstanding section 2 of the Prevention of Frauds Ordinance and sections 91 and 92 of the Evidence Ordinance

Section 5(1) of the Trusts Ordinance requires that a declaration of trust of immovable property shall be notarially executed:

> *Subject to the provisions of section 107, no trust in relation to immovable property is valid unless declared by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed.*

In addition, section 2 of the Prevention of Frauds Ordinance, No. 7 of 1840, and sections 91 and 92 of the Evidence Ordinance, No. 14 of 1895, mandate that transactions in relation to immovable property be notarially executed and that no oral evidence is permitted to be led to contradict such documents.

Despite the above express provisions, parol evidence is nevertheless admitted to establish a constructive trust. This is justified on different grounds.

The Trusts Ordinance was enacted subsequent to the Prevention of Frauds Ordinance and the Evidence Ordinance and therefore in the event of a conflict, the later Act should prevail. *Maxwell on The Interpretation of Statutes*, 12th Edition, page 193 states "*If, however, the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the earlier is abrogated by the later.*"

In *Bernedette Vanlangenberg v. Hapuarachchige Anthony [1990] 1 Sri LR 190 at 202*, the Supreme Court took the view that section 2 of the Prevention of Frauds Ordinance is applicable only to the trusts created under Chapter II of the Trusts Ordinance and not to the constructive trusts created under Chapter IX of the Trusts Ordinance.

It is also significant to note that although section 5(1) of the Trusts Ordinance enacts that no trust in relation to immovable property is valid unless notarially executed, section 5(3) further provides "*These rules do not apply where they would operate so as to effectuate a fraud.*" (*Ehiya Lebbe v. Majeed (1947) 48 NLR 357*) This means where fraud is alleged, the formalities are not insisted upon; even an oral agreement is sufficient.

In the Privy Council case of *Valliyammai Atchi v. Abdul Majeed (1947) 48 NLR 289* it was held:

> *The formalities required to constitute a valid trust relating to land are to be found in section 5 of the Trusts Ordinance and not in section 2 of the Prevention of Frauds Ordinance; that the act of the widow in seeking to ignore the trust and to retain the property for the estate was to effectuate a fraud; that, therefore, under section 5(3) of the Trusts Ordinance even a writing was unnecessary and sections 91 and 92 of the Evidence Ordinance had no application.*

The applicability of section 2 of the Prevention of Frauds Ordinance, which enacts that instruments affecting immovable property shall be of no force or avail in law unless notarially attested, has to be relaxed in the case of constructive trusts, as the Prevention of Frauds Ordinance designed to prevent fraud cannot be allowed to be misused to cover fraud. In some cases of constructive trusts, there is a non-notarial document executed in parallel to the notarially executed one manifesting the true intention of the parties. Such informal writings can be led in evidence notwithstanding section 2 of the Prevention of Frauds Ordinance and sections 91 and 92 of the Evidence Ordinance (*Dissanayakage Malini v. Mohomed Sabur [1999] 2 Sri LR 4*).

In terms of the first proviso to section 92 of the Evidence Ordinance quoted below, sections 91 and 92 of the Evidence Ordinance would not apply if parol evidence is to be led to invalidate an instrument on fraud, mistake etc:

> *Any fact may be proved which would invalidate any document, or which would entitle any person to any decree*

> *or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law.*

The fact that a notarially executed written document is not an indispensable requirement to create a trust is also discernible by section 107 of the Trusts Ordinance, which recognises "*De facto* trusts". It reads as follows:

> *In dealing with any property alleged to be subject to a charitable trust, the court shall not be debarred from exercising any of its powers by the absence of evidence of the formal constitution of the trust, if it shall be of opinion from all the circumstances of the case that a trust in fact exists, or ought to be deemed to exist.*

Attendant circumstances in favour of a constructive trust

I take the view that the learned District Judge has failed to evaluate the evidence in the proper perspective.

A proper analysis of the evidence led before the District Court demonstrates that the real reason for the execution of deed P2 was to secure a loan from the plaintiff and there was no intention to effect an outright transfer of the property. Let me now justify this finding.

The property in suit is the residential property of the defendant. The defendant had mortgaged the property to the Rural Bank to obtain a loan of Rs. 75,000 on 06.02.1997 at an interest rate of 30% per annum. The plaintiff himself produced this Mortgage Bond marked P4. According to the defendant, she obtained a loan

of Rs. 100,000 from the plaintiff to be repaid with interest at a rate of 20% per annum to redeem the said mortgage offering this property as security, although the impugned deed P2 is *prima facie* an outright transfer. This contention is acceptable, as deed P2 was executed and the mortgage to the Rural Bank was admittedly redeemed on the same day, i.e. 07.03.2000.

There is no dispute that the consideration passed on deed P2 is Rs. 100,000. If deed P2 was a genuine sale, as the plaintiff claims, the defendant would have had to pay more than the selling price of the property to the Rural Bank to redeem the mortgage (Rs. 75,000 with 30% interest from 06.02.1997 to 07.03.2000)! If that were the reality, the defendant could have simply stayed away and allowed the Rural Bank to sell the property to recover its dues. This in itself demonstrates that the defendant by executing P2 intended not to part with the property but to continue to possess the property.

The plaintiff has admitted in evidence that he lends money to others; he is a money lender. The transfer deeds marked D5 of 2005 and D6 of 2001 bear testimony to this. Although they are *prima facie* outright transfers in favour of the plaintiff in relation to different lands by different people, the plaintiff himself in re-examination admitted that deeds D5 and D6 are securities taken by him for loans.

It is significant to note that in deed D5, the attesting witnesses are Somaratne and Piyasena; in deed D6, the attesting witnesses are Somaratne and Herath Banda. In the impugned deed P2, the attesting witnesses are Herath Banda and the plaintiff's wife. In P5, which I will refer to later, the first witness is Somaratne. Apart from the plaintiff's own evidence, the only witnesses called by him

to substantiate his case are Somaratne and Herath Banda. This indicates that they work as a team lending money at high interest rates and retaining immovable properties as securities.

According to the plaintiff's evidence, he does not know the exact boundaries of the land and the layout of the house standing on it where the defendant lives.

The plaintiff has admitted in evidence that he does not have the title deed of the defendant although he purchased the property by P2. The title deed is still with the defendant. In a genuine sale transaction, in the ordinary course of events, the old deeds of the seller are given to the purchaser.

Even after this transaction, up to now, the defendant has continued to live on the property with her family. The continuation of possession of the property even after the alleged transfer is a well-known "attendant circumstance" in favour of a trust.

The document strongly relied upon by the learned District Judge to hold against the defendant on this point is the existence of P5 whereby the defendant, whilst accepting that she sold the property to the plaintiff, has promised to leave the premises within three months from the date of that document, i.e. from 22.06.2002. The parties are at variance on the circumstances in which P5 was given by the defendant. Be that as it may, it is relevant to note that P5 was obtained by the plaintiff not on the same day on which deed P2 was executed but more than two years after the execution of P2: P2 is dated 07.03.2000 and P5 is dated 22.06.2002. P6 is a similar letter issued by the defendant to the Ceylon Electricity Board permitting the monthly electricity bills to

be changed in the name of the plaintiff. By D3, which is referred to in the next paragraph, the defendant promised to get the land released within two years of the execution of deed P2. P5, written two years after P2, is, in my view, consistent with the defendant's version that P2 was not an outright transfer.

Another strong "attendant circumstance" in favour of a trust is the informal agreement marked D3 through the plaintiff. According to the defendant, this non-notarial document was signed contemporaneously with deed P2. It bears the same date as that of deed P2. The plaintiff identifies his wife's signature on D3. By this document the defendant, whilst stating that she sold the property to the plaintiff by P2, further states that she undertakes to get the land released by paying Rs. 100,000 with 20% interest per annum within two years. ("එකී රුපියල් ලක්ෂයේ මුදල හා පොලිය (20%) ගෙවා ඉඩම නිදහස් කර ගන්නා බවටත්, කෑගල්ල දේවාලේගම, පුස්සැල්ල පදිංචි ක්ලරැයින් හේවා අබේවික්‍රම වන මම මෙයින් පොරොන්දු වෙමි.") The signatories to D3 are the defendant and the two attesting witnesses to deed P2, one of whom is the plaintiff's wife. It is clear that if the defendant by P2 transferred both her legal and beneficial interest in the land, D3 is meaningless. D3, in my view, illustrates that P2 is not an out and out transfer.

The argument advanced by learned President's Counsel for the plaintiff that at the most D3 is a contract to repurchase the property by the defendant, in which class of contract time is of the essence, and the defendant failed to pay the money to retransfer the property within two years of the execution of deed P2 and therefore the plaintiff's action shall fail, is unacceptable. Such a conclusion could be arrived at only on the footing that the defendant transferred both her legal and beneficial interest in the property by deed P2 (*Dayawathie v. Gunasekera [1991] 1 Sri LR*

115 at 120-121). L.J.M. Cooray in his masterpiece *The Reception in Ceylon of the English Trust* at page 129, whilst stating that an agreement to reconvey could come within section 96 of the Trusts Ordinance (residuary section in Chapter IX which deals with constructive trusts), further explains at 129-130:

> *If there is a trust, the contractual rule that time is of the essence of the contract would not be relevant and it would be unnecessary to insist that the purchase money should be tendered within the specified period. If this is so, a trust under section 83 will also arise where a person has transferred property subject to a notarial agreement to reconvey within a specified period, and he cannot enforce the agreement because the period has elapsed. But if within a reasonable period the purchase price has not been repaid it may be assumed that the transferor has no intention of exercising the right of repurchase and has therefore parted with the beneficial interest.*

The inadequate consideration on the face of the deed and the actual value of the property is another "attendant circumstance" which favours the view that the beneficial interest has not been parted with.

Different interpretations have been given by the parties to the document marked D8. By D8 dated 25.02.2002 (which date falls within the period of two years from the execution of deed P2), the defendant agreed to sell the property to the plaintiff's daughter for a sum of Rs. 500,000 having already collected Rs. 100,000 from the plaintiff. This indicates that the value of the property was much higher than Rs. 100,000 at the time of the execution of deed P2. If the defendant wanted to part with both the legal and

beneficial interest in the land at the time of the execution of deed P2, she would not have sold the land for a sum of Rs. 100,000. There is no evidence that the defendant was looking for buyers to sell this land or that the land price increased by four times the value within two years.

In the Supreme Court case of *Premawathi v. Gnanawathi [1994] 2 Sri LR 171* the following facts were established through evidence:

(a) The defendant was in urgent need of money at the time she sold her land to the plaintiff on P1 for a sum of Rs. 6,000.
(b) The plaintiff by a non-notarial document agreed to retransfer the land to the defendant upon payment of the said sum of Rs. 6,000 within a period of 6 months and although the defendant tendered the money to the plaintiff within that period the retransfer could not be effected because the plaintiff was in hospital.
(c) Although the consideration on P1 was Rs. 6,000 the plaintiff admitted that the value of the land was about Rs. 15,000.
(d) The plaintiff's evidence was that she was ready and willing to re-transfer the land to the defendant within the period of 6 months. This was considered to be indicative of the fact that the plaintiff realised that there was an obligation attached to her ownership of the land.
(e) The possession of the land remained with the defendant.

On the said findings of fact, G.P.S. de Silva C.J. at page 175 concluded:

> *In my view, the above facts and circumstances point to a "constructive trust" within the meaning of section 83 of the*

Trusts Ordinance. In other words, "the attendant circumstances" show that the 1st defendant did not intend "to dispose of the beneficial interest" in the land by P1.

In the Supreme Court case of *Dayawathie v. Gunasekera [1991] 1 Sri LR 115*, the following "attendant circumstances" were considered sufficient to demonstrate that the original plaintiff (transferor) hardly intended to dispose of his beneficial interest in the property:

(a) The oral promise to reconvey the property in suit on receipt of Rs. 17,000 comprising the money advanced and the interest thereon.
(b) The original plaintiff continuing to remain in possession of the property.
(c) The original plaintiff's agreement to pay all future instalments due on account of the loan obtained from the National Housing Department.
(d) The gross disparity between the consideration on the face of the deed (Rs. 17,000) and the market value of the property (Rs. 70,000-80,000)
(e) The first defendant's failure to take steps to assert her ownership pursuant to the purchase until she received the letter of demand, namely, the failure to get her name registered as the owner in the assessment register of the local authority and non-payment of instalments payable to the National Housing Department.
(f) The original plaintiff taking steps to obtain a loan from the State Mortgage Bank soon after the transaction to pay off debts due to the defendants and to the National Housing Department.

Similarly, continued possession after the alleged transfer by the transferor; inadequate purchase price; failure to cause examination of the title of the property prior to the purchase; failure to produce the old deeds were considered in *Carthelis v. Ranasinghe [2002] 2 Sri LR 359* to be circumstances in favour of a constructive trust.

(*vide* also *Wijeytilaka v. Ranasinghe (1931) 32 NLR 306, Ehiya Lebbe v. Majeed (1947) 48 NLR 357, Thisa Nona v. Premadasa [1997] 1 Sri LR 169, Perera v. Fernando [2011] 2 Sri LR 192*)

Conclusion

The attendant circumstances in the instant case do not show that the defendant intended to dispose of the beneficial interest in the property to the plaintiff by deed P2 and that the plaintiff is a *bona fide* purchaser of the property. Hence it can be concluded that the plaintiff is holding the property for the benefit of the defendant, creating a constructive trust within the meaning of section 83 of the Trusts Ordinance.

The learned District Judge failed to analyse and evaluate the evidence in the proper perspective. The High Court merely endorsed the conclusion of the District Court.

I answer the question of law raised on behalf of the defendant in the affirmative and set aside the judgments of the District Court and the High Court and allow the appeal with costs. The consequential question of law raised on behalf of the plaintiff does not arise for consideration here.

The plaintiff lent Rs. 100,000 to the defendant with interest at a rate of 20% per annum. This happened on 07.03.2000. Indeed,

the defendant could not pay the money with interest within two years as agreed. After the lapse of two years, the plaintiff took up the position that deed P2 is an outright transfer, thereby preventing the defendant from repaying the money to effect a retransfer of the property.

Taking all the circumstances into account, I direct that the defendant deposit a total sum of Rs. 870,303.35 (calculated at a compound annual interest rate of 10% from 07.03.2000 to 17.11.2022) to the credit of the case within five months from today for the plaintiff to withdraw. If the money is so deposited with notice to the plaintiff, the plaintiff shall retransfer the property in the name of the defendant within one month thereof. If the plaintiff fails to do so, the Registrar of the District Court shall effect the transfer. All expenses of the conveyance of the property shall be borne by the defendant. The Registrar of this Court shall transmit the case record to the District Court forthwith for the parties to comply with these directions.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Kumudini 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 for Leave to Appeal under and in terms of the Article 128(2) of the Constitution read with Section 5C of the High Court of Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

Ummu Yasmin Mulafer,
No. 39/5, Railway Lane,
Colombo 02.

Plaintiff

SC Appeal No: 23/2019
SC Leave to Appeal No: SC/HCCA/LA/185/2018
HCCA Case No: WP/HCCA/HO/43/2017 (F)
DC Kaduwela Case No: 277/L

Vs.

1. Merinnage Rupika Wijesingha,
   No. 9/D/193, Jayawadanagama,
   Battaramulla.
2. P. Sunil Lakshman Fernando,
   No. 3/D/47, Jayawadanagama,
   Battaramulla.

Defendants

AND

Ummu Yasmin Mulafer,
No. 39/5, Railway Lane,
Colombo 02.

Plaintiff-Appellant

Vs.

1. Merinnage Rupika Wijesingha,
   No. 9/D/193, Jayawadanagama,
   Battaramulla.
2. P. Sunil Lakshman Fernando,
   No. 3/D/47, Jayawadanagama,
   Battaramulla.

Defendant-Respondents

AND NOW BETWEEN

Merinnage Rupika Wijesingha,
No. 9/D/193, Jayawadanagama,
Battaramulla.

1st Defendant-Respondent-Petitioner

Vs.

Ummu Yasmin Mulafer,
No. 39/5, Railway Lane,
Colombo 02.

Plaintiff-Appellant-Respondent

P. Sunil Lakshman Fernando,
No. 3/D/47, Jayawadanagama,
Battaramulla.

2nd Defendant-Respondent-Respondent

Before: **Justice L.T.B. Dehideniya**
Justice Yasantha Kodagoda, PC
Justice A.L. Shiran Gooneratne

Counsel: Thanuka Nandasiri with Susil Wanigapura appear for the **1st Defendant-Respondent-Petitioner.**

Shafraz Hamza, AAL appears for the **Plaintiff-Respondent-Respondent** instructed by R.M. Irsath.

Argued on: 18/05/2022

Decided on: **06/10/2022**

A.L. Shiran Gooneratne J.

The Plaintiff-Appellant-Respondent (referred to as the Plaintiff) filed Plaint dated 28/06/2010 against the 1st and 2nd Defendant-Respondent-Petitioners (referred to as the 1st and 2nd Defendants, respectively) in the District Court of Kaduwela seeking *inter alia*, a declaration of title to a corpus of 3.17 perches in extent , identified as residential premises bearing assessment No. 9/D/193, Jayawadanagama, Battaramulla, morefully

described in the schedule to the Plaint, the ejectment of the 1st Defendant and all those holding under her, restoration of possession of the said allotment to the Plaintiff and damages.

The said premises was initially vested with the National Housing Development Authority and by Deed No. 914 dated 18/01/1990, marked 'P1', was transferred to one Wijeyanthi Miguel Hewaratne and thereafter by Deed No. 2198 dated 08/11/2006, marked 'P2', the said Wijeyanthi Miguel Hewaratne transferred the said property to the 2nd Defendant. The 2nd Defendant by Deed No. 16 dated 21/01/2008, marked 'P3', transferred the property to the Plaintiff. The 2nd Defendant, the brother-in-law of the 1st Defendant, and his parents vacated the premises and handed over vacant possession to the Plaintiff within two weeks of the said Deed of transfer dated 21/01/2008. The cause of action of the Plaintiff arises on the continued occupation of the said premises by the 1st Defendant.

The 1st Defendant in her answer claimed *inter alia*, entitlement to the said property by prescription against her predecessors in title and sought for a dismissal of the Plaint. The Plaintiff filed replication dated 13/05/2011, and claimed that the 1st Defendant was a licensee of the 2nd Defendant and therefore, the 1st Defendant cannot claim prescriptive title to the subject matter. The 2nd Defendant admitted the Plaintiffs title and prayed for a dismissal of the action.

There was agreement between the parties on the identity of the corpus and the Plaintiffs documentary title to the subject matter. At the conclusion of the trial the learned District Judge by Judgement dated 31/07/2013 held *inter alia*, that the 1st Defendant resided in the said premises for over 10 years, made improvements and has acquired prescriptive

title to the corpus in suit and accordingly, decided in favour of the 1st Defendant and granted relief as prayed for in the answer.

Aggrieved by the said decision, the Plaintiff appealed to the Homagama High Court of Civil Appeal seeking, *inter alia*, to set aside the said Judgement dated 31/07/2013. The Civil Appeal Court, by Judgement dated 03/05/2018, held that the 1st Defendant did not satisfy adverse, undisturbed and independent possession against the true owner and as such cannot claim prescriptive title. The 1st Defendant is before this Court challenging the said Judgement.

This Court by Order dated 08/01/2019, granted Leave to Appeal on the questions of law stated in paragraph 19 (a) and (c) of the Petition of Appeal dated 06/06/2018, as set out below.

1. Did Honourable Judges of the Provincial High Court of Western Province (Exercising Civil Appellate Jurisdiction) Holden at Homagama err in law and fact to hold that the Petitioner has failed to establish her prescriptive title to the subject matter?
2. Did Honourable Judges of the Provincial High Court of Western Province (Exercising Civil Appellate Jurisdiction) Holden at Homagama err in fact to hold that the Petitioner is a licensee of the 2nd Defendant?

The 1st question of law is formulated on the basis that, the 1st Defendant is the licensee of the 2nd Defendant and therefore, the 1st Defendant cannot claim prescriptive title to the subject matter. The 2nd Defendant became the absolute owner of the premises in suit by Deed of Transfer No. 2198, dated 08/11/2006, marked 'P2' and the Plaintiff by Deed of Transfer No. 16, dated 21/01/2008, marked 'P3'.

The 1st Defendant's position is that subsequent to her marriage to the brother of the 2nd Defendant, the 2nd Defendant and their parents agreed to part with the subject matter in her favour and since then, the 1st Defendant enjoyed the said premises as her own (ud dominus). The 1st Defendant in her testimony before the trial court, marked several documents in proof of improvements carried out on the said premises to establish independent and adverse possession to that of the interest of the 2nd Defendant.

The Plaintiff raised Issue No. 6 to establish that the 2nd Defendant as the vendor was obligated to hand over vacant, uninterrupted and peaceful possession to the Plaintiff, but failed to fulfil his duty by not placing the Plaintiff in possession of the subject matter. A verbal agreement had been reached between the Plaintiff and the 2nd Defendant to hand over vacant possession of the premises to the Plaintiff by 07/02/2008.

The position of the Plaintiff is that the 1st Defendant was an occasional visitor to the subject matter. It is contended that the 1st Defendant unlawfully and forcibly remained in the said premises until 07/02/2008, two weeks from the date of transfer of the premises in suit to the Plaintiff. The said agreement was not a precondition to the said transfer. Eventhough the Plaintiff claimed in her replication dated 13/05/2011, that the 1st Defendant was a licensee of the 2nd Defendant, the 2nd Defendant has not subscribed to such a stand anywhere in these proceedings.

The transfer of the premises by the 2nd Defendant to the Plaintiff by Deed dated 21/01/2008, marked 'P3' was on the basis that the 2nd Defendant was the vendor and the absolute owner of the premises. In paragraph 12 of the Plaint the cause of action against the 2nd Defendant was limited to a claim in damages. Accordingly, the trial court permitted both causes to proceed in one and the same action.

The 1st Defendant also contended that she was in possession of the said premises since 1993, through her marriage to the 2nd Defendant's brother and claims entitlement to their matrimonial house on the basis that the 2nd Defendant and their parents agreed to transfer the property to her husband.

As noted earlier, the said premises was initially owned by the National Housing Development Authority and by virtue of Deed marked 'P1' dated 18/01/1990, was transferred to one Wijeyanthi Miguel Hewaratne. By Deed marked 'P2' dated 08/11/2006, the said Wijeyanthi Miguel Hewaratne transferred the said property to the 2nd Defendant. There is no evidence that the said Wijeyanthi Miguel Hewaratne was in possession of the said property since 1990 or that the 1st Defendant was a licensee of the said Wijeyanthi Miguel Hewaratne.

Knowing the settled law as we do, in the case of immovable property, when a Defendant claims prescriptive title adverse to and independent of that of the Plaintiffs title, initially, the burden is on the Plaintiff to prove title to the land in suit on a balance of probability.

The issue that arose for determination in the instant case is whether the Plaintiff's documentary title to the subject matter by virtue of Deed No. 16 dated 21/01/2008, ranks higher than the 1st Defendant's claim of prescriptive title. As noted earlier, the documentary title of the Plaintiff to the premises in suit is unchallenged and therefore, the burden now shifts to the 1st Defendant to establish the plea of prescriptive title with strong and cogent evidence.

Prescriptive title of the 1st Defendant

In **Priyangika Perera vs. Gunasiri Perera (SC Appeal No. 59/2012)**, Prasanna Jayawardena PC, J. observed that;

"a plaintiff who claims a right of way by prescription must establish the requisites stipulated in section 3 of the Prescription Ordinance. This means that, as set out in section 3, the Plaintiff has to prove that: he has had undisturbed and uninterrupted possession and the use of the right of way for a minimum of ten years and that such possession and use of the right of way has been adverse to or Independent of the owner of the land and without acknowledging any right of the owner of the land over the use of that right of way."

As observed earlier, the Plaintiff came into Court to vindicate her paper title which is uncontested. In the circumstances, the learned counsel for the Plaintiff submitted that the 1st Defendant failed in discharging the burden of proof on prescriptive title. The learned Counsel relied on **Juliana Hamine vs. Don Thomas (59 N.L.R. 546 at page 548)**, where L.W. De Silva A.J. held,

"The paper title being in the 2nd and 3rd Defendants, the burden of proving a title by prescription was on the Plaintiff. That burden he has failed to discharge. Apart from the use of the word possess, the Witnesses called by the Plaintiff did not describe the manner of possession. Such evidence is of no value where the Court has to find a title by prescription. On this aspect, it is sufficient to recall the observations of Bertram C.J. in the Full Bench Case of ***Alwis vs. Perera [(1919) 21 N.L.R. at 326]****:*

"I wish very much that District Judges - I speak not particularly, but generally - when a witness says 'I possessed' or 'we possessed' or 'We took the produce', would not confine themselves merely to recording the words, but would insist on those words

being explained and exemplified. I wish District Judges would abandon the present practice of simply recording these words when stated by the witnesses, and would see that such facts as the witnesses have in their minds are stated in full and appear in the record."

When deciding whether the 1st Defendant had acquired prescriptive title, the Civil Appeal High Court, whilst correctly asserting that there is a burden cast upon the 1st Defendant to establish her prescriptive title to the subject matter, has totally disregarded to examine and evaluate the oral evidence led before the trial court.

The 1st Defendant in her oral evidence before the District Court claimed that she was in possession of the said premises since 1993 through her marriage to the 2nd Defendant's brother, had taken care of her husband's parents and considered the said premises as their matrimonial house. She also claimed that improvements were made to the house as her husband's parents and the 2nd Defendant agreed to transfer the premises to her husband. In the impugned Judgement the Civil Appeal High Court was correct in observing that, *"the 2nd Defendant (the predecessor in title of the Plaintiff), his parents and the 1st Defendant were in possession of the subject matter when the Plaintiff purchased the same."*

The 1st Defendant tendered to Court document marked '1V1', the Birth Certificate of the daughter of the 1st Defendant born in 1994, where the informer address refers to the impugned property. Extracts of the electoral register and the Grama Niladhari Certificates to establish that the 1st Defendant was residing in the said premises from 1993 to 2010, marked '1V2' to '1V19' and '1V20 and 1V21', respectively. The receipts to prove the purchase of raw material used for structural improvements to the premises were also tendered in evidence. It has not been established in evidence that the 2nd

Defendant had in any manner interrupted the 1st Defendant carrying out such improvements or alterations.

The Plaintiff closed her case reading in evidence documents marked 'P1' to 'P3'. Documents 'P7' and 'P9' were marked during cross examination of the 1st Defendant by the Plaintiff. In the proceedings before the District Court dated 16/07/2012, a statement made by the 1st Defendant to the Thalangama Police dated 07/02/2008 was marked as 'P9' and the affidavit tendered by the 1st Defendant to the Magistrates Court of Kaduwela, was marked as 'P6'. The Civil Appeal High Court in their findings have extensively referred to and acted upon 'P6' and 'P9' (both documents were referred to as the affidavit of the 1st Defendant), *"tendered to the Magistrates Court of Kaduwela in Case Bearing No. 72869 (instituted under Section 66 of the Primary Courts Ordinance)".* Document marked 'P7' is the affidavit filed by one Ayarin Alawathi, the mother-in-law of the 1st Defendant. In the action instituted in the Magistrates Court, the 1st Defendant was given possession of the impugned premises.

In the said Judgement, the Civil Appeal High Court erroneously referred to 'P9' as the affidavit tendered by the 1st Defendant. The proceedings dated 12/02/2008, held before the Magistrates Court of Kaduwela in Case Bearing No. 72869, is marked 'P9'. According to the said proceedings the 1st Defendant had agreed to purchase the subject matter for Rs. 1,450,000/- in order to arrive at a settlement. Thereafter in the affidavit dated 16/03/2008 marked 'P6' (also referred to by the appellate court as 'P9'), in the Magistrates Court, the 1st Defendant referred to the said proceedings dated 12/02/2008 and explained her position stating that the agreement to settle the dispute was conditional upon the handing over of a room occupied by the parents of the 1st Defendant. She further states that due to fear and intimidation by the parties involved,

the settlement did not go through. Based on the said consideration to settle this action, the appellate court came to a precise conclusion that the 1st Defendant has no *ud dominum* and adverse possession against the true owner to the subject matter. In arriving at the said conclusion, the Appeal Court was utterly misdirected when it failed to appreciate the compass of Section 66(6) of the Primary Courts' Procedure Act, where it is mandated upon the learned Magistrate "to make every effort to induce the parties and the persons interested (if any) to arrive at settlement of the dispute" before fixing the case for inquiry.

Based on the same affidavit the Court also came to a decisive finding that;

"the 2nd Defendant purchased the property in 1990 and from 1997 the possession of the 1st Defendant has been disturbed by the former. As such, it is established that the 1st Defendant did not have undisturbed possession for a period of ten years as required in law".

This finding too, is totally erroneous for the following reasons;

Firstly, the evidence led before the District Court does not challenge the 1st Defendants position of continuous possession being converted to "disconnected and divided" due to any disturbance created by any party.

Secondly, the 2nd Defendant was never the owner, a licensor, lessor, or a landlord of the impugned property during the said period.

Withers, J. in **Siman Appu vs. Christian Appu, (1895) 1 NLR 288** observed that, *"possession is "disturbed" either by an action intended to remove the possessor from the land, or by acts which prevent the possessor from enjoying the free and full use of*

the land of which he is in the course of acquiring the dominion, and which convert his continuous user into a disconnected and divided user".

It is an admitted fact that the 2nd Defendant acquired documentary title to the subject matter on 08/11/2006 by Deed No. 2198, marked 'P2'. The 2nd Defendant was living at No: 3/D/47, Jayawadanagama, Battaramulla and not in the impugned property (9/D/193, Jayawadanagama, Battaramulla). The 2nd Defendant has never enjoyed ownership of the subject matter at any time prior to 2006. The above observation clearly indicate that the reliance placed upon the affidavit marked 'P6', also referred to as 'P9', to say the least, is irrational and/or misconceived in law and in fact.

The appellate court also relied on document marked 'P7', the affidavit filed by Ayarin Alawathi, to establish that the 1st Defendant visited the subject premises to take care of her husband's parents. The Plaintiff never relied on the said affidavit, as it were, to confront the 1st Defendant on the issue of leave and licence. Notwithstanding the evidence, the Court held that on facts transpired from the said affidavit filed by Ayarin Alawathi, the 1st Defendant became a licensee only for the purpose of looking after the parents. As observed earlier no evidence was led to establish that the 1st Defendant was a licensee of the 2nd Defendant with a leave and licence or as an agent who entered the premises in a subordinate character with the latter's permission.

Prior to the institution of action in the Magistrates Court the 2nd Defendant did not give any undertaking to the Plaintiff to dispose of the 1st Defendant from the subject premises. In the circumstances, it is clearly observed that the appellate court merely extracted facts from Ayarin Alawathi's affidavit in support of its reckoning.

In **D. R. Kiriamma vs. J.A. Podibanda 2005 (BLR) 9**, Udalagama, J. made reference to the requisite elements of law in establishing prescriptive possession as,

"Onus probandi or the burden of proving possession is on the party claiming prescriptive possession. Importantly, prescription is a question of fact. Physical possession is a factum probandum. Considerable circumspection is necessary to recognize prescriptive title as undoubtedly it deprives the ownership of the party having paper title. title by prescription is an illegality made legal due to the other party not taking action"

The court also made reference to the following passage in Walter Perera's "Laws of Ceylon", 2nd Edn. 396, which reads as follows;

"*as regards to the mode of proof of prescriptive possession, mere general statements of witnesses that the Plaintiff ---- have possessed the land for a number of years exceeding the prescriptive period are not evidence of uninterrupted and adverse possession to support a title of prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided by court".*

The learned District Judge having placed due weight on the Plaintiff's documentary title to the property was mindful to shift the burden to the 1st Defendant to prove her claim on prescriptive title. The trial judge considered that the 1st Defendant was in possession of the said premises from 1993 and had given due consideration to the electoral register from 1993 to 2010 and to the Grama Niladhari certificates when evaluating evidence. The trial court also considered the expenditure incurred by the 1st Defendant to complete the construction of the house.

The oral evidence, the supporting documents, or the payment receipts on incurred expenses on improvements made, remained uncontradicted in cross examination. *"Where the Petitioner has led evidence sufficient in law to prove his status, ie, a factum probandum, (the physical possession of the 1st Defendant in this appeal) the failure of*

the Respondent to adduce evidence which contradicts it adds a new factor in favour of the Petitioner. There is then an additional 'matter before 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 Petitioner is uncontradicted. The failure to take account of this circumstance is a non-direction amounting to a misdirection in law". **(L. Edrick De Silva vs. L. Chandradasa De Silva 70 NLR 169**)

The Plaintiff's main contention that the 1st Defendant had lived in the impugned premises with a leave and licence of the 2nd Defendant has not been established nor has it been subscribed to by the 2nd Defendant in these proceedings.

Gratiaen J. in **Chelliah vs. Wijenathan 54 NLR 337**, held that;

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

In the instant case the starting point of the acquisition of prescriptive title by the 1st Defendant from 1993 was never challenged. There is also no evidence of payment of rent, any other obligation of the 1st Defendant to her husband's parents or any party, which could have had a negative impact on her claim. The documentary evidence tendered to the trial court has clearly bolstered the oral evidence of the 1st Defendant. The District Court has satisfactorily discharged its duty to examine and evaluate the available evidence in totality, prior to arriving at its finding. In the circumstances the District Court was correct in holding that the 1st Defendant has led evidence sufficient in law to discharged the burden of acquiring prescriptive possession.

For the aforesaid reasons, I am inclined to hold that the 1st Defendant has proved undisturbed and uninterrupted possession of the impugned premises for over 10 years prior to bringing of this action.

Accordingly, both 1st and 2nd questions of law are answered in the affirmative.

The Judgement of the Civil Appeal High Court dated 03/05/2018 is set aside and the appeal is allowed.

Appeal allowed. No costs ordered.

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 appeal under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No: 63/2014
SC HC CA LA No: 92/2013
HC CA No: WP/HCCA/MT 89/2010
DC Moratuwa Case: 787/M

1. Amarasinghe Arachchige Somawathie
2. Muthuthanthrige Irene Fernando
   Both of No. 146/15, Kaldemulla, Moratuwa.

PLAINTIFFS

vs.

1. Mabima Vitharanage Sunil Wickremasinghe,
   No. 394, Radawana, Pugoda.

2. D.P. Tillekeratne,
   No. 95/3, Kirillawala, Weboda, Kadawatha.

DEFENDANTS

And

D.P. Tillekeratne,
No. 95/3, Kirillawela, Weboda, Kadawatha.

2ND DEFENDANT – PETITIONER

vs.

1. Amarasinghe Arachchige Somawathie
2. Muthuthanthrige Irene Fernando
   Both of No. 146/15, Kaldemulla, Moratuwa.

PLAINTIFFS – RESPONDENTS

And between

Dodampe Gamage Tillekeratne,
No. 95/3, Kirillawala, Weboda, Kadawatha.

2ND DEFENDANT – PETITIONER – APPELLANT

vs.

1. Amarasinghe Arachchige Somawathie
2. Muthuthanthrige Irene Fernando
   Both of No. 146/15, Kaldemulla, Moratuwa.

PLAINTIFFS – RESPONDENTS – RESPONDENTS

And now between

Dodampe Gamage Tillekeratne,
No. 95/3, Kirillawala, Weboda, Kadawatha.

vs.

2ND DEFENDANT – PETITIONER – APPELLANT – APPELLANT

1. Amarasinghe Arachchige Somawathie
2. Muthuthanthrige Irene Fernando.
   No. 146/15, Kaldemulla, Moratuwa.

PLAINTIFFS – RESPONDENTS – RESPONDENTS – RESPONDENTS

Amarasinghe Arachchige Somawathie.
No. 146/15, Kaldemulla, Moratuwa.

SUBSTITUTED 2ND PLAINTIFF – RESPONDENT – RESPONDENT-RESPONDENT

Before: **Vijith K. Malalgoda, PC, J**
Kumudini Wickremasinghe, J
Arjuna Obeyesekere, J

Counsel: Thilina Liyanage for the 2nd Defendant – Petitioner – Appellant – Appellant

Pradeep Fernando for the 1st Plaintiff – Respondent – Respondent – Respondent and the 2nd Substituted Plaintiff – Respondent – Respondent – Respondent

Argued on: 16th November 2021

Written Submissions: Tendered on behalf of the 2nd Defendant – Petitioner – Appellant – Appellant on 21st July 2014 and 7th December 2021

Tendered on behalf of the 1st Plaintiff – Respondent – Respondent – Respondent and the 2nd Substituted Plaintiff – Respondent – Respondent – Respondent on 4th December 2015 and 7th May 2019

Decided on: 23rd September 2022

Obeyesekere, J

The two questions of law raised in this appeal gives rise to four issues. The first is whether a defendant is entitled to receive notice of an application to amend a plaint made after the trial has been fixed *ex parte* against him/her on the original plaint. The second is whether a defendant against whom trial has already been fixed *ex parte* and who does not appear in Court in spite of being served with notice of an application to amend the plaint, is entitled to be issued with summons of the amended plaint, once the amended plaint has been accepted by Court in his absence. The third and fourth issues are dependent on the first two issues being answered in the affirmative, and are as follows:

(a) the consequences of such failure to serve notice, and summons;

(b) whether a defendant can make an application to set aside the *ex parte* judgment once steps are taken to execute the decree.

Action in the District Court

On 9th April 1999, a container carrier bearing registration number 26 Sri 3150 driven by Sunil Wickremasinghe had knocked down Amarasinghe Arachchige Gunewardena and caused his death. Gunewardena's daughter, Amarasinghe Arachchige Somawathie, the 1st Plaintiff – Respondent – Respondent – Respondent [*the 1st Plaintiff*], and his wife, Muthuthanthrige Irene Fernando, the 2nd Plaintiff – Respondent – Respondent – Respondent [*the 2nd Plaintiff*], had instituted Case No. 787/M in the District Court of Moratuwa on 23rd October 2000 seeking a sum of Rs. 500,000 as damages arising out of the death of Gunewardena. The 1st Plaintiff had been substituted in place of the 2nd Plaintiff upon the death of the 2nd Plaintiff while this appeal was pending.

The following three persons had been named as Defendants in the original plaint filed on 23rd October 2000:

1st Defendant: Sunil Wickremasinghe – driver of the said vehicle;

2nd Defendant: M.J.M. Razeek – the owner of the said vehicle;

3rd Defendant: D.P. Tillekeratne – the person in possession of the said vehicle at the time of the said accident.

Fixing for *ex parte* trial

While the 2nd Defendant, M.J.M. Razeek, had responded to the summons served on him and filed an answer, neither the 1st Defendant nor the 3rd Defendant, who is the present Appellant [*the Appellant*] had responded to the summons said to have been served on them. I must observe that even though according to the Fiscal's Report, summons is said to have been personally served on the Appellant on 11th April 2001 at the address given in the plaint, No. 95/3, Kirillawala, Weboda, summons had subsequently been re-issued on the Appellant on 9th March 2002 and 17th September 2004.

On 8th October 2004, the District Court, having been *satisfied* that summons had been served on the 1st Defendant and on the Appellant on 17th September 2004, had fixed the matter for *inter partes* trial against the 2nd Defendant and *ex parte* trial against the 1st Defendant and the Appellant, for 4th January 2005. On this date, the *ex parte* trial was not taken up as the Attorney-at-Law for the Plaintiffs had moved for a postponement. The *ex parte* trial was accordingly re-fixed for 30th March 2005.

Application to amend the plaint

On 10th February 2005, the Attorney-at-Law for the Plaintiffs had filed a motion, together with an amended plaint, seeking permission to amend the plaint in the following manner:

(1) Remove the 2nd Defendant as a party, in view of the averments in the answer of the 2nd Defendant;

(2) Re-name the 3rd Defendant (i.e. the Appellant) as the 2nd Defendant;

(3) Change the date of the accident from 8th April 1999 to 9th April 1999.

Arising from the above amendments, the averment in the plaint that the vehicle was in the possession of the *3rd Defendant* on the date of the accident was also sought to be amended by deleting the reference to the *3rd Defendant* and substituting that with a reference to the *2nd Defendant*, who is the present Appellant. It must be stressed at this point that a copy of this motion to amend the plaint had not been served on any of the three Defendants named in the plaint.

The said motion had been supported in open court on 21st February 2005, where the Attorney-at-Law for the Plaintiffs had made the following application:

> "මෙම නඩුවේ 2 වන විත්තිකරු සහ 3 වන විත්තිකරු මෙම නඩුවට අදාල අංක 26 ශ්‍රී 3150 දරණ ලොරියේ අයිතිකරුවන් වී සිටි අතර, වර්තමාන අයිතිකරු 3 වන විත්තිකරු බව 2 විත්තිකරු විසින් ඉදිරිපත් කරන ලද උත්තරය අනුව පැහැදිළි වන හෙයින් සහ 2 විත්තිකරු එම නිසා මෙම නඩුවට සම්බන්ධතාවයක් නොමැති හෙයින් සිවිල් නඩු විධාන සංග්‍රහයේ 18(1) වගන්තිය යටතේ 2 විත්තිකරු මෙම නඩුවෙන් ඉවත් කිරීමට ගරු අධිකරණයෙන් නියෝගයක් ලබා දෙන මෙන්ද සිරස සහ පැමිණිල්ල සංශෝධනය කරන ලෙස ඉල්ලා සිටිනවා. ඒ අනුව වැඩිදුරටත් ඉල්ලා සිටින්නේ පැමිණිල්ලේ ශිර්ෂයේ

2 විත්තිකරු ඉවත් කර 3 විත්තිකරු ඒ වෙනුවෙන් ඇතුලත් කිරීමෙන් සහ පැමිණිල්ලේ 2 වන පේදයේ 1999.04.08 දින වෙනුවට 1999.04.09 දින ඇතුළත් කිරීමෙන් සහ පැමිණිල්ලේ දේහයද සංශෝධනය කරන ලෙසටයි.

මෙම ඉල්ලිමට 2 විත්තිකරු වෙනුවෙන් පෙනී සිටින නිතිඥ රංපිත් ගුණවර්ධන මහතා විරුද්ධ නොවේ."

The proceedings of 21st February 2005 do not indicate that the learned District Judge considered it necessary that notice of the above application should be served on the 1st Defendant and the Appellant. Instead, the learned District Judge had made order allowing:

(a) the deletion of the name of the then 2nd Defendant [*M.J.M. Razeek*] from the caption;

(b) the filing of an amended plaint,

and directed that the matter be called on 7th March 2005.

The above order of the District Court reads as follows:

"<u>නියෝගය</u>:

2 වන විත්තිකරුගේ නම සිරසින් කපා හැරීමට නියම කරම්. සංශෝධිත පැමිණිල්ලක් ඉදිරිපත් කිරීමට අවසර දෙම්. සංශෝධිත පැමිණිල්ල සඳහා කැඳවන්න 2005.03.07."

<u>Continuation of the trial in spite of the amendment of plaint</u>

The amended plaint having been filed on 1st March 2005, the case had been called on 7th March 2005. The proceedings of that date are re-produced below:

"සංශෝධිත පැමිණිල්ලක් පැමිණිල්ල විසින් ගොනු කර ඇත. එකි සංශෝධිත පැමිණිල්ල අනුව මුල් පැමිණිල්ලේ 1, 3 විත්තිකරුවන් 1, 2 ලෙසට සඳහන් කර ඇත. **එකි මුල් පැමිණිල්ලේ 1, 3 විත්තිකරුවන්ට එරෙහිව මෙම නඩුව ඒකපාර්ශ්වික විභාගයට නියම කර ඇති** බවට කාර්ය සටහන් වලට අනුකූලව පෙනී යයි. එසේ හෙයින් **නැවත වරක් 1, 2 විත්තිකරුවන්ට සිතාසි නිකුත් කිරීමට අවශ්‍ය නොවන අතර** 1, 2 වන විත්තිකරුවන්ට එරෙහිව ඒක පාර්ශ්වික විභාගයේ දිවුරුම් ප්‍රකාශ ඉදිරිපත් කිරීමට නියම කරම්" [emphasis added].

The proceedings of 7th March 2005 do not contain an order by the learned District Judge accepting the amended plaint. What the proceedings do contain, however, is a specific decision by the learned District Judge that the necessity to issue summons on the amended plaint to the 1st Defendant and the Appellant does not arise, as the trial has already been fixed *ex parte* against them.

Pursuant to the evidence of the 2nd Plaintiff being tendered by way of an affidavit, the District Court, by its judgment dated 16th May 2005, delivered judgment in favour of the Plaintiffs, and decree has been entered accordingly.

Application to set aside the *ex parte* decree

Section 85(4) of the Civil Procedure Code [*Code*] provides *inter alia* that a copy of the decree shall be served on the defendant in the manner prescribed for the service of summons. Accordingly, the *ex parte* decree is said to have been served on the Appellant on 28th March 2006 at premises No. 95/3, Kirillawala, Weboda. Although in terms of Section 86(2), an application to vacate the said decree could be made within 14 days of its service, no such application had been made by the Appellant. In October 2007, the Plaintiffs having sought a writ to execute the decree against the Appellant and the Sri Lanka Insurance Corporation, the insurer of the said vehicle, the District Court had directed that notice be served on the Appellant, the 1st Defendant and the insurer.

On 21st January 2008, the Appellant filed a petition in the District Court seeking *inter alia* to set aside the *ex parte* judgment and decree entered against him. In the said petition, the Appellant had stated as follows:

(1) He does not reside at the address given in the caption to the plaint, namely No. 95/3, Kirillawala, Weboda;

(2) He has not been served with any summons, notices or decree relating to the said case, other than the notice relating to the application for a writ which was handed over to him at his residence, **No. 191/5**, Kirillawala, Weboda in October 2007;

(3) He became aware of the action in the District Court for the first time when the above notice relating to the application for a writ was served on him;

(4) Having examined the case record through his Attorney-at-Law, he became aware that the case had been fixed *ex parte*;

(5) The report of the Fiscal that summons and decree had been served on him personally is incorrect.

While the above was the factual position pleaded by the Appellant, a legal objection was taken on his behalf that as *notice of the application to amend the plaint*, and *summons on the amended plaint* had not been served on the Appellant, all proceedings taken thereafter are a nullity. It is this legal objection that has culminated in the first two issues that I have referred to at the outset.

Inquiry by the District Court

The District Court had proceeded to formally inquire into the above application of the Appellant, with the primary position of the Appellant being that neither the summons nor the *ex parte* decree had been served on him, as claimed in the reports of the Fiscal. The Appellant had admitted that he had resided at No. 95/3, Kirillawala, Weboda, the residence of his parents, until 1996. He had shifted residence to premises No. 191/5, Kirillawala, Weboda in 1997, at which address he claimed he continued to reside, even at the time he gave evidence. In support of this position, he had led the evidence of the Grama Niladhari who had produced the electoral register for the years 1999, 2000 and 2002 - 2007, confirming that the Appellant was registered as a voter at premises No. 191/5, Kirillawala, Weboda. According to the electoral register produced through an Officer of the Department of Elections, the Appellant had been registered as an elector from the said premises No. 191/5, Kirillawala, Weboda during the period 1999 – 2008.

Therefore, it was the position of the Appellant that from the time the accident occurred in 1999, he had been registered as a voter at premises No. 191/5, Kirillawala, Weboda. It is admitted that the address given in the caption to the plaint has been taken from the

statement made to the Police by the driver of the vehicle, the 1st Defendant. Even though the electoral registers had been tendered to support the position of the Appellant, there are two matters that must be noted. The first is that the Appellant, who operates a container carrier at the Colombo Port, has not produced any other documents, such as utility bills, bank statements etc., to confirm that he was resident at premises No. 191/5, Kirillawala, Weboda. The second is that according to the electoral registers, the parents of the Appellant continued to reside at the address given in the plaint, namely No. 95/3, Kirillawala, Weboda. It must also be noted that the Plaintiffs did not lead the evidence of the Fiscal/s who had served the summons and the *ex parte* decree on the Appellant.

Order of the District Court

By an order delivered on 14th June 2010, the District Court had rejected the application of the Appellant to set aside the *ex parte* judgment and decree entered against him. While the order has exhaustively dealt with the facts, there are two important matters that the learned District Judge has failed to consider. The first is the aforementioned legal objection of the Appellant that notice of the application to amend the plaint had not been served on him. Although in her order, the learned District Judge has referred to the fact that this objection was raised, she has neither considered the said objection nor arrived at any finding in that regard. The second is that the learned District Judge has not considered the fact that even if summons on the original plaint had been served, summons on the amended plaint had not been served on the Appellant, with the decision not to do so having being taken by the learned District Judge who presided on that date. To my mind, these were two critical issues that had to be decided by the District Court.

The learned District Judge had instead proceeded to consider if summons on the original plaint had been served on the Appellant, which, as would be seen later, was not the issue before her and was therefore irrelevant. Here too, the learned District Judge has committed two mistakes. The first is, as noted earlier, although summons were said to have been served on 11th April 2001 and 9th March 2002, the District Court had re-issued summons on the Appellant in September 2004. The *ex parte* trial had been fixed on 8th October 2004 as the District Court was satisfied that summons had been served on 17th September 2004. The learned District Judge has however pointed out in her order that

although *ex parte* trial had been fixed on the basis that summons was served on 17th September 2004, the record does not contain an affidavit of the Fiscal confirming that summons was in fact served on the Appellant on that date. Hence, the learned District Judge has disregarded the said service of summons, as well as the summons served on 11th April 2001 for the same reason, and acted upon the summons that had been served on the Appellant on 9th March 2002, even though the District Court at that time was of the view that the said service of summons on 9th March 2002 was inadequate. In my view, if the issuance of summons on the strength of which trial was fixed *ex parte* was defective, that alone was sufficient for the learned District Judge to have allowed the application of the Appellant.

The second is that in spite of the above finding, the learned District Judge had arrived at the finding that the Appellant had not discharged the burden cast on him to prove that summons and the decree had not been served on him. The basis for this finding was that since it was the Appellant who was claiming that he did not receive summons and the *ex parte* decree and was therefore challenging the evidence of the Fiscal who had reported under oath that service had been effected personally, it was the duty of the Appellant to have summoned the Fiscal, which the Appellant had failed to do.

Independent of the above, the learned District Judge has also concluded that there is no provision in law to make an application to set aside the *ex parte* decree at the point of execution of decree. It is this finding, which has been affirmed by the High Court that forms the basis for the second question of law raised in this appeal.

Judgment of the High Court

Aggrieved by the said order, the Appellant had filed an appeal with the Civil Appellate High Court of the Western Province holden in Mount Lavinia. I have examined the petition of appeal and the written submissions filed on behalf of the Appellant and find that although the objection that the District Court had failed to issue notice of the amended plaint, and hence there was a procedural error had been raised before the High Court, it had failed to consider the said objection in its judgment. The High Court had instead only considered whether the Appellant, not having made an application to set aside the *ex*

parte decree within 14 days as required by Section 86(2) of the Code, could make an application to set aside the said *ex parte* order once a writ is sought to execute the said decree. Having answered the said question in the negative, the High Court had dismissed the appeal.

Questions of law

The Appellant thereafter invoked the jurisdiction of this Court under Article 128 of the Constitution and obtained leave to appeal on the following two questions of law:

(1) Have the learned High Court Judges erred in law by not taking into consideration that the Appellant had not been re-issued summons with a copy of the amended plaint upon an application being made by the Respondents to amend the plaint?

(2) Have the learned High Court Judges erred in law in arriving at the conclusion that the Appellant had no legal right and/or provision to make an application to vacate the *ex parte* judgment in view of the circumstances of this case?

A consideration of the above two questions of law would require me to examine three important concepts relating to the procedure followed by our Courts in civil actions, namely, the amendment of pleadings, the issuance of summons and the fixing of a case to be heard *ex parte*.

I shall assume, for the purposes of determining the first question of law, that (a) summons on the original plaint was in fact served on the Appellant on 17th September 2004, and (b) fixing the case for *ex parte* trial on the original plaint on 8th October 2004 is in order, even though the learned District Judge found in her order dated 14th June 2010 that the record does not contain an affidavit of the Fiscal confirming that summons was in fact served on 17th September 2004, which as noted above means that the decision of the District Court on 8th October 2004 fixing the case for *ex parte* trial was without any legal basis.

Amendment of pleadings

Section 84 of the Code provides that where "***the defendant fails to file his answer on or before the day fixed for the filing of the answer****, or on or before the day fixed for the subsequent filing of the answer or having filed his answer, if he fails to appear on the day fixed for the hearing of the action,* ***and if the court is satisfied that the defendant has been duly served with summons****, or has received due notice of the day fixed for the subsequent filing of the answer, or of the day fixed for the hearing of the action, as the case may be, and if, on the occasion of such default of the defendant, the plaintiff appears,* ***then the court shall proceed to hear the case ex parte forthwith****, or on such other day as the court may fix*" [emphasis added].

Therefore, in terms of Section 84, once one of the three situations set out therein arises and the plaintiff appears, "*the court shall proceed to hear the case ex parte forthwith, or on such other day as the court may fix*." This would mean that with the *ex parte* trial having been fixed for 4th January 2005, the Plaintiffs ought to have proceeded with the trial on that date on the plaint already accepted by Court. That did not however happen as the Plaintiffs made an application to amend the plaint, instead of proceeding to trial on the original plaint.

Chapter XV of the Code consists of Section 93 only and deals with the amendment of pleadings. Section 93 initially read as follows:

> "*At any hearing of the action, or any time* ***in the presence of, or after reasonable notice to, all the parties to the action*** *before final judgment, the court shall have full power of amending in its discretion, and upon such terms as to costs and postponement of day for filing answer or replication or for hearing of cause, or otherwise, as it may think fit, all pleadings and processes in the action, by way of addition, or of alteration, or of omission. And the amendments or additions shall be clearly written on the face of the pleading or process affected by the order; or if this cannot conveniently be done, a fair draft of the document as altered shall be appended to the document intended to be amended and every such amendment or alteration shall be initialled by the Judge*" [emphasis added].

Section 93 was amended for the first time by the Civil Procedure Code (Amendment) Act No. 79 of 1988, by repealing the existing provision and substituting same with Section 93(1) – (3). Section 93(1) reads as follows:

> "*The court may, in exceptional circumstances and for reasons to be recorded, at any hearing of the action, or at any time* ***in the presence of, or after reasonable notice to all the parties to the action****, before final judgment, amend all pleadings and processes in the action by way of addition, or of alteration or of omission*" [emphasis added].

Civil Procedure Code (Amendment) Act No. 9 of 1991

The above Section introduced in 1988 was again repealed by the Civil Procedure Code (Amendment) Act No. 9 of 1991 and substituted with Section 93(1) – (4). Section 93(1) and (2), which are the provisions that prevailed at the time the plaint in this appeal was sought to be amended in March 2005, are re-produced below:

> "*(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*.
>
> *(2) On or after the day first fixed for the trial of the action and before final judgement, 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*" [emphasis added].

It must be noted that Section 93 has been amended by the Civil Procedure Code (Amendment) Act No. 8 of 2017 to reflect the introduction of provisions relating to pre-trial proceedings.

Entitlement of a defendant to receive notice of an application to amend a plaint

It is therefore clear that right from its inception in 1889, Section 93 of the Code required that an amendment of pleadings must be carried out in the presence of, or after reasonable notice to, all the parties to the action. While I shall discuss later if that requirement has been dispensed with, albeit partially, by the amendment introduced in 1991, it was the position of the learned Counsel for the Appellant that any amendment of pleadings can only take place with notice of such amendment to the other party.

In support of this position, he relied on the judgment of the Court of Appeal in **Rajasingham v Seneviratne and Another** [(2002) 1 Sri LR 82], which considered the provisions of Section 93, as amended by Act No. 78 of 1988. In that case, the respondent had filed action on 22nd February 1985 against the Commissioner of National Housing and the appellant [*referred to as the 2nd defendant in the judgment*] seeking a declaration that the respondent was entitled to the use of lot 2 in Plan No. 2058, as part and parcel of a road reservation which the respondent claimed as her access, and a declaration that the Commissioner of National Housing had no right to convey the dominium in lot 2 or any part of the road reservations to the appellant absolutely. The appellant by answer dated 04th September 1985 stated that as the substantive relief has been sought against the Commissioner of National Housing, she would abide by any order made by Court, thus demonstrating that the appellant was not interested in contesting the plaint since the reliefs prayed for did not affect her.

On 23rd January 1990, a date was obtained for an amended plaint to be filed, followed by a motion containing the proposed amendments, comprising *inter alia* an additional prayer which sought an order on the appellant to demolish and remove the structures constructed by her. Although a copy of this motion had been sent directly by the respondent to the appellant by registered post, notice of the motion was not issued through Court. The application to amend the plaint had been allowed by the District Court in the absence of the Appellant and the case had subsequently been fixed for *ex parte* trial and judgment delivered accordingly.

Having considered the provisions of Section 93, it was held by Wigneswaran, J at page 89 that:

> "*On the face of it, the amendment to the plaint took place without conforming to the provisions of section 93 of the Civil Procedure Code. Under that section it was the Court which should have given notice to the 2nd defendant. It should have gathered all parties together before it on its own volition. In this instance it was absolutely essential that this was done due to the type of answer filed by the 2nd defendant …*
>
> ***When an application was suddenly made on 08. 02. 1990 to amend plaint, immediately the Court should have noticed the 2nd defendant*** *irrespective of whether the plaintiff had sent a copy of motion to amend or a copy of draft amended plaint to 2nd defendant by registered post*" [emphasis added].

At page 90, it was held that:

> "***Any change in course should have had the attention of the 2nd defendant****, specially when such change was going to affect her adversely.* ***Any such change in course should have been undertaken after notice to all parties by Court…***" [emphasis added].

Although in the above case, the defendant was still before Court when the motion seeking to amend the plaint was made, and the case was fixed *ex parte* only thereafter, I am of the view that the finding that any change in course should have the attention of the defendant would apply with equal force to the situation that has arisen in this appeal, where the trial has been fixed *ex parte* prior to the application to amend the plaint.

This position is reflected in the judgment of the Court of Appeal in **Gunasekera v Punchimenike and Others** [(2002) 2 Sri LR 43] which too considered Section 93(1) introduced in 1988. In this case, an application to amend the plaint was allowed after the action had been fixed for *ex parte* trial, with the District Court determining that since the amendment was being made to reflect a plan prepared during the course of the *ex parte* trial, and the defendants were not before Court as at that date, notice was not necessary. In that case, Wigneswaran, J held as follows:

"*If an ex parte is to be held against a party on a plaint which is innocuous and harmless, that party may keep away knowing fully well that nothing serious was going to take place. It is akin to an accused person not leading any evidence on his behalf and keeping mum in Court when he is certain that the prosecution cannot prove a prima facie case against him. But, after obtaining an order for ex parte trial if a plaintiff would take steps to include into the original ineffective plaint matters which may adversely affect and prejudice the defendants, the Court would be duty bound to give notice of any such amendment*..." [page 49].

"***Any attempt to change or amend the pleadings must necessarily be preceded by notice to all parties to the action.*** *At least those parties who would be affected by the decree that shall be passed on such amended pleadings, must necessarily be given notice whether they are before Court or 'deliberately and contumaciously kept away from the judicial proceedings and who had shown scant respect for the due process of law'…*" [page 50; emphasis added].

"***After all an amended plaint would be a fresh plaint on which the case would be continued, abandoning the earlier plaint.*** *The defendants were, therefore, entitled to notice. … Since such notice was not given,* ***at least at the stage of inquiry into the application to purge default, the denial of notice to the defendants, should have been taken into consideration and order made accordingly...***" [page 50; emphasis added].

"***Therefore, we find that the allowing of amendment of the plaint after the case was fixed for ex parte trial without notices to all parties who would have been affected by such amendment was tainted with illegality. A Court cannot allow amendment of pleadings without notice to all parties who shall be affected by such amendment***" [page 51; emphasis added].

I am of the view that the above two judgments of the Court of Appeal correctly reflect the provisions of Section 93(1) as it stood at the relevant time. A defendant may have multiple reasons to not respond to the summons and keep away from Court on the summons returnable date. That is a calculated risk that he takes and must therefore face

the adverse consequences flowing from his actions. If, however, the plaintiff moves to amend the plaint once the matter has been fixed for *ex parte* trial, I am of the view that it is mandatory that notice of the application to amend be served on the defendant.

Entitlement to notice of an application to amend a plaint – Section 93(2)

As I have already noted, Section 93, both prior to and after the amendment in 1988, required that the amendment of pleadings shall be done "*in the presence of, or after reasonable notice to, all the parties to the action*." Thus, if the amendment in this appeal was sought to be made prior to the introduction of Act No. 9 of 1991, the position would be that any amendment of the pleadings can only be carried out in the presence of, or after notice has been issued by Court to all parties in the action.

However, in this appeal, the law that was in existence in 2005 when the application to amend the plaint was made, was the amendment introduced by Act No. 9 of 1991. The thrust of the said amendment was twofold. The first is that a distinction has been drawn between an amendment that is sought to be made "*before the day first fixed for trial of the action*" [Section 93(1)], and "*after the day first fixed for trial of the action*" [Section 93(2)]. The second is that the criteria that should be applied in determining whether an amendment should be allowed in each of the said two situations had also been set out.

Thus, while prior to 1988, *the court shall have full power of amending in its discretion … all pleadings*, and after 1988, *the court may, in exceptional circumstances and for reasons to be recorded … amend all pleadings*, after 1991, the power of Court to allow the amendment of pleadings in its full discretion was limited to applications made before the day first fixed for trial. In respect of applications made after the day first fixed for trial, an amendment can only be allowed where the Court is satisfied that grave and irremediable injustice will be caused if such amendment is not permitted, and that the party so applying has not been guilty of laches.

As observed by Chief Justice G.P.S. De Silva in **Kuruppuarachchi v Andreas** [(1996) 2 Sri LR 11 at page 13]:

"*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.' … 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*."

Section 93(1) introduced by Act No. 9 of 1991 also specified that the amendment to pleadings must be made "*in the presence of, or after reasonable notice to, all the parties to the action."* However, Section 93(2), under which Section the amendment made in this appeal should be considered, as the trial had already been fixed when the motion seeking the amendment of the plaint was made, does not contain such a requirement, thereby giving rise to the question whether an amendment made after the date first fixed for trial should also be "*in the presence of, or after reasonable notice to, all the parties to the action*."

In my view, the answer to the said question must be in the affirmative, although Section 93(2) is silent in this regard, for the reason that any application, whatever its nature may be, made in the course of any proceeding of an action filed under the Civil Procedure Code must be with notice to the adverse party, thereby ensuring that the principles of natural justice are adhered to, unless the Code itself permits an application to be made without notice to the other party.

As held by the Court of Appeal in **Gunasekera and Another v Abdul Latiff** [(1995) 1 Sri LR 225 at page 234],

"*The petitioners have to clear two hurdles. They have to satisfy court firstly that, (1) grave and irremediable injustice will be caused to them if the amendment is not permitted, (2) there has been no laches on their part in making the application. Once this hurdle is overcome, they are further required to satisfy court the circumstances that warrant an amendment to pleadings under section 93(1) also exist. Namely, that no irremediable prejudice will be caused to the respondents, such an amendment will avoid a multiplicity of actions and facilitate the task of*

administration of justice (see Mackinnons v Grindlays Bank (1986) 2 Sri LR 272). An obvious example of prejudice being caused to the opposing side is when the amendment if allowed, would deprive that party pleading prescription of the cause of action. Besides these considerations, there is also the general bar set out in the proviso to section 46 of the Civil Procedure Code, against permitting amendments which would have the effect of converting an action of one character into an action of inconsistent character."

In other words, where an amendment to the pleadings is sought after the date first fixed for trial, and even if the party seeking the amendment is successful in satisfying Court of the two matters set out in Section 93(2), whether Court should permit the amendment is still at the discretion of the learned District Judge, as stipulated in Section 93(1). What is important is that prior to exercising that discretion, the Court must hear the opposing party, which means that the opposing party is entitled to notice of the amendment of pleadings, whether the amendment is made under Section 93(1) or (2).

It is clear from the motion dated 10th February 2005 filed by the Attorney-at-Law for the Plaintiffs that notice of the application to amend the plaint was not served on any of the Defendants. As a result, when the said motion and the application was supported on 21st February 2005, only Razeek who was the 2nd Defendant at that time and who had filed an answer, was present in Court. I am of the view that at that point, the District Court was under a duty to direct that notice of the application to amend the plaint be served on those defendants against whom *ex parte* trial had already been fixed. This, the District Court has failed to do, thus depriving the Appellant an opportunity of objecting to the application to amend the plaint. What has taken place thereafter is a nullity, unless the Appellant has subsequently acquiesced to what had taken place.

Entitlement of a defendant to be served with summons

Having permitted the application to amend the plaint, the District Court directed (a) the Plaintiffs to file the amended plaint, and (b) that the matter be called on 7th March 2005 for that purpose. On that date, having observed that pursuant to Court granting permission, an amended plaint has been filed, the District Court held that as *ex parte* trial

has already been fixed, the necessity to order the issuance of summons does not arise. The issue that I have to consider in order to answer the first question of law raised by the Appellant is whether the Appellant was entitled in law to be served with summons on the amended plaint, once it was accepted by Court.

Chapter VII of the Code, which contains Sections 39 – 54, is titled '*Of the mode of institution of action*' and contain provisions with regard to the filing of plaint, the requisites of a plaint, the rejection of a plaint etc. Section 39, while specifying that "*Every action of regular procedure shall be instituted by presenting a duly stamped written plaint to the Court, or to such officer as the Court shall appoint in that behalf*," specifies further that, "… ***the plaint shall be accompanied by such number of summonses*** *in Form No. 16 in the First Schedule as there are defendants, and a precept in Form No. 17 of the said Schedule*" [emphasis added].

Chapter VIII of the Code is titled '*Of the issue and service of summons*' and comprises of Sections 55 – 71. Section 55(1) reads as follows:

> "*Upon the plaint being filed and the copies of concise statements required by section 49 presented,* ***the Court shall order summons*** *in the Form No. 16 in the First Schedule to issue, signed by the Registrar of the Court, requiring the defendant to answer the plaint on or before a day to be specified in the summons, such day, being a day not later than three months from the date of the institution of the action in Court*" [emphasis added].

Thus, the Code has made it mandatory for a plaintiff to tender together with the plaint, summons to be served on a defendant. Once the plaint is accepted by Court, summons shall be served on the defendant together with a copy of the plaint, with the summons specifying the date prior to which the answer must be filed. Upon receipt of the summons, the defendant is required to answer the plaint on or before the date specified in the said summons, although the practice that is followed is for the defendant to appear in Court through an Attorney-at-Law, file proxy and move for an adjournment to file the answer. Singular importance has thus been placed by the above provisions of the Code on the requirement to issue summons, as it serves as the notice given to a defendant that an

action has been filed against him, that he must file an answer in response to the said plaint, and that failure to do so would result in the action being proceeded with and heard *ex parte*.

The critical importance of summons was considered in **Ittepana v Hemawathie** [(1981) 1 Sri LR 476]. In that case, the plaintiff sued his wife for a divorce on the ground of malicious desertion. Summons was reported to have been served on the defendant and a proxy was filed on her behalf. At the trial, although the defendant was absent, she was represented by a lawyer. Decree nisi was entered and later made absolute. A few months later, when the defendant appeared in Court in connection with her maintenance case, the plaintiff had produced the said decree absolute. The defendant claimed that she had not been served with summons and denied having filed proxy. She thereafter made an application in the District Court to have the decree annulled on the ground of non-service of summons. The District Judge inquired into the said application and held with the defendant and vacated the decree.

In an appeal by the husband, Sharvananda, J (as he then was) drew a nexus between the issuance of summons, the rules of natural justice and the assumption of jurisdiction by a court when he held as follows:

> "*Principles of natural justice are the basis of our laws of procedure. The requirement that the defendant should have notice of the action either by personal service or substituted service of summons is a condition precedent to the assumption of jurisdiction against the defendant*..." [page 479].
>
> *"'Jurisdiction' may be defined to [be] the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it. When the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction. An inquiry whether the Court has jurisdiction in a particular case is not an exercise of jurisdiction over the case itself. It is really an investigation as to whether the conditions of cognizance are satisfied. Therefore, a Court is always clothed with jurisdiction to see whether it has jurisdiction to try the cause submitted to it.*

"*Jurisdiction naturally divides itself into three heads. In order to the validity of a judgment, the Court must have jurisdiction of the persons, of the subject matter and of the particular question which it assumes to decide.* ***It cannot act upon persons who are not legally before it****, upon one who is not a party to the suit …* ***upon a defendant who has never been notified of the proceedings.*** *If the Court has no jurisdiction, it is of no consequence that the proceedings had been formally conducted, for they are coram non judice. A judgment entered by such Court is void and a mere nullity*" (Black on Judgments – P. 261)" [page 483; emphasis added].

"*Failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant. It is only by service of summons on the defendant that the Court gets jurisdiction over the defendant. If a defendant is not served with summons or is otherwise notified of the proceedings against him, judgment entered against him in those circumstances is a nullity …*" [page 484].

A similar situation arose in **Beatrice Perera v The Commissioner of National Housing and Others** [77 NLR 361]. Perera, who was the landlady of premises No. 108, Galle Road, Wellawatte, had instituted action in the Court of Requests on 13th August 1969 praying that the defendant, Saraswathi Narayanan, who was occupying and running a business there as a tenant of Perera, be ejected from the premises on the ground that she had caused wilful damage and wanton destruction to the premises. In the return to the summons, the Fiscal's Officer made a report supported by an affidavit to the effect that Saraswathi was evading summons. The Court having ordered substituted service of summons on her, and the Fiscal reporting that such service has been effected, the case was fixed for *ex parte* hearing as Saraswathi did not appear on the date fixed in the summons for her appearance. After *ex parte* trial, judgment and decree were entered in favour of Perera and decree had been executed on 10th July 1970. On 14th July, Saraswathi filed a petition and affidavit in the Court of Requests and prayed that the judgment and decree entered *ex parte* against her be vacated as neither summons nor substituted service has been effected.

After inquiry, the Commissioner of Requests found the Fiscal's Officer who gave evidence of his efforts to serve summons and of the substituted service on Saraswathi to be totally unworthy of credit. Having held that summons had not been served and that substituted service had not been effected, the Court made order vacating the default judgment and decree and granted the defendant an opportunity to file answer and defend the action.

On appeal, Chief Justice Tennekoon stated at page 366 that:

> "*Lack of competency in a Court is a circumstance that results in a judgment or order that is void. Lack of competency may arise in one of two ways. A Court may lack jurisdiction over the cause or matter or over the parties; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court. Both are jurisdictional defects; the first mentioned of these is commonly known in the law as a 'patent' or 'total' want of jurisdiction or a "defectus jurisdictionis" and the second a 'latent' or 'contingent' want of jurisdiction or a "defectus triationis." Both classes of jurisdictional defect result in judgments or orders which are void. But an important difference must also be noted. In that class of case where the want of jurisdiction is patent, no waiver of objection or acquiescence can cure the want of jurisdiction; the reason for this being that to permit parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to litigation to create new jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature; the proceedings in cases within this category are non coram judice and the want of jurisdiction is incurable. In the other class of case, where the want of jurisdiction is contingent only, the judgment or order of the Court will be void only against the party on whom it operates but acquiescence, waiver or inaction on the part of such person may estop him from making or attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction …*"

In **Leelawathie v Jayaneris and Others** [(2001) 2 Sri LR 231 at pages 236-237], the Court of Appeal held as follows:

> "*Unless summons in the Form No. 16 in the 1st Schedule to the Civil Procedure Code issues, signed by the Registrar requiring the Defendant to answer the plaint on or before a day specified in the summons and is duly served on the Defendant there cannot be due service of summons. In this case the original summons with attached copies of plaint and affidavit tendered with the original plaint dated 05.10.1988 to be issued against the 1st – 3rd Defendants are still in the Record unsigned by the Registrar (vide pages 179 to 209). They had been duly tendered on 05.10.1988 with the original plaint as per Court Seal of that date. What had been served on 1st – 3rd Defendant were notices that issued under the hand of the Registrar on 07.10.1988. Hence there had been no service of summons on the 1st – 3rd Defendants.* ***Unless summons were served on them, all the consequences of default in appearance would not apply to them.*** *There is no question of implying or presuming that the Defendants were aware of the case filed, since statutory provisions apply to service of summons and unless the summons are duly served the other statutory consequences for non-appearance on serving of summons, would not apply to Defendants*" [emphasis added].

The legal position therefore is very clear. It is by service of summons on the defendant that a Court gets jurisdiction over the defendant. The failure to serve summons is a failure which goes to the root of the jurisdiction of Court to hear and determine the action against the defendant. If a defendant is not served with summons, the judgment entered against him in those circumstances would be a nullity.

Entitlement of a defendant to be served with summons on the amended plaint

The learned District Judge was invited by the Appellant to declare that the *ex parte* decree was void not only because summons on the original plaint had not been served but also because summons on the amended plaint was not served, with the latter arising from a specific order of the District Court. I shall now consider whether the necessity to re-issue

summons arises once the Court accepts an amended plaint, and if so, the consequences of not complying with that requirement.

This Court in **Bartleet Finance PLC v Ranepura Hewage Kusumawathi** [SC Appeal No. 121/2016; SC minutes of 8th August 2019] dealt with a situation where the District Court failed to issue summons to a defendant on an amended plaint. In that case, the plaintiff sought *inter alia* an enjoining order and an interim injunction preventing the defendant from selling the vehicle bearing registration number 62 – 4959. The interim injunction had been refused on 3rd October 2003 and the case had been fixed for answer for 3rd December 2003. The plaintiff had filed a motion the day before, seeking to amend the plaint. Even though an amended plaint had not been filed on that date, the journal entry of 3rd December 2003 provided that, "*Amended plaint is being filed. Objections (if any) and answer on 28.1.2004*." The amended plaint had however been accepted by Court only on 28th January 2004 and the journal entry of that date recorded that, "*Objection and answer – No (not filed). The defendant is absent. No legal representation for the defendant.* ***Amended plaint is accepted.*** *Case is fixed for ex parte trial. Ex parte trial is fixed for 5.3.2004*" [emphasis added].

Having considered whether the District Court made a grave procedural error in fixing the case for *ex parte* trial on 28th January, 2004, this Court held as follows:

> "*Since the court has accepted the amended plaint on 28.1.2004, it was the duty of court to have given an opportunity to the Defendant-Petitioner to file an answer on the amended plaint. But the learned District Judge did not give this opportunity to the Defendant-Petitioner and fixed the case for ex parte trial. … The learned District Judge on 28.1.2004 could not have fixed the case for ex parte trial even on the basis that the Defendant-Petitioner was absent and unrepresented because the acceptance of the amended plaint has taken place only on 28.1.2004.* ***When the amended plaint is accepted****, the original plaint does not exist.* ***Then it becomes the duty of court to act under Section 55 of the Civil Procedure Code and serve summons on the defendant*** *if the defendant is absent in court. If the defendant is present in court, the court should give him an opportunity to file his answer on the amended plaint. The learned District Judge has not taken the above steps. Therefore*

it is seen from the above material that the District Court has not fixed a date to file answer on the amended plaint. The learned District Judge on the day that the amended plaint was accepted without fixing a date to file an answer, has fixed the case for ex parte trial which is wrong" [emphasis added].

I am of the view that the moment the amended plaint was accepted by the District Court, the original plaint ceased to exist, and the provisions of Section 55(1) would once again be triggered, thereby necessitating the service of summons on the Appellant to answer the amended plaint. The order made by the District Court on 7th March 2005 confirms that Court was of the view that summons on the amended plaint need not be served. Everything that followed thereafter is a nullity.

<u>The District Court could not have proceeded with the *ex parte* trial</u>

The above conclusion brings to the fore two specific aspects of Section 84, which I shall now advert to, for the sake of completeness.

Section 84 of the Code provides for three distinct situations in which a trial can be fixed *ex* parte. It is the first situation that is relevant in this appeal and which is set out below:

"*If the defendant fails to file his answer on or before the day fixed for the filing of the answer … and if the Court is satisfied that the defendant has been duly served with summons … and if, on the occasion of such default of the defendant, the plaintiff appears, then the Court shall proceed to hear the case ex parte forthwith, or on such other day as the Court may fix*."

The fixing of a trial to be heard *ex parte* due to the failure of a defendant to file his answer on or before the day fixed for the filing of the answer, is conditional upon the defendant being issued summons with a copy of the plaint. It is only if the defendant is served with summons and he does not appear on the date specified in the summons or having appeared, does not file an answer or does not seek time to file answer, that the case can be fixed for *ex parte* trial. In other words, due service of summons on the defendant is a condition precedent that must be satisfied in order to fix the trial *ex parte*.

The first aspect that I wish to advert to is that in this appeal, the moment the amendment of the plaint was allowed, the District Court was required to re-calibrate the procedure and to have issued summons on the amended plaint. In the absence of doing so, the District Court could not have proceeded to hear the case *ex parte* based on the order made on 8th October 2004.

The second aspect that I wish to advert to, was discussed in **Bartleet Finance PLC v Ranepura Hewage Kusumawathi** [supra], where Sisira de Abrew, J having considered the provisions of Section 84, stated as follows:

> "*Under Section 84 of the Civil Procedure Code, the court is empowered to fix a case for ex parte trial if the defendant fails to file his answer on or before the day fixed for the filling of the answer or on or before the day fixed for the subsequent filing of the answer. This is one of the grounds discussed in Section 84 of the Civil Procedure Code. After the amended plaint was accepted, did the court fix a date for filing of the answer? The answer is clearly in the negative. It has to be noted here that after accepting the amended plaint on 28.1.2004, the court without fixing a date to file the answer, fixed the case for ex parte trial. There was no opportunity for the Defendant-Petitioner to file his answer on the amended plaint since the court has failed to fix a date for the answer on the amended plaint. Therefore the argument that the Defendant-Petitioner has failed to file his answer on or before the day fixed for filing of the answer or on or before the day fixed for the subsequent filing of the answer cannot be accepted. For the above reasons I hold that the Defendant-Petitioner has not violated Section 84 of the Civil Procedure Code; that the learned District Judge on 28.1.2004 could not have fixed the case for ex parte trial; and that the order made by the learned District Judge on 28.1.2004 fixing the case for ex parte trial without giving an opportunity for the defendant to file his answer is wrong, a nullity and has violated a fundamental rule. Failure by the District Court to give an opportunity for the Defendant-Petitioner to file his answer upon acceptance of the amended plaint is a violation of a fundamental rule.*

For the benefit of the trial Judges and legal practitioners of this country I would like to set down here the following guidelines.

1. *When an amended plaint is accepted by court, the court cannot on the same day fix the case for ex parte trial on the basis that the defendant is absent or he did not file the answer.*

2. *When an amended plaint is accepted by court, the court must give an opportunity for the defendant to file his answer.*

3. *When an amended plaint is accepted by court, it becomes the duty of court to summon the defendant if he is absent in court because the amended plaint has to be considered as a new plaint*."

The resultant position is that a defendant, even though absent on the date the Court accepts the amended plaint in spite of the notice to amend having been served on him/her, is entitled to be issued summons on the amended plaint and granted an opportunity to file an answer to the said amended plaint. The failure by Court to do so would render all proceedings that take place thereafter a nullity.

Conclusion on the first question of law

This brings me back to the order of the learned District Judge delivered on 14th June 2010 refusing to vacate the *ex parte* judgment. In the said order, the learned District Judge has failed to appreciate that (a) even if one accepts the position that summons has been served on the Appellant, that that was on the original plaint, and (b) the case was fixed for *ex parte* trial on the strength of the said original summons having been served on the Appellant, which as I have discussed earlier is rendered nugatory the moment Court accepts an amended plaint. The High Court too has not given its mind to either of the said issues.

Furthermore, the learned District Judge and the High Court have failed to appreciate that the moment an application was made to amend the plaint, the District Court was required to adopt a three-tiered approach. The first should have been to direct that notice of the

application to amend be served on the Appellant, thereby ensuring compliance with the provisions of Section 93 of the Code. The second is, irrespective of whether the Appellant responded to the said notice and presented himself in Court, the learned District Judge was required to consider if the amendments could be allowed in the light of the provisions of Section 93. The third is, if the amendments are allowed and the amended plaint is accepted but the Appellant is yet not before Court, to direct that summons on the amended plaint be served on the Appellant, thereby affording the Appellant an opportunity of filing an answer on the amended plaint. It is only where Court is satisfied that such summons has been served that an order could be made in terms of Section 84 by fixing the case for *ex parte* trial on the amended plaint.

As the facts of this appeal reveal, it is admitted that neither the notice seeking to amend the plaint nor the summons on the amended plaint have been issued on the Appellant. Therefore, what followed thereafter is a nullity.

I would accordingly answer the first question of law, namely "Have the learned High Court Judges erred in law by not taking into consideration that the Petitioner had not been re-issued summons with a copy of the amended plaint upon an application being made by the Respondents to amend the plaint?" as follows: Yes. The District Court and the High Court have also erred in law in not taking into consideration the fact that notice of the application to amend the plaint has not been served on the Appellant.

Could the Appellant have made an application to set aside the *ex parte* decree?

I shall now consider the second question of law raised by the Appellant, which is, "Have the learned High Court Judges erred in law in arriving at the conclusion that the Petitioner had no legal right and/or provision to make an application to vacate the *ex parte* judgment in view of the circumstances of this case?"

The District Court as well as the High Court have held that there is no provision in law to make an application to set aside an *ex parte* decree at the point where its execution is sought by the judgment creditor. I would have concurred with this conclusion had it been established that:

(a) Court had directed that summons on the amended plaint be issued on the Appellant and such summons had in fact been served on the Appellant;

(b) the case was fixed for *ex parte* trial only thereafter;

(c) the *ex parte* decree too had been served on the Appellant, and yet, the Appellant failed to come before the District Court within 14 days and make an application to set aside the decree.

The Order of the District Court made on 7th March 2005 makes it abundantly clear that summons on the amended plaint has not been served on the Appellant. What proceeded thereafter – i.e., the *ex parte* trial and the decree based on the *ex parte* judgment – are void. The earliest opportunity that the Appellant had of coming to Court was when the said decree was served on him. The Appellant has denied receiving the said decree and in the absence of any evidence being led to contradict his position, the conclusion of the learned District Judge that even though the Appellant was no longer resident at No. 95/3, Kirillawela, Webada, she is satisfied that the decree was served on the Appellant is not tenable.

In these circumstances:

(a) I have no other alternative except to accept the version of the Appellant that the *ex parte* decree was not served on him;

(b) I am of the view that when a writ is sought to be executed to seize his property, the Appellant had a right to come before the District Court and seek to have the *ex parte* decree set aside on the basis of non-service of summons and the *ex parte* decree.

In **Ittepana v Hemawathie** [supra] this Court, having arrived at the conclusion that where a defendant is not served with summons or is otherwise notified of the proceedings against him, the judgment entered against him in those circumstances is a nullity, went on to hold as follows:

"*And when the Court is made aware of this defect in its jurisdiction, the question of rescinding or otherwise altering the judgment by the Court does not arise since the judgment concerned is a nullity. … The proceedings being void, the person affected by them can apply to have them set aside ex debito justitiae in the exercise of the inherent jurisdiction of the Court…*" [page 484].

"*Every Court, in the absence of express provision in the Civil Procedure Code for that purpose, possesses, as inherent in its very constitution, all such powers as are necessary to undo a wrong in the course of the administration of justice.*

Section 839 of the Code preserves the inherent power of the Court "to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." This section embodies a legislative recognition of the inherent power of the Court to make such orders as may be necessary for the ends of justice. The inherent power is exercised ex debito justitiae to do that real and substantial justice for the administration of which alone Courts exist" [page 485].

Sharvananda, J (as he then was) thereafter cited **Rodger v Comptoir d'Escompte de Paris** [(1871) LR 3 PC 465 at page 475] where the Privy Council stated the following:

"*One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is a duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court.*"

The Court then held:

> "*Thus, when a complaint is made to Court that injustice has been caused by the default of the Court in not serving summons, it is the duty of the Court to institute a judicial inquiry into the complaint and ascertain whether summons had been served or not, even going outside the record and admitting extrinsic evidence, and if it finds that summons had not been served, it should declare its ex parte order null and void and vacate it*" [page 485].

In **Beatrice Perera v The Commissioner of National Housing and Others** [supra; at page 369], this Court held that:

> "*… where summons has not been served at all, an ex parte judgment against the defendant is void and the defendant can challenge its validity at any time when the judgment so obtained is sought to be used against him either in the same proceedings or collaterally, provided always that he has not by subsequent conduct estopped himself*."

In **Rajasingham v Seneviratne and another** [supra; at page 91], the Court of Appeal, referring to the submission of the respondent that, whether notice was given of the amendment of plaint to the appellant or not is irrelevant in an application to set aside the *ex parte* decree, held that:

> "*This is an astounding submission. If this submission is accepted what it would mean is, that a plaintiff has a right to do anything he or she likes and obtain an ex parte decree in whatsoever manner he or she wishes and the only relief that a defendant who had defaulted in appearance but adversely affected by the decree has, is to make out a proper case for his absence. If not, the ex parte decree could be executed, come what may. The serious flaw in this argument lies in making the Court a party to all the machinations of a plaintiff.*

… A Court of law should not be an apathetic bystander under these conditions. ***If notice of amendment of pleadings is not given in terms of the law to the party affected****, if the Court does not consider (whether the affected party is before Court or not) the feasibility of the amendment prayed for and act in terms of the law,* ***all proceedings thereafter would become tainted with illegality****, whatever the shortcomings in the defendant's conduct might be*" [emphasis added].

Given the circumstances peculiar to this appeal, I am of the view that the Appellant was entitled to make the application to set aside the *ex parte* decree and I would therefore answer the second question of law in the affirmative.

Conclusion

Taking into consideration all of the above circumstances, I set aside the following orders/judgments and allow this appeal:

(a) The order made on 8th October 2004 fixing the case *ex parte* against the Appellant and the 1st Defendant;

(b) The order dated 21st February 2005 made by the learned District Judge, Moratuwa, permitting the amendment of the plaint;

(c) The order dated 7th March 2005 made by the learned District Judge, Moratuwa, that summons on the amended plaint need not be served on the Appellant;

(d) The judgment dated 16th May 2005 delivered by the learned District Judge, Moratuwa;

(e) The order dated 14th June 2010 by which the District Court refused to set aside the *ex parte* decree; and

(f) The judgment of the High Court dated 5th February 2013 dismissing the appeal of the Appellant.

The District Court is directed to issue notice of the application of the Plaintiffs to amend the plaint to the Appellant and the 1st Defendant, consider the said application to amend in the light of the provisions of Section 93 and thereafter proceed to trial according to law, expeditiously. I make no order with regard to costs.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe, J

I agree.

JUDGE OF THE SUPREME COURT

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

1A. Palihawardana Arachchige
Shiroma Dilrukshi Jayawardena
1B. Virendri Sajani Waranasuriya
Jayawardena
Both of No. 251/1,
Dharmapala Mawatha,
Colombo 7.
Substituted Defendant-
Respondent-Appellants

SC APPEAL NO: SC/APPEAL/39/2017
SC LA NO: SC/HCCA/LA/424/2014
HCCA NO: WP/HCCA/COL/3/2011 (LA)
DC COLOMBO NO: DLM/127/2010

Vs.

1. H.J. Shalana Rodrigo,
No. 109/1, Gothami Road,
Borella.
2. H.C.S. Romesh Rodrigo,
No. 109/A, Gothami Road,
Borella.
3. H.M. Sharon Rodrigo,
No. 48/1, Gothami Road,
Borella.

4. H.M. Shanali Rodrigo,
   No. 133/27,
   Gothami Road,
   Borella.
5. Union Chemist Property
   Development Limited,
   No. 460, Union Place,
   Colombo 2.
   Plaintiff-Petitioner-Respondents

Before: Vijith K. Malalgoda, P.C., J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Niranjan Arulpragasam for the Substituted Defendant-Respondent-Appellants.

Rohan Sahabandu, P.C., with Surekha Withanage for the Plaintiff-Petitioner-Respondents.

Argued on : 29.10.2021

Decided on: 20.05.2022

Mahinda Samayawardhena, J.

The Plaintiff-Petitioner-Respondents (Plaintiffs) filed this action against the Defendant-Respondent-Appellant (Defendant) in the District Court of Colombo seeking as the substantive relief a declaration that the Plaintiffs, their agents, customers and suppliers are entitled to use the right of way described in the second schedule to the plaint to enter the land described in the first schedule to the plaint. Pending determination of the action,

the Plaintiffs also sought an interim injunction preventing the Defendant from disturbing the Plaintiffs' use of the said right of way. The District Court refused the interim injunction and, on appeal, the High Court of Civil Appeal granted it. The Defendant has now come before this Court against the Judgment of the High Court of Civil Appeal.

This Court granted leave to appeal against the Judgment of the High Court of Civil Appeal on three questions of law. The first question is whether the High Court erred in law in granting the interim injunction. The second and third questions (i.e. whether the Plaintiff failed to establish a *prima facie* case and whether the balance of convenience lies with the Defendant) are encapsulated in the first question.

In my view, the High Court erred in granting the interim injunction which allows the Plaintiffs, their agents, customers and suppliers to use the 20-foot-wide road depicted as Lot 7 in Plan No. 1095 (D2) to enter the land described in the first schedule to the plaint. This I say on first principles. Let me explain.

It is clear that the disputed right of way (Lot 7 in Plan No. 1095) is a private road in extent of 23.1 perches starting from Dharmapala Mawatha; but, unfortunately, this is not the right of way described in the second schedule to the plaint. The second schedule refers to a portion of land in extent of 0.1 of a perch lying outside the disputed right of way.

The land described in the first schedule to the plaint is Lot X1 in Plan No. 2363 (P3), which is bounded on the North by premises bearing assessment No. 460 on Union Place (belonging to the

Plaintiffs); East by premises bearing No. 251/11 on Union Place; South by Lot Y1 of the same Plan; and West by the remaining portion of Lot X. The extent of Lot X1 is 1 perch.

The land described in the second schedule to the plaint is Lot Y1 in Plan No. 2363, which is bounded on the North and East by Lot X1 of the said Plan (referred to in the first schedule to the plaint); South by a private road (the private road in dispute); and West by Lot Y. The extent of Lot YI is 0.1 of a perch.

In short, although the disputed right of way is Lot 7, neither the schedules to the plaint nor the substantive relief sought by the plaintiff refer to Lot 7.

The issuance of interim injunctions by our Courts is mainly regulated by section 54 of the Judicature Act, No. 2 of 1978, as amended, and sections 662-667 in Chapter 48 of the Civil Procedure Code. The former deals with jurisdiction and the latter with procedure.

In an interim injunction application, the Plaintiff shall demonstrate that the act of the Defendant is in violation of the Plaintiff's legal rights in respect of the subject matter of the action and would tend to render the Judgment nugatory in the event of the Plaintiff's success in the suit. An interim injunction has no independent survival. It is dependent upon the substantive relief sought. The interim injunction is issued to protect the substantive relief and ceases to exist with the entering of the Judgment. A necessary corollary of this is that a party cannot by way of an interim injunction ask for more than what he has asked for as substantive relief. No Court has jurisdiction to grant interim relief incapable of being accommodated in the final relief. (*Mallika De*

Silva v. Gamini De Silva [1999] 1 Sri LR 85, Haji Omar v. Wickremasinghe [1999] 1 Sri LR 82) As the plaintiff's action is presently constituted, the interim relief granted cannot be preserved in the final judgment.

The application for interim injunction is misconceived in fact and law. There is no necessity to go into the finer details of the matter.

Although the District Court refused the interim injunction on different grounds, I agree with the conclusion of the learned District Judge. I set aside the Judgment of the High Court of Civil Appeal. The substituted Defendant-Respondent-Appellants are entitled to costs in all three Courts.

Judge of the Supreme Court

Vijith K. Malalgoda, 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 the article 128 of the Constitution of the Democratic Socialistic Republic of Sri Lanka read with Section 5 C of the High Court of the Provinces (special Provisions) act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC Appeal No. 42/2010

SC (HCCA) LA 328/2009

HCCA Matara Appeal No.240/2004(F)

DC Tangalle Case No.2503/L

Visenthi Baduge Piyasiri,

Peoples' Bank,

Mutiyangana Branch, Badulla

Plaintiff

Vs.

Dissanayaka Mudiyanselage

Gunarathna Banda,

No.71, Tangalle Road, Beliatta

Defendant

AND

Dissanayaka Mudiyanselage

Gunarathna Banda,

No.71, Tangalle Road, Beliatta

Defendant-Appellant

Visenthi Baduge Piyasiri,
Peoples' Bank,
Mutiyangana Branch, Badulla

Plaintiff-Respondent

AND NOW

Visenthi Baduge Piyasiri,
Peoples' Bank,
Mutiyangana Branch, Badulla

Plaintiff-Respondent-Petitioner

Vs.

Dissanayaka Mudiyanselage
Gunarathna Banda,
No.71, Tangalle Road, Beliatta

Defendant-Appellant-Respondent

Before: L.T. B Dehideniya, J.
Murdu N.B Fernando, PC, J.
A.A.U Wengappuli, J.

Counsels: Dr. Wijedasa Rajapakshe PC with Gamini Hettiarachchi for the Plaintiff-Respondent- Appellant
W. Dayaratne PC with Ms. R. Jayawardena for the Defendant -Appellant-Respondent

Argued on: 09.02.2021
Decided on: 17.06.2022

L.T.B. Dehideniya, J.

Plaintiff-Respondent-Appellant (hereinafter sometime referred to as the Appellant) instituted an action in the District Court of Tangalle by plaint dated 05.02.1996, seeking for a declaration of title and ejectment of the Defendant-Appellant-Respondent (hereinafter sometime referred to as the Respondent) from the land called "Kahagalagodella/Bogahahena", morefully described in the schedule to the Plaint. The Appellant's argument is that the Respondent was in unlawful and forcible occupation in the said land.

The Appellant submits that Peter Silva who was the original owner of the land in question died intestate leaving as his heirs his wife Vineetha Ediriweera Jayasuriya (Appellant's Aunt) and the daughter A.P Baby Champa Matilda (Respondent's Wife), who gifted the said land to the Appellant by deed No.645 dated 28.09.1973 attested by H.S De Silva Notary Public (marked as **P-1**). Thereafter, Vineetha Jayasuriya and Baby Champa Matilda revoked the said gift by deed of revocation No.710 dated 18.09.1976 attested by Charles Wirittamulla Notary Public (marked as **P-2**), with the consent of the Appellant. However, upon receiving information from the Bank that the aforesaid deed of gift No.645 is an irrevocable gift and therefore the said revocation is not valid, the Appellant gifted the entire property to Vinitha Jayasuriya by the deed No.970 dated 19.05.1977 (marked as **P-3**). The Appellant further submits that thereafter, the property had been divided into three blocks and transferred the lot No. 2 and 3A to the Appellant by deed No.08 dated 12.08.1977 and deed No.3774 (marked as **P-4** and **P-5**) and gifted lot 3 by the deed No.3775 (marked as **P-6**) to Baby Champa Matilda, who later transferred the said rights by the deed No.4598 dated 27.10.1984 **(**marked as **P-7**) to the Appellant. Accordingly, the Appellant argues that he is the absolute owner of the property in question.

The Respondent, who was the husband of Baby Champa Matilda submits that Baby Champa Matilda did not transfer her rights to the Appellant by deed No.4598. The Respondent's position is that the said deed is a fraudulent document.The Respondent further denied the rights of the Appellant and claimed that since the deed of gift No.645 was cancelled by the deed of revocation No.710, the Appellant is not entitled to transfer his rights to Vinitha Jayasuriya by the deed No.970.

Having considered the aforementioned evidence, the Learned District Judge entered the judgement in favour of the Appellant holding that an irrevocable deed of gift cannot be revoked by a deed of revocation and the deed of gift executed by the Appellant (marked as **P-3**) is a valid gift and thereafter the Appellant got title from deeds **P-4** to **P-7**. Being aggrieved by the said judgement, the Respondent tendered an appeal there from to the Civil Appellate High Court of Southern Province holden at Matara. Civil Appellate High Court held that as Vinitha Jayasuriya and Baby Champa Matilda had revoked the deed of gift No.645 with the consent of the Appellant by the deed of revocation No.710 (marked as **P-2**), the deed of gift No.970 does not transfer any rights/title.Therefore, the High Court set aside the judgement of the District Court and held that the deeds produced marked **P-3** to **P-7** are null and void and further held that Baby Champa Matilda has never transferred her rights to the Appellant by the deed No.4598 (marked as **P-7**). It is from the aforesaid judgement that this appeal is preferred.

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

1) Have their Ladyships' Judges misconstrued the law relating to revocation of deed of gifts?
2) Have their Ladyships' Judges disregarded the fact that said deed of gift No.645 had been made with the consent of all the parties concerned?

3) Is their Ladyships' Judges' judgment contrary to the Principles relating to ownership of an immovable property?
4) Have their Ladyships' Judges failed to consider that the Respondent was estopped in law from disputing the title of the Appellant?
5) Have their Ladyships' Judges misdirected or misguided when they held that ownership of the Respondent was established in proceedings initialed under section 66 of the Primary Court Procedure Act?
6) Have their Ladyships' Judges failed to appreciate the fact that in his judgement the learned trial Judge has come the most appropriate conclusion after evaluation of evidence and considering applicable legal principles?

The Appellant's case is based upon the ground that the Judges of the Civil Appellate High Court have come to the erroneous conclusion that deed No.970 (marked as **P-3**) and all the subsequent deeds after the deed of revocation No. 710 (marked as **P-2**) do not have any legal validity and therefore no title has been transferred to the Appellant. When considering the legal context of the issue before this court and the evidence tendered by both parties, it appears that by the deed of revocation No. 710 dated 18.09.1976 attested by Charles Wirittamulla Notary Public, the donor (Vineetha Jayasuriya and Baby Champa Matilda) has revoked the deed of gift No. 645 and the Appellant has consented to the same.

In the eyes of the law it is competent for the donor to reserve to himself the right to revocation of a deed of gift.

A similar view was expressed in the case of ***Stephen v. Hettiarachchi and Another*** [2002] 3 Sri L.R 39 at p.43 per Weerasuriya J.

"Although ordinarily a deed of gift is irrevocable by the donor nevertheless it is competent for the donor to reserve to himself the right of revocation in which event the donor can by executing a subsequent deed of revocation.."

The legal question of whether a donor can revoke a deed of gift with the express consent of the donee. This can be decided upon examining the expressed intention of the parties. In the case of ***Jinaratana Thero v. Somananda Thero*** (1946) 32 C.L.W. 11 it was held that in construing a deed, the expressed intention of the parties must be discovered.

In ***Rathnayake Mudiyanselage Jayathilaka v. R.M. Siriwardena of Ihalagama*** (S.C. Appeal No. 221/2012, decided on 19.12.2019) at p.8 per E. A. G. R. Amarasekara J,

"The afore quoted legal texts, decisions and authorities indicate that when interpreting a deed, a court has to;

• Find the expressed intention of the parties,

• Find such intention through the meaning of the words used in the deed while considering the whole document to ascertain the true meaning of its several clauses. Sometimes the very form of the document may help in ascertaining the intention…"

When considering the present application, by the deed of revocation No.710, the both Appellant and the donor has expressed their valid consent to revoke the deed of gift No.645.

Deed of revocation No.710 marked as **P-2**, at p. 1-2;

"..තවද එම ත්‍යාග දීමනාව නිසා අප දෙපාර්ශවය කෙරෙහි තිබූ ඥාතීත්වයට හා එකිනෙක පක්ෂයක් කෙරෙහි අප තුළ තිබූ ස්වභාවික ආදරකරුණාවටද දැනට මහත් බාධා ඇති වී

තිබෙන බැවින් තවදුරටත් එම තත්වය ඇති නොවීම සඳහා එම ත්‍යාගය අප දෙපාර්ශවයේ සමගියෙන් අවලංගු කර ගැනීමට අදහස් කරගෙන ඊට එකඟ වූ බැවි අප මෙයින් ප්‍රකාශ කරමු.''

Under the law, a deed of gift is irrevocable unless donor reserves the right to revoke the gift. This legal concept gives a right to the donee that he can retain the title without any disturbance from the donor. If the donee, the person who receives the gift, is willing to return the gift to the donor, the person who gave the gift, donor, need not to reserve the right to revoke. The donee can give consent to revoke the gift. In the present case also, the deed is an irrevocable deed, but the donee consented for the revocation. Therefore, the deed of revocation No.710 (marked as **P-2**) becomes a valid deed and the deed of gift No.645 (marked as **P-1**) was revoked.

With the deed of revocation the title to the land in question repassed to the original owners, namely; Vineetha Jayasuriya and Baby Champa Matilda. After the deed No. 710 (marked as **P-2**) has been executed, no title remains on donee. Therefore, the deed of gift No. 970 (marked **P-3**), which was executed after the deed of revocation marked as **P-2,** will not transfer any right/title to the donee of the deed of gift No. 970 (marked **P-3**), Vineetha Jayasuriya.

Deed of gift No.970 marked as **P-3**, at p. 1

''...විසෙන්ති බදුගේ පියසිරි වන මට වර්ෂ 1973 ක් වූ සැප්තැම්බර් මස 28 වන දින එච්.එස්. ද සිල්වා ප්‍රසිද්ධ නොතාරිස් මහත්මයා විසින් සහතික කළ අංක 645 දරණ තෑගි ඔප්පුව පිට අයිතිව නිරවුල්ව භුක්ති විඳගෙන එන මෙහි පහත උපලේඛනයෙහි විස්තර කරනු ලබන දේපළ සහ ඊට අයිති සියලු දේත්...''

However, as per the aforesaid discussion, since the deed of revocation No.710 is valid, the Appellant (donor) has no title at the time of execution of deed No.970. Therefore, the Appellant

did not have a legal right to execute the said deed No.970 and consequently the said deed does not convey any rights before the law.

It is a well-established legal principle under the Roman Dutch common law *"exceptio rei venditae et traditae"* provides that where a vendor/transferor sells without title but subsequently acquires one, this title adds to the benefit of the purchaser and those claiming through him. In the case of ***Nicholas De Silva v. Shaik Ali*** (1895) 1 NLR 228 at. p 238 Withers J. explained that, if 'A' sells for value and delivers to me a land which does not at the time belong to him; if he acquires it afterwards and brings an action to re-vindicate it, I may defeat him by saying, "But you sold and delivered it to me." I may plead "sale and delivery" with equal effect against the true proprietor who, inheriting the land from my vendor, seeks to re-vindicate it, and this plea is available to those to whom I sell for value and their assigns.

Nevertheless, the law identifies several instances where *exceptio rei venditae et traditae* is not applicable; which includes cases of gifts.

In the case of ***Tissera v. William*** (1944) 45 NLR 358, Keuneman J. held with observing the Voet's Commentaries: Book XXXIX-Title 5;

> *"...Counsel for the appellant argued that under this issue the Commissioner has utilized the exceptio rei venditae et traditae, and that this exception is not applicable to the case of a donation. Certainly no authority has been cited to me to show that this exception applies in the case of a donation, nor am I satisfied that a donation of this kind can be regarded as a sale.*
>
> *Voet (XXXIX 5, 10) dealing with donations states as follows: - ....in case of doubt "the presumption should not be in favour of a donation, secondly because a*

donation is stricti juris and on that account should receive a stricter construction so as to burden the donor as little as possible.." [emphasis added]

Therefore, as the deed No.970 is a deed of gift, it is apparent to this Court that the principle of *exceptio rei venditae et traditae* cannot be applied in the present application.

The Appellant submits that even if the title of the land in question was repassed to its original owners Vineetha Jayasuriya and Baby Champa Matilda by the deed of revocation No.710, said Vineetha Jayasuriya and Baby Champa Matilda had a legal right to transfer their undivided shares to the Appellant by four deeds of transfer respectively deed No.08 (marked as **P-4**), deed No.3774 (marked as **P-5**), deed No.3775 (marked as **P-6**) and deed No.4598 (marked as **P-7**). The Appellant's contention is that whether the deed of gift No.970 is valid or invalid it makes no difference with regard to the devolution of title and the Appellant has become the absolute owner of the property.

When carefully examining the aforesaid transfer deeds (marked as **P-4**, **P-5** and **P-6**) it appears that what was transferred by the transferee is the title that she received upon the said deed of gift No.970.

Deed of transfer No.08 marked as **P-4**, at p.2

"**ඉහත කී උපලේඛනය නම්:-**

1977 ක් වූ මැයි මස 19 වන දින චාල්ස් විරිත්තමුල්ල නොතාරිස් මහතා සහතික කරන ලද අංක 970 දරණ තෑගි ඔප්පුව අනුව අයිතිව නිරවුල්ව භුක්තිවිඳගෙන එන.."

Deed of transfer No.3774 marked as **P-5**, at p.1

"බෙලිඅත්තේ පදිවි විනීතා එදිරිවීර ජයසූරිය වන මම මට මෙහි උපලේඛනයෙහි අංක 1 ට සඳහන් දේපල මෙම කන්තෝරුවේදි සහතික කළ අංක 3396 දරණ ඔප්පුව පිටද අංක 2 ට සඳහන් දේපල මෙම කන්තෝරුවේදි සහතික කළ අංක 970 සහ 1977.05.19 දින දරණ ඔප්පුව පිට අයිති පහත උපලේඛනයෙහි සඳහන් දේපල.."

Deed of transfer No.377**5** marked as **P-6**, at p.1

"බෙලිඅත්තේ පදිවි විනීතා එදිරිවීර ජයසූරිය වන මම මට මෙ මෙම කන්තෝරුවේදි සහතික කළ අංක 970 සහ 1977.05.19 දින දරණ ඔප්පුව පිට අයිති පහත උපලේඛනයෙහි සඳහන් දේපල.."

Therefore, since the deed of revocation No.710 is valid and the deed of gift No.970 does not transfer any rights/title, consequently aforementioned three deeds of transfer marked as **P-4, P-5** and **P-6** does not convey any rights before the law.

The Appellant, further submits that title rights of Baby Matilda's undivided share was transferred to the Appellant by the deed of transfer No.4598 dated 27.10.1984 (marked as **P-7**). According to the recitals of the said deed, it was stated that Baby Matilda was transferring the rights she received from transfer deed No.3775 which does not convey any rights as for the reasons discussed above.

Deed of transfer No.4598 marked as **P-7,** p.1

"බෙලිඅත්තේ පදිංචි අලුත් පටබැඳිගේ බේබි මැටිල්ඩා හෙවත් චම්පා මැටිල්ඩා වන මම මට මෙම කන්තෝරුවේදී සහතික කළ අංක 3775 සහ 1983.8.20 ඔප්පුව පිට අයිති මෙහි පහත උප ලේඛනයෙහි විස්තර කරනු ලබන දේපළ.."

Therefore it is clear to this Court that the deed of transfer No.4598 also does not convey any rights before the law.

The Appellant submits that the Learned High Court Judges have misguided when they held that the ownership of the Respondent was established in proceedings initiated under Section 66 of the Primary Court Procedure Act. The Respondent argues that nowhere in judgement, the Learned High Court Judges have stated that the Respondent has established his ownership to the property in question in the Primary Court Proceedings.

Section 66 of the Primary Courts Procedure Act which deals with inquiries into disputes affecting land, where a breach of the peace is threatened or is likely. In the case of ***Rajamanthri Gedera Somalatha v. Wajira Kanthi Rathnasinghe*** **(**SC Appeal 33/2013, SC minutes dated 07.11.2019) Justice Vijith K. Malalgoda PC. cited with approval of the well-known decision of ***Ramalingam v. Thangarajah*** (1982) 2 Sri L.R 693 where it was held that a matter under section 66 of the Primary Court Procedure Act is not a civil action and the object is to prevent a breach of peace, not to decide any question of title or right to possession of the parties to the land. Accordingly, based on the Order made by the Magistrate's Court under the section 66 application, it cannot be justified one's possession or title rights to a land. Therefore, it is apparent that Section 66 of the Primary Court Procedure Act cannot be applied to the present application.

By considering above circumstances, I answer the questions of law as follows,

1) No
2) No
3) No
4) No
5) No
6) No

Therefore, I dismiss the appeal. Parties to bear their own costs.

Judge of the Supreme Court

Murdu N.B Fernando PC, J.

I agree.

Judge of the Supreme Court

A.A.U 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 from the Judgement of the Civil Appellate High Court of the Western Province holden in Colombo.

S.C. Appeal No.44/2016
SC(HC)LA No.40/2014
CHC No. 244/2013/MR

1. Nawa Rajarata Appliances (Pvt) Ltd.,
   No. 111, Kurunegala Road,
   Galewela.

2. K.D.G.S. Wijeratne.
   Managing Director,
   Nawa Rajarata Appliances (Pvt) Ltd.,
   No. 111, Kurunegala Road,
   Galewela.

Plaintiffs

Vs

Commercial Bank of Ceylon PLC,
Commercial House,
No. 21, Sir Razeek Fareed Mawatha,
P.O. Box 856, Colombo 01.

Defendant

AND NOW BETWEEN

Commercial Bank of Ceylon PLC,
Commercial House,
No. 21, Sir Razeek Fareed Mawatha,
P.O. Box 856, Colombo 01.

Defendant-Petitioner/Appellant

Vs

1. Nawa Rajarata Appliances (Pvt) Ltd.,
   No. 111, Kurunegala Road,
   Galewela.

2. K.D.G.S. Wijeratne.
   Managing Director,
   Nawa Rajarata Appliances (Pvt) Ltd.,
   No. 111, Kurunegala Road,
   Galewela.

Plaintiffs-Respondents

Before: Murdu N.B.Fernando, PC. J.,
P. Padman Surasena, J. and
E.A.G.R.Amarasekara, J.

Counsel: Shivan Coorey with Ms Sadeekah Akram for the Defendant-Appellant.
Faizar Musthapha PC with Tharaka Nanayakkara, Muneer Thoufeek, Ashan Bandara and Dananjaya Perera for the Plaintiffs-Respondents.

Argued on: 06.10.2020

Decided on: 05.10.2022

Murdu N.B. Fernando, PC. J.,

The defendant-appellant ("the appellant/ the defendant bank") came before this Court, having obtained Leave to Appeal against an Order made by the High Court of the Western Province holden in Colombo, in the exercise of its civil jurisdiction ("the High Court").

The High Court on 20th June, 2014 granted an Interim Injunction to the plaintiffs-respondents ("the respondent/ the plaintiff") restraining the defendant bank from selling the mortgaged properties under and in terms of the provisions of the Recovery of Loans by Bank (Special Provisions) Act No 4 of 1990 as amended ("Recovery of Loans Act").

This Court on 01st March, 2016 whilst granting Leave to Appeal to the defendant bank, directed that the High Court trial should proceed.

The two Questions of Law on which Leave to Appeal was granted to the defendant bank referred to in paragraph 17(b) and (d) of the Petition of Appeal is as follows:

i) The learned Judge of the Commercial High Court has erred in taking the view that the respondents have not accepted the rescheduled banking facilities when in point of fact the material before court clearly establishes that, though the respondents have not signed the letter of offer, the respondents have accepted and benefitted from these rescheduled banking facilities.

ii) The learned Judge of the Commercial High Court has erred in overlooking the fact that the respondents did not dispute that they received and benefitted from the rescheduled banking facilities even when they received several letters written by the petitioner requesting and then demanding repayment of the monies due on the said rescheduled banking facilities, which letters were filed with the said statement of objections of the petitioner and were before the learned judge?

The aforesaid two questions of law signify, that this appeal pivots around the **rescheduled banking facilities** granted by the appellant to the respondent. This Court is also mindful that by this appeal only the Interim Injunction issued by the High Court in 2014, restraining the appellant from pursuing the course of action stipulated in the Recovery of Loans Act is challenged before this Court, whilst the trial is proceeding.

The High Court granted the Interim Injunction sought by the plaintiff, solely upon the ground that the 'offer' pertaining to the rescheduled banking facility was not signed by the plaintiff and thereby coming to the conclusion that the 'offer' was not accepted by the plaintiff.

The High Court went onto hold, that in a situation where there was no consensus between the parties, the defendant bank had gone ahead and rescheduled the banking facilities on its own volition and thus prima facie there is a case in favour of the plaintiff. The High Court also held, on a balance of probability that the properties mortgaged were sufficient to recover the overdue monies and restrained the defendant bank from resorting to parate execution of the properties secured.

This Court observes that the said Order of the High Court is devoid of any reasoning. It is a mere re-statement of the stance of the plaintiff. It is bald and bare, short and skeletal and though the terms 'prima facie case' and 'balance of probability' is repeated it does not comment or refer to judicial authority vis-á-vis issuance of interim injunctions nor evaluate facts and circumstances of the matter in issue.

The impugned Order completely ignores the points of contention put forward by the defendant. It does not consider, examine or evaluate the documents marked and tendered to court pertaining to the rescheduling of the banking facilities granted to the plaintiff nor the default of the payments pursuant to the rescheduling of the banking facilities by the plaintiff.

The impugned Order is also silent on the numerous objections raised by the defendant bank in its statement of objections filed before the High Court.

Prior to considering the questions of law raised before this Court, for easier understanding of the matter in issue, I wish to briefly refer to a few material facts from the documents produced before the High Court.

01. For many decades the plaintiff [an unincorporated company and its managing director] obtained short term loans, import demand loans, overdrafts and other banking facilities from the defendant bank. Mortgage bonds were executed over several properties as security, for the repayment of the monies due upon those facilities.

02. In **December 2008**, the plaintiff requested the defendant [**R**] to discharge some of the mortgage bonds upon clearing of outstanding monies and to reschedule the remaining banking facilities upon properties already secured to the bank.

03. In **February 2009**, the defendant bank acceded to the request of the plaintiff for rescheduling of the outstanding short term loans, import demand loans and overdrafts by granting term loans [**S**] [**P4** and **P4A**]. Two new loan accounts [bearing number 500941 and 500945] were opened and requisite funds were transferred to the plaintiff's bank account and the proceeds were utilized to clear the outstanding sums on the aforesaid facilities. Seven out of the fourteen mortgage bonds were discharged and released. The balance outstanding sums reflected in the two new term loans and the remaining banking facilities were secured upon seven existing mortgage bonds. [**D1, D2, D3, D4, D5, M1** and **M2**].

04. The plaintiff failed to re-pay the defendant bank, monies due upon the rescheduled banking facilities and went in to default. The plaintiff was put on notice by the defendant with regard to the consequences that would flow in the event the facilities obtained under the Recovery of Loans Act were not adhered to by the plaintiff. [**Z1** and **Z2**].

05. In **February 2010**, Letters of Demand [**AA1** to **AA4**] were sent by the defendant bank to the plaintiff demanding the outstanding sum. The plaintiff did not dispute the outstanding dues nor settle the banking facilities obtained by making the necessary payments.

06. Thereafter in **May 2010**, the defendant bank resolved [**BB1**] [**P9, P10** and **P11**] to sell five mortgaged properties in terms of the Recovery of Loans Act and recover the sums due to the bank on some of the facilities granted to the plaintiff. In **September 2010** notice of such decision was communicated to the plaintiff [**CC1** and **CC2**]. The plaintiff did not respond nor dispute the outstanding sum.

07. In **2011** and **2012** too, the defendant bank wrote to the plaintiff [**DD, CC3** and **CC4**] indicating that if the overdue sums are not duly settled, the bank will be compelled to publish the notice of resolution in the government gazette and proceed to take follow up action. The plaintiff did not endeavor to settle nor dispute the outstanding sum even at this stage.

08. Thereafter in **December 2012**, the resolution was published in the government gazette [**FF1** to **FF6**] indicating that the properties referred to therein will be sold by public auction.

09. The auction was scheduled for 15th and 16th **August 2013** and the plaintiff was given due notice of the sale [**HH1** and **HH2**]. It was also published in the newspapers and displayed in public places [**HH3** to **HH22**].

10. Consequent to the same, the plaint dated 13-08-2013 was filed. The plaintiff instituted the instant case pleading that the plaintiff did not consent nor agree to the rescheduling of the banking facilities, that it was unilaterally done by the defendant bank, that though a request was initially made by the plaintiff for rescheduling and an offer letter and an application for rescheduling was received by the plaintiff [**P4** and **P4A**] that the plaintiff did not counter sign nor authorize such proposal and therefore, the plaintiff did not accept the rescheduling and the term loans granted to the plaintiff.

11. The plaintiff also annexed the resolution published in the newspapers [**P9, P10** and **P11**] and pleaded that the resolution was not served on the plaintiff in terms of the Recovery of Loans Act. The plaintiff thus moved for an enjoining order and an interim injunction, restraining the sale scheduled for August 2013, on the ground that if the secured properties were to be sold by public auction, that the plaintiff would be greatly prejudiced.

12. The High Court granted the enjoining order prayed for by the plaintiff restraining the defendant bank from proceeding with the sale and gave notice of interim injunction to the bank.

13. The defendant bank filed a statement of objections annexing a number of documents and pleaded that it had acted in terms of the law and moved for vacation of the enjoining order already granted and to reject the application of the plaintiff for injunctive relief.

14. The High Court inquired into the matter by way of written submissions and in June 2014 granted the interim injunction as prayed for by the plaintiff and restrained the defendant bank from proceeding with the sale. Being aggrieved by the said Order the appellant is now before this Court.

Having referred to the factual matrix, let me now move onto the questions of law raised before this Court.

For better appraisal of the two questions of law, I wish to re-phrase it as follows:

i) Did the respondent accept and benefit from the rescheduled banking facilities, although the respondent did **not** sign the letter of offer?

ii) Did the respondent **not** dispute the fact that it received and benefitted from the rescheduled banking facilities even when the appellant requested and then demanded repayment of the overdue monies?

Having referred to the questions to be determined by this Court, let me move onto examine the matter in issue.

The appellant challenged the impugned Order before this Court primarily on the ground that the plaintiff has dishonestly suppressed, concealed and misrepresented material facts from the High Court when invoking its jurisdiction and thus the plaintiff is not entitled to obtain injunctive relief. The appellant also contended that the plaintiff, having accepted the offer for rescheduling cannot thereafter take up the position that there was no express acceptance.

The respondent on the other hand maintained that a prima facie case was made against the bank before the High Court and strenuously contended that the resolution was bad in law, since it contained facilities relating to two distinct borrowers and is in respect of a sum less than the sum stipulated in the Act. The respondent also submitted that the matter in issue is in respect of a third party mortgage and such mortgages are not enforceable through parate execution.

This appeal stems from an interim Order i.e. an Order granting the interim injunction as prayed for by the plaintiff, restraining the defendant bank from proceeding with the sale of five properties secured by five mortgage bonds. The defendant bank resorted to this course of action to recover default payment pertaining to two term loans and an overdraft facility granted to the plaintiff by the bank.

Thus, the matter to be examined by this Court, is limited to the granting of injunctive relief and the question to be determined in this appeal is whether the plaintiff has established a case for such relief or not.

In order to answer the said query, I wish to look at the grievance of the plaintiff as reflected in the plaint.

The plaintiff averred that it is in the trading business and for many years has obtained a number of overdraft facilities secured upon fourteen mortgage bonds. The plaintiff annexed five such mortgage bonds to the plaint. (**P3A** to **P3E**)

The plaintiff further averred, that in 2009 a request was made by the plaintiff to the defendant bank to reschedule the facilities obtained by the plaintiff and release one secured property in order to pay back the overdue sum of money but the bank released nine properties and rescheduled the outstanding facilities.

The plaintiff annexed as **P4 and P4A**, the letter of the defendant bank dated 26-02-2009 which the plaintiff had to counter sign and an application form to be perfected. The position of the plaintiff was that the said documents were not signed and returned to the bank and by the said act the plaintiff pleaded it rejected the offer of the bank for rescheduling of the banking facilities. The plaintiff further averred in spite of the rejection, the bank had gone ahead and rescheduled the facilities and opened two new term loans.

Another document annexed to the plaint was **P5**, plaintiff's letter to the Monitoring Division of the Central Bank dated 21-02-2012, alleging that the defendant bank has fraudulently prepared documentation in opening two term loans and praying that the plaintiff should not be black listed and that the plaintiff's name be removed from the list of defaulters maintained by the Credit Information Bureau. (CRIB)

The rest of the documents annexed to the plaint were **P6** defendant bank's response to the complaint (**P5**) made to the Central Bank (forwarded to the defendant bank by the Central Bank); **P7** and **P8** bank statements received by the plaintiff pertaining to the two term loans; **P9, P10** and **P11** the board resolution published in three newspapers; **P12** notice of sale served on the plaintiff by the bank; **P13, P14** and **P15** photographs and affidavits of the photographer and another pertaining to the notice of sale.

Thus, the case presented by the plaintiff was that the notice of sale was not properly affixed to the property to be sold. Hence, the plaintiff moved for a declaration that the bank has no right to take steps in respect of the two term loans and that the resolution passed by the bank is null and void. The plaintiff also prayed for a permanent injunction against the sale of the five lands reflected in the schedule to the plaint, an interim injunction and an enjoining order in the interim.

From the foregoing it is amply clear that the plaintiff was seeking declaratory relief against the rescheduling of banking facilities executed in 2009, solely upon the ground that **P4** and **P4A** were not counter-signed and returned. The plaintiff admitted that a request for rescheduling was made by the plaintiff and did not dispute the receipt of proceeds consequent to the rescheduling. The plaint did not disclose steps or action taken by the plaintiff to dispute or challenge the rescheduling from the point of granting of the facility until filling of plaint, i.e., from February 2009 to August 2013, a period of 4 ½ years excepting dispatch of **P5**. The letter annexed as **P5** was addressed to the Central Bank and not to the defendant bank as erroneously pleaded in the plaint.

The plaint also does not indicate follow up action taken by the plaintiff consequent to rescheduling in 2009, receipt of the bank statements (**P7** and **P8)** and the board resolution (**P9, P10** and **P11)** authorizing recovery procedure under the Recovery of Loans Act. The photographs **(P13)** and the two affidavits (**P14** and **P15**) are only in reference to one secured property and in my view no consequences flow from **P13, P14** and **P15** to justify the plaintiff's case for injunctive relief presented to the High Court.

The plaint filed by the two plaintiffs was supported by an affidavit, sworn to by the 2nd plaintiff in his personal capacity. It is observed that a further affidavit sworn to by the 2nd plaintiff on behalf of the 1st plaintiff company is also available in the brief. No counter affidavits have been filed disputing the defendant banks statement of objections and the numerous documents annexed thereto.

The impugned Order of the High Court does not examine or consider the plaintiff's relationship with the bank, the numerous facilities obtained, the time lapse (February 2009 to August 2013 i.e., from the date of rescheduling and issuance of term loans to the date of resorting to legal action to challenge the rescheduling). The Order is silent on the large number of documents tendered with the statement of objections which referred to the rescheduling of the facilities, the letters of demand, the outstanding monies and the consequences of default which entailes the bank to resort to the Recovery of Loans Act to re-coup the monies extended by the bank.

The impugned Order only focuses upon the letter of offer (**P4** and **P4A**) issued by the bank in February 2009 and the fact that it has not been acknowledged and counter signed, to come to a finding that there was no consensus between the parties with regard to the rescheduling of the banking facilities. It is observed based only upon the said fact that the High Court granted the interim injunction to the plaintiff and restrained the sale of secured properties resorted to by the bank, in terms of the Recovery of Loans Act.

Having examined the factual matrix of the instant case, I now move onto consider the legal submissions presented by the appellant and the respondent before this Court.

The Counsel for the appellant pivoted his submission upon the ground that the plaintiff was not entitled to obtain equitable relief from the High Court, as the plaintiff suppressed and misrepresented facts to the High Court. He went onto contend that the plaintiff acted in a wrongful and dishonest manner and invoked the jurisdiction of the trial court to obtain injunctive relief. The submission of the appellant was that the respondent did not act in good faith, a necessary ingredient to obtain equitable relief from our courts, as clearly enunciated by the jurisprudence of our courts.

To substantiate his argument, the learned Counsel relied upon the case of **Alphonso Appuhamy v. Hettiarachchi [1973] 77 NLR 131** where this Court quoted with approval the observations made in two English authorities. It reads as follows:

> *"A plaintiff applying ex-parte comes (as it has been expressed) under a contract with the court that he will state the whole case fully and fairly to the court. If he fails to do that, and the court finds, when the other party applies to dissolve the injunction, that any material fact had been suppressed or not properly brought forward, the plaintiff is told that the court will not decide on the merits, and that as he has broken faith with the court, the injunction must go."*
>
> *"I have always maintained, and I think it most important to maintain most strictly, the rule that, in ex-parte applications to this court, the utmost good faith must be observed. If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is alted, to discharge the order at once, so as to impress upon all persons who are suitors in this court the importance of dealing in good faith with the court when ex-parte applications are made"* (page138)

The Counsel for the appellant, further submitted that a misstatement of true facts which puts an entirely different complexion on the case when presented to obtain injunctive relief, would amount to misrepresentation and suppression of material facts warranting dissolution of the injunction without going into the merits of the matter and that a party cannot plead that the misrepresentation was due to inadvertence or that he was unaware of certain facts which he omitted to place before court. Ref. **Hotel Galaxy (Pvt) Ltd. and others v. Mercantile Hotel Management Ltd. [1987] 1 Sri LR 5; Walker sons and Company Ltd. v. Wijayasena [1997] 1 Sri LR 293.**

Thus the appellant contended, based upon the pronouncements in the aforesaid **Hotel Galaxy case**, firstly, the concealment and suppression by the plaintiff that the rescheduling of the banking facilities was a direct response to the specific request of the plaintiff; secondly, that it was with the express consensus and consent of the plaintiff; and thirdly, the specific averment in the plaint that the rescheduling was done on the own volition of the defendant bank amounts to gross misrepresentation, which warrants dissolution of the interim injunction issued by the High Court.

The Counsel also contended, that the plaintiff at all times benefitted from the rescheduling and that the proceeds of the term loans were utilized to reschedule some of the overdue sums and clear certain facilities and release a number of properties back to the plaintiff. The suppression by the plaintiff of the utilization and benefit it derived from the rescheduling

together with the fact that no steps or action were taken or resorted to by the plaintiff to dispute or challenge the rescheduling from 2009 i.e. the grant of rescheduling up until 2012, when representations were made by the plaintiff (vide **P5** to the Central Bank) also amounts to misrepresentation which on its own, the appellant contended, warrants dissolution of the interim injunction.

Further, the learned Counsel submitted that in the light of the numerous defenses raised by the defendant bank in its objections, the High Court could not have been convinced firstly, that a prima facie case had been presented by the plaintiff or that the plaintiff had a legitimate, legally enforceable and or a recognizable right or more over a reasonable prospect of success in the instant case. Thus, based upon the said submission too, the Counsel for the appellant contended that an interim injunction ought not to have been issued by the High Court.

The attention of this Court was also drawn by Counsel to the decisions of this Court in **Amarasakera v. Mitsui and Company Ltd. and another [1993] 1 Sri LR 22** and **Yasodha Holdings (Pvt) Ltd. v. Peoples Bank [1998] 3 Sri LR 382**, wherein the grounds on which an injunction can be issued was critically analyzed.

This Court having considered the submissions of the appellant and especially the contention that the plaintiff has concealed and suppressed material facts from the trial court, failed to act in good faith in invoking the jurisdiction of court, see merit in the submissions of the appellant.

Further, we see merit in the submission made, that the failure of the trial judge to judicially analyze and evaluate the case of the defendant bank (presented to the trial court and reflected in the statement of objections and the documents annexed thereto) together with the misrepresentation referred to above are material factors warranting dissolution of the interim injunction granted by the trial court.

Having said that let me move on to examine the case presented by the respondent.

The learned President's Counsel rested his case to uphold the impugned Order upon the ground that the letter of offer pertaining to the rescheduling was not accepted by the respondent and for that reason submitted that the board resolution was *void abinitio.* It was also contended, that the resolution relates to two distinct borrowers and relying on the case of **Ramachandran and another, Ananda Siva and another v. Hatton National Bank and others [2006] 1 Sri LR 293** vigorously argued that third party mortgages cannot be enforced through parate execution.

The learned Counsel also referred to two other decided cases of this Court, viz, **Hatton National Bank Ltd. v. Jayawardene and others [2007] 1 Sri LR 18** and **DFCC Bank v. Muditha Perera and others [2014] 1 Sri LR 128** and distinguished the rationale of the said

cases and submitted that this Court should not be guided by the dicta in the said cases and should refrain from lifting the veil of incorporation of the plaintiff company in the instant appeal, for the reason that the appellant did not allege fraud on the part of the plaintiff and or that another party benefitted from the facility given to the plaintiff.

Further, the respondent contended that the resolution was bad in law, since the facilities referred to therein were less than the minimum amount specified in the Recovery of Loans Act and drew the attention of this Court to the judgement of **Nanayakkara v. Hatton National Bank Ltd. S.C.Appeal 53/2017- S.C.M. 28.11.2017.**

I wish to consider firstly, the submission presented by the respondent, pertaining to the board resolution.

In the impugned Order no reference is made with regard to the legality or validity of the resolution passed in 2010. The cases referred to above and heavily relied upon by the respondent before this Court were not considered, referred to or evaluated in the impugned Order. We observe that the passing of the resolution or the date of the resolution was not a matter of contention for the High Court. The Order only states that the offer for rescheduling was not accepted by the plaintiff and that there was no consensus between the parties. That was the sole ground upon which the High Court granted the interim injunction in the instant appeal.

Likewise, the plaint too does not refer to the validity or the legality or the infirmities of the board resolution (**P9**) passed way back in 2010. The grievance of the plaintiff as reflected in the plaint pertains to the notice of sale. The principal ground is that adequate notice was not given by the bank to the plaintiff prior to publishing of the notice of sale. Moreover, the plaintiff pleads that the notice of sale was not exhibited on the properties advertised to be sold and great prejudice will be caused to the plaintiff. This Court observes the **P13** photographs and the **P14** and **P15** affidavits were tendered to court to justify this contention. Based upon the notice of sale the plaintiff moved for interim relief.

Thus, it is undisputed that in the trial court the resolution passed by the bank in June 2010, was not an issue upon which the parties were at variance. In the said circumstances, to plead that the board resolution is *void abinitio,* before this Court in my view, has no merit. The substantive issue pertaining to the board resolution has still not been considered and or determined by the trial court. The impugned Order which this Court is called upon to examine and adjudicate does not refer to the board resolution or its validity or legality and is purely founded upon the contention that there was no consensus between the parties. Therefore, the challenge to the resolution on the ground that it is bad in law, cannot be maintained before this Court, in the instant appeal.

The second contention put forward by the respondent is with regard to 3rd party mortgages. This Court is mindful that there are two plaintiffs before Court. The 1st plaintiff is the company and the 2nd is its managing director. The plaint filed was supported by an affidavit sworn to by the managing director in his personal capacity. A further affidavit was also filed by the managing director for and on behalf of the company. Therefore, in my view, I see no merit in the contention put forward with regard to the plaintiff being two distinct borrowers.

Similarly, I see no merit in the contention of the respondent that the mortgages in issue (**D1** to **D5**), are 3rd party mortgages. Moreover, to rely upon the dicta in **Ramachandran's case** (supra) and to present an argument that **D1** to **D5** i.e., third party mortgages are not subject to parate execution, is fallacious and in my view a frivolous ground to contend the correctness of the impugned Order.

The inherent power of a trial court, to piece and or lift the veil of incorporation and ascertain the true nature and identity of the parties before it, cannot be stifled and or curtailed prematurely. When facts and circumstances demands and in order to mete out justice, a trial court is entitled to go beyond the corporate veil. Ref. **HNB v. Jayawardena case** (supra). In this instant appeal, the trial court has still not gone into that stage to examine or evaluate such fact. Thus, in my view, this contention put forward by the learned President's Counsel for the respondent, does not stand to reason. Hence, a discussion on the cases relied upon by the respondent in this appeal, will only be of academic interest and will not assist in determining this appeal.

This brings me to the last and final submission of the respondent namely, the letter of offer pertaining to the rescheduling of facilities. The contention of the respondent was since the rescheduling was not formally assented to by the respondent that the respondent did not agree or accept the rescheduled banking facilities and therefore the respondent refrained from making any payments upon the said facility.

The appellant in response argued, that the rescheduling of facilities was done in deference to the respondent's own request (**R**) made in December, 2008 where by the respondent requested, to clear and off-set several other facilities obtained by the respondent during the years 2001 to 2008 by way of overdrafts, short term loans and import demand loans and to give the respondent a longer period of time i.e., long term loan to re-pay the monies which were then due to the bank on the said facilities.

The appellant further contended that the request of the respondent (**R**) is a very material factor which has been deliberately concealed by the respondent from the trial court. The Counsel also submitted that consequent to the request of the respondent (**R**) the appellant issued the letter dated 26-02-2009 (**S**) and acceded to the respondents request for rescheduling of the outstanding monies. Thereafter only, the defendant granted the term loans of longer

duration and transferred the necessary funds to the respondents account in March 2009. Thus, the Counsel contended, the proceeds of the two new term loans through which such moneys were dispensed has been received by the respondent and utilized to clear the overdue monies and thereby the respondent has immensely benefitted from the two term loans.

The appellant further contended that the respondent was fully aware of the transfer of funds and not only benefitted but enjoyed the fruits of such proceeds from March 2009 and that the respondent did not dispute rescheduling of the facilities, up until filling of the instant case. The appellant also drew our attention to a draft copy pertaining to a resolution of the plaintiff printed on the letter head of the 1st plaintiff company filed by the plaintiff together with **P4** and **P4A** in the trial court and contended that the plaintiff appears to have resolved to obtain the rescheduled facilities, which factor was unchallenged by the respondent.

In the aforesaid circumstances the appellant submits, a contract came into being. The learned Counsel went onto contend that an offer could take place by express words or by conduct and in the instant matter it was by conduct. Though the letter dated 26-02-2009 (**S**) (also marked by the respondent as **P4)** and the application form (**P4A**) was not signed and returned, the appellant contends that by conduct the respondent has accepted the rescheduling of the facilities in the year 2009 and is estopped from challenging the rescheduling of the banking facilities, four years later by filling the instant case in 2013.

I have considered the submissions made by both parties and the documents and material in the brief pertaining to the specific contention that there was no consensus between the two parties.

I have carefully examined the request made by the respondent on 22-12-2008 (**R**) to re-schedule the existing banking facilities citing a litany of woes and hardships and the letter dated 26-02-2009 (**S** and **P4**) by which the appellant acceded to the request of the respondent to reschedule the existing banking facilities. I have also examined the bank statements produced before the High Court (**P7** and **P8**) reflecting that in March 2009 two new term loans were given, the proceeds of the two new term loans were credited to the respondents account and thereafter utilized to clear the moneys overdue on three existing banking facilities.

The respondent does not deny the said factors, especially the granting, crediting and utilizing of the proceeds of the two loans. Its contention is that it was done without its consent on the volition of the appellant itself. No evidence has been produced to establish that the respondent at any point of time objected, disputed or challenged the said transfer of funds to clear the overdue sums in the three existing banking facilities or communicated or corresponded with the bank not to proceed with the rescheduling on the ground that the rescheduling has not been accepted by the respondent.

Thus, I am of the view although the documentation was not perfected and returned to the bank that by conduct, the respondent has acquiesced with the rescheduling and concurred with the procedure adopted by the appellant. Therefore, the respondent is now estopped from challenging the rescheduling of the banking facilities upon the basis that it was done without the respondents' express and written consent.

In our legal system, contracts entered into by and between parties, either expressly or impliedly have been recognized as valid contracts enforceable in terms of the law. In the law of contract, what is material is the offer and acceptance. It could be oral or in writing, expressly stated or inferred by implication, entered into by word or by conduct. The essential element is the acceptance of the offer with a mutual understanding.

Weeramantry, in his illuminating thesis on **Law of Contract** at page 124 observes as follows:

> *"Acceptance of an offer may take place by express words or by conduct."*

Chitty on Contracts, Volume I, General Principles [31st ed] under the title 'Express and Implied contracts observes:

> *"Contracts may be 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 […] 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 word and in the other case by conduct."* (chapter 1-096)

Whilst appreciating that the intricacies of a contractual obligation or whether the ingredients of a contract have been fulfilled is a matter for the trial court to elucidate, the sweeping statement made by the High Court, that there was no consensus between the parties, for rescheduling of the banking facilities, in my view is a wrongful presumption. From the reading of the impugned Order, it is extremely clear, that the High Court has come to such a finding merely because the documents **P4** and **P4A** were not signed and returned. The High Court when making such order has not considered or examined the request (**R**) made by the plaintiff for rescheduling of the banking facilities nor the past relationship between the plaintiff and the defendant bank when all such material was before court. It had completely ignored or thought it irrelevant or immaterial to consider the time lapse of approximately three to four years, when no steps were taken by the plaintiff to dispute or challenge the rescheduling or even communicate with the defendant bank its dissention with regard to the granting of the two new term loans by which the plaintiff's, past dues have been completely wiped-off and cleared.

This court is also mindful that the only document tendered by the plaintiff to substantiate any action been taken during the time duration March 2009 [time of granting of the two new term loans] and August 2013 [filling of plaint] is **P5**, which is addressed to the Central Bank and not even to the defendant bank.

In the aforesaid circumstances, for the High Court to come to a finding that the plaintiff has established a prima facie case in favour of the plaintiff, in my view is unwarranted and erroneous.

The High Court, upon the ground of balance of probability too, determined that the properties mortgaged are sufficient to recover the monies outstanding. Therefore, the finding made without examining or considering the defaulted sum vis-á-vis the value of the properties mortgaged, in my view is untenable. Similarly, the High Court has failed to give any basis or reason for such finding and in my view on the said ground too, the impugned order cannot be justified.

Thus, based upon such unfounded assertions of the plaintiff, to grant an interim injunction to restrain the defendant bank from taking steps under the provisions of the Recovery of Loans Act, in my view is ill-founded and preposterous.

The prime duty of a court of law is to consider and examine the case presented by the parties and come to a finding in terms of the law. In the impugned Order, it is regretted to note that the rudiments of the law have been completely ignored and brushed aside. However, it should be borne in mind that the observations and views expressed herein, are to determine this appeal. It should not prejudice the parties in the adjudication of their claim and should not in any way be construed at the trial as the concluded view on any matter of law or fact to be decided at the trial.

The attention of this Court was also drawn to the below mentioned dicta, by the Counsel for the appellant to substantiate its case.

Amerasinghe, J., in the **Mitsui case** (supra) observed;

> *"what the learned District Judge was expected to do was to consider the material before him placed by all the parties and decide whether the plaintiffs prospect of success was real and not fanciful and that he had more than a merely arguable case"* (page 35*)*

In **Yasodha Holdings case** (supra) this Court observed;

> *"The power which the court possess of granting injunctions should be very cautiously exercised and only on clear and satisfactory grounds. An application for an injunction is an appeal to an extra ordinary power of the court and the*

applicant is bound to make out a case showing a clear necessity for its exercise" (page 387)

In the case referred to above, Yasodha Holdings among other grounds moved court for interim relief against the bank, when the bank took steps to transfer the defaulting company's bank account to non-performing category and report the company to the Sri Lanka Credit Information Bureau.

In the said case, Amerasinghe, J., went onto observe:

> *"I am of the view that the balance of convenience in this case lies in allowing the normal banking laws and procedures to operate. The equities are in favour of the bank. The submission that the bank would not stand to lose anything is an untenable proposition having regard to the fact its loan portfolio, liquidity and profitability have been and will continue to be affected if it cannot take such measures, as it is entitled in law to protect its interests. Moreover, the appellant has failed to show that irreparable harm would be sustained unless the injunction was granted [.....]*
>
> *If the bank, acting in accordance with the law, takes certain steps that might eventually harm the appellant's business the appellant should not be restrained, for the harm sought to be prevented does not relate to acts that are unlawful or wrongful [....] The harm, if any, that might be cased would be that which the appellant has brought upon itself by failing to liquidate its debts".* (page 386)

I fully concur with the aforesaid observations expressed by this Court pertaining to grant of injunctions in banking matters and am of the view the power of the trial court to grant injunctions should be exercised cautiously and on distinct grounds specifically referred to and laid down in the Order of the court.

In the instant appeal, the respondent has already been reported to the Sri Lanka Credit Information Bureau (CRIB), a board resolution passed to recover monies due by sale of mortgaged properties, respondent given sufficient time to repay its debts and upon the failure of the respondent to honour its obligations the bank has resorted to publish the notice of sale and follow the provisions of the Recovery of Loans Act.

The High Court, when making the impugned Order, has not evaluated the aforesaid facts and especially the plethora of material tendered to the High Court by the bank together with its statement of objections. It has not considered the respondents' prospect of success at the trial vis-á-vis the respondents initial request for rescheduling and the conduct of the respondent. It has not examined the respondents' deep silence and the failure to dispute the liability and or reject or challenge the rescheduling alleged to be done by the bank on its own

accord and volition. It has not examined the conduct of the respondent in the light of the receipt of bank statements and more so, on receipt of the letters of demand. It has failed to evaluate the belatedness or the lapse of time between the grant of rescheduling of facilities and resorting to litigation. It only parrots that there was no consensus between the parties without examining the true nature of the relationship between the parties. It overlooks the beneficial interest accrued to the respondent in view of the rescheduling and or re-arrangement of the loans.

Most importantly, the impugned Order does not consider the relevancy or comment upon the misrepresentation and gross suppression of material facts, which this Court has time and again observed, disentitles a party from receiving equitable relief. **Alphonso Appuhamy v. Hettiarachchi; Hotel Galaxy v. Mercantile Hotel Management Ltd.; Amarasekara v. Mitsui and Company Ltd.;** and **Yasodha Holdings v. Peoples Bank cases** discussed earlier.

In the aforesaid circumstances, I hold that granting relief by way of an interim injunction as prayed for by the respondent and detailed in the plaint filed in the High Court is not sustainable in law for the reason that the respondent has failed to establish a prima facie case, a reasonable prospect of success and more so, that the balance of convenience is in favour of the respondent.

Therefore, for reasons more fully adumbrated in this Judgement, I answer the two questions of law, raised before this Court in the affirmative and in favour of the appellant.

I allow the appeal of the Appellant and set aside the Order of the High Court dated 20th June, 2014. The interim injunction issued by the High Court is thus dissolved.

I further direct the 1st and 2nd respondents in these proceedings to pay a sum of Rs 500,000/= as costs of this appeal to the appellant.

Appeal is allowed.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree

Judge of the Supreme Court

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

I had the privilege of reading the judgment written by Her Ladyship Justice Murdu N. B. Fernando in its draft form. I am in agreement with the conclusion reached by Her Ladyship to set aside the Order of the High Court dated 20.06.2014 on the basis of suppression of material facts by the Plaintiff-Respondents (herein after the Plaintiffs) which has a direct bearing in answering the second question of law allowed by this Court.

The letter marked 'R' with the objections is a request made by the 2nd Plaintiff, who is also the Managing Director of the 1st Plaintiff, to reschedule the overdraft facilities. 'R' does not contain any specific reference to loan accounts maintained under the 1st plaintiff's name and 2nd plaintiff's name. The documents marked 'S' and 'V' marked with the objections (also marked as P4 with the Plaint) contain terms relevant to the proposed rescheduling of the loans of the 1st Plaintiff and of the 2nd Plaintiff respectively. Whether such terms were accepted by the Plaintiffs orally or by their conduct will have to be considered and decided at the trial proper. Even the Defendant bank has admitted that the 2nd Plaintiff refused to sign the offer letter- vide P6. It must be noted that 'S' and P4 were addressed to the Directors of the 1st Plaintiff and 'V' and P6 were addressed to the 2nd Plaintiff. No signature is found neither on 'S' nor on 'V' to indicate that they were accepted by signing the document. It is somewhat uncommon for a bank to release money or securities either prior to fulfilling the terms of agreements or prior to a formation of a new contract or agreement with regard to the existing defaulted loans. In that backdrop whether the Defendant bank made mere book entries while the money remaining in its coffers when the Plaintiffs were not in agreement with the offers have to be decided at the main trial after hearing evidence. It must be observed that the draft resolution of the 1st Plaintiff company annexed with P4 and P4a has not been signed and there is no board minute to show that it was passed. Whether there are sufficient facts available to lift the corporate veil and whether the properties mortgaged may not be considered as third party mortgaged properties and whether the Defendant bank can proceed to sell may become issues at the trial proper since the property mortgaged being the managing director's property may not be sufficient to lift the corporate veil. Thus, still there may be an arguable case for the Plaintiffs.

On the other hand, it must be noted that the Plaintiffs themselves have admitted that a rescheduling took place after they made a request and some properties were released- vide paragraphs 9 and 10 of the plaint. It appears that while enjoying the said benefit of releasing some properties through the impugned rescheduling of the loans and without refusing to accept such relief on an impugned invalid agreement, the Plaintiffs have filed the action challenging the impugned rescheduling. Under such circumstances, it is difficult to say that the Plaintiffs have come to courts with clean hands to ask for interim injunctions.

However, in evaluating whether the Plaintiffs had a prima facie case the document marked 'R', 'AA1','AA2', ÁA3', ÁA4', 'BB1', 'CC1', 'CC2', 'CC3', 'CC4', 'DD', 'EE1', 'EE2'

with the objections are highly relevant, since these documents indicate that the Plaintiffs possibly had the knowledge from about 2010 regarding the resolution and the new accounts numbers 500941 and 500945 which appeared to have been opened after the impugned rescheduling. Suppression of these documents in presenting the plaint while praying for an enjoining order and an interim injunction poses the question whether the Plaintiffs have presented a genuine claim; whether the Plaintiffs concealed those documents since those documents may favour a situation that indicates a possible acceptance of the offers to reschedule orally or by their conduct and whether it was done with the knowledge and consent of the Plaintiffs. It further questions why the Plaintiffs delayed filling an action challenging the resolution and rescheduling of loans till the bank decided to go ahead with the auction doing necessary publications, and communicated it to the 2nd Plaintiff as evinced by documents marked HH1 to HH22. On one hand, delay defeats equity and on the other, suppression of material facts disentitles the Plaintiffs from obtaining equitable reliefs without going into the merits of the case. The learned High Court Judge has not given his mind to the contents of the aforesaid documents, the suppression of the material documents and the delay in presenting the plaint. Thus, the 2nd question of law allowed by this Court has to be answered in favour of the Defendant bank.

Therefore, I agree that the appeal must be allowed and the order granting interim injunction has to be set aside. I further observe that Rs.500000.00 has been deposited as a security in terms of the order made on the occasion of issuing an enjoining order. Since the Plaintiffs are not entitled to interim reliefs they prayed, said deposit can be released to the Defendant Bank.

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 the Uva Province sitting in Badulla 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

SC/APPEAL 47/2021

SC/ HCCA/ LA No.: 499/2019

UVA/HCCA/ BDL No.: 20/2017 (F)

District Court Monaragala Case No.: L/1657

K.G. Somawathie,

Mudiyala, Kotagama,

Bibile.

PLAINTIFF

vs.

1. Y. R. Upul,
   Wedikumbura, Monaragala.
2. Y.R. Nimal Jayathilaka,
   No. 51, Dutugemunu Road,
   Monaragala
3. W.G. Gunadasa,
   No 48, Wedikumbura Road,
   Monaragala.

DEFENDANTS

AND BETWEEN

1. Y. R. Upul,
   Wedikumbura, Monaragala.
2. Y.R. Nimal Jayathilaka,
   No. 51, Dutugemunu Road,
   Monaragala
3. W.G. Gunadasa,
   No 48, Wedikumbura Road,
   Monaragala.

DEFENDANTS- APPELLANTS

Vs

K.G. Somawathie,

Mudiyala, Kotagama,

Bibile.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

1. Y. R. Upul,
   Wedikumbura, Monaragala.
2. Y.R. Nimal Jayathilaka,
   No. 51, Dutugemunu Road,
   Monaragala
3. W.G. Gunadasa,

No 48, Wedikumbura Road,

Monaragala.

DEFENDANTS- APPELLANTS-PETITIONERS

Vs

K.G. Somawathie,

Mudiyala, Kotagama,

Bibile.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE : **S. THURAIRAJA, PC, J**
JANAK DE SILVA, J AND
MAHINDA SAMAYAWARDHENA, J

COUNSEL : Dr. Jayatissa de Costa with Charuka Ekanayake for the Defendants-Appellants-Appellants
S.N Vijithsingh for the Plaintiff-Respondent- Respondent

WRITTEN SUBMISSIONS : Plaintiff-Respondent-Respondent on 15th July 2021
Defendants-Appellants-Petitioners on 14th July 2021

ARGUED ON : 15th September 2022

DECIDED ON : 14th December 2022

S. THURAIRAJA, PC, J.

The Plaintiff-Respondent-Respondent ("Hereinafter referred to as the "Plaintiff-Respondent") instituted action on 30.10.1996 in the District Court of Monaragala against the Defendants-Appellants-Appellants (Hereinafter referred to as "Defendants-Appellants") seeking order that the Plaintiff-Respondent is entitled to possess the land described in the first schedule to the Plaint, for ejectment of the Defendants-Appellants from the land described in the second schedule to the Plaint, and for damages at Rs. 1500 per month. The Defendants-Appellants filed answer seeking dismissal of the action. Thereafter a commission was issued to W. Wilmot Silva, Licensed Surveyor for preparation of plan and he returned his commission with Plan No. 1038 dated 28/07/1998.

The facts relevant to this appeal are such that, at the initial stages of the trial on 03/03/1999, 23 issues were raised on behalf of both parties, with issues 1 to 10 raised on behalf of the Plaintiff-Respondent and issues 11 to 23 on behalf of the Defendants-Appellants. Subsequently, the case was taken up for trial before a new District Judge on 17/02/2000 where parties raised issues once again, with 27 issues being raised at this stage. At this juncture, issues 1 to 13 were raised on behalf of the Plaintiff-Respondent and issues 14 to 27 were raised on behalf of the Defendants-Appellants.

It appears that the District Judge delivered judgment dated 31/10/2007 answering 23 issues and granting reliefs prayed for by the Plaintiff-Respondent in her Plaint. The Defendants-Appellants being aggrieved that the issues raised at the subsequent stage not being answered appealed to the High Court of Badulla from this decision, and the appeal was dismissed by judgment dated 8/11/2012.

Subsequently, leave to appeal application no. SC/HCCA/LA/522/2012 was preferred before this Court and leave was granted on the question of whether the judgment of the District Judge could not stand due to failure to answer all questions raised at the trial. Judgment was delivered on 18/01/2016 by then Supreme Court

Judges; Justice Chandra Ekanayake, Justice S.E. Wanasundera, PC, and Justice Sisira J de Abrew, directing the District Judge of Monaragala to pronounce judgement on the issues framed and evidence led at the trial which commenced on 17/02/2000, and further dismissed the impugned judgment of the High Court of Civil Appeal.

However, when the original case record was sent back to the District Court of Monaragala, the learned District Judge appears to have sent a letter to the Judicial Service Commission, seeking advice for next steps to comply with the above directions as the District Judge concerned, Hon. M. W. J. K. Weeraman, had been subsequently promoted as a High Court Judge of Anuradhapura. The Judicial Service Commission had sent the original case record to the said Hon. M. W. J. K. Weeraman, who delivered judgment dated 23/11/2016 in the capacity of an Additional District Judge, granting reliefs prayed for by the Plaintiff-Respondent, answering 27 issues.

The instant appeal has been preferred from this aforementioned judgment by the Defendants-Appellants to the High Court, which dismissed the appeal on 13/11/2019, and subsequently before this Court. When the matter was supported before this Court on 22/03/2021, Court was inclined to grant leave on the question of law found in Paragraph 13 (ii) of the Petition dated 19/12/2019 as follows:

> *"Have their Lordship's of the Court of Civil Appeal failed to observe that the Learned District Judge had failed to comply with the order/direction made by Your Lordships' of the Supreme Court"*

In addition to the above, Court raised another question of law as follows:

> *"The Judgment of the District Court dated 23/11/2016 which was affirmed by the Civil Appellate High Court is in inconformity with the Civil Procedure Act"*

However, after hearing submissions of both Counsel on 15/09/2022, the Court inquired as to whether both questions were to be answered, to which both Counsel submitted

that the question raised by Court need not be answered as it will be redundant. As such it was agreed among the parties that the Court will only be answering the former question of law, and both Counsel made submissions on this sole agreed upon question of law.

In terms of the Supreme Court decision dated 18/01/2016, the crux of the matter was identified as the- judgment of the trial Judge only answering issues 1 to 23 framed at previous trial before the District Judge which commenced on 3/3/1999 and failure to answer issues admitted to second trial which appears to have commenced on 17/02/2000. The decision of the Supreme Court was to set aside the District Court judgment and High Court Judgment without costs and stands as:

> *"**Having considered both the above judgments this Court is also of the view that the learned District Judge has failed to answer the correct set of issues admitted at the second trial and thereby substantial prejudice has been caused to the parties. Failure to answer the correct set of issues admitted to trial is a cardinal error committed by the District Judge…***
>
> ***"On careful consideration of all the material before this Court and the submissions of Counsel we are inclined to take the view that if the learned District Judge is directed to consider the issues admitted to the second trial which appears to have commenced on 17/02/2000 and the evidence led at that trial justice would be met. We therefore direct the learned District Judge of Monaragala to comply with the above order and to pronounce judgment on the issues framed and evidence led at the trial which appears to have commenced on 17/02/2000 as expeditiously as possible."***

As such, the only direction of this Court previously was for pronouncement of judgment based on the correct set of issues and evidence, and not a disturbance of the substance of this case nor a direction to lead fresh evidence or start any proceedings anew.

In order to affect the same, the Judicial Services Commission is in fact empowered to appoint the learned Judge as an additional District Judge for the purposes of pronouncing judgment. This position has been accepted previously by this court in multiple instances and is not a matter contested by either party.

In the case of Hebtulabhoy **& Co. Ltd. v. A. L. M. Fernando, High Court Judge & Others 1988 1 SLR 191** The 1st respondent was a District Judge who had heard and reserved order in a case where the petitioner was plaintiff. Before the order was delivered the 1st respondent was appointed as a High Court Judge. Subsequently, the Judicial Service Commission appointed the 1st respondent as an Additional District Judge to deliver judgment in certain cases heard by him as District Judge. When Order was made against the petitioner, application was made to the Court of Appeal to quash the order on the ground that the appointment by the J.S.C. was invalid, mainly for the reason that a Judge of the High Court cannot in law be appointed at the same time to be or to function as a District or Additional District Judge and/or be empowered to exercise two jurisdictions concurrently. Reference was made to this Court by the Court of Appeal regarding the same. It was held by this court in that instance that it is legally competent for the holder of the office of Judge of the High Court to function as a 'judicial officer' upon being appointed as such by the Judicial Service Commission to enable him to deliver judgment and/or to continue and conclude a case commenced by him previously as a 'judicial officer'.

In the instant case, the Judicial Service Commission has recommended the most suitable course of action as he was the Judge before whom evidence was led and matter was heard. The appointment of the most suitable person for this task is in

conformity with the direction of the Supreme Court to deliver judgment expeditiously and it is in the best interest of all parties involved.

I observe that this Court is not called upon to disturb the findings of the trial Judge as the question of law is purely as to whether the District Judge has adhered to the Supreme Court direction, which in the instant case, is to be answered without unnecessary investigation into the merits of this matter.

The previous direction of this Court focused solely on the failure of the original Judgment of the District Court to answer the correct questions before the trial judge, and the obligation placed upon the District Judge was merely to answer all questions raised at the subsequent trial, and not a direction to lead fresh evidence and conduct a trial anew. The judgment has not made any indication that the original findings in itself are unsupported. In light of the same, the judgment delivered by the learned judge in the capacity of an Additional District Judge in 2016 is in conformity with this direction as all 27 questions raised at the subsequent stage are answered.

While it is evident that the judgments in 2016 and in 2007 are similar, it is since the facts of the matter and the evidence considered is what was led before him at the initial stage. Simply due to the questions being framed more extensive, one cannot expect an overhaul of the entirety of the findings or for the judgment to be entirely contrary or be manifestly different when it is based upon the same material facts and evidence. As such, given that the procedure required has been followed and the directions of the Supreme Court have been met by answering all correct questions before the trial judge, the Defendant cannot hope to succeed in appeal simply on the basis that the decision is unfavourable to them and extending this trial on mere technicalities cannot be endorsed by this Court. As the reasons for the decision have clearly been provided, and the findings are based on the facts and evidence before the trial judge, no prejudice has been caused to the Defendant.

Considering all facts and submissions before this Court, due to reasons enumerated above, Appeal is dismissed with costs.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, 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

SC/ Appeal No. 48/2016

Civil Appeal Kurunegala No.
NWP/HCCA/KUR/26/2013(LA)

D.C, Kuliyapitiya No. 12483/L

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) (Amendment) Act, No. 54 of 2006, to be read with Article 128 of the Constitution.

Disanayakage Lional Rajapaksha
No 2/324, Asswedduma,
Kuliayapitiya.

Plaintiff

Vs.

1. W.A Prema Swarnamali Bandara,
No 324/A,Kurunegala Road,
Kuliyapitiya.

2. Hettiarachchi Mudiyanselage Cyril Bandara,
No 324/A,Kurunegala Road,
Kuliyapitiya.

3. Singhage Nandawathi Podimanike,
No 2/324, Asswedduma,
Kuliayapitiya.

4. Disanayakage Harshani Trishila Rajapaksha,
No 2/324, Asswedduma,
Kuliayapitiya.

Defendant

AND

1. W.A Prema Swarnamali Bandara,
No 324/A, Kurunegala Road,
Kuliyapitiya.

2. Hettiarachchi Mudiyanselage Cyril Bandara,
No 324/A, Kurunegala Road,
Kuliyapitiya.

1st and 2nd Defendant Petitioner

Vs.

Disanayakage Lional Rajapaksha,
No 2/324, Asswedduma,
Kuliayapitiya.

Plaintiff- Respondent

3. Singhage Nandawathi
Podimanike, No 2/324,
Asswedduma, Kallayapitiya

4. Disanayakage Harshani Trishila
Rajapaksha,
No 2/324, Asswedduma,
Kuliayapitiya.

Defendant- Respondents

AND NOW

Disanayakage Lional Rajapaksha,
No 2/324, Asswedduma,
Kuliyapitiya

Plaintiff- Respondent-Petitioner

Vs.

1. W.A Prema Swarnamali Bandara,
No 324/A,Kurunegala Road,
Kuliyapitiya

2. Hettiarachchi Mudiyanselage Cyril
Bandara,
No 324/A, Kurunegala Road,
Kuliyapitiya.

1st and 2nd Defendant
Petitioner- Respondents

3. Singhage Nandawathi
Podimanike, No 2/324,
Asswedduma,
Kuliayapitiya.

4. Disanayakage Harshani Trishila
Rajapaksha
No 2/324, Asswedduma,
Kuliayapitiya.

3rd and 4th Defendant-
Respondent- Respondents

Before: L.T.B. Dehideniya, J.
E.A.G.R. Amarasekara, J.
Yasantha Kodagoda, PC, J.

Counsels: Rasika Dissanayake with Nilantha Kumarage for the Plaintiff- Respondent-Appellant.

M.C. Jayeratne PC, with H.A. Nishani, H. Hettiarachchi and M.D.J. Bandara for the 1st and 2nd Defendant-Petitioner-Respondents.

Yasas de Silva for the 3rd and 4th Defendant- Respondent- Respondents.

Argued on: 18.09.2020
Decided on: 08.11.2022

L.T.B. Dehideniya, J.

The Plaintiff- Respondent- Petitioner (hereinafter called as the Petitioner) instituted action in the District Court of Kuliyapitiya claiming a right of way on prescription and necessity against the 1st and 2nd Defendant- Petitioner- Respondent (hereinafter called as the 1st and 2nd Respondent) and two others. Plaintiff's claim was that lot No.5 of the plan bearing No. 507 dated 10th October 1982 surveyed by G.S. Galagedara Licensed surveyor was belonged to him and he used the right of way to access to his land over the lot 7 of the said plan. 1st and 2nd Respondents obstructed said right of way by erecting a gate and by other means. After trial, the Learned District Judge delivered the Judgement in Appellant's favour granting all the reliefs prayed for by the Appellant. The Respondent appealed to the Civil Appellate High Court of North Western Province where the appeal was dismissed and leave to appeal there from to the Supreme Court was also dismissed.

On the application of the Appellant a writ was issued to remove all the obstructions and the fiscal has executed writ on 21.07.2010 and reported to court that it has been properly executed. Thereafter the Respondent made an application of District Court informing that the writ had not

been executed properly by not removing the electricity posts and telephone posts which were on the right of way and moved court that the writ be reissued. The District Court ordered that only the obstructions that the Petitioner claims to be an obstruction to his right of way can be removed. The 1st and 2nd Respondents appealed to the Civil Appellate High Court challenging the said order. The learned judges of High Court ordered to reissue the writ on the application of Respondent who is the judgement debtor. Being aggrieved by the said order the Appellant tendered this appeal to this court. The Supreme Court granted leave to appeal on the following questions of law;

1) Whether the learned Judges of the Civil Appellate High Court of Kurunegala and/or Learned Additional District Judge of Kuliyapitiya have erred in law by making an order to execute the writ once again despite the fact that the decree of the case bearing No. 12483/L of the District Court of Kuliyapitiya has already been executed as far back on 21 July 2010?

2) Whether the learned Judges of the Civil Appellate High Court of Kurunegala have erred in law by disregarding the fact that non other than a judgement creditor can make an application to execute the writ?

3) Whether the learned Judges of the Civil Appellate High Court of Kurunegala have erred in law by arriving at a conclusion that the judgement debtor is entitle to make an application to execute the writ when in fact the decree has already being executed at the request of the judgement creditor?

4) Whether the learned Judges of the Civil Appellate High Court of Kurunegala have erred in law by making an order to remove the Telephone Posts and trees ect. purportedly on the basis that they are obstructions to the said right of way?

5) Whether the learned Judges of the Civil Appellate High Court of Kurunegala have erred in law by coming to an erroneous conclusion that the purported obstructions as claimed by the judgment debtor should also be removed?

6) Whether the learned Judges of the Civil Appellate High Court of Kurunegala have erred in law due to their failure to consider that due to the purported directions and/or orders made in the said impugned judgement of the Civil Appellate High Court, the Judgement and/or decree is invariably altered and or changed?

The main issue of this case is whether the judgement debtor can make an application to reissue a writ after the writ had been properly executed on the application of the judgement creditor. On the other hand if the judgment creditor is satisfied with the execution of the decree can the judgment debtor move to reissue the writ on the basis that it was not properly executed?

In this case, the Learned District Judge delivered the judgement as prayed for in the plaint. As per the answer given to the issue No. 19 in the judgment dated 12/07/2007, the Learned District Judge dismissed the claims of the 1st and 2nd Respondents prayed for in the answer. Under these circumstances the Appellant became the judgement creditor who was granted all the reliefs claimed and Respondents became judgement debtors whose claims were dismissed.

Under **Section 323** of **Civil Procedure Code** any *"...application to the court for execution of the decree may be made by the judgment-creditor in the manner, and according to the rules..."* The Civil Procedure Code has made it a policy that only the judgement creditor can make and application to execute a decree. The reason behind is that the judgement creditor is the person who was granted relief not the judgement debtor.

In the case of ***W. Sirinivasa Thero v. Sudassi Thero*** (1960) 63 NLR 31 it was held that by invoking inherent jurisdiction on certain occasions, a judgement debtor or the party who lost the case may be able to ask for a writ of execution, if the original execution was done without a right to get a writ of execution or the execution of the writ has given more than the entitlement of the judgement creditor causing injury to the judgement debtor through an erroneous act or by a mistake of court.

However, case at hand does not fall within the ambit of an error or mistake of the court.

As per Section 4(e) of Civil Procedure code the plaint shall contain a demand of the relief which the Plaintiff claim. If the Defendant claims anything in reconvention under Section 75(e), he has to claim it in the answer and that will have the effect as plaint in a cross action.

The court cannot grant any relief not prayed for by the plaint or the claim in reconvention. It has been held on the case ***Surangi Vs Rodrigo 2003 Sri L.R 35*** that no court is entitle to or has jurisdiction to grant relief to a party which are not prayed for in the prayer to the plaint. Further in ***Danapala Vs Baby Nona 77 NLR 95*** it was held that even a Magistrate cannot award any sum in excess of quantum claimed by the applicant in a maintenance action. In the case of ***Weragama Vs Bandara 77 NLR 289*** it has been held that the Learned District Judge erred in granting the first plaintiff relief not prayed for and not claimed in the action by him.

It appears, the Respondents had some claims in reconventions which were refused to be granted (vide answers to issue number 19). The 1st Defendant has referred to these Telephone Posts in her answer dated 19.09.2000 (document marked as **X-1** in the brief- averments 13-15 of the answer). No issue has been raised by the 1st and 2nd Defendants over that (vide issues in the judgment of the District Court).It appears that the Respondents are now trying to get what they were not given or refused to be given through the judgement.

If the court cannot grant any relief, which is not prayed for in the action, I am of the view that, the Respondent who loss his case cannot claim to reissue the writ on the basis that it was not properly executed.

The relief granted to the Appellant in the District Court is a right of way. Plaintiff is satisfied with the way of execution of the writ. No relief granted to the Respondent. He may or may not use this right of way. But there is no pronouncement by the court that the Respondents are entitle to use the questionable road. Therefore court has no jurisdiction to issue writ of execution on the application of the Respondents.

The Respondent argument is that they are also using the right of way depicted as lot 7 of the said plan to gain access to their land depicted as lot 6 of their plan. The Learned District Judge in his judgement noted that this right of way is used for lot 5 and lot 6 in the page 34 of the judgement. But the Learned District Judge has not made any determination or granted any relief in favour of the Respondents. Therefore 1st and 2nd Respondents will not get a right to execute the writ.

Another argument of the 1st and 2nd Respondents was that the writ had not been properly executed. This case was filed by the Appellant, the judgement was in favour of the Appellant and the writ was issued in favour of the Appellant. In these circumstances if the Appellant was satisfied that the decree was executed properly, any other person including the Respondent has no right to say that writ was not properly executed. The judgment is of a declaration of a right of way. The party who claimed the said right of way is satisfied that the writ was executed properly and now he can use the path, the judgment debtor has no right to say that there are some more obstructions which need to be removed. In the instant case the Respondents are trying to remove the telephone and electricity lines that are leading to the Appellant's house on the pretext of the judgment where the Appellants were given the right to use the road. Court cannot allow that type of mischievous applications.

Respondents in their Written Submission argued that the judgement of the District Court is per incuriam. After the judgement was affirmed by Civil Appellate High Court and leave to appeal to the Supreme Court being refused, the Respondent cannot argue that the judgement of District Court is per incuriam. If so, the Respondents should have preferred such application when leave to appeal was refused by this Court in 2009.

I answer the questions of law as follows;

1) Yes
2) Yes
3) Yes

4) Yes

5) Yes

6) Yes

I set aside the judgment of the Civil Appellate High Court of North Western Province holden at Kurunegala, dated 03.09.2014.

Appeal allowed. The Appellant is entitled to costs of this court and the courts below.

Judge of the Supreme Court

E.A.G.R. Amarasekara, 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 Special Leave to Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC/Appeal 53/2022

SC/SPL/LA 188/2021

Court of Appeal No. CPA 132/2020

High Court Colombo No. 613/19

The Democratic Socialist Republic of Sri Lanka.

COMPLAINANT

Vs.

Madapathage Dona Thilaka Alias Shyamali

ACCUSED

AND BETWEEN

Madapathage Dona Thilaka Alias Shyamali

ACCUSED - PETITIONER

Vs.

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

COMPLAINANT-RESPONDENT

AND NOW BETWEEN

Attorney General

Attorney Generals Department,

Colombo 12.

COMPLAINANT – RESPONDENT-APPELLANT

Vs

Madapathage Dona Thilaka Alias Shyamali

ACCUSED-PETITIONER-RESPONDENT

BEFORE : **S. THURAIRAJA, PC, J**
A. H. M. D. NAWAZ, J AND
A.L. SHIRAN GOONERATNE, J

COUNSEL : Dilan Ratnayake, Senior Deputy Solicitor General with Maheshika Silva, DSG for the Complainant-Respondent-Appellant
Nissanka Nanayakkara, PC with Naveen Hettiarachchige for the Accused-Petitioner-Respondent

WRITTEN SUBMISSIONS: Complainant-Respondent-Appellant on 13th October 2022.
Accused-Petitioner-Respondent on 29th September 2022

ARGUED ON : 25th October 2022

DECIDED ON : 30th November 2022

S. THURAIRAJA, PC, J.

The Complainant-Respondent-Appellant, namely the Attorney General ("hereinafter referred to as the "Complainant-Appellant") filed an application in this Court, against the order by the Court of Appeal dated 19th May 2022, praying for the Accused-Petitioner-Respondent (hereinafter referred to as the "Accused-Respondent"), to be taken back into custody.

This Application precedes from a complaint filed by the Complainant-Appellant at the Magistrate Court of Maligakanda, where the Accused-Respondent was ordered to be kept in remand custody, following which she was indicted in the High Court of Colombo on the 3rd June 2019, and was charged with:

> *Possessing and trafficking a quantity of 43.723 grams of heroin, punishable under Sections 54A (b) and 54A (c) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by the Amending Act No. 13 of 1984.*

A bail application was made on the 25th November 2019, and was refused by the High Court judge on the same date. Another application was filed on the 14th June 2020 and was refused on said date, where the High Court judge stated that the Accused-Respondent failed to bring any exceptional circumstances to consider bail as required by under Section 83 of the Poisons, Opium and Dangerous Drugs Ordinance. Another bail application was made on 31st July 2020 and was refused by the learned High Court Judge on same date citing that although it was a serious concern, the fact that Sub Inspector Udara Chathuranga, the main investigating officer in this case, was arrested on suspicion for another drug trafficking offence, was not a reason strong enough to be considered as an exceptional circumstance.

Thereafter the Accused-Respondent appealed to the Court of Appeal for judgement to be set aside. After hearing submissions of both parties, the Judge of the Court of Appeal delivered order dated 08th June 2021, allowing the appeal and

dismissing the judgement of the High Court. The Accused-Respondent was then granted bail on the following conditions,

i. cash bail of Rs. one million

ii. surety bail of Rs. two million each

iii. petitioner to surrender her passport to relevant High Court, and the Registrar to inform the Director of Immigration and Emigration not to allow the petitioner to leave the country.

iv. The petitioner to report to the police Narcotics bureau on every Sunday of the month.

(CPA 132/2020)

Being seriously concerned with the said order of the Court of Appeal, the Hon. Attorney General, Complainant-Appellant made an appeal to this Court seeking the above judgment to be set aside on the grounds set out in the Petition dated 29th September 2022. On 13th October 2022, Court granted Leave to Appeal on the following questions of law,

"Did the Court of Appeal err in law by considering "the morality" as a yardstick or an exceptional ground in considering an application for revision in relation to an offence committed under the Poisons, Opium and Dangerous Drugs ordinance?"

"Did the Court of Appeal err in law by holding that the "credibility of a witness" in considering a bail application to be an item of "exceptional circumstance"?"

In determining the same, the facts and circumstances of this application needs to be considered.

The Facts

The Accused-Respondent, namely Madapathage Dona Thilaka Alias Shyamali was arrested by the Police Narcotic Bureau on 2nd February 2018, for alleged possession of 120 grams of brown powder suspected to be heroin. During the investigation, it was referred to the Government Analyst, who found 43.732 grams of diacetylmorphine (heroin) in the said brown powder.

Hon. Attorney General, preferred an indictment against said Accused-Respondent. When the matter was pending trial at the High Court, the Accused-Respondent prayed for bail. The Petitioner-Respondent stated that the fact that the main investigating officer, namely Sub Inspector Udara having been arrested on suspicion for another incident involving drugs subsequent to her arrest was an exceptional circumstance under Section 83 of the Poisons, Opium and Dangerous Drugs Ordinance.

The Petitioner-Respondent then filed a revision application to the Court of Appeal, for the Court to grant bail. After hearing the revision application, the Court of Appeal delivered judgement on 08th June 2021, and granted bail to the Accused-Respondent. The learned SDSG submits that the Accused-Respondent has suppressed very important material facts, namely her previous convictions on drug related matters was not submitted to the Court of Appeal in her revision application, of which the Court of Appeal has not seriously considered.

Given that this application is based on the granting of bail under the Poisons, Opium and Dangerous Drugs (Amendment) Act, No. 13 of 1984, Section 83 (1) on bail is of relevance. This provides that:

> *No person suspected or accused of an offence under section 54A or 54B of this Ordinance shall be released on bail, except by the High Court in exceptional circumstances.*

The said offences under Section 54A and 54B are as follows:

54A. Prohibition against manufacture, trafficking, import or export and possession of dangerous drugs.

54B. Abetting in the commission of an offence under section 54A.

However, exceptional circumstances are not defined in the said Ordinance, and are considered on a case-by-case basis. This can be seen in the decision of **Ramu Thamodarampillai vs The Attorney General SC 141/75 (2004) 3 SLR 180**, where His Lordship Vythialingam, J held that,

"the decision must in each case depend on its own peculiar facts and circumstances."

As the case at hand deals with the possession and trafficking of heroin, it is essential to establish that heroin falls within the definition of a dangerous drug under Sri Lankan law. As per Article 48 of Chapter V of the Poisons, Opium, and Dangerous Drugs Ordinance,

(1) the drugs, substances, articles or preparations, specified for the time being in Groups A, B, C, D and E in Part I of the Third Schedule, shall be deemed to be dangerous drugs

The narcotic drug heroin, also referred to by its chemical name diacetylmorphine can be found in the 49th place in the Third Schedule of the Conventions Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act No. 1 of 2008. Hence, it is established that heroin is a dangerous drug which falls within the prohibition under Section 54A. As the Accused-Respondent was in possession of 43.723 grams of heroin, we can further establish that she committed the offence of possessing and trafficking said heroin. Bail application must therefore be considered under Section 83 to determine whether exceptional circumstances apply.

As per the order of the High Court Judge, bail was refused on three accounts,

1. First account dated 25th November 2019

2. Second account dated 14th June 2020

3. Final account dated 31st July 2020.

The Sub Inspector Udara, the main investigating officer and witness providing evidence at the trial of the Accused-Respondent, as well as a few other police officers were arrested on suspicion after the indictment of Accused-Respondent for trafficking and smuggling of dangerous drugs.

The stance of the Accused-Respondent was that the fact that the Sub Inspector and witness providing evidence at her trial being arrested on suspicion at the time of indictment of Accused-Respondent, for another drug-related offence was enough to constitute exceptional circumstances as under Section 83 of the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 13 of 1984. This, according to the Accused-Respondent, would constitute an exceptional circumstance because it allegedly infers unreliability of the witness.

However, the High Court judge stated on all three instances that the Accused-Respondent failed to bring any exceptional circumstances to consider bail, and the said exceptional circumstance of the Sub Inspector being arrested for a separate incident, while serious, did not constitute a serious enough issue to be categorized as an exceptional circumstance under Section 83, stating;

> *"මෙම නඩුවේ ප්‍රධාන වැටලීම් නිලධාරියා වෙනත් නඩුවක සැකකරුවෙක් ලෙස සිටීම පමණක් චුදිතට ඇප නියම කිරීම සඳහා වූ සුවිශේෂ කරුණක් ලෙස සැලකිය නොහැකි බව මාගේ අදහසයි. එම කරුණ ප්‍රධාන වැටලීම් නිලධාරියාගේ සාක්ෂියේ සාක්ෂිමය විශ්වසනීයත්වයට බලපාන කරුණක් විය හැකි නමුත් එය චුදිතට ඇප නියම කිරීම සඳහා වූ සුවිශේෂ කරුණක් ලෙස මේ අවස්ථාවේ සැලකිය නොහැක."*

For ease of reference, the translation of the above statement says that

> *"In my opinion, the fact that the chief investigating officer in this case is a suspect in another case cannot be considered as a special factor for granting bail to the accused. That fact may affect the evidentiary*

credibility of the evidence of the chief raiding officer but it cannot be considered as an exceptional ground for granting bail to the accused at this time."

The Court of Appeal considered the High Court judge's decision to be flawed, and that their finding as to the officers who conducted the raid being accused in other similar cases as not an exceptional ground to be considered for bail under Section 83, was not seen as,

"being very correct because it causes a serious doubt in the investigations conducted by these officers as to the truthfulness of the same, therefore the question arises whether ***it is morally*** *correct to keep an accused in remand until the conclusion of the trial under those circumstances.* ***(Emphasis Added)***

Further, the conclusion of the trial appears rushed as the Judge of the Court of Appeal had also quoted that

"although the trial has commenced the current corona situation in the country which has affected the smooth running of the judicial system might delay the conclusion of the trial hence in view of the exceptional behavior of the investigative officers, this court decides to enlarge the petitioner on bail."

In answering the first question of law, it appears that the judge of the Court of Appeal has considered "morality" as a yardstick or an exceptional ground in considering an application for revision in relation to an offence committed under the Poisons, Opium and Dangerous Drugs ordinance, where it was stated that

"the question arises whether it is morally correct to keep an accused in remand until the conclusion of the trial under those circumstances"

As per the Oxford Dictionary, "morality" is defined as

"principles concerning the distinction between right and wrong or good and bad behaviour",

whereas the same defines "law" to be

"the system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties".

It is of utmost importance to note that while these two are similar and often rely on one another, all persons in law are aware of the distinctions drawn between the two grounds in the study of Jurisprudence as morality not being an essential criterion for legality as they are in fact, different to one another. Hence, using morality as a yardstick for justice not only muddies the waters of law, but it would also set an unclear precedent.

In the present case, the morality of the decision of the High Court to keep the Accused-Respondent in remand custody until the conclusion of the trial has been questioned by the Court of Appeal, and in the Court of Appeal, it was decided that this was,

"not fair and justifiable",

and bail was granted to Accused-Respondent on this account.

However, in case of **Cader (On Behalf of Rashid Khan) vs Officer-In-Charge Narcotics Bureau CA 123/2005 (2006) 3 SLR 74** His Lordship Eric Basnayake, J held that,

"*These types of offences affect the society at large. The law should not be made impotent that it does not serve the Society and the antisocial elements should not be given licence to create havoc in Society."*

Stemming from the fact that heroin is a drug that is difficult to detect in most cases, the tendency of criminals to resort to committing this type of crime has been quite high.

I must also observe that Accused-Respondent had suppressed very important material in revision application to the Court. The Accused-Respondent failed to bring to the attention of court regarding two previous convictions of similar nature.

i. Possession of 1000 mg of heroin – Rs. 75000 fine imposed on 11.03.1997 **(Maligakanda Magistrates Court Case Number 73873/1997)**

ii. Possession and trafficking of less than one gram of heroin – A sentence of one year of Rigorous Imprisonment imposed suspended to seven years by High Court of Colombo on 14.03.2012. Accused-Respondent was arrested for the present case during the operative period of this suspended sentence. **(Colombo High Court Case Number 5846/2011)**

However, the Learned Judge of the Court of Appeal, while having acknowledged this fact as;

"that the petitioner has failed to state the previous convictions, which this court is unable to endorse."

has failed to give sufficient weight to this in the final conclusion, and appears to have disregarded it. As such it is merely an acknowledgement of the same but appears not to have had any real effect on the conclusion which is irregular in an application of this nature.

Furthermore, drawing from Hon. Eric Basnayake, J in **Cader (On Behalf of Rashid Khan) vs Officer-In-Charge Narcotics Bureau** (Supra),

"The repetitive factor prevalent in this sort of crime and the difficulty of detection are significantly strong reasons for refusing bail in this type of cases."

We can see that the Accused-Respondent has hidden the fact she was previously penalized for committing two previous similar offences. Considering the morality of the decision of the High Court seems insignificant in the face of her penchant to commit offences under the Poisons, Opium and Dangerous Drugs ordinance.

Hence, as there is no legal basis of considering morality as a yardstick in an application for or revision in relation to an offence committed under the Poisons, Opium and Dangerous Drugs ordinance, I am of the view that the Court of Appeal has erred in considering morality as a yardstick or an exceptional ground in an application for revision in relation to an offence committed under the Poisons, Opium and Dangerous Drugs Ordinance.

In order to arrive at a conclusion on whether the creditworthiness of the witnesses is questionable, the tests of creditworthiness that can be tested on the witnesses can be referred to.

An important test of creditworthiness is whether the witness is an interested or disinterested witness. Hon. Rajaratnam J. in **Tudor Perera v. AG SC 23/75** (**Supreme Court Minutes dated 1st November 1975)** perceived that when considering the evidence of an interested witness who may wish to conceal the truth, such evidence must be inspected with due diligence. The independent witness will normally be favoured over an interested witness in case of conflict. In the present case, since the witness is neither a close relative, nor a person whose interests are closely associated with the Accused-Respondent, it appears that there are no circumstances of affiliation shedding doubt on the independence of the witness, and his evidence will be evaluated by the trial court.

There are further elements to be considered in the issue regarding the credibility of witnesses.

Firstly, that at the time of the initial trial, the Sub Inspector was arrested on suspicion of possessing and smuggling large quantities of narcotics, however, it must be emphasised that he was only suspected in an ongoing investigation, and at the time there was no conclusion to the trial finding him guilty of the crimes he was accused of. At the time of granting bail to the Accused-Respondent by the Court of Appeal, he was not a convict.

Secondly, it must be noted that the incident that the witness is being investigated and inquired for is a case that has no relation to the present case at hand, and the two cases are not part of the same transaction. Sub Inspector Udara Chathuranga, at the time of being questioned at the High Court, was detained by the Criminal Investigation Department for a separate investigation. While the offences may be similar, it is clear that both of the incidents are totally independent of one another, and thus it is the view of this Court that he is more than capable of presenting clear evidence for this case. Further, as he was the main officer responsible for the current investigation into the Accused-Respondent, it is crucial that he stands as a witness, to paint a picture of the events that took place.

In deciding whether the Court of Appeal erred by finding that the witness, the chief investigating police officer, was an uncreditable witness, it is essential to refer to previous judgements.

In the case of **Kumara De Silva And 2 Others Vs. Attorney General CA 4/2003 (2010) 2 SLR 169** it was held that

> *"Credibility is a question of fact, not of law. The acceptance or rejection of evidence of witnesses is therefore a question of fact for the trial Judge."*

Hence, as seen in the above judgement, it is inappropriate for someone other than the trial judge to conclude whether or not a witness has credibility. If the trial judge finds him not to be creditworthy, it is a matter to be considered among other things such as whether other witnesses are available. Hence, creditworthiness must be decided by a court of first instance, which has not been done. The trial judge has not found fault with the credibility of the witness, and therefore it is of no relevance to the appellate judge.

Furthermore, when employing the tests relevant to this case, we can see that the creditworthiness of the witness has not been impugned as of yet. Even if the conduct of the said witness does not constitute a creditworthy action, this Court is of the view that it is not a serious enough concern to be classified as an "exceptional circumstance" under Section 83.

This is especially so as creditworthiness of witness is not a matter which is relevant to the granting of Bail. It is a consideration that is redundant to the questioning of whether there are exceptional circumstances and cannot bear any weight as a ground for granting bail.

This is due to the fact that the character of people would not be of great importance when being presented as a witness in an unrelated case, for the simple reason that the said witness merely appeared in official capacity, regarding an official function in that capacity.

Therefore, under these circumstances, no material is before the Court of Appeal to come to a decision regarding if the witness is creditworthy, nor is it relevant to the granting of Bail in this application in the first place. Hence, it cannot be considered as an "exceptional ground" in considering an application for revision.

Considering all, it appears that the finding of the Judge of the Court of Appeal is unsubstantiated and flouts the accepted norms of law. I am inclined to answer both

questions of law presented in front of this Court in the affirmative. Therefore, I set aside the order given by the Court of Appeal.

Appeal is allowed. Bail order is cancelled.

Further, on the request of the learned SDSG and considering all the facts I direct the learned High Court Judge to take Accused-Respondent back into custody, and to conclude trial expeditiously.

Appeal Allowed

JUDGE OF THE SUPREME COURT

A. H. M. D. NAWAZ, 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. Weerappuli Gamage Gamini
   Ranaweera,
   No. 415/18,
   High-Level Road,
   Delkanda,
   Nugegoda.
   Plaintiff

SC APPEAL NO: SC/APPEAL/56/2020
HCCA GALLE NO: SP/HCCA/GA/22/2013(F)
DC GALLE NO: 14617/L

Vs.

1. Matharage Davith Singho,
   Aluth Ihala,
   Mapalagama.
   Defendant

AND BETWEEN

1. Matharage Davith Singho,
   (Deceased)
   Aluth Ihala,
   Mapalagama.
   Defendant-Appellant

1A. Matharage Dharmasiri,
1B. Matharage Mahinda,
1C. Matharage Premawathi,
1D. Matharage
Shiriyawathie,
All of Dehigodawatta,
Aluth Ihala,
Mapalagama.
1E. Matharage Ariyawathie
of Bambarawana,
Mattaka.
1F. Matarage Seetha of
Gorakagashuduwa,
Mapalagama.
1G. Matarage Renuka of
Akuresse Gedara,
Etahawilwatta,
Mapalagama
Substituted Defendants-
Appellants

Vs.

1. Weerappuli Gamage Gamini
Ranaweera,
No. 415/18,
High-Level Road,
Delkanda,
Nugegoda.
Plaintiff- Respondent

AND NOW BETWEEN

1. Weerappuli Gamage Gamini
Ranaweera,
No. 415/18,
High-Level Road,
Delkanda,
Nugegoda.
Plaintiff-Respondent- Appellant

Vs.

1A. Matharage Dharmasiri,
1B. Matharage Mahinda,
1C. Matharage Premawathi,
1D. Matharage Shiriyawathie,
All of Dehigodawatta,
Aluth Ihala,
Mapalagama.
1E. Matharage Ariyawathie
of Bambarawana,
Mattaka.
1F. Matarage Seetha of
Gorakagashuduwa,
Mapalagama.
1G. Matarage Renuka of
Akuresse Gedara,
Etahawilwatta,
Mapalagama.
Substituted Defendants-
Appellants-Respondents

Before: Murdu N.B. Fernando, P.C., J.
A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Hilary Livera for the Plaintiff-Respondent-Appellant.
Vishwa de Livera Tennakoon for the 1A Substituted Defendant-Appellant-Respondent.

Written submissions:

by the Plaintiff-Respondent-Appellant on 29.07.2020

Argued on : 10.01.2022

Decided on: 20.05.2022

Mahinda Samayawardhena, J.

The plaintiff filed this action in the District Court seeking a declaration of title to and ejectment of the defendant from the land in suit. The defendant filed answer seeking dismissal of the action. At the trial, the defendant raised an issue claiming prescriptive title to the land. After the conclusion of the trial, the District Court entered judgment for the plaintiff. On appeal, the High Court of Civil Appeal set aside the judgment of the District Court on the basis that the plaintiff failed to establish legal title to the land. The High Court arrived at this conclusion by making a comparison between the original title deed of the plaintiff (deed No. 1986) marked P6 and a photocopy of the same deed marked V1. This Court granted leave to appeal to the plaintiff on the following two questions of law:

(a) Did the learned Judges of the High Court err in law in concluding that the deed bearing No. 1986 does not fulfil the due requirements of section 2 of the Prevention of Frauds Ordinance?

(b) Did the learned Judges of the High Court misdirect themselves in evaluating the evidence and concluding that the attesting witnesses have not given evidence when the record bears out that one attesting witness had in fact given evidence?

The short question to be decided in this appeal is whether deed No. 1986 has been properly executed in terms of section 2 of the Prevention of Frauds Ordinance, No. 7 of 1840, as amended. The said section insofar as relevant to the present purposes reads as follows:

> *No sale, purchase, transfer, assignment, or mortgage of land or other immovable property…shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses.*

To prove due execution of a deed, this section requires proof of four matters:

(a) the deed was signed by the executant

(b) it was signed in the presence of a licensed notary public and two or more witnesses

(c) the notary public and the witnesses were present at the same time

(d) the execution of the deed was duly attested by the notary and the witnesses

It may be relevant to note that under section 2 of the Prevention of Frauds Ordinance, the document shall be signed by the executant in the presence of the notary and the two witnesses present at the same time. However, the section does not expressly state that the document shall also be signed by the two witnesses and the notary in the presence of the executant at the same time.

Execution and attestation are two different things: the former by the maker/executant and the latter by the notary and the witnesses.

Attestation is two-fold: due attestation by the notary and the witnesses as stated in section 2 of the Prevention of Frauds Ordinance, and formal attestation by the notary as stated in section 31 of the Notaries Ordinance, No. 1 of 1907, as amended.

In the execution of deeds, the requirements under section 2 of the Prevention of Frauds Ordinance are mandatory, and non-compliance renders a deed invalid. Conversely, non-compliance with the Rules made for notaries set out in section 31 of the Notaries Ordinance does not invalidate a deed as expressly provided for in section 33 of the Notaries Ordinance, which reads as follows:

> *No instrument shall be deemed to be invalid by reason only of the failure of any notary to observe any provision of any rule set out in section 31 in respect of any matter of form:*

> *Provided that nothing hereinbefore contained shall be deemed to give validity to any instrument which may be invalid by reason of non-compliance with the provisions of any other written law.*

(*Weeraratne v. Ranmenike (1919) 21 NLR 286, Asliya Umma v. Thingal Mohamed [1999] 2 Sri LR 152, Wijeyaratne v. Somawathie [2002] 1 Sri LR 93, Pingamage v. Pingamage [2005] 2 Sri LR 370*)

What constitutes the attestation and the form of attestation are set out in sections 31(20) and 31(21) of the Notaries Ordinance; this is the formal attestation appended by the notary at the end of the deed. This is different from attesting a deed by the notary and witnesses as contemplated in section 2 of the Prevention of Frauds Ordinance. If the formal attestation of a deed is defective, the notary can be prosecuted under the Notaries Ordinance, but the deed's validity is unaffected.

In *Thiyagarasa v. Arunodayam [1987] 2 Sri LR 184*, the deed on its face had the date 14th January 1973 as the date of execution. According to the plaintiff, the actual date of execution was 7th October 1972. The District Court held that the deed was not properly executed. On appeal, G.P.S. De Silva J. (later C.J.) held at 188-189:

> *Once it is established that the requirements of section 2 of the Prevention of Frauds Ordinance relating to the execution of the deed have been complied with, the mere fact that the notary has inserted a false or wrong date of its execution does not render the deed void. The lapse on the part of the notary does not touch the validity of the deed but may render the notary liable to be prosecuted for contravention of the provisions of the Notaries Ordinance. This seems reasonable*

> *and just for the parties to the transaction have no control over the acts of the notary who is a professional man. I am therefore of the opinion that P3 is valid and effective to transfer the legal title to the property and is not bad for want of due execution.*

The Court quoted with approval the following statement of law found in *The Conveyancer and Property Lawyer* (1948) Vol. 1 Part 1 by E.R.S.R. Coomaraswamy at page 94:

> *The formal attestation by the notary is not part of the deed but it is the duty of the notary to append it.*

What is compulsory is compliance with the provisions of section 2 of the Prevention of Frauds Ordinance; non-compliance with the other provisions of the Prevention of Frauds Ordinance or the Notaries Ordinance does not *ipso facto* make the deed invalid.

It was held in *Weeraratne v. Ranmenike (1919) 21 NLR 286* that the requirement under section 16 (now section 15) of the Prevention of Frauds Ordinance that a deed shall be executed in duplicate was only a duty imposed on the notary and was not intended to invalidate the deed in the event of non-compliance. De Sampayo J. held at 287-288:

> *It is clear to my mind that this clause merely imposed a duty on the notary, and was not intended to invalidate deeds where the notary might have failed to observe the direction therein contained. It is well settled that a notary's failure to observe his duties with regard to formalities which are not essential to due execution, so far as the parties are concerned, does not vitiate a deed. For instance, the absence of the attestation clause does not render a deed invalid. D.C.*

> *Kandy, 19,866 (Austin's Rep. 113); D.C. Negombo, 574 (Grenier (1874), p.39). Similarly, I think the failure on the part of the notary to have a deed executed in duplicate does not affect its operation as a deed. The case D.C. Kandy, 22.401 (Austin's Rep. 139) is an authority on this point. I therefore think that the decision of the Commissioner in this case is erroneous.*

Let me now turn to the word "attest" as contemplated in section 2 of the Prevention of Frauds Ordinance. Following the ordinary dictionary meaning of "attest" which is "to bear witness to", a person who sees the document signed by the executant is a witness to it; if he subscribes as a witness, he becomes an attesting witness. *Black's Law Dictionary* (11th edition) defines "attesting witness" as "someone who vouches for the authenticity of another's signature by signing an instrument that the other has signed."

A word of caution: although section 2 of the Prevention of Frauds Ordinance does not require the witnesses and the notary to attest the deed before the executant, this section requires the execution of the deed to be "duly attested" by the notary and the two witnesses.

The word "duly" here is not without significance. How is a deed considered to be duly attested? In this context, section 2 of the Prevention of Frauds Ordinance needs to be read with section 31(12) of the Notaries Ordinance which runs as follows:

> *[The notary] shall not authenticate or attest any deed or instrument unless the person executing the same and the witnesses shall have signed the same in his presence and in*

> *the presence of one another, and unless he shall have signed the same in the presence of the executant and of the attesting witnesses.*

Although compliance with the Rules contained in section 31 is not mandatory as explained above, it was held in *Emalia Fernando v. Caroline Fernando (1958) 59 NLR 341* that an instrument which is required by section 2 of the Prevention of Frauds Ordinance to be notarially attested must be signed by the notary and the witnesses at the same time as the maker and in his presence. This conclusion was reached giving due regard to the expression "duly attested" found in section 2 of the Prevention of Frauds Ordinance. I am in complete agreement with this interpretation, for otherwise the Prevention of Frauds Ordinance which was enacted to prevent fraud can be misused to cover fraud on the basis that section 2 of the Prevention of Frauds Ordinance does not require the notary and witnesses to sign the deed before the executant in the presence of one another. At page 344 Basnayake C.J. held:

> *Learned counsel for the appellant contended that the requirement of the Notaries Ordinance in regard to the attestation of documents is not relevant to a consideration of the true meaning of the section. I am unable to agree that the provisions of the Notaries Ordinance are irrelevant to a consideration of the meaning of section 2 of the Prevention of Frauds Ordinance. I think in giving effect to the word "duly" we should take into account provisions of law which regulate the execution of documents required to be notarially attested. Section 30(12) of the Notaries Ordinance provides that a notary "shall not authenticate or attest any deed or*

> *instrument unless the person executing the same and the witnesses shall have signed the same in his presence and in the presence of one another, and unless he shall have signed the same in the presence of the executant and of the attesting witnesses." Section 30(20) requires the notary to state in his attestation that the deed was signed by the party making it and the witnesses in his presence and in the presence of one another. The view I have expressed above is in accord with the decision of this Court in the case of Punchi Baba v. Ekanayake (4 S.C. C. 119), in which this Court expressed the view that section 2 of the Prevention of Frauds Ordinance required that the notary and the witnesses should sign in the presence of the maker and at the same time and that a deed not so signed was not valid.*

P6 is the original title deed of the plaintiff and V1 is the photocopy of that deed tendered by the plaintiff with the plaint in support of an application for an interim injunction. The contention of the defendant, which was accepted by the High Court, is that: V1 did not contain the signature of the second attesting witness; the signature of the second attesting witness appearing in P6 had been placed after the execution of the deed; therefore the plaintiff's title deed had not been duly executed.

It is significant to note that the defendant did not raise an issue on due execution of the deed either at the beginning of the trial or during the course of the trial. When the original deed P6 was marked through the plaintiff, the defendant moved that it be marked subject to proof. When the plaintiff closed his case reading in evidence the marked documents including P6, the defendant did not maintain that it had not been proved, thereby

indirectly conceding that the objection was no longer a live objection.

How can a deed be proved?

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.*

The plaintiff called as witnesses the notary and the first attesting witness to the deed, and they confirmed that the donor, the donee, the first attesting witness, the second attesting witness and the notary were all present at the same time and signed the deed in that order. When they were confronted with V1, they stated that they saw V1 for the first time in the witness box. The following finding of the High Court is not correct:

> *When there is a dispute or challenging a document with regard to the due execution, the notary alone is not sufficient to give evidence. At least one attesting witness should give evidence. In this case attesting witnesses have not given evidence and no explanation is given for it.*

Although the High Court came to the finding that no attesting witness was called to give evidence on the execution of P6 and no explanation was provided for such failure, in fact, two attesting witnesses were called to prove P6: one was the notary and the other was the first attesting witness.

There is no dispute that Anoma Ranaweera, the wife of the donee who signed as the first witness to the deed and whose evidence has been overlooked by the High Court, is an attesting witness. The decision of the High Court would have been different if the Court had drawn its attention to the evidence of this attesting witness.

The notary is as much an attesting witness as the two witnesses themselves within the meaning of section 68 of the Evidence Ordinance. (*Wijegoonetileke v. Wijegoonetileke [1956] 60 NLR 560, The Solicitor General v. Ahamadulebbe Ava Umma (1968) 71 NLR 512 at 515-516, Thiyagarasa v. Arunodayam [1987] 2 Sri LR 184, Wijewardena v. Ellawala [1991] 2 Sri LR 14 at 35*)

In *Marian v. Jesuthasan (1956) 59 NLR 348* it was held:

> *Where a deed executed before a notary is sought to be proved, the notary can be regarded as an attesting witness within the meaning of section 68 of the Evidence Ordinance provided only that he knew the executant personally and can testify to the fact that the signature on the deed is the signature of the executant.*

In *Marian*'s case, the execution of the deed by the executant was in issue but only the notary who did not personally know the executant gave evidence to prove the deed. It is in that context the Court held that the notary was not an attesting witness. This should not be understood to mean that a notary can never be an attesting witness unless he knows the executant personally. For instance, in the case at hand, whether or not the notary knew the executant is beside the point as the deed is challenged on the sole ground that the second attesting witness did not sign the deed.

Even if the notary did not know the executant personally, he can still be an attesting witness but proof of execution of the deed is incomplete on his evidence alone. If the notary does not know the executant, he must know the witnesses and the witnesses must know the executant. In that eventuality, at least one of the two attesting witnesses needs to be called to prove due execution.

Sections 31(9) and 31(10) of the Notaries Ordinance are relevant in this regard.

> *31(9) 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.*
>
> *31(10) He shall not authenticate or attest any deed or instrument in any case in which both the person executing the same and the attesting witnesses thereto are unknown to him.*

To sum up, the notary is a competent witness to prove attestation, and if he knows the executant, he is a competent witness to prove attestation and execution, both of which are the *sine qua non* of proving due execution. This was lucidly explained by T.S.

Fernando J. in *The Solicitor General v. Ahamadulebbe Ava Umma (1968) 71 NLR 512 at 516*:

> *The object of calling the witness is to prove the execution of the document. Proof of the execution of the documents mentioned in section 2 of No. 7 of 1840 means proof of the identity of the person who signed as maker and proof that the document was signed in the presence of a notary and two or more witnesses present at the same time who attested the execution. If the notary knew the person signing as maker, he is competent equally with either of the attesting witnesses to prove all that the law requires in section 68 – if he did not know that person then he is not capable of proving the identity as pointed out in Ramen Chetty v. Assen Naina (1909) 1 Curr. L.R. 257, and in such a case it would be necessary to call one of the other attesting witnesses for proving the identity of the person. It seems to me that it is for this reason that it is required in section 69 that there must be proof not only that "the attestation of one attesting witness at least is in his handwriting" but also "that the signature of the person executing the document is in the handwriting of that person." If the notary knew the person making the instrument, he is quite competent to prove both facts – if he did not know the person then there should be other evidence.*

In the instant case the notary stated in his evidence that he knew the executant and the other witnesses personally as the donee was his classmate, the donor is the donee's aunt, the first witness is the donee's wife, and the second witness is his (the notary's) clerk. The question in this case is not whether the executant

signed the deed but whether the second witness was present (together with the others) at the time of the deed being signed by the executant and duly attested.

This in my view has been proved by marking the original deed as P6 and calling the notary and the first witness to the deed as witnesses in the plaintiff's case. The High Court, without considering the aforementioned evidence, relied on a photocopy of the deed (which had been tendered by the plaintiff with the plaint for another purpose) to reject the original deed. The High Court at page 8 of the impugned judgment states "*even though it is a true copy, it has the Land Registry seal and the inference the court can draw is that the document marked P6 has been sent to the Land Registry without the signature of one attesting witness*."

The standard of proof of due execution of a deed is on a balance of probabilities. It is in my view unjust on the part of the appellate Court to hold against the plaintiff on "inferences" when there was no issue raised in the District Court on the due execution of the deed, when P6 was not objected to at the closure of the plaintiff's case as a deed which had not been proved, when the deed was proved by calling two attesting witnesses, and when the defendant or the District Court did not insist that the plaintiff produce the duplicate and/or protocol of the deed to further verify the matter.

The case of *Baronchy Appu v. Poidohamy (1901) 2 Brown's Reports 221* relied upon by the High Court to say that in addition to the notary another witness should have been called has no applicability to the facts of the instant case. The headnote of this case reads as follows:

> *[W]hen it is alleged that a person signed a blank sheet of paper which was subsequently filled up in the form of a deed and impeached as fraudulent by such person, the execution of such document ought to be proved, not by calling the notary who attested it, but by calling at least one of the witnesses thereto.*

The statement of law enunciated in the above case is correct on the unique facts of that case where the deed was challenged on the basis that the notary obtained the signatures on blank papers. The challenge in the instant case is different and, in any event, in the instant case, the notary and another attesting witness have given evidence on due execution.

The *ratio decidendi* in a decision must be understood in light of the unique facts and circumstances of that particular case. Unless the two situations are similar, judicial precedents need not be mechanically applied merely because the subject area is the same.

Moreover, the course of action adopted by the High Court is against the basic principles of proof of documents as envisaged in the Evidence Ordinance. Documents must be proved by primary evidence except in the limited instances where secondary evidence is permitted: sections 64 and 65 of the Evidence Ordinance, section 162 of the Civil Procedure Code. It is not possible to defeat primary evidence by secondary evidence (other than in exceptional situations), although *vice versa* is possible.

For the aforesaid reasons, I answer the two questions of law in the affirmative. The judgment of the High Court of Civil Appeal is

set aside and the judgment of the District Court is restored. The appeal is allowed with costs both here and in the Court below.

Judge of the Supreme Court

Murdu N.B. Fernando, 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 Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No. 59/2021
SC Spl. LA 176/2021
CA Revision Application No:
CA (PHC) APN 50/2021
HC Colombo Case No: HC 6256/2012

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

Complainant

Vs.

Asselage Sujith Rupasinghe,
No. 30/6, Nadun Uyana,
Katukurundugasyaya,
Mirigama.

Accused

AND BETWEEN

Mrs. P.M. Ranasinghe,
21B, Alfred Place,
Colombo 3.

Aggrieved Party – Petitioner

Vs.

1. Asselage Sujith Rupasinghe,
No. 30/6, Nadun Uyana,
Katukurundugasyaya,
Mirigama.

Accused – Respondent

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

Complainant – Respondent

AND NOW BETWEEN

Mrs. P.M. Ranasinghe,
21B, Alfred Place,
Colombo 3.

Aggrieved Party – Petitioner – Appellant

Vs.

1. Asselage Sujith Rupasinghe,
No. 30/6, Nadun Uyana,
Katukurundugasyaya,
Mirigama.

Accused – Respondent – Respondent

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

Complainant – Respondent – Respondent

Before: **S. Thurairaja, P.C., J**
Achala Wengappuli, J
Arjuna Obeyesekere, J

Aggrieved Party – Petitioner – Appellant appeared in person

Counsel: Sajith Bandara, State Counsel for the Attorney General

Argued on: 15th February 2022

Written Submissions: Tendered on behalf of the Aggrieved Party – Petitioner – Appellant on 18th February 2022

Tendered on behalf of the Attorney General on 9th March 2022

Decided on: 8th April 2022

Arjuna Obeyesekere, J

In this appeal, the Aggrieved Party – Petitioner – Appellant [*the Appellant*] is seeking to set aside an order delivered by the Court of Appeal on 28th April 2021, by which the Court of Appeal refused to issue notice on the Respondents in a revision application filed by the Appellant in respect of an order of the High Court of Colombo.

The facts of this appeal very briefly are as follows.

On 19th September 2012, the Attorney General forwarded indictment against Asselage Sujith Rupasinghe, the Accused – Respondent – Respondent [*the Accused*], to the High Court of Colombo on six charges. The gravamen of the said charges was that the Accused, together with Bulathsinhalage Gunasinghe Cooray and others unknown to the prosecution had conspired to, and prepared, two forged deeds in respect of premises No. 21A, Alfred Place, Colombo 3 belonging to the Appellant.

The trial before the High Court commenced on 25th July 2016. The prosecution led the evidence of the Appellant and ten others, prior to closing its case. In his evidence, the Accused, who had served as a Reserve Police Officer for some time, denied the several charges against him and stated that he purchased the aforementioned property from the said Cooray, who had claimed that the said property belonged to him. It was the position of the Accused that he had been cheated by Cooray into believing that the said property was owned by Cooray.

The Accused had stated that on 16th October 2016, he had seen an obituary notice containing the photograph of a person by the name of E.S. Thanthrige who the Accused claimed was in fact the person who sold the said property to him – i.e., Cooray. The Accused claims that he brought this information to the notice of the investigating officer. He had stated further that he had gone to the address displayed on the obituary notice and found that Cooray's actual name was E.S. Thanthrige and that the said person was a fraudster who had a similar case against him. In cross examination, the Accused admitted that the alleged sighting of Cooray/E.S. Thanthrige had happened while the prosecution case was proceeding before the High Court.

After the evidence of the Accused was concluded on 15th November 2016, an application had been made to call *inter alia* the following persons on the list of witnesses filed on behalf of the Accused:

a) The Director of the Criminal Investigation Department [CID] to give evidence with regard to a letter dated 31st October 2016 sent by the Accused wherein he had asked that an investigation be done in respect of E.S. Thanthrige [witness No. 2];

b) Renuka Damayanthi to give evidence relating to the death of E.S. Thanthrige [witness No. 3];

c) Mangala Deepal, Attorney-at-Law, who attested Deed No. 894 by which the Accused is said to have purchased the property from Cooray [witness No. 4];

d) Deepthi Premalal to give evidence with regard to Deed No. 894 and the death of E.S. Thanthrige [witness No. 5].

The application to call witness No. 2, the Director of the CID, had been refused by the High Court on the basis that the evidence that the witness was required to give must relate to the period prior to the service of the indictment, which was not the case with regard to witness No. 2. The prosecution had also objected to witness Nos. 4 and 5 being called to give evidence as they had already been called by the prosecution and had been subjected to extensive cross-examination. The High Court had upheld the said objection and by its Order delivered on 16th November 2016, refused the application to call witness Nos. 4 and 5. The High Court had thereafter issued summons on witness Nos. 3 and 7-12 on the list of witnesses filed on behalf of the Accused, although the Attorney-at-Law for the Accused had informed that he would be filing an amended list omitting the names of witness Nos. 8, 9 and 10.

Aggrieved by the said Orders of the High Court refusing permission to summon witness Nos. 2, 4 and 5, the Accused had invoked the revisionary jurisdiction of the Court of Appeal in terms of Article 138 of the Constitution, seeking *inter alia* (a) to revise the aforementioned orders of the High Court, and (b) an order directing the High Court to issue summons on witness Nos. 2, 4 and 5. By its judgment delivered in CA/PHC Application No. 148/2016 on 26th July 2017, the said application had been refused by the Court of Appeal.

In the course of its judgment, the Court of Appeal had held as follows:

> "*This Court cannot think of any advantage that would accrue to the defence even if the Accused succeeds in establishing that it was late E S Thanthrige who deceived him, since what the indictment alleges is that the said person is a fictitious person. Indeed, it is noteworthy that what the indictment has alleged is that the Accused had conspired with a person said to be Bulathsinhalage Gunasinghe Cooray or a person unknown to the prosecution.*

The Accused has already testified in his evidence, the position taken by him in this regard. The Notary Public who attested the alleged forged deed in his evidence has already stated that he does not know the alleged seller Gunasinghe Cooray. It is his position that he personally knew the Accused who introduced a person said to be Gunasinghe Cooray. Thus, it is the view of this Court that the question whether the person said to be Gunasinghe Cooray is still alive or now dead, would not help either party in this case. It is the view of this Court that such fact would be neither a fact in issue nor relevant to any fact in issue. One has to bear in mind that Section 5 of the Evidence Ordinance only permits evidence relating to existence or non-existence of a fact in issue and such other facts as are declared relevant to any fact in issue."

The Accused thereafter sought Special leave to appeal against the said judgment from this Court – *vide* SC Spl. LA Application No. 197/2017 – on five questions of law, including the following: "*Did the Court of Appeal err in concluding that even if the defense were to prove that E.S. Thanthrige was not a fictitious person, there would be no advantage to the defence case?*"

The application for Special leave to appeal had been refused on 25th October 2017.

The trial before the High Court commenced on 2nd February 2021 for the resumption of the case for the defence. The Accused was present in Court. The Attorney-at-Law looking after the interests of the Appellant had moved that an order be made refusing the application to call the aforementioned witness No. 3, Renuka Damayanthi who, as noted above, had been listed to give evidence relating to the death of E.S. Thanthrige. The Senior State Counsel appearing for the prosecution had however stated that she had no objection to the evidence of the said witness being led. The above application of the Appellant had been rejected by the High Court on the following basis:

a) The Court of Appeal had refused the application to call witness Nos. 4 and 5 on the basis that their evidence had already been led when they were called as witnesses for the prosecution;

b) Witness No. 3 is not such a witness and one does not know what evidence is to be elicited from witness No. 3;

c) While the right of an accused to a fair trial will be affected by the refusal to call a witness on his behalf, in this instance, no prejudice will be caused to the Appellant by the said witness being called.

Although the Appellant had made an application to revise the above order, the Court of Appeal, by its Order delivered on 28th April 2021 in CA/PHC Application No. 50/2021 had refused to issue notice on the Accused and the Attorney General on the basis that there was no "*exceptional illegality in the order of the learned High Court Judge which shocks the conscience of this Court.*"

Aggrieved by the said Order, the Appellant sought and obtained Special leave to appeal from this Court on the following question of law:

> "*Did the Court of Appeal err in law and fact in failing to consider that the Court of Appeal had in CA/PHC Application No. 148/2016 held that, whether Gunasinghe Cooray is dead or alive is neither a fact in issue nor a relevant fact in issue in this case?*"

Notices had been dispatched to the Accused, on one occasion prior to this matter being supported and thrice thereafter. The Accused however was neither present nor represented before this Court, although he had been enlarged on bail by the High Court.

It was the submission of the Appellant who appeared before us in person that the High Court was correct when it held that the judgment of this Court in CA/PHC Application No. 148/2016 related to three witnesses who had already been called as witnesses for the prosecution. The Appellant, however, contended that the High Court had erred, when it failed to consider the following:

a) The purpose of calling witness No. 3 had specifically been set out in the list of witnesses filed by the Accused – namely to produce documents relating to the death of E.S. Thanthrige and give evidence relating thereto – and therefore the reason for

calling the said witness was known;

b) That part of the said judgment of the Court of Appeal, which held that whether Gunasinghe Cooray, whom the Accused now claims is E. S. Thanthrige, is dead or alive would not help either party as such fact would be neither a fact in issue nor relevant to any fact in issue;

c) That even though a question of law had been raised in that regard, Special leave to appeal had been refused by this Court;

d) That there was no basis to call a witness whose evidence is not relevant.

She therefore submitted that the said Order of the High Court was illegal and that the Court of Appeal had misdirected itself when it held that it did not see any illegality in the order of the High Court.

The learned State Counsel, referring to the evidence of the Accused where he attempted to establish that the real name of Cooray was E.S. Thanthrige, submitted that witness No. 3 is not a witness to the forged deed and is therefore unable to give any evidence regarding the complicity or the non-complicity of the Accused relating to the offences set out in the indictment. He submitted further that the death of E.S. Thanthrige would not prove either the existence or non-existence of the facts in issue nor any other fact relevant to the charges in the indictment, and therefore the evidence of witness No. 3 has no relevance to the trial before the High Court. He drew the attention of this Court to Section 5 of the Evidence Ordinance, which provides that, "*Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant and of no others.*"

The learned State Counsel cited the judgment of Chief Justice Basnayake in **Queen v Sodige Singho Appu** [62 NLR 112], where it was held as follows:

> "*The Evidence Ordinance lays down strict limits within which evidence may be given in any suit or proceeding. Evidence may be given of the existence or non-existence of*

every fact in issue and of such other facts as are declared by the Ordinance to be relevant and of no others (Section 5). Evidence admitted in disregard of Section 5 is evidence improperly admitted and a conviction is liable to be quashed if such evidence has resulted in a miscarriage of justice."

The issue before us is limited to whether the Appellant had established an illegality in the order of the High Court which warranted the Court of Appeal to exercise its discretion and issue notice on the Respondents.

The power of revision is an extraordinary power. A person invoking the revisionary jurisdiction of the Court of Appeal must, *inter alia*, (a) demonstrate the error or illegality on the face of the record, which would occasion a failure of justice; and (b) plead and establish exceptional circumstances warranting the exercise of revisionary powers in order to succeed with his or her application. The presence of exceptional circumstances is the process by which the court selects the cases where the extraordinary power of revision should be exercised.

Rule 3(3) of the Court of Appeal (Appellate Procedure) Rules, 1990, read with Rule 3(4) thereof, requires that an application made under Article 138 must be supported in open Court, and that notice will be issued on respondents only thereafter.

In this instance, the Court of Appeal has refused to entertain the application of the Appellant at the threshold stage of issuing notice. In order to have notice issued on the Respondents, the burden cast on the Appellant was to establish a *prima facie* sustainable case and for the Court to be satisfied that there is a *prima facie* case to be looked into. In other words, the Court was only required to be satisfied that the application before it warrants a full investigation at a hearing with the participation of all parties.

Having carefully considered the submissions of the Appellant and the learned State Counsel, the aforementioned material placed by the Appellant before this Court and especially the fact that this Court has refused Special leave to appeal on the aforementioned question of law, it is clear that neither the High Court nor the Court of Appeal have considered that part of the judgment of the Court of Appeal in CA/PHC

Application No. 148/2016 with regard to the relevancy of evidence relating to E.S. Thanthrige.

In the said circumstances, I am satisfied that:

a) The Appellant has established a *prima facie* case of an illegality which warrants full investigation with the participation of all parties; and

b) This is a fit matter where the Court of Appeal should have issued notice on the Respondents.

I therefore answer the aforementioned question of law in the affirmative and direct the Court of Appeal to (a) issue notice of the revision application on all Respondents; and (b) expeditiously conclude the hearing of the said revision application since a period of over five years have lapsed since the Accused gave evidence before the High Court.

The appeal is therefore allowed, 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

In the matter of an Appeal from the Judgement of the Provincial High Court of the Western Province holden in Negombo dated 7th November 2016 in HCALT 38/2013, 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

Kachchakaduge Frank Romeo Fernando,
No. 17/28, Raja Mawatha,
3rd Kurana, Negombo.

Applicant

S.C. Appeal No. 60/2018
SC/HC/LA 89/2016
HCALT 38/2013
L.T. Application No. 21A/998/2010

Vs.

Brandix Apparel Solutions Limited
(Formerly Brandix Casualwear Ltd),
No. 409, Galle Road, Colombo 03.
(having a factory at 21, Temple Road,
Ekala, Ja-ela).

Respondent

AND BETWEEN

Kachchakaduge Frank Romeo Fernando,

No. 17/28, Raja Mawatha,

3rd Kurana, Negombo.

Applicant-Appellant

Vs.

Brandix Apparel Solutions Limited

(Formerly Brandix Casualwear Ltd),

No. 409, Galle Road, Colombo 03.

(having a factory at 21, Temple Road, Ekala,

Ja-ela).

Respondent-Respondent

AND NOW BETWEEN

Brandix Apparel Solutions Limited

(Formerly Brandix Casualwear Ltd)

No. 409, Galle Road, Colombo 03.

(having a factory at 21, Temple Road, Ekala,

Ja-ela).

Respondent-Respondent-Petitioner

Vs.

Kachchakaduge Frank Romeo Fernando,

No. 17/28, Raja Mawatha,

3rd Kurana, Negombo.

Applicant-Appellant-Respondent

Before: Jayantha Jayasuriya, P.C., C.J.

Vijith K. Malalgoda, P.C., J.

Janak De Silva, J.

Counsel:

Suren Fernando with Khyati Wickramanayake and Sanjit Dias for the Respondent-Respondent-Appellant

P.K. Prince Perera for the Applicant-Appellant-Respondent

Written Submissions filed on:

03.07.2019 and 11.08.2021 by the Respondent-Respondent-Appellant

19.06.2019 and 02.08.2021 by the Applicant-Appellant-Respondent

Argued on: 30.07.2021

Decided on: 05.05.2022

Janak De Silva, J.

The Applicant-Appellant-Respondent (hereinafter referred to as "Respondent") has joined the Respondent-Respondent-Appellant (hereinafter referred to as "Appellant") as a Quality Executive. While serving as Assistant Manager (Finishing) at the Appellant's plant in Seeduwa, the Respondent was suspended from service on 07.10.2009. The Respondent was told verbally that the reasons for the suspension will be communicated later. Subsequently, on 09.10.2009, a notice of suspension of service (A2) without pay effective 07.10.2009 was served on the Respondent, which contained two charges.

Thereafter, the Respondent was informed of a disciplinary inquiry (A4) against him on 27.10.2009. In response, the Respondent pointed out that he had not yet been served with a charge sheet nor afforded an opportunity to show cause (A5). Subsequently, the disciplinary inquiry was postponed and the Respondent was given a formal charge sheet containing three charges and asked to show cause (A8). After the Respondent responded to the show cause letter, a disciplinary inquiry was carried out and he was convicted on two charges.

The findings of the disciplinary inquiry were communicated to the Respondent by letter dated 11.01.2010 (A13). He was advised that as a result of the findings, he is subject to a punitive transfer to a factory in Polonnaruwa, owned by the Appellant, effective 18.01.2010. He was also informed that if he does not report to work at the Polonnaruwa factory, he will be deemed to have vacated post. The letter then indicated that his work would be monitored for a period of six months. The services of the Respondent were to be terminated if he failed to comply with the Appellant's rules and regulations during this period.

In response, by letter dated 28.01.2010 (A16), the Respondent rejected the contents of the letter dated 11.01.2010 (A13). He claimed that the disciplinary inquiry was conducted in violation of the principles of natural justice in an unjust and unreasonable way. The Respondent stated that imposing a punitive transfer based on the findings of such an inquiry is unfair and unreasonable. The Respondent requested the Appellant to invalidate the letter dated 11.01.2010 (A13). He indicated his willingness to comply with the transfer order and report to work at the factory located at Polonnaruwa if the Appellant removed the punitive conditions contained in the transfer order.

Subsequently by letter incorrectly dated 05.01.2010 (A18), which should read as 05.02.2010, the Respondent informed the Appellant that due to the Appellant's failure to reply to his letter dated 28.01.2010 (A16) and as the Appellant is bent on punishing him for acts he did not commit, he has been compelled to come to the conclusion that the Appellant has constructively terminated his services with effect from 01.02.2010. The Respondent concluded by stating that he will accordingly seek suitable judicial remedies.

The Appellant, by letter dated 10.02.2010 (A21) rejected the contents of the letter dated 28.01.2010 (A16). The Respondent was informed that he is required to report to work by 22.02.2010 and that the failure to do so will compel the Appellant to deem that the Respondent has vacated post.

The Respondent however did not report to work and the Appellant informed him by letter dated 25.02.2010 (A20) that he is considered to have vacated post. However, prior to this communication, on 24.02.2010, the Respondent filed an application with the Negombo Labour Tribunal stating that his services had been terminated in a constructive manner. The Appellant filed answer denying termination and maintained that the Respondent had vacated post by failing to comply with the transfer order.

At the conclusion of the inquiry before the Labour Tribunal, the learned President dismissed the application on the ground that constructive termination had not been proved. He went on to observe that the Respondent was in transferable service and liable to be transferred by his employer in the normal course of business.

The learned President referred extensively to the judgment of Amaratunga J. in ***Sri Lanka Insurance Corporation Ltd. v. Jathika Sewaka Sangamaya*** **[(2011) 2 Sri.L.R. 114]**, where it was held that if an employee who was issued a transfer order at the conclusion of a disciplinary inquiry, fails to comply with the said order and keeps away from work without obtaining leave, he, by his own conduct, secures his own discharge from the contract of employment with his employer. Accordingly, the learned President concluded that the Respondent had vacated his post by refusing to comply with the transfer order unless the punitive terms contained in it is removed and that there has been no termination of by the Appellant. The learned President concluded that as such, the Labour Tribunal lacked jurisdiction to inquire into the application made by the Respondent.

Aggrieved by the order of the Labour Tribunal, the Respondent appealed to the High Court of the Western Province holden in Negombo which held that the Appellant had unjustly and unreasonably terminated the services of the Respondent and ordered reinstatement with back wages.

This Court on 03.04.2018, granted leave to appeal on the following questions of law contained in paragraph 10 of the Petition of Appeal dated 15.12.2016:

(a) Did His Lordship of the High Court err in law in failing to recognize that the jurisdiction of the High Court was restricted to questions of law?

(d) Did His Lordship of the High Court err in law in failing to apply principle of law relating to burden of proof, especially in the context where termination was denied?

(e) Did His Lordship of the High Court err in law in failing to properly consider and apply the principles of law applicable to transfer of employees and the principle of 'Comply and Complain'?

(f) Did His Lordship of the High Court err in law in failing to recognize there was no termination of Respondent's services as alleged?

(g) Did His Lordship of the High Court err in law in failing to recognize that the Respondent has vacated post?

I shall first address the question of law set out in (d).

Jurisdiction of the Labour Tribunal

The Respondent invoked the jurisdiction of the Labour Tribunal alleging that constructive termination had taken place. In terms of section 31B(1)(a) of the Industrial Disputes Act as amended, the jurisdiction of the Labour Tribunal is engaged only where there has been a termination of the services of the workman by the employer. In the absence of such termination in law, the Labour Tribunal is without jurisdiction.

Judicial precedent establishes that the jurisdiction of the Labour Tribunal is also engaged in cases of constructive termination. Here the workman alleges that the employer has constructively terminated his services although the employer, as in this case, denies any termination.

The learned Judge of the High Court proceeded on the basis that the transfer order was invalid due to the domestic inquiry not been conducted in a just and fair manner. The learned High Court Judge held that by failing to present the proceedings of the domestic inquiry to the Labour Tribunal, the Appellant had failed to establish that it did not act in an unjust and unfair manner towards the Respondent. He further held that while he is in agreement with the reasoning in ***Sri Lanka Insurance Corporation Ltd*. v. Jathika Sewaka Sangamaya (Supra.)**, the principle of *comply and complain* did not apply to the instant case as the disciplinary inquiry was not conducted in a fair manner. The learned High Court Judge held that the *comply and complain* principle did not apply where the transfer order was illegal.

The learned High Court Judge expressed his views as follows:

> *"වැඩිදුරටත් විනය චෝදනාවට අදාළව විනය පරීක්ෂනයක් පවත්වන ලද බවට වගඋත්තරකාර පර්ශ්වය සාක්ෂි දුන්න ද, කම්කරු විනිශ්චයාධිකරණයේ දී ඉල්ලුම්කරුට විරුද්ධව ඇති චෝදනා සම්බන්ධයෙන් කිසිදු සාක්ෂියක් මෙහෙයවා නැත. අවම වශයෙන් විනය පරීක්ෂනයේ සටහන් හෝ වාර්තාවක් ඉදිරිපත් කර නැත. මේ අනුව, සේවායෝජකයා ඉල්ලුම්කරු කෙරෙහි අසාධාරණ හෝ අයුක්ති සහගත චේතනාවකින් කටයුතු නොකලේ යැයි කීමට කිසිදු කරුණක් අධිකරණයට ඉදිරිපත් වී නොමැති බවට මා තීරණය කරමි. මෙම කරුණු අනුව, කම්කරු විනිශ්චයාධිකරණයේ තීන්දුව පාදක වූ අවනත වී පැමිණිල්ල කළ යුතුය යන (Comply and Complain) රීතිය මෙම වගඋත්තරකරු කෙරෙහි යොදා ගත නොහැකි බව මා තීරණය කරමි."*

Burden of Proof

In this context, the question arises as to who bears the burden of proving constructive termination so as to engage the jurisdiction of the Labour Tribunal.

In ***The Ceylon University Clerical and Technical Association, Peradeniya v. The University of Ceylon, Peradeniya*** **(72 N.L.R. 84 at 90)** and ***Anderson v. Husny*** **[(2001) 1 Sri.L.R. 168 at 175]** it was held that although Labour Tribunals are not bound by the provisions in the Evidence Ordinance, the principles contained therein are a useful guide in determining the matters before it. In ***Indrajith Rodrigo v. Central Engineering Consultancy Bureau*** **[(2009) 1 Sri.L.R. 248 at 260]** it was explained that although the equitable nature of the jurisdiction of Labour Tribunals has consistently been recognized in the decisions of our courts, in the process of redressing grievances of workmen in a just and equitable manner, one cannot lose sight of procedural propriety and evidentiary legitimacy.

Section 102 of the Evidence Ordinance reads:

> "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Accordingly, the burden is on the workman to establish that there has been a constructive termination of services so as to vest jurisdiction in the Labour Tribunal as the workman will fail if no evidence is given on either side. Therefore, the onus was on the Respondent to prove that his services were constructively terminated as the Appellant had denied termination.

In this respect the decision in ***Indrajith Rodrigo v. Central Engineering Consultancy Bureau*** **(Supra.)** is illustrative as it was held that in Labour Tribunal proceedings where the termination of services of a workman is admitted by the respondent, the onus is on the latter to justify termination by showing that there were just grounds for doing so and that the punishment imposed was not disproportionate to the misconduct of the workman. It was further held that 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 qui negat*.

Conversely, where the employer denies termination as in this case, the burden is on the workman to prove that there was termination as well as that the termination was unjust and unlawful. The onus is not on the employer to prove that the termination was just and lawful when the termination is denied.

Accordingly, I hold that the learned High Court Judge erred in law in placing the burden of proof on the Appellant to establish that it did not act in an unfair and unjust manner towards the Respondent. Consequently, question of law (d) is answered in the affirmative.

Next, I will examine question of law (e).

Comply and Complain

The learned counsel for the Respondent submitted that the punishment transfer given to the Respondent by letter dated 11.01.2010 (A13) is perse mala fide, bad and misconceived in law as the disciplinary inquiry was held in breach of the principles of natural justice in an unfair and unjust manner. Furthermore, it was argued that an employer's general right to transfer an employee within the organization is not an absolute right.

Relying on the decision in ***Janatha Estates Development Board and Others v. Kurukuladitta*** **[(1990) 2 Sri.L.R. 169]**, the learned counsel for the Respondent contended that the employee is entitled to disobey the transfer, where the transfer order is tainted with mala fide intentions and that in these circumstances, the learned Judge of the High Court did not err in law in holding that the principle of *comply and complain* is not applicable to the instant case.

As correctly submitted by the learned counsel for the Respondent, in ***Janatha Estates Development Board and Others v. Kurukuladitta*** **(Supra.)** it was held that an employee is justified in refusing to comply with a transfer order if the transfer order is mala fide. Moreover Weeramantry J., in ***Ceylon Estates Staffs' Union v. The Superintendent, Meddecombra Estate, Watagoda*** **(73 N.L.R. 278 at 287)**, observed that there is no general principle that an employee is in all cases bound to accept a transfer order under protest for there may be cases where the mala fides prompting such order is self-evident or the circumstances of the transfer so humiliating that the employee may well refuse to act upon it even under protest. This was cited with approval by Fernando J. in his dissenting judgement in ***Nandasena v. The Uva Regional Transport Board*** **[(1993) 1 Sri.L.R. 318 at 327]** where he observed that an employee has a limited right, bona fide to challenge an improper transfer order.

Nonetheless, Goonewardene J. delivering the majority judgment in ***Nandasena v. The Uva Regional Transport Board*** **(Supra.)** held that even where the transfer order 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*. I must add that Amaratunga J. in ***Sri Lanka Insurance Corporation Ltd. v. Jathika Sewaka***

Sangamaya **(Supra.)** was dealing with what he considered to be a legal transfer order, since he held (at page 125), that the High Court had failed to consider the legal result of the workman's total refusal to comply with a disciplinary order made after a disciplinary inquiry regarding which he had no cause to complain.

Accordingly, the question whether an employee is bound to *comply and complain* against an invalid transfer appears to be open for definitive determination. However, this is not a matter which Court needs to examine in the present case as I am of the view that the impugned transfer order has not been established by the Respondent to be invalid. Let me now set out the reasons for this conclusion.

The main thrust of the Respondent's argument is that the impugned transfer order is invalid as the disciplinary inquiry that led to it was conducted in breach of the rules of natural justice. He attempted to justify this position on a number of grounds.

At the outset, the Respondent complained that he was not given the right of representation at the disciplinary inquiry. He stated that, by letter dated 31.10.2009 (A9), he had requested permission to have a defence officer. The Respondent claims that his application was refused by letter dated 19.12.2009 (A11). The issue to be addressed is whether an employee is entitled to representation at a disciplinary inquiry.

In ***Chulasubadra De Silva v. The University of Colombo and Others*** **[(1986) 2 Sri.L.R. 288]** it was held that a university student appearing before an Examination Committee on a charge of having committed an examination offence is not entitled as of right to have legal representation.

A similar approach was adopted in ***Frazer v. Mudge and Others*** **[(1975) 3 All E. R. 78]** where it was held that a prisoner is not entitled, as of right, to be legally represented before a Board of Visitors. Lord Denning in ***Enderby Town Football Club Ltd. v. The Football Association Ltd.*** **[(1971) 1 All E. R. 215 at 218]** observed:

> *"… is a party who is charged before a domestic tribunal entitled as of right to be legally represented? Much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter for the discretion of the tribunal. It is master of its own procedure; and if it in the proper exercise of its discretion, decline to allow legal representation, the courts will not interfere."*

S.R. De Silva in ***Disciplinary Action and Disciplinary Procedures in the Private Sector*** **[Monograph No. 2, 3rd Edition, page 22]** states that under no circumstances should the accused employee be represented by an outsider, e.g. a lawyer or an official of his parent union.

It is thus clear that an employee is not entitled as of right to legal representation at a disciplinary inquiry . Nonetheless, the question remains whether the Respondent had a right to be represented through a defending officer and if so, whether that right is subject to any limitations.

In ***R v. Secretary of State for the Home Department and Others*** **[(1984) 1 All E. R. 799]** it was held that although a prisoner appearing before a board of visitors in a disciplinary charge was not entitled as of right to have legal representation or the assistance of a friend or advisor, as a matter of natural justice, a board of visitors had a discretion to allow such representation or assistance before it.

S.R. De Silva in ***Disciplinary Action and Disciplinary Procedures in the Private Sector*** **[Supra.]** goes on to state that if existing practice allows representation, the representative of the accused employee should be either a co-employee or an official of his Branch Union. In my view, such a practice is justified as the facts leading to a disciplinary inquiry is essentially an internal matter between the employee and the management and such matters should not reach the public domain at that stage.

In this context, I observe that although the Respondent testified that he was not permitted to have a defending officer, it transpired during his evidence that he was permitted to get a defending officer from within the Appellant's establishment [Appeal Brief page 87].

Moreover, it is observed that the prosecuting officer was not a lawyer. No evidence was adduced to establish that the Appellant's disciplinary rules conferred a right to outside representation on an employee at a disciplinary inquiry. In these circumstances, I hold that the rules of natural justice have not been breached on the alleged ground of non-representation.

The learned counsel for the Respondent then drew our attention to letter dated 12.11.2009 (A19) in which the Respondent complained about the conduct of the prosecuting officer. However, the alleged unlawful conduct of the prosecuting officer cannot result in the breach of the rules of natural justice unless it is proved that the inquiring officer is guilty of such breach. The burden to do so was on the Respondent which he failed to do.

Further, the learned counsel for the Respondent submitted that the Respondent had not received a copy of the inquiry proceedings. I am not persuaded that, even though this allegation is true, it invalidates the disciplinary inquiry. Moreover, S.R. De Silva in ***Disciplinary Action and Disciplinary Procedures in the Private Sector*** **[Monograph No. 2, 3rd Edition, page 27]** states that unless it is obligatory to do so in terms of a Collective Agreement, a transcript of the proceedings of the inquiry should not be given to the accused employee.

Next the learned counsel for the Respondent submitted that the punishment transfer given to the Respondent by letter dated 11.01.2010 (A13) is perse mala fide.

Judicial precedent unequivocally establish that a transfer order made mala fide is unjustifiable and amounts to constructive termination. **[**See ***The Superintendent, Baranagalle Estate v. Supaiya*** **(S.C 108/69, S.C.M. 11.11.1972),** ***Gurusinghe v. Ceylon Theatres Ltd.*** **(S.C. 122/69, S.C.M. 19.01.72),** ***Ceylon Estate Staffs' Union v. Ratwatte, Superintendent, Frotoft Group, Ramboda*** **(S.C. 186/70, S.C.M. 16.7.74)].**

However, I note that the application made by the Respondent to the Labour Tribunal does not contain any allegation of bad faith against the Appellant.

The burden of proving bad faith on the part of the Appellant, as alleged, was on the Respondent and the burden is heavy. It is an evidentiary principle recognized in administrative law.

In ***Principles of Administrative Law*** **(Jain & Jain, 7th Edition 2011-page 1202)** it is stated as follows:

> "*While the plea of mala fides is raised quite often before the courts to challenge discretionary decisions, it succeeds rarely; it is extremely difficult to prove mala fides. The courts insist that the plaintiff who seeks to invalidate an order should prove the allegation of bad faith to the court's satisfaction. This is quite a difficult task to do and it is only in an exceptional fact-situation that such plea can be substantiated to the court's satisfaction.*"

This principle has also been used in industrial conflicts. In ***Ceylon Mercantile Union v. Ceylon Cold Stores Ltd. and Another*** **[(1995) 1 Sri.L.R. 261 at 269]** Wijetunge J. quoted with endorsement the following statement in Malhotra in the Law of Industrial Disputes (1968 edition) at 479-481:

> *"It is, however, for the party alleging mala fides to lead reliable evidence in support of the said plea. A finding the management has not acted bona fide will ordinarily not be reached if the materials are such that a reasonable- man could have come to conclusion which the management has reached."*

Weeramantry J. had in fact earlier in ***Ceylon Estates Staffs' Union v. The Superintendent, Meddecombra Estate, Watagoda*** **(Supra. at 282)** quoted with approval the approach taken by the Indian Supreme Court that Industrial Tribunals should interfere if a transfer order is made mala fide or for the ulterior purpose of punishing an employee for his trade union activities, and that a finding of mala fides should be reached by Industrial Tribunals only if there is sufficient and proper evidence in support of the finding.

To support a plea of mala fides the Court must positively conclude that the employer could have been acting only with a dishonest motive, and it is not sufficient to conclude that it was probably so **[**See ***Ramankutty v. State of Kerale*** **((1972) IILJ 509 Ker. at paragraph 26),** ***Royappa v. State of Tamil Nadu*** **(1974 A.I.R. (SC) 555 at 586)]**

Notwithstanding the failure on the part of the Respondent to specifically plead mala fides against the Appellant, a careful examination of the evidence shows that that no cogent evidence has been led by the Respondent to establish mala fides on the part of the Appellant.

One of the primary grounds for claiming that the transfer was made in bad faith was that it was a demotion of the Respondent. The learned counsel for the Respondent submitted that the transfer of the Respondent from the position of an "Assistant Manager-Finishing" at Seeduwa plant to the post of "Washing Coordinator" at the Polonnaruwa plant amounted to a demotion.

However, the Appellant maintained throughout the case that the transfer did not involve a demotion or a break in service. This position was specifically asserted in letters dated 11.01.2010 (A13) and 10.02.2010 (A21) sent by the Appellant. Weeramantry J. in ***Ceylon Estates Staffs' Union v. The Superintendent, Meddecombra Estate, Watagoda*** **(Supra. 284)** placed much reliance on a similar assertion by the employer in that case in concluding that the transfer was not a demotion. Furthermore, this allegation was expressly rejected during the cross-examination of the witness for the Appellant [Appeal Brief page 308]. Moreover, the Appellant had by the Letter of Appointment (A1), specifically reserved the right to transfer the Respondent to any other post of equivalent status. In these

circumstances, the evidence does not establish any demotion or break in service of the Respondent as a result of the punitive transfer. Thus, the Respondent has failed to establish mala fides.

On the contrary, the evidence demonstrates the good faith of the Appellant. For example, by letter dated 10.02.2010 (A21) the Respondent was informed that he will be paid back wages for the period of suspension and that a mutual transfer to a place of choice of the Respondent can be considered at the end of the six-month period specified in letter dated 11.01.2010 (A13). Moreover, the Appellant rescheduled the disciplinary inquiry and gave the Respondent time to show cause when it was pointed out that he had not yet been served with a charge sheet nor afforded an opportunity to show cause.

It is also pertinent to observe that the Respondent complained that the transfer to Polonnaruwa is unfair, unreasonable and financially detrimental to him. Nonetheless by letter dated 28.01.2010 (A16) the Respondent informed the Appellant that he is willing to comply with the transfer order and report to work at the factory located at Polonnaruwa if the punitive conditions contained in the transfer order are removed. It is difficult to reconcile the contradictory positions taken by the Respondent. Such inconsistent positions negate the allegations of mala fides against the Appellant and fortifies the view that the Respondent was looking for excuses not to comply with the transfer order.

Another ground relied on by the Respondent to substantiate that the impugned transfer order was invalid is that it will adversely affect him financially to go and work at Polonnaruwa.

In ***Ceylon Estates Staffs' Union v. The Superintendent, Meddecombra Estate, Watagoda*** **(Supra. at 282)** Weeramantry J. took the view that one limitation on the right of transfer is that the employee cannot be made to suffer financially. However, S.R. De Silva in ***Transfer*** **(Monograph No. 7, Revised 1995, page 11)** states that any monetary loss does not render a transfer unjustified. I am in agreement with this proposition particularly as the Letter of Appointment (A1) issued to the Respondent by the Appellant states as follows:

> "*Your appointment will be to the position of Quality Executive on the Executive grade, with effect from 11.02.2002 in the regular establishment of the company but the company reserves to itself the right to transfer you to any other post of equivalent status and responsibility permanently, temporarily or on secondment within L.M. Apparels (Pvt) Ltd or any of its Associate companies, subsidiaries or holding company as may be required*"

Consequently, the Respondent knew that he was in a transferable position that could have financial implications. I hold that in these circumstances for a punitive transfer to be unjustified on the ground that the employee has been made to suffer financially, the employee must establish that he has been made to suffer unreasonable financial loss as a result of the punitive transfer. In fact, Weeramantry J. took this view in ***Ceylon Estates Staffs' Union v. The Superintendent, Meddecombra Estate, Watagoda*** **(Supra. 283)** by holding that no material had been placed before the Labour Tribunal by the applicant to support his submission that his emoluments would be affected to an extent rendering justifiable his refusal to accept a transfer. The Respondent has failed to adduce any such evidence in this matter.

Finally, the question arises whether the Respondent could have been given a punishment transfer. The general right of an employer to transfer an employee within his service is well recognized in our legal system **[*Ceylon Estates Staffs' Union v. The Superintendent, Meddecombra Estate, Watagoda* (Supra. 281-282)]**. Moreover, the position of the Appellant is that the Respondent is in transferable service, which has not been challenged by the Respondent probably in view of the contents of the Letter of Appointment (A1).

I have to add that the Respondent was found guilty of verbal sexual harassment against an employee of the Seeduwa plant. It should be noted that it is the duty of an employer to provide a safe and supportive work environment for its employees. The productivity of the employee and the company will not increase unless such an environment exists. Sexual harassment in any form should be dealt with severely because it will otherwise pollute the working environment and affect employee morale. In these circumstances, it was virtually difficult for the Appellant to retain the Respondent at the same plant because it would have had a negative impact on the workplace. Therefore, there was nothing unfair or illegal about the punitive transfer given to the Respondent.

I hold that where the contract of employment expressly or impliedly provides for a transfer, and the employee is given a punishment transfer consequent to the conduct of a valid disciplinary inquiry, the employee cannot reject outright the transfer order and must comply and complain.

For all the foregoing reasons, I hold that the impugned transfer order is valid and that the *comply and complain* principle applies to the Respondent. Accordingly, I answer question of law (e) in the affirmative.

I will next examine questions of law (f) and (g) together as they are connected.

Constructive Termination

As the position of the Respondent before the Labour Tribunal was that his services were constructively terminated, it is apposite to scrutinize this concept in some detail given the dearth of authority on the matter.

The contract of employment attracts certain fundamental principles of the law of contracts and therefore any examination of this concept must begin with an examination of a few fundamental principles in the law of contracts relevant to the matter before us.

A contract may be breached by one party failing to perform an obligation in full or in part undertaken by him or by one party repudiating the contract.

However, not every breach will entitle the innocent party to terminate the contract. Where the breach is of a term which goes to the root of the contract, the innocent party has the right to terminate the contract. Here the breach occurs where the guilty party fails to render performance at the time of performance of the term, which goes to the root of the contract. The innocent party has a choice of deciding whether or not to terminate the contract. The choice must be communicated to the guilty party.

A contract may also be breached by one party repudiating the contract. Weeramantry in ***The Law of Contracts*** **(Volume II, page 879)** observes:

> *"Repudiation may occur either expressly, as where a party states in so many words that he will not discharge the obligations he has undertaken, or impliedly, as where by his own act a party disables himself from performance or makes it impossible for the other party to render performance."*

Here the repudiation occurs prior to the due time of performance. The repudiation must be of a term which goes to the root of the contract. Where one party has repudiated the contract, the other party has two options. Firstly, he can accept the repudiation and treat the contract as having been terminated and seek legal remedies. Alternatively, the innocent party can waive the repudiation and consider the contract as still subsisting.

Therefore, repudiation will result in the termination of the contract only where the innocent party accepts the repudiation for as Asquith L.J., stated in ***Howard v. Pickford Tool Co. LD.*** **[(1951) 1 K.B. 417 at 421]**, *"an unaccepted repudiation is a thing writ in water and of no value to anybody; it confers no legal rights of any sort of kind."* This position has been accepted in ***Noorbhai et al. v. Karuppen Chetty*** **(27 N.L.R. 325)**, ***Senanayake v. Anthonisz and Another*** **(69 N.L.R. 225 at 229)** and by Weeramantry in ***The Law of Contracts*** **(Supra. 880).**

It has been questioned whether this principle in the law of contracts applies to contracts of employment. In ***Vine v. National Dock Labour Board*** **[(1956) 1 Q.B. 658,674]** and ***Sanders v. Ernest A. Neale Ltd.*** **[(1974) L.C.R. 565(N.I.R.C.)]** the view has been taken that as contracts of employment are *sui generis*, repudiatory conduct automatically brings an end to the contract of employment and that there is no right of election on the innocent party. However, in ***Thomas Marshall (Exports) Ltd. v. Guinle*** **[(1978) I.C.R. 905]** and ***Gunton v. Richmond-upon-Thames London Borough Council*** **[(1980) 3 W.L.R. 714]** it was held that even where contracts of employment are concerned the innocent party must accept the repudiation before the contract is terminated.

It must be borne in mind that the contract of employment provides an employee with livelihood and as such he must be given the choice of electing to consider whether the contract of employment should be considered to have been constructively terminated due to the repudiation by the employer. Similarly, the employer relies on the services rendered by the employee to his business and should also be given the choice of electing to consider whether the contract of employment should be considered to have been constructively terminated due to the repudiation by the employee. Accordingly, in my view, even in employment contracts, the innocent party must accept the repudiation for the contract to be terminated.

Accordingly, where an employee claims that there has been constructive termination by the employer due to the employer repudiating the contract of employment, the employee must communicate to the employer that he is accepting the repudiation. It is only then may he seek to invoke the jurisdiction of the Labour Tribunal on the ground of constructive termination in terms of section 31A(1)(a) of the Industrial Disputes Act.

The difficult question is what type of conduct may amount to constructive termination of a contract of employment. It has been held that whether there has been constructive termination or not depends on the facts and circumstances of each case [See ***Pfizer Limited v. Rasanayagam*** **(1991) 1 Sri.L.R. 290**; ***Thaksala Weavers Ltd. v. Dhanawathie Perera and Others*** **(1994) 3 Sri.L.R. 116**; ***J.H. Jacotine and Another v. Air Lanka Limited & Others*** **(S.C.(CHC)Appeal 26/2009, S.C.M. 03.02.2012)**; ***Christopher W.J. Silva v. Sri Lankan Airlines Limited*** **(S.C. Appeal 212/2016, S.C.M. 22.03.2019]**. Although this is correct in principle and is a good

starting point, a more helpful formulation is that the conduct of the guilty party relied on by the innocent party to establish that there has been repudiation of the contract must be examined.

In ***Western Excavating (ECC) Ltd. v. Sharp*** **[(1978) 2 WLR 344 at 349]** Lord Denning enunciated the following formula:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

Accordingly, for there to be constructive termination due to the conduct of the employer, the breach by the employer must go to the root of the contract of employment or must be an indication that he is no longer bound by an essential term of the contract of employment. A breach will be considered as going to the root of the contract of employment if the breach would render the performance of the rest of the contract by the party in default a thing differing in substance from what the other party has stipulated for.

Courts have held the following instances to be constructive termination: requiring the employee to report to a junior officer is tantamount to a demotion **[*Pfizer Limited v. Rasanayagam* (Supra.)]**; reversion of a workman's post to his former post amounts to a demotion **[*Superintendent, Liddesdele Group, Halgranoya v. Ponniah* [C.A. No. 453/83, C.A.M. 14.05.1993]**; Where an employer failed to take disciplinary proceedings and at the same time did not allow the workman to work

[*Thaksala Weavers Ltd. v. Dhanawathie Perera and Others* (Supra.)]; Sudden, unforeseen and unnotified long distance transfers **[*Mahagamage Chandramadu and Others v. Paradigm Clothing (Private) Limited & Others* (S.C. Appeal No. 106/2014, S.C.M. 19.12.2019]**.

At this point it must be stressed that constructive termination cannot occur where there has only been a breach of reasonable conduct without there being a breach of an express or implied term of the contract of employment which goes to its root or foundation **[**See ***Wetherall v. Lynn* (1977) IRLR 336** ***; Western Excavating (ECC) Ltd. v. Sharp* (Supra.); *Christopher W.J. Silva v. Sri Lankan Airlines Limited* (Supra.)]**.

Accordingly, in order to establish constructive termination, the Respondent should have proved that:

(a) The Appellant is guilty of conduct which is a significant breach going to the root of the contract of employment; or

(b) The Appellant has repudiated the contract of employment by showing that the Appellant no longer intends to be bound by one or more of the essential terms of the contract going to the root of the contract of employment.

(c) The Respondent notified the Appellant that he is terminating the contract of employment due to the breach by the employer or that he is accepting the repudiation by the employer.

The Respondent has given the required notification in terms of (c). However, for the reasons discussed more fully above, the Respondent has failed to establish that the Appellant is guilty of conduct which is a significant breach going to the root of the contract of employment or that there has been a repudiation of the contract of employment by the Appellant showing that it no longer intends to be bound by one or more of the essential terms of the contract going to the root of the contract of employment. The impugned transfer was not made mala fide or in contravention of the rules of natural justice or a demotion . Accordingly, the Respondent has failed to establish that there has been a constructive termination of his services.

On the other hand, the Respondent has failed to comply and then complain against the valid punitive transfer. In ***Sri Lanka Insurance Corporation Ltd. v. Jathika Sewaka Sangamava*** **[Supra.]**, it was held that if an employee who was issued a transfer order at the conclusion of a disciplinary inquiry, fails to comply with the said order and keeps away from work without obtaining leave, he, by his own conduct, secures his own discharge from the contract of employment with his employer. Therefore, the learned High Court Judge erred in concluding that there has been constructive termination.

Accordingly, the questions of law (f) and (g) are answered in the affirmative.

The only remaining question to be answered is (a). In my view, the learned High Court Judge did appreciate that the jurisdiction of the High Court was limited to questions of law. However, for the reasons set out above, he answered them erroneously. Accordingly, question of law (a) must be answered in the negative.

For all the foregoing reasons, I set aside the judgment of the High Court of Western Province holden in Negombo dated 07.11.2016 and affirm the order of the learned President of the Labour Tribunal of Negombo dated 14.12.2012.

I make no order as to costs.

Appeal allowed.

JUDGE OF THE SUPREME COURT

Jayantha Jayasuriya, P.C., C.J.

I agree.

CHIEF JUSTICE

Vijith K. Malalgoda, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

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

D.M. Sumanawathie,
No. 267,
5th Village,
Siyambalanduwa.
Plaintiff

SC APPEAL NO: SC/APPEAL/61/2014
SC LA NO: SC/HCCA/LA/20/2014
HCCA UVA NO: UVA/HCCA/BDL/01/2008 (F)
DC MONARAGALA NO: L/1950

Vs.

D.M. Susiripala,
Kongaspitiya,
Kandaudapanguwa.
Defendant

AND BETWEEN

D.M. Sumanawathie,
No. 267,
5th Village,
Siyambalanduwa.
Plaintiff-Appellant

Vs.

D.M. Susiripala,
Kongaspitiya,
Kandaudapanguwa.
Defendant-Respondent

AND NOW BETWEEN

D.M. Susiripala,
Kongaspitiya,
Kandaudapanguwa.
Defendant-Respondent-Appellant

Vs.

D.M. Sumanawathie,
No. 267,
5th Village,
Siyambalanduwa.
Plaintiff-Appellant-Respondent

Before: Vijith K. Malalgoda, P.C., J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Sanjeewa Ranaweera for the Defendant-Respondent-Appellant.

Parakrama Agalawatte for the Plaintiff-Appellant-Respondent.

Argued on: 29.10.2021

Written submissions:

by the Defendant-Respondent-Appellant on 03.11.2014.

by the Plaintiff-Appellant-Respondent on 29.09.2015.

Decided on: 20.01.2022

Mahinda Samayawardhena, J.

The plaintiff filed this action in the District Court of Monaragala seeking a declaration that she is the owner of the land described in the schedule to the plaint on the permit marked P1 issued under the Land Development Ordinance, and ejectment of the defendant therefrom. The defendant filed answer seeking dismissal of the plaintiff's action and a declaration that he is the owner or possessor of the land. In addition, he prayed that in the event the court is inclined to grant the reliefs sought by the plaintiff, the plaintiff be directed to pay him compensation in a sum of Rs. 1 million for the improvements effected to the land.

After trial the District Judge dismissed the plaintiff's action predominantly on the basis that the Divisional Secretary had issued the permit P1 in violation of the provisions of the Land Development Ordinance. On appeal, the High Court set aside the judgment of the District Court and entered judgment for the plaintiff but the defendant was allowed to remove the buildings without causing damage to the land. Hence this appeal by the defendant to this court. This court granted leave to appeal on the following questions of law:

Did the High Court err in law:

(a) when it held that the plaintiff proved she is the permit-holder;

(b) when it held that the plaintiff had established her rights pertaining to the land;

(c) when it failed to consider that the plaintiff could not have been issued a permit as she was just 13 or 14 years of age at the time;

(d) when it failed to apply the fundamental principles of rei vindicatio actions in determining the plaintiff's rights pertaining to the land;

(e) when it held that the defendant was not entitled to any compensation for the improvements that he had effected on the land.

The position of the plaintiff is that the original permit issued in 1979 was destroyed when their house was burnt down during the insurgency in 1988 and the permit P1 is a copy thereof issued by the Divisional Secretary. P1 issued by the Divisional Secretary, who is the lawful authority to issue permits under the Land Development Ordinance, was not marked subject to proof at the trial. The Land Officer gave evidence confirming the position of the plaintiff. P1 was not challenged by invoking the writ jurisdiction of the Court of Appeal. Above all, the Divisional Secretary is not a party to the case. The case is between the plaintiff and the defendant. In these circumstances, the District Judge was wrong to have concluded that the issuance of P1 is erroneous or P1 is a nullity.

The land in suit is admittedly a state land. The position of the defendant is that the plaintiff's father sold this land to him in

1989 by an informal writing marked V1. The plaintiff's father had no right to sell the land to the defendant. State lands cannot be sold by individuals. In terms of section 46 of the Land Development Ordinance, even the permit-holder cannot alienate the permit land without the written consent of the Divisional Secretary: such alienations are null and void. Besides, P1 is a non-notarial document and has no force or avail in law in view of section 2 of the Prevention of Frauds Ordinance.

As evident from P3, there had been an inquiry into this dispute with the participation of both the plaintiff and the defendant, by the Divisional Secretary in 2000. P1 has been issued in 2001 after the inquiry.

P4 *inter alia* goes to show that the defendant has made at least some improvements to the land despite the Divisional Secretary's warning not to effect improvements until the dispute was settled. He effected the improvements at his own risk. There is no evidence that the defendant attempted to obtain a permit for the land. This may be because he knew that a permit had already been issued in respect of the land.

Only *bona fide* possessors are entitled to compensation for useful improvements and the *ius retentionis* (right of retention) is available to them until compensation is paid by the owner. Even if the defendant is a *bona fide* possessor, the plaintiff does not want the buildings on the land perhaps because she does not have the financial capacity to pay compensation. The buildings cannot be thrust upon her and she cannot be compelled to pay compensation to the defendant. The High Court allowed the defendant to remove the buildings. The *ius tollendi* (right to

remove improvements) is available to the improver when compensation cannot be awarded.

The defendant does not have a permit; only the plaintiff has one issued by the Divisional Secretary. The contention of learned counsel for the defendant is that in a *rei vindicatio* action the plaintiff shall prove title as pleaded in the plaint and the plaintiff in this case did not prove that P1 is a copy of the original permit. What the plaintiff in a *rei vindicatio* action shall prove is that he was the owner of the land at the time of filing the action and continues to be so until judgment is entered in his favour. In my view the plaintiff has discharged her burden.

As I held in *Wasantha v. Premawathie (SC/APPEAL/176/2014, SC Minutes of 17.05.2021)*, there is no necessity to interpret the law with excessive stringency against the plaintiff in a *rei vindicatio* action and if the plaintiff proves on a balance of probabilities that he has "sufficient title" or "superior title" to that of the defendant, the plaintiff shall succeed.

Learned counsel for the defendant submits that it was erroneous on the part of the learned High Court judges to have considered the defendant's case in entering judgment in favour of the plaintiff because in a *rei vindicatio* action the defendant need not prove anything and the burden lies fairly and squarely on the plaintiff to prove title to the land. As I held in *Wasantha v. Premawathie (supra):*

> *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.*

Moreover, in the instant case, the plaintiff sought a declaration that he is the owner of the land on P1. The defendant countersued for a declaration that the defendant is the owner of the land. In such circumstances, is the court not entitled to look at the competing claims of both parties to decide who the owner of the land is? The court eminently is.

In my view there is no reason to interfere with the judgment of the High Court. I answer the questions of law in the negative and dismiss the appeal but without costs.

Judge of the Supreme Court

Vijith K. Malalgoda, 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 Special Leave to Appeal in terms of Section 31D of the Industrial Disputes Act No. 43 of 1950 as amended by Industrial Disputes (Amendment) Act No. 32 of 1990, read with Supreme Court Rules 1990

Inter Company Trade Union,
No. 259/9, Sethsiri Mawatha,
Koswatta, Thalangama.

On behalf of
Yakupitiyage Senavirathne,
Kudagama Liyanage Kapila Udayanga,
Sunil Bandara,
Heenpatilage Wimal Premarathne.

Applicants

SC Appeal 66/2018

HCALT/09/2015
LT Colombo Case No.
2/A/3546-3549/2011

Vs,

Trico Maritime (Pvt) Ltd.,
50K, Cyril C. Perera Mawatha,
Colombo 13.

Respondent

And then between

Inter Company Trade Union,
No. 259/9, Sethsiri Mawatha,
Koswatta, Thalangama.

On behalf of
Yakupitiyage Senavirathne,
Kudagama Liyanage Kapila Udayanga,
Sunil Bandara,
Heenpatilage Wimal Premarathne.

Applicant-Appellant

Vs,

Trico Maritime (Pvt) Ltd.,
50K, Cyril C. Perera Mawatha,
Colombo 13.

Respondent-Respondent

And Now between

Trico Maritime (Pvt) Ltd.,
50K, Cyril C. Perera Mawatha,
Colombo 13.

Respondent-Respondent- Appellant

Vs,

Inter Company Trade Union,
No. 259/9, Sethsiri Mawatha,
Koswatta, Thalangama.

On behalf of
Yakupitiyage Senavirathne,
Kudagama Liyanage Kapila Udayanga,
Sunil Bandara,
Heenpatilage Wimal Premarathne.

Applicant-Appellant-Respondent

Before: **Justice Vijith K. Malalgoda PC**
Justice K. K. Wickremasinghe
Justice Arjuna Obeyesekere

Counsel: Kushan De. Alwis, PC with Kaushalya Nawaratne instructed by Santhoshi S. Herath Associates for the Respondent-Respondent-Appellant

Applicant-Appellant-Respondent is absent and unrepresented

Argued on: 16.11.2021

Decided on: 30.03.2022

Vijith K. Malalgoda PC J

The Applicant - Appellant - Respondent (herein after referred to as 'The Applicant') made four applications on behalf of its four members against the Respondent – Respondent – Appellant (herein after referred to as 'The Respondent') to the Labour Tribunal of Colombo alleging that the services of its members had been illegally and unjustifiably terminated by the Respondent Company. In the said applications, the Applicant prayed that the members whom the Applicant had represented before the Labour Tribunal be reinstated with back wages by the Respondent or be granted compensation in lieu of reinstatement and any other relief that the Tribunal may seem meet.

The Respondent whilst filing the answers before the Labour Tribunal, took up the position that the termination of the services of the said employees were due to serious act of misconduct which were established after a formal domestic inquiry. The Respondent stated further, that the said termination on the part of them, was lawful and justifiable and prayed, the applications be dismissed.

All four applications were heard together and after the trial, the Labour Tribunal by its Order dated 30th January 2015 held that two of the said employees have not been proven guilty for the charges made against them, and the other two has directly participated with the incident of assault and thereby committed an act of grave misconduct. However, the Labour Tribunal concluded that the termination of the services of all four employees were just and equitable, and no one has been compensated.

Being aggrieved by the said Orders of the Labour Tribunal, the Applicant appealed to the High Court of Western Province holden in Colombo, and by the Judgment dated 5th of June 2017, the learned Judge of the High Court of Western Province holden in Colombo, allowed the appeal by setting aside the Order of the learned President of the Labour Tribunal and ordered a re-trial before the Labour Tribunal.

Being aggrieved by the said Judgment delivered by the High Court, the Respondent preferred the Petition of Appeal dated 14th July 2017 seeking Special Leave from the Supreme Court. The Supreme Court having considered the submissions made on behalf of the Respondent on 02nd October 2017, granted Special Leave on the question of law set out in sub paragraphs (a) to (f) of paragraph 14 of the said Petition, which states as follows;

(a) Whether the Honourable Judges of the High Court entitled to reverse or set aside the order of the President of the Labour Tribunal and to order a re-trial on the basis of the alleged contradictions when the oral and documentary evidence on record clearly prove and establish that the Applicants have assaulted Josheph Benedict Fernando, Public Relations Officer of the Respondent?

(b) Whether the Respondent has in law justified the basis of the termination of the contract of employment of the Applicants before the Labour Tribunal on a balance of probability or on a preponderance of evidence?

(c) Whether the Honourable Judge of the High Court has erred in law in ordering a re-trial when the Respondent has duly discharged the burden in proving and justifying the termination on balance of probability or on a preponderance of evidence?

(d) Without having any legal basis, did the learned High Court Judge err in law and in fact in holding that the President of the Labour Tribunal has failed to analyze the oral and documentary evidence placed before him?

(e) This the Learned High Court Judge err in law in failing to take into consideration the legal principle enunciated in the case of **The Caledonian (Ceylon) Tea and Rubber Estates Ltd. Vs. J. S Hillman** 79 (1) NLR 421, **Associated Battery Manufacturers (Ceylon) Ltd. Vs. United Engineers Workers Union** 77 NLR 541, **Hemas (Estates) Ltd. & Another vs. Ceylon Workers' Congress** 76 NLR 59, and thereby further err in ordering a re-trial?

(f) Whether the Honourable Judge of the High Court erred in holding that two employees out of several employees involved in an assault incident cannot be found guilty due to the lack of evidence against the other accused employees?

Subsequent to the filing of the instant Special Leave to Appeal Application before the Supreme Court, on several occasions prior and after the granting of Special Leave, notices were issued on the Applicant Union to appear before this Court but the said Union defaulted its duty to represent the employees. As observed by me the Court had issued notice on the Applicant Union on 7 occasions under Registered Post and finally taken up for hearing since the Applicant had not appear before this Court from the time the Special Leave to Appeal Application was filed.

However, this Court is mindful of this fact as well as its responsibility to pronounce a just and equitable order in this case.

Before moving on to the questions of law, on which the leave was granted, it is important to refer briefly to the factual Matrix of this case to have a better understanding of the two contradictory views taken by the Labour Tribunal and the High Court when disposing the cases heard before them.

The Applicant, Inter Company Trade Union, has filed four separate applications in the Labour Tribunal on behalf of the four employees of the Respondent Company Trico Maritime (Pvt.) Ltd, namely Yakupiti Senevirathne De Silva, Kudagama Liyanage Kapila Udayanga, Muruthagahapitiya Ralalage Sunil Bandara and Heenpatilage Wimal Premarathne alleging that the termination of their services was unreasonable and unjustifiable.

In the answers filed before the Labour Tribunal, the Respondent whilst admitting the termination, had taken up the position that the said termination was both lawful and justifiable. It was the position taken by the Respondent, that the termination of the services of the four employees was due to the assault of its Public Relations Officer namely “Josheph Benedict Fernando” at the Hotel “Brighton Rest”, where the Annual General Meeting of the Welfare Society was held. According to the Respondents, after the said incident having recorded the statements of the four employees, they were interdicted without pay with effect from 18th November 2010 and a charge sheet was served on them by registered post, calling for their written explanations. Since their explanation were found unsatisfactory and unacceptable, a domestic inquiry by an outside and independent inquiry officer was held and the said employees had been found guilty by the inquirer.

The four applications before the Labour Tribunal were consolidated with the consent of the parties and had taken up as one trial.

At the trial before the Labour Tribunal, Josheph Benedict Fernando (Public Relations Officer) and Gamage Nishantha Cooray who was an eyewitness gave evidence with regard to the alleged incident of assault. Sidath Mahendra Nagahawatte (Manager, Security Services of the Mobitel), Mrs. Roshini Dilrukshi (Human Resources Officer), Kasun Thivanka Mallawarachchi (Networking Officer), Arachchige Dinesh Priyantha Salgado (Manager, Human Resources) were also called to give evidence and the documents marked as "R1" to "R8", "X", "X1" and "Y" were produced on behalf of the Respondent.

On behalf of the Applicant, Muruthagahapitiya Ralalage Sunil Bandara and Yakupiti Senevirathne De Silva gave evidence marking the document "A1". Although the Applicants have admitted that they participated the event, the alleged assault was denied by them.

At the conclusion of the trial before the Labour Tribunal, the President, whilst concluding that there was evidence of assault on J. B. Fernando, observed further, that the said evidence was insufficient to establish the assault by two employees namely Kapila Udayanga and Wimal Premarathne who were also represented by the Applicant before the Labour Tribunal.

The President of the Labour Tribunal had observed an inconsistency between the evidence of Josheph Benedict Fernando and Nishantha Cooray with regard to the assault as follows;

> "විනිශ්චය අධිකාරියට පැහැදිලි වන්නේ ඉසව්ගත පහරදීමේ සිදුවීම සිදුකල සේවකයන් සම්බන්ධ සාක්ෂිකරුවන් දෙදෙනා අතර පැහැදිලි පරස්පරතාවයක් පවතින බවයි."

and proceeded to conclude,

> "නමුත් ඉදිරිපත්ව ඇති සාක්ෂි මත තහවුරු වන කරුණු කෙරෙහි අවධානය යොමු කිරීමේදී විනිශ්චය අධිකාරියට පැහැදිලි වන්නේ 2/අති/3547/11 නඩුවේ සේවකයා සහ 2/අති/3549/11 නඩුවේ සේවකයා වගඋත්තරකරුගේ සුපරීක්ෂක 'ජෝෂප් බෙනඩික් ප්‍රනාන්දු' යන අයට පහර දුන් ස්ථානයේ සිටි බවට සාක්ෂි ඉදිරිපත් වුවද ඔවුන් 'ජෝෂප් බෙනඩික් ප්‍රනාන්දු' යන අයට පහර දුන් බවට කරුණු තහවුරු වී නොමැති බවයි. ඒ අනුව වගඋත්තරකරු විසින් එකී සේවකයන් දෙදෙනාට එරෙහිව 'ජෝෂප් බෙනඩික් ප්‍රනාන්දු' යන අයට පහර දීම යන විෂමාචාරය මත ඉදිරිපත් කර ඇති චෝදනා මෙම විනිශ්චය අධිකාරිය ඉදිරියේ ඔප්පු කිරීමට අපොහොසත් වී ඇති බව තීරණය කරමි."

but dismissed the Applications filed before the Labour Tribunal on behalf of the said employees for different reasons.

The Superior Courts, when exercising its Appellate powers, are reluctant to interfere with the findings of a Labour Tribunal based on the evidence led before the Tribunal, except acting under Section 31D (3) of ***the Industrial Disputes Act 43 of 1950*** (as amended) on a question of Law.

However, in the case of ***Ceylon Transport Board Vs. N. M. J. Abdeen 70 NLR 407***, this Court held that,

> "Where the President of a Labour Tribunal misdirects himself on the facts, such misdirection amounts to a question of law within the meaning of the Industrial Disputes Act.

In the case of ***Ceylon Transport Board Vs. W. A. D. Gunasinghe 72 NLR 76***, it was further held that,

> "Where a Labour Tribunal makes a finding of fact for which there is no evidence-a finding which is both inconsistent with the evidence and contradictory of it-the restrictions of the right of the Supreme Court to review questions of law does not prevent it from examining and interfering with the Order based on such findings if the Labour Tribunal is under a duty to act judicially."

As observed by this Court, the dismissal of four employees on alleged misconduct, was the subject matter before the Labour Tribunal and was entirely based on an incident of assault by four employees of the Respondent Company on an officer of the same Company. The officer who was assaulted namely J. B. Fernando, in his evidence before the Labour Tribunal had identified those who assaulted him as follows;

ප්‍ර : එතකොට ඔහු හැංගිලාද ගැහුවේ?

උ : එම මේසයේ 5 හෝ 6 දෙනෙක් හිටියා. ඉසිල් කියන තැනැත්තා නැගිටලා ඇවිත් මට ගැහුවාත් සමඟම අනෙක් අය බිම පෙරලාගෙන ගැහුවා

ප්‍ර : ඉසිල් හෝ වෙනත් කවුරු හෝ මොනවා හෝ කිව්වාද?

උ : කිසිම දෙයක් කිව්වේ නැහැ. ඔවුන් එකතු වෙලා මට ගැහුවා. සෙනෙවිරත්න කියන තැනැත්තා බෝතලයකින් මට දමලා ගැහුවා. මම බිමට පාත් වුනා. ඉන් පසුව එම බෝතලය ඇවිත් කුරේ යන අයගේ බෙල්ලට වැදුනා.

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ප්‍ර : තමාට අද උසාවියේ ඉන්න හතර දෙනා පහරදුන්නා?

උ : එසේය.

.....

ප්‍ර : ඒ සිද්ධිය වුනාට පසු තමා මොකද කලේ?
පොලීසියට ගියාද?

උ : පොලීසියට ගියා.

ප්‍ර : ගිහිල්ලා තමා මේ සම්බන්ධව පැමිණිලි කලාද?

උ : පැමිණිල්ලක් කලා. ඊට කලින් මෙහෙයුම් කලමණාකරු වික්‍රම මහතා සමඟ කතාකලා. ඔහු කිව්වා පොලීසියට පැමිණිල්ලක් දමන්න කියලා.

The said complaint had been produced at the trial marked R-2.

In his evidence before the Labour Tribunal, witness Nishantha Cooray had referred to the incident that took places on the day in question and said that witness Fernando had accompanied him to the 2nd floor in order to show the "Bar" to him and at that time witness Fernando was assaulted by some employees. He identified Applicants Bandara and Senevirathne along with another person assaulting the victim but not seen Kapila and Pemarathne assaulting the victim but they were with the others at that time. He too was hit with a bottle thrown by Senevirathne and he had to bend holding to his face at that time.

That was the only evidence led before the Labour Tribunal with regard to the incident and witness Fernando in his evidence had clearly implicated all 4 Applicants assaulting him along with another person and the 1st Complaint made by him to the Police was marked as R-1 during his evidence. No contradictions were marked with his police statement during the cross examination. Even though witness Cooray had not seen Premarathne and Kapila Assaulting the victim he had seen them with the other three, who assaulted the victim but at one stage he had to bend holding to his face since a bottle which was thrown by Senevirathne hit his head.

In the case of ***Associated Battery Manufacturers (Ceylon) Ltd Vs. United Engineering Workers' Union 77 NLR 541***, it was held that,

> "Where in an inquiry before a Labour Tribunal it was alleged that the reason for the termination of employment was that the workman was guilty of a criminal act involving moral turpitude, the allegation need not be established by proof beyond reasonable doubt

> as in a criminal case. Such an allegation has to be decided on a balance of probability, every element of the gravity of the charge becoming a part of the whole range of circumstances, which are weighed in the balance, as in every other civil proceeding"

In the case of ***Hemas (Estates) Ltd Vs. Ceylon Workers'Congress 76 NLR 59*****,** Sirimane (J) has observed the burden of proof before the Labour Tribunal as,

> "In proceedings before a Labour Tribunal relating to a dispute between a workman and his employer, it is open to the President to accept the more probable version and to decide the case on a balance of probability"

It was also held in the case of ***The Caledonian (Ceylon) Tea and Rubber Estates ltd. Vs. J. S. Hillman 79 NLR 421,***

> "That on allegation of misconduct in proceedings before Labour Tribunal has to be decided on a balance of probability it is not necessary to call for proof beyond reasonable doubt as in a criminal case."

In the said circumstance it is clear, that the standard of proof before Labour Tribunal had been considered by this Court as the more probable version of evidence which can be identified in order to ascertain the termination of the employment is reasonable or not. The required proof is not beyond reasonable doubt as in a criminal case but it is on a balance of probability.

As revealed before this Court, witnesses Fernando and Cooray were the eyewitnesses and their evidence can be used to identify the incident of assault to the Officer "J.B. Fernando" and therefore, the Tribunal should consider the evidence on the standard of balance of probability to come to a reasonable conclusion, or to have a just and equitable Order. It does not need to have more witnesses to prove this. Even the evidence of one witness is sufficient to reach a reasonable conclusion on probabilities if the evidence of the said witness is reliable.

Vythiylingam (J) had observed in the case of ***Associated Battery Manufacturers (Ceylon) Ltd vs. United Engineering Workers' Union (supra),***

> "…. The reason for the termination was connected with the conduct of the workman. The issue before the Tribunal in this case was whether having regard to all the facts and circumstances of the case the termination of the employment of the workman was justified or not, and not simply whether the workman was guilty of theft of the boots or not"

It was held further,

> "In the instant case the Tribunal had to find as a fact whether the workman did commit theft of the boots or not, but this was only incidental to the decision as to whether the termination of the employment was justified or not and not for the purpose of punishing him for a criminal offence. It has been emphasized in a number of cases that the proceedings before a Labour Tribunal are not criminal in nature and therefore the standards of proof required to establish a criminal charge are wholly inappropriate where the Tribunal has merely to ascertain the facts and make an order which in all the circumstances of the case is just and equitable. In doing so the Tribunal is not bound by the rules of evidence contained in the Evidence Ordinance and may base its decisions on evidence which would be shut out from the ordinary courts of law"

In the said circumstances, it is clear that the President of the Labour Tribunal had misdirected himself when analyzing the evidence of the eye witnesses and had come to a wrong conclusion with regard to the act of misconduct committed by two employees namely, "Kapila Udayanga" and "Wimal Premarathne"

However, when the order of the Labour Tribunal was appealed to the High Court, the High Court had failed to observe the above misdirection on the part of the President of the Labour Tribunal, but also misdirected with regard to the burden of proof required before the Labour Tribunal.

In his order the learned High Court Judge had observed;

> "ඒ අනුව මෙහිදී මා හට පෙනී යනුයේ මෙම කරුණ නිසි ආකාරයෙන් විශ්ලේෂණය කර මෙම කම්කරු විනිශ්චය සභාවේ සභාපතිතුමා විසින් නිගමනයකට එළඹීමක් සිදුකර නොමැති බවයි. මෙහිදී මෙම නඩුව තීරණය කිරීමේදී වැදගත්ම කරුණ වනුයේ මෙම පහර දීමේ සිද්ධියයි. මෙම පහර දීමේ සිද්ධිය වගඋත්තරකරුවන් විසින් අධිකරණය හමුවේ ඔප්පු කළ යුතුවනු ඇත. තවදුරටත් සභාපතිතුමාගේ නියෝගය සලකා බලන කල එතුමා ප්‍රකාශ කර ඇත්තේ සේවකයන් දෙදෙනෙකුට පහර දීම පිළිබඳව පරස්පර විරෝධතාවයක් නොමැති බවයි. එය එම නියෝගයේ 9 වන පිටුවේ සඳහන් වේ. එනම් **'ඒ සම්බන්ධව එම සාක්ෂිකරුවන් දෙදෙනා අතර කිසිදු පරස්පරතාවයක් නොමැති බව පැහැදිලි වේ'** වශයෙන් සඳහන් කර ඇත. මෙහිදී මෙම සාක්ෂිකරුවන් දෙදෙනා එක් කරුණක් සම්බන්ධයෙන් පරස්පර විරෝධතා දක්වන්නේ නම් තවත් කරුණක් සම්බන්ධයෙන් පරස්පර නොවූ පමණින් ඔවුන්ගේ විස්වාසදායකත්වය පිලිබඳව විනිශ්චයකාර සභාව සැලකිල්ලට ගත යුතුව ඇත. මේ අනුව මෙම මූලික කරුණ මත මෙම සම්පූර්ණ සිද්ධිය රදා පවතී."

In the said circumstances, it is clear that the said finding of the High Court is erroneous and the Judges of the High Court misdirected themselves when they expected the Respondent to prove the case against the Applicants beyond reasonable doubt. I therefore answer the questions of law on which the leave had been granted by this Court in favour of the Respondent.

As already referred to in this Judgment the Labour Tribunal had dismissed the application filed by the Applicant on behalf of all four employees for different reasons, even though the Tribunal had no legal basis to come to the said finding. However, the finding of the Labour Tribunal to dismiss all four applications which were taken up before the Labour Tribunal as one trial, with the consent of all parties, can be justified for the reasons already referred to in this judgment.

I therefore allow the appeal and affirm the order of the Labour Tribunal dated 30. 01. 2015 for the reasons elucidate in my Judgment.

Appeal allowed.

No cost.

Judge of the Supreme Court

Justice K. K. Wickremasinghe,

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

SC Appeal No. 67/2017

S.C. (SPL) L.A. Application No. 274/2015

C.A.L.A. Application No. 148/2006

D.C. Colombo Case no. 9606/RE

O.L.M. MACAN MARKAR LIMITED

No: 26, Gall Face Court

Sir Mohamed Macan Markar Mawatha

Colombo 03.

PLAINTIFF

-VS-

AL- HAMBRA HOTEL LIMITED

No. 30, Sir Mohamed Macan Markar Mawatha,

Colombo 03

DEFENDANT

AND

AL- HAMBRA HOTELS LIMITED

No. 30, Sir Mohamed Macan Markar Mawatha,

Colombo 03

DEFENDANT - PETITIONER

-VS-

O.L.M MACAN MARKAR LTD

No. 26, Galle Face Court, Sir Mohamed Macan Markar Mawatha, Colombo 03.

PLAINTIFF-RESPONDENT

AND NOW

AL- HAMBRA HOTELS LTD.

No. 30, Sir Mohamed Macan Marker Mawatha Colombo 03.

DEFENDANT- PETITIONER- APPELLANT

Vs.

O.L.M MACAN MARKAR LTD

No. 26, Galle Face Court, Sir Mohamed Macan Markar Mawatha

Colombo 03.

PLAINTIFF-RESPONDENT- RESPONDENT

Before: B.P Aluwihare, PC, J.

L.T.B Dehideniya J.

P. Padman Surasena J.

Counsel: Harsha Soza, PC with N. Kandeepan for the

Defendant –Petitioner- Appellant

Avindra Rodrigo, PC, with Ashiq Hassim and

Ms.Kasuni Jayaweera for the Plaintiff-

Respondent- Respondent

Argued on: 08.06.2020

Decided on: 11.02.2022

L.T.B Dehideniya J.,

The Plaintiff- Respondent- Respondent (hereinafter sometimes called and referred as the Respondent) instituted this action in the District Court seeking for ejectment of the Defendant- Appellant- Appellant (hereinafter sometimes called and referred as the Appellant) and the damages. The Appellant was the tenant of the Respondent. The Appellant and the Respondent both were limited liability companies registered under the Companies Act. The Appellant came into the occupation as a tenant prior to the September 2003. These facts were admitted by the parties, and the Respondent further admitted that he received the quit notice.

Both parties admitted that the Rent Act No. 7 of 1972 as amended, is in operation of the area where the premises described in the schedule to the plaint was situated. The Plaintiff's case is that the Minister has issued the Extra Ordinary Gazette Notification No. 1305/17 of 09th September 2003 declaring that if the landlord or the tenant is a company registered under the Companies Act, the said premises become exempted premises. Since the Petitioner and the Respondent both are limited liability companies registered under the Companies Act, the Plaintiff's contention is that the premises in suit becomes an excepted premises.

At the beginning of the trial two preliminary issues of law were raised,

05. (c) Do those regulations (in Gazette No. 1305/17 of 09-09-2003 act retrospectively?

(d) If not, is the premises in suit not an excepted premises?

(e) Hence can the Plaintiff have and maintain this action?

11. (a) Is it only for the purpose of carrying out or giving effect to the provision and principles of the Rent Act that regulations could be made under Section 43(1) of the Rent act ?

(b) Is the protection granted to a rent controlled premises a preliminary principle of the Rent Act?

(c) If the aforesaid regulation relied on by the Plaintiff receives retrospective effect, can the aforesaid regulations remove the protection enjoyed by the tenant?

(d) If the above issues "a", "b", "c" are answered in favour of the defendant is the authority granted under Section 43(1) of the Rent Act to make the aforesaid regulations rendered Ultra Virus and not enforceable or effectual at law.

(e) If so can the Plaintiff ever have and maintain this action?

The District Court held in negative to issues No. 5 and decided that the action can proceed. For issue No. 11, held positive and allowed the plaintiff to maintain the action.

Aggrieved by the said order, the Defendant – Appellant appealed to the Court of Appeal and the said appeal has been dismissed. Being aggrieved by the said order of the Court of Appeal, the Appellant presented this appeal.

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

1) Was the Court of Appeal in coming to conclusion that the regulations were prospective in their application, in error in proceeding on the contrary basis that the regulations would cover the tenancy in this case and that therefore the Plaintiff was entitled to invoke the regulations to eject the Defendant from the premises in suit?

2) Did the Court of Appeal err in failing to consider the fact that the rule making power conferred by a statute on any public functionary should be exercised strictly within the ambit of the powers conferred by the statutes and, any rule or regulation which falls outside the powers conferred or is inconsistent with/repugnant thereto would be ultra vires?

3) Did the Court of Appeal err in coming to conclusion that the Regulation in question would cover those tenancies where the tenant had been a company and the tenancy commenced before the said regulation was published on the purported basis that the rights of the parties are decided as at the date of the action?

The main issue in this case is whether the Extra Ordinary Gazette Notification No. 1305/17 of 09.09.2003 is applicable to the premises in suit or not.

The Rent Act applies only to the premises where it has been declared that it applies. The Act may not apply to certain premises which belongs to certain persons. Section 2 of the Rent act specifies the applicability of the Act. Section 2(4) specifies the premises on which this Act does not apply. Under Section 2(4) (a), the Act does not apply to excepted premises, and under Sub Section 5, the schedule to the Act shall have the effect for the purpose of determining the premise which shall be excepted for the purpose of the Act.

<u>Section 2(4)</u>

So long as this Act is in operation in any area, the provisions of this Act shall apply to all premises in that area, other than—

(a) excepted premises;

Section 2(5)

The regulations in the Schedule to this Act shall have effect for the purpose of determining the premises which shall be excepted premises for the purposes of this Act, and may be amended from time to time by regulation made under Section 43.

This Sub Section 5 permits the Minister to amend the schedule by way of regulations made under Section 43.

As per the scheme set out in the Rent Act, it applies only to certain premises and certain premises were except from its application. The Legislature has declared that certain premises were excepted and further permitted the Minister in charge of the subject to amend the schedule of the excepted premises by publishing a Gazette Notification. Under Section 43(1), the Minister may make all such regulations, may be necessary for the purpose of carrying out or giving effect to the provisions and the principals of the Rent Act. Applying the Rent Act to certain premises, as well as removing the applicability to the certain premises is a matter of giving effect to the Rent Act. As I have stated above, the principal of the Rent Act is to apply it only to certain premises and not to all rented premises. Therefore, the Minister is authorized to amend the schedule by adding new items or removing the existing items in the schedule.

The Minister, exercising his statutory powers, published the Extra Ordinary Gazette Notification No. 1305/17 of 09.09.2003, removing the applicability of the Rent Act on certain premises.

Under Sub Section 2 of Section 43, the Gazette comes into operation on the date of the publication. It has to be presented to the Parliament under Sub Section 3,

and if the Parliament does not approve the regulation, it has to be published under Sub Section 4. Under Sub Section 5, any Gazette Notification approved by the Parliament becomes valid and effectual, as it was enacted by the Rent Act. Therefore, the Gazette Notification dated 09.09.2003 becomes a law from the date it was published.

Section 43

(1) The Minister may make all such regulations as may be necessary for the purpose of carrying out or giving effect to the provisions and principles of this Act.

(2) Every regulation made by the Minister shall be published in the Gazette and shall come into operation on the date of such publication or on such later date as may be specified in the regulation.

(3) Every regulation made by the Minister shall, as soon as convenient after its publication in the Gazette, be brought before the House of Representatives for approval. Any regulation which is not so approved shall be deemed to be rescinded as from the date of disapproval, but without prejudice to anything previously done thereunder.

(4) Notification of the date on which any regulation made by the Minister is so deemed to be rescinded shall be published in the Gazette.

(5) Any regulation made by the Minister shall when approved by the House of Representatives, be as valid and effectual as if it were herein enacted. Notification of such approval shall be published in the Gazette.

The Counsel for the Appellant argued that the Gazette Notification cannot be published with retrospective effect. He argued that the Appellant became the tenant prior to the Gazette Notification; therefore, this Gazette Notification does not apply to the Appellant. The Respondent agreed that the Gazette Notification has no retrospective effect. Further the Court of Appeal also held that the said Gazette Notification only has a prospective effect.

Under Section 43(2), the regulation made by the Minister shall be published in the gazette and it shall come into the operation on date of such publication or on such later date, as may he specified in the regulations. Under this Section, the Minister was given authority to declare a later date than the date of publication when the Gazette should come into operation. But Minister was not empowered to declare a date anterior to the date which it was published.

As I have previously stated, the Rent Act applies to the premises only. It does not apply to the persons or to the Contract of Tenancy. If the Rent Act applies to a certain premises, then there would be some restrictions in terms of contract. The Extra Ordinary Gazette Notification No. 1305/17 was published on 09.09.2003. From that date onwards, the premises belong to a company or the tenant is a company registered under the Companies Act, the Rent Act will not apply, because it will be excepted premises from that date onwards. Parties may have come into occupation or entered into rent agreement when the Rent Act was in operation. When a Minister publishes a Gazette Notification declaring that the said premises is excepted from that day onwards, the Rent Act will not apply to the said premises. The Law is above the private contract.

In the case of Queen's Bench decision in *Baily VS De Crespigny 1861-73 A.E.R 332* a case related to covenant of landlord and tenant the Chief Justice Cockburn held that,

"... in the absence of clear words showing contrary intention, parties must always be considered as contracting with the law as existing at the time of contract...."

Existing laws is interpreted in the Article 170 of The Constitution of the Democratic Socialist Republic of Sri Lanka 1978,

"Article 170 of the Constitution –

"Existing law" and "existing written law" mean any law and written law, respectively, in force immediately before the commencement of the Constitution which under the Constitution continues in force;"

As referred to earlier form the evidence led at the trial, it demonstrates that at a point of time the Rent Act was in operation both parties entered in to the rent agreement. But after the publication of The Extra Ordinary Gazette Notification No. 1305/17 said premises were except from the operation of the act and then Rent Act will not be applied to such premises. So the existing law will be the private contract law.

In the case of *Peiris vs. Rathnabatthi Aratchy (50 NLR 138)* it was questioned about the commencement of tenancy before Ordinance came in to operation. In this case Justice Basanayake held that,

" I think it is clear from section 3(1) and 3(1A) of the ordinance that regardless of the time which the tenancy commenced it is unlawful for any land lord to demand, receive or recover and for any tenant to pay , or offer to pay in respect of a period commencing on or after the date on which the Ordinance came into operation in any area , any rent in excess of the rent which may lawfully be received or paid under the Ordinance.

A retrospective status is a status that has affect from a date anterior to that on which it becomes law…. The fact that the ordinance interference with the future operation of existing contracts does not make it retrospective. Where a statute affects an existing contract the contract must yield to the status."

Subsection (5) of Section 2 of the Rent Act declares that "The Regulation in the schedule to this shall have effect for the purpose of determining the premises which shall be excepted premises for the purpose of The Rent Act, and may be altered from time to time by regulation made under Section 43," The aforementioned regulation No.1305/17, dated 2003.09.09, was introduced in accordance with Section 43 read with Section 2(5) of the Act to amend the Schedule to the Act in order to designate certain premises as "excepted premises." The effective date of the regulation may be the date of publication of the regulation, that is September 9, 2003.

"Section 43 (2),

Every regulation enacted by the Minister shall be published in the Gazette and shall take effect on the date of such publication or on such later date as the rule may specify."

As a result, the regulation's effective date is regarded to be 09th September 2003. Since the premises become an excepted premises from that date, the Rent Act does not apply to the said premises thereafter.

I will consider the rule-making power conferred in a public functionary by a statute. The Subsection 2(5) of the Rent Act allows the Minister in charge of the subject to change the schedule by issuing regulations under Section 43. The

scheme outlined in the Rent Act only applies to specific types of properties, and certain types of properties have been exempted from its application. The legislator declared that some premises were excepted, and the Minister in charge of the Subject was given the authority to change the list of excepted premises by publishing a Gazette notification. The Minister may make all necessary regulations under section 43(1) for the purpose of carrying out or giving effect to the provisions of Rent Act. As a result, the Minister has the authority to change the schedule by adding new premises or removing old ones.

According to Article 168 (4) of The Constitution of the Democratic Socialist Republic of Sri Lanka 1978, the Minister has the power to amend, vary, rescind or revoke such subordinate legislations.

> *" 168 (4) Whenever the Constitution provides that any provision of any existing written law shall continue in force until or unless Parliament otherwise provides and the existing written law referred to consists of subordinate legislation, the provision that such existing written law shall continue in force until or unless Parliament otherwise provides shall not in any manner be deemed to derogate from the power of the person or body on whom the power to make and when made, to amend, vary, rescind or revoke such subordinate legislation is conferred to exercise the power so conferred until or unless Parliament otherwise provides."*

The Government Gazette (Publication) Ordinance of November 15, 1930 recognizes the Minister's power to issue gazettes on any matter or item with which he is charged.

> *"Section 2(1) –*
>
> *It shall be lawful for the Minister, after consulting the Minister of Justice, by Order published in the Gazette, to declare that any provision of written*

law with the administration of which he is charged and which requires that any matter or thing, or any order, notification, list, statement, abstract, notice, or other document, shall be published or proclaimed, or published by Proclamation, in the Gazette, shall cease to be in force as from a date to be specified in such Order."

Based on the statutory facts cited above, it is evident that the Minister, in exercising his statutory authority, issued Extraordinary Gazette Notification No. 1305/17 of 2003.09.09, deleting the Rent Act's application to a certain premise.

Another concern that has been put forward for determination by this Court is "whether that the rights of the parties are decided as at the date of the action?" In this regard, the date of the tenancy's commencement is significant. The date of the aforementioned Regulation and the date on which the plaint in this case was filed are pertinent. The parties acknowledge that the defendant leased the premises in question in January 2003, before the said Regulation was enacted. On 09.09.2003 the Gazette was published. On 20th May 2005, the Plaintiff filed this ejectment and damages action against the Respondent. The parties' rights are determined at the time the action is filed, according to established law. Therefore, by operation of law since 9th September 2003, the premises concerned becomes an Excepted Premises and the tenancy is no longer no longer governed by the Rent act.

"*Cries statutes law 7th Edie page 387*

".... a statute is to be deemed to be retrospective which takes away or impairs any vested right acquired under existing laws or creates new obligations, or imposes new duty, or attaches a new disability in respect to transaction or considerations already past. But a statute is not properly

called a retrospective statute because a part of the requisites for its action is drown from a time antecedent to its passing.

The Rent Act contains no provision stating that the regulations promulgated by Gazette Extraordinary No. 1305/17 dated 2003.09.09 will apply retrospectively. As a result, it is apparent that the regulations have no retrospective effect, and the abovementioned regulations will take effect on 9th September 2003.

As a result, it is a widely acknowledged principle that parties' rights should be determined according to the law in effect at the time of the action. It is also determined in the case of *Eastern Hardware Stores vs. J.S.Fernando 58 NLR 568.* Since the plaint was filed on 20.05.2005, the parties' rights in this dispute must be determined based on the facts and law that existed at the time the action was filed.

According to the existing law, if the landlord and the tenant are companies registered under the Companies Act No. 17 of 1982, the premises shall be an excepted premises.

In the case of *K.Mary Margret Fernando vs. Beeta De Silva (SC Appeal No. 193 of 2011)*, the issue is whether business premises located in the local authority's territory are exempt. Which are referred to as "excepted premises" under the Rent Act No. 7 of 1972, as amended. The Saleem Marsoof PC J held that,

"It is common ground that the time of institution of action the property in suit was situated with in the local authority area of the Anuradhapura Urban Council, and the relevant annual value for the property to be regarded in law as excepted premises.."

The Gazette Notification amending the list of excepted premises was published on 09th September 2003 and it becomes a law from that date. This action was

filled after the publication of the said Gazette Notification therefore that amendment applies to the present case.

I answer the questions of law in the following way,

1) The regulations published by gazette notification No. 1305/17 of 09.09.2003 is not retrospective and the plaintiff is entitle to invoke the regulations.
2) No
3) No

The appeal dismissed.

Judge of the Supreme Court

B.P. Aluwihare , PC, J.

Judge of the Supreme Court

P. Padman Surasena J,

Judge of the Supreme Court

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

S.C. Appeal No. 71/2017
SC/HC/CALA No.231/2010
WP/HCCA/COL 246/2007 (F)
D.C. Colombo Case No. 5391/99/SPL

Merryl Ephram Henry De Almeida,
No. 62/2, Old Kottawa Road,
Mirihana, Nugegoda and 32 others

Plaintiffs

Vs.

Jayakodi Arachchige Dona Patriciahamy,
No. 40, Naththandiya Road,
Marawila.

Mohamed Anver Mohamed Ashrof,
No. 96, Central Road,
Colombo 12.

Defendants

AND

Mohamed Anver Mohamed Ashrof,
No. 96, Central Road,
Colombo 12.

2nd Defendant – Appellant

Vs

Merryl Ephram Henry De Almeida,
No. 62/2, Old Kottawa Road,
Mirihana, Nugegoda and 32 others

Plaintiffs - Respondents

Jayakodi Arachchige Dona Patriciahamy,
No. 40, Naththandiya Road,
Marawila.

1st Defendant – Respondent

AND NOW BETWEEN

Mohamed Anver Mohamed Ashrof,
No. 96, Central Road,
Colombo 12.

2nd Defendant – Appellant – Petitioner/Appellant
Vs

Merryl Ephram Henry De Almeida,
No. 62/2, Old Kottawa Road,
Mirihana, Nugegoda and 32 others

Plaintiffs – Respondents - Respondents

Jayakodi Arachchige Dona Patriciahamy,
No. 40, Naththandiya Road,
Marawila.

1st Defendant – Respondent - Respondent

Before : B. P. Aluwihare PC, J,
Murdu N. B. Fernando, PC J,
E. A. G. R. Amarasekara, J,

Counsel : Faiz Musthapha PC, with Mr. Keerthi Thilakaretne for the 2nd Defendant –Appellant- Petitioner.
Nihal Jayamanne PC with Ms. Uditha Kollure for the Plaintiff- Respondent- Respondent.

Argued on: 25.11.2019

Decided on: 24.06.2022

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

The Plaintiff- Respondent – Respondents (hereinafter referred to as the Plaintiffs or Plaintiff Respondents) by filing the plaint dated 19.07.1999, instituted case No. 5391/99SPL in the District Court of Colombo on 27.07.1999 against the 1st Defendant – Respondent – Respondent (hereinafter referred to as the 1st Defendant or 1st Defendant

Respondent) and the 2nd Defendant – Appellant – Petitioner (hereinafter referred to as the 2nd Defendant or the 2nd Defendant Appellant) praying inter alia for;

- A declaration that the Plaintiffs are entitled to the proceeds of the sale of the property described in the schedule to the Plaint, in terms of the Last Will bearing No. 3064 dated 09.02.1963 executed by late Benedict de Andrado which was admitted to probate in DC Colombo Case No. 21198/T.
- A declaration that the 1st Defendant and the 2nd Defendant are not entitled to the said property.
- Ejectment of the 2nd Defendant from the said property.
- A direction on the Registrar to sell the said property and to deposit the proceeds of sale.
- Distribution of the said proceeds of sale among the Plaintiffs and the other beneficiaries of the said Last Will.
- Orders or directions to give effect to the terms of the said Last Will.

As per the said Plaint;

- The subject matter of the action consists of lot 1 depicted in plan no. 349 dated 19.09.1992, made by A. Sameer, Licensed Surveyor together with the right of way attached to it over lot 6 of the same plan. The plantation and the buildings in the said Lot 1 bear the assessment no. 136, Mahawatte Road, Madampitiya.
- Aforesaid property was owned by one Benedict de Andrado who died on 25.06.1963 leaving a Last Will bearing No. 3064 as stated above. And in terms of the said Last Will, his wife Violet de Andrado was appointed the executrix. And that the said Last Will was duly proved in the District Court Colombo case No. 21198/T and the probate was issued to said Violet de Andrado.
- Said Violet de Andrado had passed away without conveying or distributing the assets of the estate according to the terms of the said Will and the said Last Will stipulated that the rest and residue of the estate of the deceased be converted to cash and be divided into 15 equal parts.
- The subject matter of the action constituted part of the rest and residue of the estate of said Benedict de Andrado, and his wife Violet de Andrado was given only a life interest on that in terms of the said Last Will.
- The rest and residue of the estate of the said late Benedict de Andrado was bequeathed to be converted into cash and divided into fifteen parts and distributed as follows;

  "1 part to the Parish Priest of St. Joseph's Church, Grandpass, to be used for the holy masses

1 part to the St. Anthony's Church, Mahawatte for improvements to the Church

3 parts to the Brother–Director of St. Benedict's College, Kotahena for scholarships

4 parts to the children of Laurie de Almeida

4 parts to the children of Bridget Gunaratne

1 part to the children of Leo de Almeida

1 part to the children of Lennie Gunawarndena.:"

The Plaint further states;

- That the 1st to 33rd Plaintiff- Respondents were the children and the heirs of the above designated natural persons, namely Laurie, Bridget, Leo and Lennie whose children were named to get 10/15 parts of the cash gained after the selling of the rest and residue of the estate as indicated above.
- That the 1st Defendant had caused the production of a Last Will purportedly executed by said Violet De Andrado in District Court Marawila Case No 280/T and had obtained probate to administer the estate of said Violet de Andrado which included the property in suit. And thereafter the 1st Defendant by Executor's Conveyance bearing No. 368 dated 17.01.1994, had purportedly transferred the said property to herself and subsequently by Deed of Transfer bearing No. 4793 dated 05.12.1994, the said property had been conveyed to the 2nd Defendant Appellant.
- That, since the said Violet de Andrado had only a life interest in the property in question, she could not have disposed of the same by a Last Will and hence no title could pass to the 2nd Defendant Appellant and the Plaintiff Respondents are entitled to the proceeds of sale from the said property.

As per paragraphs 5 and 6 of the plaint and the corresponding issue no 9 raised by the plaintiffs, it appears that in describing how the cause of action arose, the plaintiffs have attempted to allege that it happened due to the fault of said Violet De Andrado who being the executrix of the said Will died without distributing the relevant assets according to the said last will of Benedict de Andrado. However, this allegation contradicts the position in their plaint which says that said Violet de Andrado had the life interest over the same property, because if she had the life interest, she had the right to use and enjoy the property till her death and the law cannot expect her to do what should have been done after her death, prior to her death.

The idea of instituting testamentary proceedings is generally to administer the estate of the deceased person under the supervision of the court through the executor named in the Will, or through an administrator appointed by the court and, through that administration, to settle the liabilities of the estate and to collect the dues to the estate and, thereafter, distribute the estate among the legatees or the heirs as the case may be. Mere reading of the said Last Will indicates that the expectation of the testator at the time of making the Last Will was that estate be declared closed only after certain legatees get the money allocated to them through the Will after converting the rest and residue of the estate in to money. The first executrix named in the will was undoubtedly given a life time interest to enjoy the said rest and residue. (Whether the terminology used in the Will indicates a creation of a fideicommissum or a life interest will be discussed later.). Thus, it appears, the prayers in the plaint filed in the District Court seems to be reliefs that could have been gained even in the testamentary case filed in relation to the last will of Benedict de Andrado by the relevant legatees or their representative through intervention at the appropriate stage. In this regard I would like to refer to **Meemanage Harold Fernando Vs Jayani Wimalarathna nee Fonseka S.C Appeal 56/2010 S.C minute dated 29.03.2012** where this court had expressed the view that the role of the judge in a testamentary action is not a mere spectator nor to be a rubber stamp. Thus, the judge has a supervisory role and even if the final account is filed, the court ex mere motu or on the instance of a party or an intervenient party can consider whether such account should be accepted or should make necessary orders for the proper accounting of the estate and distribution of assets before the estate being declared closed. Therefore, it appears that the legatees of the said will or their heirs who apparently were to gain benefit from the subject matter after converting it to cash, had not taken due interest to get proper orders in the said testamentary action filed in relation to the last will of said Benedict De Andrado, and now the plaintiffs, as the said legatees or their heirs, have filed a separate action to claim the said benefits for them.

Generally, publications are made at the commencement of a testamentary actions. Plaintiff Respondents or their predecessors might have been aware of the testamentary case. As per the case record of the said testamentary action related to Benedict De Andrado's estate marked P2 at the trial, it appears that the Plaintiff Respondents were not parties to the said action. Thus, they might not have had notice of any interim applications or orders made in that case. However, the ability to file a separate action will be discussed later in this Judgment.

The 2nd Defendant by Answer dated 11.07.2000 has admitted that said Benedict de Andrado at the time of his death seized and possessed the land described in the schedule to the plaint and he made and executed the Last Will bearing no. 3064 and said Violet de Andrado was the executrix appointed by the said Will. He has further admitted that said Benedict de Andrado died on 25th June 1963 without revoking the said Will and the said Will was duly proved in Colombo District Court Testamentary Proceedings No. 21198/T

and Probate was issued to said Violet de Andrado. He also has admitted that the 1st defendant filed the Testamentary Proceedings No. 280/T in the Marawila District Court and the said 1st defendant obtained the Probate for the estate of said Violet de Andrado.

The 2nd Defendant has further stated in his answer that;

- The land in the schedule of the plaint was correctly included as a land belonged to the estate of said Violet de Andrado.
- Since the proceedings in the Testamentary Case No. 280/T had been terminated on 10.01.1994, the Plaintiffs have no right to challenge the issuance of probate in the said case and even if there was any right, now it is prescribed.
- The 1st Defendant as the executrix of the estate of Violet de Andrado executed an executor's conveyance no.368 dated 17.01.1994 and got the title of the land in issue in her name and the 2nd Defendant bought the said land for Rs.4200000.00 as a bona fide purchaser.
- Violet de Andrado even had prescriptive title to the said property in terms of the provisions of the Prescription Ordinance due to her absolute possession from the death of Benedict De Andrado and even the 2nd Defendant has prescriptive title as he and his predecessors in title have been in adverse and independent possession against all and everyone for more than 10 years.[1]
- In any event, even if one assumes that said Violet de Andrado had only a life interest, with the passage of Abolition of Fideicommissa Act No. 20 of 1972, the said Violet de Andrado became the absolute owner of the property and the Plaintiffs cannot maintain this action.
- The Plaintiffs have no rights whatsoever to the land and premises in issue and no cause of action has accrued to them and further, in any event, without obtaining probates or letters of administration for the estates of their predecessors in title in terms of the section 545 of the Civil Procedure Code, the Plaintiffs cannot maintain this action.
- In view of the malicious and mala fide action of the Respondents, the 2nd Defendant is entitled to damages in a sum of Rs. 5 million.

The Plaintiff Respondents then filed a replication denying the claim of the 2nd Defendant.

[1] My view is that this is not a viable argument unless there is a proof of an overt act from which commences the adverse possession since Violet de Andrado either as the executrix or as the Fiduciarius of a fideicommisssum (as per the stance of the 2nd Defendant) or as the life interest holder (as per the stance of the Plaintiffs) cannot commence prescriptive possession without changing the nature of possession she had on the land in that capacity. This argument may hold water if it is proved due to the abolition of Fideicommissa Act, Volet De Andardo became the owner of the land 10 years prior to the institution of the action. Also see **Bahar V Burah 55 N L R 1**

The case then proceeded to trial *inter parte* between the Plaintiffs and the 2nd Defendant on 29 issues raised by the parties and one of the main issues was whether the Last Will of said Benedict de Andrado conferred only a life interest on his wife Violet de Andrado in respect of the property in suit or whether it was given subject to a fideicommissum.

The learned District Judge and, in appeal the learned Civil Appellate High Court Judges held in favour of the Plaintiff Respondents. Being aggrieved by the Judgment of the learned High Court Judges, the 2nd Defendant had filed a leave to appeal application to this court and when it was supported, as per the S.C. minutes dated 07.10.2015 and 24.03.2017, this court has granted leave on following questions of law.

"1. Did the Civil Appellate Court err in holding that the Last Will (P1) did not create a fideicommissum in favour of Violet in respect of the property in subject matter of this action?

2. The Civil Appellate Court err in granting that (Sic) the reliefs prayed for in paragraphs "a" and "b" of the Petition to the District Court dated 19.07.1999?

3. Did the High Court Judges err in not granting the reliefs prayed for in paragraphs "ඒ", "ඒ", "ඉ", "ඊ"in the plaint as granted by the District Judge?

4. The Respondent not having sought to canvass the judgment of the court of Appeal (Sic) by way of an Application for Leave, is he entitled in law to raise the issue No. 3?"

The questions of law no. 1, 2 and 4 mentioned above were suggested by the learned President's Counsel for the Defendant Appellant and the question of Law No.3 above was suggested by the learned President's Counsel for the Plaintiff Respondent.

Before analyzing whether the courts below erred in coming to their conclusions, it is appropriate to quote the relevant portion of the last will of the Benedict De Andrado.

(Quote)

" I give devise and bequeath to my wife VIOLET a life interest on the rest and residue of my estate in remainder reversion or expectancy nothing expected.

After the death of my wife it is my desire that such residue be converted to cash and direct that cash be divided into 15 equal parts……..

(a) Out of such fifteen parts I give one part to the Parish Priest of St. Joseph's Church Grandpass to be utilized for Masses for the following:

1. *Miguel de Andrado and wife (Paternal Grand Parents)*
2. *Philip de Andrado and Sarah de Andrado (Parents)*

3. *Thomas and Camel de Andrado (Uncles)*
4. *Patronotia de Andrado (Grand Aunt)*
5. *Joseph Victor Emmanuel and Clement de Andrado (Brothers)*
6. *Michael Mendis and wife (Grand Parents Maternal)*
7. *James de Mendis, Philip de Mendis*
8. *Josephine, Emmie Lousia (Aunts Paternal)*
9. *Repose of soul of my wife Violet*
10. *Repose of soul of self*

(b) One part to St. Anthony's Church Mahawatte to be utilized for improvements to the said Church.

(c) Three parts to the Brother Director of St. Benedict College Kotahena for the establishment of a Scholarship fund at the said institution under the title of "The Andrado Scholarship" for the education of a Roman Catholic pupil, such pupil to be selected by the Director above referred to at the annual Prize Examination.

The rest of the management of the fund, I leave entirely to the discretion of the said Director……..

(d) The balance ten parts out of the 15 is to be distributed as follows: -

- *4 parts to the children of Laurie de Almeida*
- *4 parts to the children of Bridget Gunaratne*
- *1 part to the children of Leo de Almeida*
- *1 part to the children of Lennie Gunawardena*

……

……

I appoint my wife VIOLET DE ANDRADO executrix of my LAST WILL AND TESTIMENT. On the demise of my wife I appoint His Grace the Archbishop of Colombo or his nominee as Executor of my LAST WILL." (unquote)

In the District Court

The learned District Judge by Judgment dated 08.06.2007 decided the action in favour of the Plaintiffs on the following findings, namely;

- That the Defendants did not dispute the Last Will made by Benedict De Andrado and the Testamentary action filed in relation to the said Last Will.

- That the evidence led by the plaintiffs in relation to the devolution of title also was not disputed.
- That the property in issue was covered by the Last will of Benedict De Andrado and it was owned by said Benedict de Andrado were not among the disputed facts.
- That said property was to be sold and the cash to be distributed among certain people subject to the life interest of Violet de Andrado were also not among the disputed facts.
- That it was not in dispute that Violet de Andrado had the life interest to the property in issue which is part of the rest and residue of the estate of Benedict de Andrado in terms of the Last Will of Benedict de Andrado marked as P1.
- That the said Last Will marked P1 sets out in detail that the rest and residue of the estate of Benedict de Andrado should be converted to money after the death of Violet de Andrado and the said money had to be divided in to 15 equal portions and also as to how it should be distributed.
- That what was in dispute was whether the 1st defendant got lawful title to the property in issue since Violet de Andrado had only a life interest under the Last Will of Benedict de Andrado, marked as P1.
- That the right decision of the case would depend on the question whether the Last Will of Benedict de Andrado created a life interest in favour of Violet de Andrado or whether it created a fideicommissum with regard to the rest and residue of the estate and whether Violet de Andrado acquired full title due to the Abolition of Fideicommissa Act.
- That in the present case, the testator had clearly identified the beneficiaries who were entitled to the proceeds of sale. In that backdrop, on the basis of the Judgment of **Kularatne Vs Gunatilleke 1994 (2) SLR 258**, the said Last Will only conferred a life interest on Violet de Andrado without dominium and hence no fideicommissum was constituted and therefore, no title could pass to said Violet de Andrado due to the abolition of Fideicommissa Act.
- Thus, the named persons in the Last Will marked P1 to receive said 15 portions of sale proceeds in the manner stated in the said Will, are entitle to get that money through the sale of the property and the 1st Defendant did not have good title to convey it initially to herself through an executor conveyance and subsequently to the 2nd Defendant.

It appears that the learned District Judge at certain places in the judgment had misinterpreted the case between the parties and the Last Will when in his judgment he stated that it was not in dispute that the said property was to be sold and the money was to be distributed among certain people subject to the life interest of Violet de Andrado. The dispute was that even though the word life interest was used in the Last Will, in the factual

context whether it created a Fideicommissum or whether the Abolition of Fideicommissa Act had any effect on the devise of property in dispute by the said Will. Further, what was expected by the Will was to convert the property into money after the death of said Violet de Andrado. Thus, the direction was not to sell the property subject to life interest but to convert it to money only after the consummation of 'life interest' given to Violet de Andrado. Thus, when the Will says that the property to be converted to cash, it is important to see whether it is imperative to sell the property to fulfill the direction given in the Will or whether a proper valuation and making payments accordingly would suffice. In this regard I would like to quote **Walter Pereira** from his book titled **"Laws of Ceylon- 2nd Edition".**

(Quote)

> *" In England, legacies are payable primarily out of personal estate; and where, by implication, real estate is also charged with the payment of the legacies, the presumption is that the real estate is intended to be charged in aid only of, and not so as to exonerate, the personalty."* (unquote)-(at page 465 of the said book).

The above indicates the possibility of paying money without selling the property concerned and getting it redeemed for the benefit of lawful heirs. This questions whether it was imperative to grant the reliefs as prayed for in the plaint which demand to sell the property and distribute money even if one decides that there was a case for the Plaintiff Respondents since their entitlement was for certain amount of money corresponding to the value of the property. The entitlement of the plaintiff Respondents as per the Will is rather to a sum of money than to the landed property. Further, this possibility of paying money and getting the property released, makes it necessary to prove how and on what grounds or what circumstances the testamentary case relating to the estate of Benedict de Andrado was terminated, to get the reliefs prayed for in the plaint, and that aspect will be discussed later in this judgment.

It appears that the naming of the beneficiaries in the Will had been considered by the learned District Judge as a ground to say that there was no fideicommissum created by the Will. To come to a conclusion whether there is a fideicommissum or not, the court has to see whether dominium of the property was given to a beneficiary with a condition that it shall be passed on to someone or some other persons at a later stage; thus, whether there is a *fiduciarius* (the dominium owner) and a *fideicommissarius* (the sequential owner). Walter Pereira in his book mentioned above at page 429 refer to the definition of *Fideicommisum* as follows;

> *"A Fideicommissum is defined in the Censura Forensis as a provision of one's last will by which a mandate is given to him to whom something is to come to give the whole or a part of it up to another, or to give something else. Van der Linden says – "Sometimes a person is appointed heir under the condition that the property after his death shall pass to another. This is termed a fideicommissum."*

At the same page, referring to **Voet 36.1.9**, he also points out that a fideicommissum can be imposed not only by will, but by an act *inter vivos*.

It appears that for the creation of a fideicommissum, all that the law requires is a prohibition against alienation (express or implied) and a provision that after a specified time or on fulfilment of some condition the property should go over from the first taker to second beneficiary, who must be clearly designated – vide **Mary V Kurera 74 N L R 5.** However, what has been quoted above indicates even a mandate to give part of the property or something else also may constitute a fideicommissum.

Though the Fideicommissa are abolished now, why a creation such as Fideicommissum was needed is explained in the following paragraph found in the same book at page 430.

> *"A fidei commissum may be so expressed as to take effect from a day, as at the expiration of ten years after the death of the fiduciary heir. Such a limitation would be void without the interposition of a fidei commissum, because the law would not permit the inheritance to remain in abeyance, or, in other words, for the ancestor to remain intestate during this interval. But by a fidei commissum, an heir is in the meantime instituted, who holds inheritance until the fidei commissary becomes entitled to receive it."*

The above quoted paragraph indicates that when a legacy is to be taken effect not immediately after the death of the testator or a fiduciary heir but after a certain period of time, to suspend the title going to the legal heirs on the death of the testator or the fiduciary heir as per the Law relating to intestate succession, an interposition of fideicommissum was needed to hold the title through a fiduciary till the fideicommissary becomes entitled to receive the property.

The decisions in **Welgama V Wijesundera (2006) 1Sri L R 110** also expresses the view that the Law does not and cannot recognize an interval between the death and the passing of property, since rights and obligations, from which perspective only, property

and legal relationships are identified in law, have to be, at any given point of time vested or reposed in a person or a legal entity.

However, in a usufruct such as simple life interest over a property, the usufructuary /life interest holder does not have full title or dominium and the Donor/ Testator or his heir or some other person has rights in reversion or remainder which rights are rather dormant till the usufruct/life interest is over. In **Sunil Gotabaya Lamabadusuriya V Yasoma Champa Nilmini Abeygunawardena SC Appeal No 169/2011** decided on 06th April 2018, Prassanna Jayawardena PC, J while referring to authors such as Masdorp, Wille, Van Leeuwen, Grotius and Lee discussed the nature of a usufruct/life interest and points out that a life interest holder, even though has the power to exercise *jus utendi* and *jus fruendi* (Rights to use and enjoy the Property) in full measure, subject to his right to deal with his life interest, he does not have power to exercise *jus disponendi* (Right to alienate the property) or *jus abutendi* (Right to demolish or diminish the property) which remains with the title holder who has the dominium over the property but who could not exercise it fully without the assent of the life interest holder . On the other hand, it was stated in **Silva V Jayawardene 28 NLR 115 at 122** *"the ordinary rule is that in the case of a Fideicommissum the fiduciary retains the dominium until his death and there is no vested interest in the remainder nor during that interval. Where the fidei commissary dies before the fiduciary the latter takes the property."*

Thus, fiduciary of a fideicommissum has the full dominium subject to the prohibition or bar (unless such power is given) to alienate the property which is to be vested on the fideicommissary when the condition is satisfied or the contingency is reached. If the contingency or the condition for the fideicommissum to take effect is the death of the fiduciary, in effect the fiduciary has only a "life interest" but with dominium, subject to the prohibition or bar to alienate and, no one holds rights in remainder or reversion as in a usufruct or life interest over property. Thus, when the term life interest is used in a testamentary disposition that belongs to the time when fideicommissum was valid, it has to be carefully scrutinized to see whether it refers to a simple life interest given to a person where the rights in remainder and/or reversion lies with another or whether it is a 'life interest' of a fiduciary of a fideicommissum who has the right to enjoy the property till his death with full dominium subject to the prohibition or bar to alienate. The learned District Judge in her judgment has found what has been given by the testator to his wife Violet de Andrado was only a life interest over the rest and residue of his property. However, it appears that the learned District Judge has not attempted to see whether there is any meaning in the phrase *"in remainder reversion or expectancy nothing expected"* found in the paragraph in the Will which reads as *"I give devise and bequeath to my wife VIOLET a life interest on the rest and residue of my estate in remainder reversion or expectancy nothing expected."*

On the other hand, though the learned District Judge had come to the conclusion that life interest was with Violet De Andrado, it is not clear, as per the learned District Judge's judgment, who held the title or dominium parallelly to said life interest. As explained above, the test that should have been applied to decide whether Violet De Andrado was given a mere life interest or fiduciary status subject to a fideicommissum to hold and enjoy the property during her life time was to see with whom the dominium or title was bestowed with.

Further, to negate the applicability of the Abolition of Fideicommissa Act the court must satisfy itself that not only the nonexistence of a fideicommissum but also the nonexistence of a provision in the Will relating to the property in issue that has the effect of any entail, settlement or restraint on alienation of property or limit or curtailment on the person whom the title of the property was vested with[2]. Further, certain factual differences as described below can be identified between the case at hand and the aforementioned **Kularatne Vs Gunatilleke** referred to by the learned District Judge in her Judgment;

- As per the terminology used in the Will in this case, the legatees named therein for the distribution of the money after converting the property into cash cannot be termed as people who are entitled to claim the property in issue in its physical form after the death of Violet de Andrado, the first beneficiary. They are entitled to a certain share of the cash gained by conversion of the property into cash. The property in issue has not been given or bequeathed to them to deal with it as they wish. Among the recipients of money, other than the natural persons named as children of certain named individuals who are entitled to the 10/15 share of the money value after conversion, Parish Priest of St. Joseph's Church, St. Anthony's Church, and Brother Director of St. Benedict's College also had been named as recipients. The money is given to those office holders or the institution only for the charitable or religious deeds mentioned in the Will. Thus, the natural persons who hold those office may change and, as 5/15 of money to be gained after conversion of the property was allocated to spend and do charitable and religious work, it cannot be said that to that extent, any personal entitlement has been created to that amount of money which represent the 5/15 share of the money value of the property. It appears that the intention of the testator was to give money to the natural persons who would be holding the offices as parish priest of St. Joseph's Church or the director of St. Benedict's College or the care taker of the St. Anthony's Church respectively at the time the conversion of property to money would take place. Thus, one cannot think that the testator intended that they be vested with the right in remainder

[2] See sections 2 to 4 of the Abolition of Fideicommissa Act No 20 of 1972 as amended by Law No13 of 1972

or the dominium of the property relating to the 'life interest of Violet' at the time of his death. Further the other legatees who have been described in the Will as entitled to money after the conversion of rest and residue of the estate to money after the death of Violet de Andrado have been identified as children of certain named individuals but names of those children are not given. It is not clear whether all of them were even born at the time of the death of the testator. However, nowhere in the Will it is stated that the testator devised or bequeathed or gave the rest and residue of the estate to those children. They have not been given a right to the immovable property but to certain shares in cash after converting the property to cash; may be by sale or through a valuation. Their entitlement is not on the landed property but to money. If the testator wanted to give dominium over the property leaving a life interest to his wife, he could have easily devised the property to them while leaving the life interest to his wife. However, it appears that the plaintiffs in the aforesaid case **Kularatne Vs Gunatillake** were entitled to claim the property itself after the demise of the first beneficiary as the property in that case had been bequeathed to the legatees in that case to deal with according to their wishes which is not the case at hand.

- In the said case relied on by the learned District Judge, it appears that the intention of the testator was to vest the property in the beneficiaries after the death of the named persons in the Will who were to enjoy the property until their death. However, in the case at hand, property was not intended to be given to the named people or institutions to deal with it as they wish, but only cash was to be distributed among them; for some of them for the purposes mentioned therein and for some of them as their personal entitlement. Further, it appears a phrase similar to "in remainder reversion or expectancy nothing expected" was not included in the Will relevant to the said case. Thus, the factual matrix of the case cited by the learned District judge to decide what was given to Violet de Andrado was a life interest differs from the case at hand.

Even in **Fonseka V Babunona 11 N L R 333** cited by the Plaintiff Respondents rest and residue of the estate was to be given to the blood heirs after the death of the life interest holders where in the case at hand it is not the landed property but the money generated from converting the property has to be distributed, indicating that the dominium of the property was not intended to be vested with them to deal with the property the way they want. Further, it appears, nothing similar to the phrase quoted above from the Will in question in the present case was discussed in the said **Fonseka V Babunona** case.

Gunawardene V Visvanathan 24 N L R 225 was a case where the testator gave and devised the property to his wife to hold and possess it during her life time but with a

prohibition to alienate and the property was to be devolved on the testator's sons after her death. It was decided that the prohibition on alienation as well as the words used namely '*I give and devise*' indicates that it did not create a life interest but a fideicommissum by giving full dominium to the wife. In that case even when the property itself was to be devolved on the sons after the death of the testator's wife, it was held that the property was given to the wife with full dominium. In the case at hand the phraseology used is '*I give devise and bequeath*' and, even though there is no direct prohibition for alienation, the intention of the testator that it shall not be alienated during his wife's life time is expressed by stating his desire to convert the property after the wife's death into money and distribute it among the legatees.

The above indicates that there were certain areas that had to be looked into with regard to the correctness of the decision of the learned District judge. Especially the learned District Judge;

- appears to have given prominence to the word 'life interest' but has not considered whether any additional meaning is contained in the phrase 'in remainder reversion or expectancy nothing is expected',
- appears to have not considered that the testator has not devised the landed property that was included among the rest and residue of his estate to the named legatees other than giving them and named institution or office holders of certain named institutions entitlements to certain amount of money,
- appears to have not considered, as to who held the title to property parallel to the 'life interest', if it was only a life interest given to the wife.

<u>In the High Court</u>

As mentioned before, the Appeal made by the 2nd Defendant Appellant against the said Judgment of the District Court, was dismissed by the Civil Appellate High Court of the Western Province holden in Colombo by its judgment dated 11.06.2010, and the learned High Court Judges in their judgment stated that;

- Since the testator had specifically devised several properties to his wife, his intention with regard to the rest and residue of the estate was that it should devolve on the persons nominated in the Last Will and only a life interest had been given to the wife. The title of the said rest and residue of his estate has been given to the said nominated people subject to the life interest of the wife. For easy distribution it has been directed to sell and distribute the money as per the order they have been nominated.
- The testator intended that his estate had to be administered even after the death of the executor appointed by him, namely his wife and there was also

a provision to appoint a succeeding executor nominated, namely His Grace the Archbishop of Colombo.

- No fideicommissum was constituted since the intention of the testator was to bequeath only a life interest to Violet, his wife and it appears that no intention was there to convey title of the property to the Wife, Violet.
- The passage of Abolition of Fideicommissa Act did not have a bearing on the said property and Violet de Andrado or her successors did not get any title to the property.
- No order for ejectment of the Defendant Appellant could be granted in the absence of a declaration of title in favour of the Plaintiff Respondents, and their prayer to the effect that the property to be sold in this action and the proceeds of sale of the property in suit be distributed among them also cannot be granted as it is a relief that should be given through the administration of the estate in the testamentary action.
- Only the declaratory reliefs can be granted in the present case and the other reliefs have to be moved in the relevant Testamentary action.

The learned High Court Judges also have referred to aforesaid decision **Kularatne and Another V Gunathileke (1994) 2 Sri L R 258** but to express that the intention of the testator has to be gathered from the terms of the Will and surrounding circumstances. I also can endorse the view that the intention of the testator has to be gathered from the terms of the Will and surrounding circumstances but what matters is whether the learned High Court Judge has come to the correct finding in that regard.

Mere reading of the above quoted relevant parts of the Last Will of Benedict De Andrado No.3064 marked as P1 indicates that said Benedict de Andrado wanted to appoint His grace the Archbishop of Colombo or his nominee as executor after the demise of his wife, the first named executrix of the Will, indicating that the intention of the testator was to administer his estate even after the demise of his wife, the first named executrix. Thus, the learned High Court Judges were correct in stating that the testator intended that his estate had to be administered even after the death of the executor appointed by him, namely his wife Violet de Andrado. However, any named executor of a Will is at liberty to decline the office.

Anyhow, the learned High Court Judges have come to the conclusion that no order for ejectment can be granted in the absence of a declaration of title in favour of the Plaintiff Respondents and further, the learned High Court Judges have refused to grant the reliefs prayed to the effect that the property be sold in this action and the proceeds of sale of the property in suit be distributed among the Plaintiffs and also to make necessary orders to effect the direction given in the Will as the High Court Judges saw that the reliefs sought

are reliefs that should be given through the administration of the estate in the testamentary action.

However, the conclusion of the learned High Court Judges that no order for ejectment of the Defendant Appellant can be granted in the absence of a declaration of title in favour of the Plaintiff Respondents appears to be a misstatement of law even when the cause of action is based on title, as decided in the case of **Dharmasiri V Wickramatunga (2002) 2 Sri L R 218**, a relief of ejectment can be granted if the title is pleaded and proved even though there is no prayer for a declaration of title. On the other hand, as per section 217 of the Civil Procedure Code a decree to yield up possession is a stand-alone relief and it need not be a relief prayed along with a declaration of title. However, title is needed to be proved by the party claiming such relief of ejectment be given, if the cause of action is based on title. However, in this case no title to the impugned property had been pleaded and or raised as an issue by the Plaintiff Respondents other than the statements to the effect that the Defendants have no title to the property and they are entitled to the sale of property and to their share of cash as per the directions in the Will. Hence, case filed before the District Court was not based on a cause of action based on title to the property.

Thus, though there is a misstatement, it was correct to say that such relief of ejectment cannot be given in a case where the cause of action is based on title and where title is not proved, but in my view, it should not mean to say that the legatees cannot file an action even after the estate was closed after administration, if the estate was administered in an improper manner, in other words, if the cause of action is based on improper administration. It is true that it was stated in **Nonohamy V Punchihamy 31 NLR 220** that where a final account has been filed in administration proceedings and the estate is declared closed, the court has no power to reopen proceedings in order to entertain a claim to share of the estate on the ground that the claimant is an heir. However, in **Aron Fernando V Buddhadasa (1986) 2 Sri L R 285** it was decided that an Administrator is functus officio only when he has duly completed the administration of estate. Closing of the proceedings or rendering of a final account or even a judicial settlement of the estate will not make the administrator functus officio if he has not completed the administration. In **Ekanayake V Appu (1899) 3 N L R 350**, it was expressed that the tendering of a final account does not make an administrator functus without a judicial settlement or a formal discharge or removal from the office. In **Supramaniam Chetty V Palanniappa Chetty 3 Bal 57**, an opinion was expressed that even where there has been a judicial settlement an administrator may still be sued and it may be proved that he had not duly administered the estate. Middleton J in **Soysa V Abeydera 12 N L R 349,351** stated that under English Law an executor is entitled to his release from the beneficiaries under the will upon filing of proper accounts and vouchers showing a due discharge of his obligation under the will, and, so far as what can gather from a perusal of chapters XXXVIII and LIV of the Civil Procedure Code, an executor may get his discharge in Ceylon on the same grounds and for

the same reasons. However, the said statement contemplates the proper accounting and due discharge of the duties. (See **Moysa Fernando V Alice Fernando 4 N L R 201, Silva V Silva 10 N L R 234, Malliya V Ariyaratne 65 N L R 145** with regard to the extent of applicability of English Law in respect of Executors and Administrators).

Above shows the possibility of suing the executor or administrator if there was no proper discharge of duties as administrator or executor even after the tendering of the final account. However, in the matter at hand, Violet, the executrix of the estate of Benedict de Andrado, who dealt with the relevant property through her own last will after the conclusion of the aforesaid testamentary proceedings of Benedict de Andrado's estate, is dead and gone. Thus, it is necessary to see whether any aggrieved legatee of the administration of the estate of Benedict de Andrado can file an action against the person who holds the relevant property after the administration.

No doubt an executor's relationship is fiduciary in nature like in a trust.

> "*In English law, if a trustee wrongfully disposes of property entrusted to him, the cestui que trust is entitled to follow it into the hands of any person, except a purchaser for value without notice. In Dutch Law the fidei commissary*[3] *is entitled to follow immovable property into the hands of any one, but right to follow movables is limited.*[4] *As regards immovables, although in theory they can be followed into any hands, the courts of South Africa have repeatedly expressed their disinclination to interfere with bona fide purchaser without notice who had obtained registered transfer."*- vide page **458 of Laws of Ceylon 2nd edition by Walter Pereira**.

Thus, in that context, the correctness of the view expressed by the learned High Court Judges that the order for ejection cannot be obtained without a declaration of title and also the refusal to grant certain reliefs on the ground that they should have been prayed in the testamentary action can be questioned in this type of action filed by a legatee to recover property and get their entitlement as per the Will due to alleged maladministration of the estate. In this regard, I wish to quote the following paragraphs at pages 474 and 475 of the book 'Laws of Ceylon' referred to above.

> *"The Legatee has three distinct actions for his legacy—(1) A personal action under the will against the heir or such other person as is charged with the payment of the legacy, or against*

[3] Fideicommissa were the only trusts fully recognized by the Roman Dutch Law. Vide Walter Pereira, Laws of Ceylon 2nd Edition, page 456.
[4] Voet 36.1.64

the executor, for the delivery of the thing, with such increase or decrease as it may have suffered, provided the latter has not been caused by the fault of the heir. The legatee may not take possession of the thing bequeathed on his own authority. He must demand it from the heir, unless the right to take possession is allowed him by the Will. (2) An action in rem to recover the thing itself, against any possessor whosoever, if the thing bequeathed belonged to the testator. (3) Any Hypothecary action on the ground of the tacit or implied mortgage which the law gives to legatees in this respect in all the property which comes to the heir from the testator. The Legatee has a right of tacit hypothec on the estate of the deceased after the debts have been paid, but the right of mortgage may be disallowed by the Will."

"A legatee may maintain an action for the legacy against the executor of the Will under which the legacy is claimed without alleging or proving the latter's assent to the bequest, nor need he allege or prove sufficiency of assets in the hands of the executor to meet the bequest. Whether the assets are sufficient or not is a fact particularly within the knowledge of the executor, and he may plead insufficiency of assets in answer to the legatee's claim.[5]"

What is elaborated above indicates the availability of a separate action for the legatee against the executor/administrator or against the person who holds the property. Thus, I doubt the correctness of the statements made by the learned High Court Judges in refusing certain reliefs by stating that they have to be prayed in the testamentary action as this case appear to be based on a cause of action arising out of an allegation of improper or wrongful administration of the estate. Even though, a testamentary action commenced after due publications, a legatee or heir who does not have any objection to the issue of probate or letters of administration may not intervene and thus, may not have due notice with regard to the other interim application made to court in relation to the administration of the estate. It must be noted as per the documents tendered in relation to the testamentary case relevant to the estate of Benedict de Andrado, no one has been named as Respondents. Even the learned High Court judges by granting the declaratory reliefs have admitted this right to file an action by the legatees. However, it is my view that the plaintiff to be successful in obtaining reliefs as prayed for in the plaint, which are referred to at the commencement of this judgment, there must be proof for;

[5] Fernando V Soysa 2 N L R 40

- That the administration of the estate was improper,
- That the Defendant was not a bona fide purchaser, and
- Entitlement of the legatees to the property alienated.

Whether there was proof of improper administration of the Estate;

It is not incorrect to say that it is the task of the executor/ executrix to execute the intention of the testator expressed in the will subject to the supervision of the relevant court and further, the executor/executrix may also have to settle the liabilities of the estate of the deceased testator. Once the liabilities are settled there may be situations that may cause difficulties in executing the intention of the testator in the same manner as expressed in the Will due to the insufficiency of assets or funds. Even in the case at hand, as per the document marked P5 which is relied upon by the Plaintiff Respondents as the final account in the testamentary case of Benedict de Andrado, certain liabilities of the estate of the said Benedict de Andrado had been mentioned where the monetary value of such liabilities appeared to have been exceeding the cash received by the said estate even though the total value of the assets exceeded the value of liabilities. This indicate that certain liabilities mentioned there had to be a burden on the immovable property of the said estate which included the property in issue in this case. However, insufficiency of funds had not been pleaded in defense in this case. On the other hand, the executor who tendered the said final account and who had the knowledge as to the sufficiency or insufficiency of funds was not among the defendants before the District Court case to take up such stance. It appears that the position of the Plaintiff Respondents is that the said testamentary case was terminated on this final account. However, no convincing evidence had been led by the plaintiff respondents to show why the legatees who were entitled to cash as per the Will did not intervene in the said case and prayed for suitable intervention by the court. However, as mentioned before they were not parties to the testamentary action and might not have had the notice of the purported final account or of the termination. In this regard I would like to refer to the decision of **Meemanage Harold Fernando Vs Jayani Wimalarathna nee Fonseka S.C Appeal 56/2010 S.C minute dated 29.03.2012** mentioned above.

In fact, it is questionable whether Violet de Andrado, the first executrix had the ability to tender a final account as such, since the administration of the estate was intended to be continued after her demise. In this regard, the Plaintiff Respondents has brought this court's attention to an averment in the said final account tendered by Violet de Andrado which was marked as P5B which is quoted below.

(quote)

> "*There are certain legacies to be made after my death from the residual property bequeathed to me and I shall in due course*

make the necessary provisions to give effect to those legacies."
(unquote)

However, as per the above averment in the purported final account quoted above, said Violet de Andrado. while referring to the property as one bequeathed to her, has undertaken to do certain things which she cannot do or ensure of taking place since, in terms of the Will, land has to be converted into money and the money has to be distributed only after her death. Therefore, as per the views expressed in the said case **Meemanage Harold Fernando Vs Jayani Wimalarathna nee Fonseka**, there were sufficient grounds for the legatees who were to get money from the conversion of the residual property to money to challenge the said document as the final account in the said testamentary case if the operation of law due to the Abolition of Fideicommissa Act had no effect on this Will. However, as they were not parties, as mentioned before, they might not have notice of the tendering of final account and the termination of the testamentary case.

On the other hand, as per the Jurat at the end of the said final account, it was dated 4th November 1974. The journal entries of the said testamentary case had been marked as P3 at the trial. As per the Journal Entry dated 18.11.74, it appears the final account had been tendered to court by that date, and as per the journal entries dated 18.12.74 and up to the Journal entry dated 28.08.1975, it is clear that the Court did not accept the final account as it was, and had directed to tender an amended final Account in accordance with the report contained in journal entry no 42-(vide journal entries Nos. 41 to 49). At Journal Entry 50, the lawyer for the petitioner of that case (namely lawyer for the said Violet De Andrado, the Executrix) had revoked his proxy, and as per the journal Entry No.51 dated 27.10 75, it appears that the said Petitioner of that case had filed a motion and moved to do away with the need for an amended final account and to release her from her duty as the executrix and further to terminate the proceedings due to the reasons contained in the motion. Accordingly, the district court had ordered to do away with the need to file an amended final account and had terminated the proceedings. What is important is that the Plaintiff Respondents have not tendered the relevant motion at the trial before the original court. It appears that the real reasons to terminate the proceedings were contained in the said motion which was not produced in evidence. Thus, no evidence was there as to the reason for the termination of the testamentary case prior to the death of Violet de Andrado. Among the possible reasons, lawful or not, that might have contained inter alia in the motion to terminate proceedings without keeping the estate open to be administered after the death of the first executrix, there might even have been a settlement to do away with the final accounts or a submission that Abolition of Fidecommissa Act applies and the petitioner of that case had become the owner of the property or a submission that a necessary arrangements as per her averment in the said final account were made or payments were made to satisfy the payments to the legatees who were to get money after

the death of the executrix by conversion of the residual property to cash or even a settlement or renunciation of the legacies etc.

As explained before, Violet de Andrado cannot be blamed for what had to be done after her death but if she impeded the distribution of the money as per the direction of the Will, that may amount to improper administration. Due to the non-production of the said motion in evidence, the trial court was not aware of the true reasons for the termination of the proceedings without an amended final account and also without keeping the estate open for further administration after the death of the executrix, Violet de Andrado. In that backdrop, one cannot come to the decision that there was sufficient proof of improper administration of the estate. Thus, the Plaintiff Respondent have failed to prove that the administration of the Benedict Andrado's Estate was improper as they failed to prove the reasons or on what grounds the relevant testamentary case was terminated prior to the death of Violet de Andrado.

For the sake of argument if one considers that the improper administration was proved and Abolition of Fideicommissa Act has no relevance, in my view, the outcome would have been that Violet de Andrado and /or her executor had to hold the property in trust for the legatees in terms of Sections 90 and/or 96 of the Trust Ordinance. Trust would be to convert the property to money and distribute it among the legatees. No allegation has been made in the plaint that the 2nd Defendant Appellant bought the property for a lesser value. In such a situation there would have been a cause of action to recover the money from the 1st Defendant who was the executrix of the estate of Violet de Andrado but I doubt whether there was any cause of action against the 2nd Defendant Appellant who appears to be a bona fide buyer.

Whether there was proof to show that the Defendant was not a bona fide purchaser;

The Defendant did not buy the property involved from Violet de Andrado. Violet de Andrado included it in her last will and the executrix of the said last will of Violet de Andrado, namely the 1st Defendant executed an executor's conveyance transferring the property to her name and then sold it to the 2nd Defendant. It appears the 1st Defendant did not take part in the proceedings after serving summons. To prove mala fides of the 2nd Defendant there should be evidence to show that the 2nd Defendant, prior to buying the said property, knew that Violet de Andrado did not have title and there was an improper administration of the estate of Benedict de Andrado. To prove there was improper administration, the Plaintiff has not filed the aforesaid motion which apparently contained the reasons for termination of the testamentary proceedings. Whether, due to the operation of law introduced by the Abolition of Fideicommissa Act, the property was vested with Violet de Andrado will be discussed later in this judgment. However, no evidence has been led to show that the second Defendant was aware of the contents of the Will of Benedict de Andrado or of the said motion or that Violet de Andrado did not have title to the property

prior to the moment he bought the property in issue. On the other hand, even to establish that there is a defect in title, it was necessary to prove how and why the testamentary case was concluded by producing the said motion in evidence and also necessary to establish that Abolition of Fideicommissa Act has nothing to do with in deciding the title holder of the property involved in this action.

Whether there was proof with regard to the entitlement of the legatees;

To prove the entitlement of the legatees even to the share of money, the legatees must first prove that the estate of Benedict de Andrado was not properly administered. For this, as explained earlier the Plaintiffs have not tendered the motion that contained the request and reasons for the termination of the proceedings of the testamentary case prior to the death of Violet de Andrado.

However, it appears that the learned High Court Judges were of the view that the title to the rest and residue of the estate was vested with the legatees who were entitled to get certain share from the money after converting the said property to money and only a life interest was given to the wife Violet de Andrado. The reasons to express the said view by the High Court appears to be that;

- Violet de Andrado, the wife of the testator and the first named executrix in the Will had been given certain properties separately and thereafter life interest of the rest and residue had been given to her subject to the sale of the said rest and residue after her demise to distribute the money as directed in the Will.
- The intention of the testator emanating from the Will due to aforesaid direction was to devise the title of the rest and residue of his estate to the said legatees while subjecting the said rest and residue to the life interest of his wife, Violet de Andrado and only for the convenience of distribution it has been directed to sell the property.

However, it appears that the learned High Court Judges failed to appreciate that,

- Other than the expression of the testator's desire to distribute the money by the conversion of the property after the death of his wife the first executrix named in the Will, as said before, the terminology used in the Will does not directly indicate that the testator had any intention to devolve the title of the landed property, which became the rest and residue, to the named legatees who were made entitled to cash to be gained by the conversion of the property;
- Some of the legatees named therein appears to be not legal or natural persons who can hold property but only offices or institutions such as parish priest, director of an institution or a church as mentioned above;

- If it was the intention of the testator to give the title of the rest and residue of the property to the legatees who have been named to receive cash, it could have been simply stated that his intention was to devise the rest and residue to those legatees while reserving the life interest to his wife but he has only directed to give cash to them after converting the property to cash;
- It was only a direction given to the executor to convert the property into money as there is a named executor to be appointed after the death of Violet De Andrado, the first executrix named in the Will but not a conveyance of dominium of the landed property to the legatees;
- Even though, the testator had specifically devised several properties to his wife, it is not sufficient to decide whether the intention of the testator was only to give a life interest to his wife or to create fideicommissum as the Abolition of Fideicommissa Act was not in force at the time the testator executed the last will, and the same result could have been achieved by creating a restriction on alienation of title while giving dominium of the property to the wife with full power to enjoy it through her life.

There is no doubt that the testator intended to give cash to the named legatees in the manner described in the Will. However, the view expressed stating that for easy distribution it was directed to sell and distribute money seems to be found upon mere conjectures and surmises not supported by any evidence to that effect. Moreover, in coming to that conclusion, even the learned High Court Judges appear to have overlooked the phrase "*in remainder reversion or expectation nothing expected*" and only have given prominence to the word 'life interest' preceding those words in the Will.

Further, if the finding of the learned High Court Judges to the effect that the residual property and its title were to be devolved on the said legatees and the direction was to sell it for cash is correct, then their finding that the Abolition of Fideicommissa Act has no application seems to be defective. Since the said property cannot be alienated in any other manner those named legatees wish. Only thing that could have been done to the property was to sell it and distribute money among the named legatees in the manner described in the Will. In such a scenario, the Plaintiffs should have become the owners for two reasons, firstly, due to the enforcement of the Abolition of Fideicommissa Act and secondly with the death of Violet de Andrado their right in remainder attracts the full enjoyment of the Property. In such a situation the property ceased to be a part of the estate of the Benedict de Andrado due to operation of law. Thus, if the learned High Court Judges' finding that the title was with the legatees was correct due to operation of law their entitlement to sell the property would not arise from the direction contained in the Will but due to the ownership. The cause of action and the prayers in the plaint would not correspond to such legal rights. However, it appears though there were several Plaintiffs named in the plaint, some of them had not given proxies to proceed with the case (vide-page 16 of the district

court judgment and proceedings dated 25.08.2003) and they were not made party defendants even. If so, if the finding of the learned High Court Judges were correct as to the devolution of title on them, only some of them cannot as Owner-Plaintiffs pray for a declaration for their entitlement to sell the property. Thus, for the reasons given above, there appears to be insufficiency of proper reasons to support certain conclusions reached by the learned High Court Judges when they declared the plaintiffs were entitled to the landed property or that the 1st and 2nd Defendants were not entitled to the land in dispute, especially in deciding whether Violet de Andrado had only a life interest/usufruct and not a 'life interest' subject to a fideicommissum. Thus, I cannot uphold the High Court judges' decision to grant reliefs to the plaintiff respondents.

In deciding whether it was a life interest or a devise of property to Violet de Andrado subject to a fideicommissum, the proper test to apply was to see whether the life interest holder had the title or dominium to the property or whether it was with someone else; in other words, whether rights in remainder or reversion vested with someone else. If A bequeath a life interest on his land to B while keeping the dominium with him, B has right to use and enjoy the fruits of the property but A or his heirs as the case may be has rights in reversion that reverts the full use and enjoyment of the land at the death of the life interest holder. On the other hand, they have rights in remainder since the life interest holder does not hold *jus disponendi* (Right to alienate the property) or *jus abutend*i (Right to demolish or diminish the property) or the full dominum. On the other hand, if A devises the land to C while bequeathing a life interest on B, C has a right in remainder that attracts the full use and enjoyment of the land at the death of the life interest holder.

In the above backdrop, which sets out the difficulties in accepting the interpretation given by the learned High Court Judges, I would endeavor to see other possible interpretations that could be given to the relevant term in the Will, namely "*I give devise and bequeath to my wife VIOLET a life interest on the rest and residue of my estate in remainder reversion or expectancy nothing expected*" and the acceptability of such interpretations. It must be noted, after the above term in the Will, the testator had expressed his desire to convert the rest and residue to cash and distribute among the named legatees but nowhere, he has expressed, as said before, his intention to devise the landed property on the said legatees.

Other interpretations;

1. one other interpretation that can be considered is that the testator intended only to give life interest to his wife, Violet de Andrado, namely right to use and enjoy the property during her life time and other residual rights of ownership and or the dominium were not given to any one expressly as conveyance of such rights to any person cannot be understood from the words used in the Will and the 2nd executor named in the Will had to execute the

conversion of property after the demise of first named Executor. This interpretation cannot be accepted for two reasons namely;

a) It also does not give any meaning to the words *"in reversion remainder or expectation nothing expected".*

b) If the residual rights of the ownership what is not included in the life interest, in other words, the dominium of the rest and residue of the estate was not intended to be given to the wife or any other person identified in the Will, with the death of Benedict De Andrado, said residual rights or dominium had to devolve on his lawful heirs which included his wife as per the laws relating to succession of intestate property, as any part of his estate cannot be remained intestate till an unknown future date that comes after the death of his wife Violet de Andrado as indicated above by quoting from page 430 of the Laws of Ceylon.

In **Welgama V Wijesundera (2006) 1 Sri L R 110**, this proposition of law was stated as follows;

> *"The Law does not and cannot recognize an interval between the death and the passing of property, since rights and obligations, from which perspective only, property and legal relationships are identified in law, have to be, at any given point of time vested or reposed in a person or legal entity[6]."*

Thus, when one contemplates a situation where the residual rights related to a life interest or the dominium was not given to the wife Violet de Andrado or any one named in the Will, with the death of Violet de Andrado rights to use and enjoy the property would also devolve on the rest of the lawful heirs and on the person/s who get entitlement through the testator's wife Violet de Andrado and they would gain the full title to the said rest and residue of the property. So, on such a scenario, by the operation of law it would not remain as part of the Estate of the Benedict de Andrado for the second named executor to sell it as part of the Benedict de Andrado's estate at the death of Violet de Andrado. As the intention of the testator was to convert the rest and residue of his estate after the death of his wife, it is clear that he did not intend to get the residual rights that remains after creating a life interest or dominium remain as part of his intestate property. Thus, the said interpretation would not suit the intention of the testator. On the other hand, if one argues that even on such scenario legal heirs are bound to sell the property through the second executor and distribute the money as per the Will, then there is an effect of an entail or restraint on alienation of property.

[6] Also see Silva V Silva 10 N L R 234 where Grenier A.J stated that on the death of a person his state, in the absence of a Will, passes at once by operation of law to his heirs, and the dominium vests in them and once it is so vests, they cannot be divested of it except by the several well-known modes recognized by law.

2) Another interpretation that can be considered is that the testator intended to give full dominium to his wife Violet de Andrado but subject to a condition that she can enjoy it through her life time but should not alienate and preserve the property for the executor to convert it to money which money is to be distributed as per the directions in the Will. In my view this interpretation is more plausible for the following reasons;

- At the time the Will was made, Abolition of fideicommissa Act was not in existence, and as such the testator had the ability to impose a restriction on alienation.
- This interpretation gives a meaning to the words "*in reversion, remainder or expectation nothing expected*". It appears, by these words, the testator intended to express that he wanted to give his wife a life interest but without any hope or expectation with regard to his or his heirs or any other person's rights in remainder or reversion. Thus, it denotes his intention of giving full title or dominium without keeping any residual rights after creating the life interest. However, there is an implied restriction of alienation as he had expressed his desire for the rest and residue to be converted to money after the death of his wife and distribute it among the named legatees.
- What has been given to the wife was the life interest of the rest and residue of the estate. If this was taken as a simple life interest on the rest and residue of the estate after distributing the other parts of the estate as per the terms of the Will, the residual rights of ownership after giving the life interest remains with the estate of Benedict de Andrado, and it again become the rest and residue of the estate for which the life time enjoyment again has to be with the wife. In other words, rights in remainder or reversion of the subject matter are not something alien to the estate of Benedict de Andrado but part and parcel of the rest and residue of the said estate. Thus, it indicates the intention was to give full dominium to wife subject to the implied restriction of alienation.
- As per **Gunawardene V Visvanathan 24 N L R 225** mentioned above when the words "I give and devise" are used and /or prohibition of alienation is contained in the Will the dominium is given to the beneficiary.

In view of the above I opine that the 'life interest' given to Violet de Andrado was subject to a fideicommissum and she had the full dominium. Title to the property was to be devolved on the lawful heirs or persons who get it through Violet de Andrado but subject to the charge on the property to convert it to money and pay as directed. Even if one can argue that there is no fideicommissum since fideicommissaries are not clear, Violet de Andrado had been given dominium subject to a restriction on alienation for which the Abolition of fideicommissa Act Applies.

Since the passing of Abolition of Fideicommissa Act took place after the making of this last will and as it prohibits fideicommissum, restriction on alienation and entailments, that law applies to this Last will, and as per the provisions of the said law the Violet de Andrado, wife of the testator who possessed the property involved at the time that law came into existence became the absolute owner of the property. Hence the Plaintiff Respondents' claim could not have been successful before the District Court and the learned High Court Judges erred in granting even the declaratory reliefs.

As such, in my view, the Plaintiff Respondents could not have obtained any relief prayed in the plaint including the declaratory reliefs which were given by the learned High Court Judges. Thus, in my view, the questions of law no.1 and 2 have to be answered in the affirmative. It must be noted that the action has been filed to get the property sold and distribute the money and not to recover money from the 1st defendant. Further, subject to the answer to be given to the question of law no.4, on merits, the question of law no.3 has to be answered to say that even though there appears to be certain misstatements of law made by the learned High Court Judges, not granting of the reliefs referred to in the question of law No. 3 was correct.

However, the question of law No.4 challenges the entitlement of the Plaintiff Respondents to raise such a question of law as represented by question of law no.3 in this appeal. In fact, if the Plaintiff Respondents were dissatisfied by the learned High Court Judges' decision which did not grant reliefs as prayed in the prayers **'c'** to **'f'**, they could have filed a leave to appeal application over that. Filing of a leave to appeal application by the Defendant Appellant or possible outcome of that appeal cannot create a new situation that brings any new grief or dissatisfaction in relation to not granting of those relief. It must be noted learned High Court Judges granted only declaratory reliefs, but no executable relief was granted. As such dissatisfaction due to the refusal of prayers **'c'** to **'f'** should have been there from the moment the judgment was pronounced. As per section 754 of the Civil Procedure Code an aggrieved party has to appeal within the appealable period. Hence, in my view the Plaintiff Respondents are not entitled to raise the question of law as contemplated in question of law no.3. Thus, answer to question law no.4 has to be in the affirmative.

For the forgoing reasons, this appeal of the 2nd Defendant Appellant is allowed with costs here and also in the courts below and accordingly, reliefs prayed in prayer (b), (c), (d) and (e) of the Petition of Appeal dated 22nd July 2010 are granted.

Judge of the Supreme Court

Murdu N.B. Fernando, PC. J.

I have had the advantage of reading in draft, the judgement of my brother Amarasekara, J., allowing this appeal. However, I respectfully beg to dissent with the said judgement for the reasons stated herein and hence pens this judgement.

Amarasekara J., in his draft judgement had extensively dealt with the facts pertaining to the matter in issue. Nevertheless, in order to understand my reasons for this dissenting view, I wish to refer to the facts in chronological order;

01. One Benedict de Andrado on 09-02-1963 executed a Last Will attested by ARM Razeen N.P. ("Last will") whereby he gave and bequeathed to his wife Violet de Andrado, the following,

    - an undivided half share of a coconut land at Mahawewa in Marawila;

    - blocks 2,4,5 in plan No 349 dated 14.08.1962 made by M I Sameen Licensed Surveyor, [pertaining to a land at Grandpass, Colombo/ Mahawatta Road, Madampitiya] with a notation 'without any reversion whatsoever'; and

    - all the moveable property of his estate.

02. In addition to the above, by the said Last Will Benedict de Andrado, gave and devised defined lands and properties to a relative, referred to by name, subject however to the life interest of his wife Violet. He also bequeathed cash to certain other named persons.

03. Lastly, by the said Last Will Benedict de Andrado devised and bequeathed to Violet his wife, the ***life interest on the 'rest and residue' of his estate, in remainder, reversion or expectation nothing expected.*** *He went on to state that after the death of his wife Violet, it was his desire that such residue be* ***converted to cash*** *and directed such* ***cash be divided into 15 equal parts*** *and be distributed in the following manner;*

    - *one part to be utilized for masses at a Grandpass church for the repose of the soul of himself, his wife and certain named ancestors;*

    - *another part for the improvement of a church at Mahawatta;*

    - *three parts for establishment of a scholarship fund at St. Benedicts College, Kotahena;*

- the balance ten parts to be distributed as stipulated among the children of four relatives referred to in the Last Will.

04. Benedict de Andrado appointed his wife Violet to be the executrix of the Last Will and Testament and on the demise of Violet his wife, named His Grace the Archbishop of Colombo or his nominee to be the executor of his Last Will.

05. Benedict de Andrado died on 25.06.1963. Violet his wife filed testamentary action in the District Court of Colombo. The Last Will was duly proved and probate was thereafter issued to Benedict de Andrado's wife Violet de Andrado.

06. Violet de Andrado died on 29.08.1991 at an Elders Home in Kegalle, 28 years after the demise of Benedict de Andrado.

07. Thereafter the 1st defendant-respondent-respondent ("the 1st defendant") one Patriciahamy, said to be the lady who looked after Violet de Andrado, being the beneficiary and the executrix of a non- noterially executed Last Will of Violet de Andrado dated 22-03-1985, applied to the District Court of Marawila and obtained probate to administer the estate of Violet de Andrado. The said Last Will of Violet, executed in Marawila before five persons (whose names are not reflected in the Last Will) only referred to a single property, land and premises in extent 33.56 P bearing No. 136, Mahawatta Road, Madampitiya.

08. On 17.01.1994, the 1st defendant Patriciahamy by executor's conveyance transferred the said property referred to as lot number one together with the right of way attached to it over lot 6 depicted in plan bearing No 349 dated 14.08.1962 made by MI Sameer, Licensed Surveyor to herself as the beneficiary of Violet's Last Will.

09. On 05.12.1994, the 1st defendant conveyed the said property at No.136, Mahawatta Road, Madampitiya to the 2nd defendant-appellant-appellant (2nd defendant/appellant).

10. Thereafter in the year 1999, the plaintiffs-respondents-respondents ("the plaintiffs/ respondents") being the identified beneficiaries of 10/15 parts [the church being the beneficiary of the balance 5/15 parts] upon the rest and residue clause of Benedict de Andrado's Last Will dated 25-06-1963, sued the 1st and 2nd defendants in the District Court of Colombo and prayed for the relief stated therein.

11. Only the 2nd defendant filed answer in the instant case and took up the position that the land referred to in the schedule to the plaint, *viz.*, No 136, Mahawatta Road, Madampitiya was a land belonging to the estate of Violet de Andrado and upon

proof of the Last Will of Violet, the 1st defendant obtained title to the said land which had now passed onto the 2nd defendant, a *bona-fidae* purchaser. The 2nd defendant also pleaded that Violet had prescriptive title to the land and even if its assumed that 'Violet only had a life interest' in the property in issue, with the passage of Abolition of Fidei Commissa Act No 20 of 1972, 'Violet becomes the absolute owner' and therefore, the bequeath by Violet to 1st defendant is lawful and valid. Further, the 2nd defendant pleaded, therefore the transfer of the subject property by the 1st defendant to the 2nd defendant is also in accordance with the law and claimed damages in a sum of Rs. 5 million.

12. The instant appeal before this Court springs from the said District Court case.

13. The District Court trial proceeded *ex-parte* against the 1st defendant and *inter-partes* against the 2nd defendant. The District Court gave judgement in favour and the plaintiffs and granted all the reliefs *i.e.*, prayer (a) to (g) prayed for by the plaintiffs in the plaint and dismissed the cross-claim of the 2nd defendant.

14. Aggrieved by the said judgement the 2nd defendant, appealed to the Civil Appellate High Court ("the High Court"). The High Court rejected the appeal and upheld the District Court judgement. However, the High Court disallowed the reliefs (c),(d),(e) and (f) and granted only the declaratory relief referred to in prayer (a) and (b) to the plaintiffs. v*iz., a declaration that the plaintiffs are entitled to the proceeds of sale of the property described in the schedule to the plaint and a declaration that the 1st and 2nd defendants are not entitled to the said property*.

15. Whilst the plaintiffs did not canvass the said judgement of the High Court, the 2nd defendant came before this Court and obtained Leave to Appeal upon the contention that the **High Court erred in holding that the Last Will did not create a *fidei commissum* in favour of Violet de Andrado,** in respect of the property in issue, which is the subject matter of this appeal, *viz.*, No 136, Mahawatta Road, Madampitiya, depicted as lot 1 together with the right of way over lot 6 in plan No 349 dated 14.08.1962 more fully referred to in the schedule to the plaint.

From the foregoing narration of facts, it is my respected view, that the crux of the issue to be determined by this Court is, whilst Benedict de Andrado, unequivocally without any reservation whatsoever bequeathed lots 2,4,5 in plan bearing No 349 dated 14.08.1962 [together with other defined properties] to his wife Violet, whether **the transfer of the life interest in the rest and residue of his estate, constitute a *fidei commissum*** with regard to only 'lot one' in plan No 349, in favour of Violet when in fact 'lot one' in the said plan is not expressly or impliedly referred to in the Last Will of Benedict de Andrado.

Corollary, can an unidentified, undefined and undescribed property of a testator fall within the realm of *fidei commissum*? Moreover, can only one single undefined property, which among other properties constitute the 'rest and residue of an estate' establish a *fidei commissum* in favour of a life interest owner?

In general parlance, can the clauses and properties in a Last Will be severed and interpreted individually? Could some clauses or certain properties in a clause in a Last Will, expressly or impliedly establish a *fidei commissum*, independent to other properties and clauses, which will not establish a *fidei commissum*?

To be very specific, when it is the desire of the testator **to convert to cash the rest and residue of his estate** subject to the life interest of the spouse of the testator, can only a precise property where title has not been expressly bequeathed to the spouse of the testator and which comes within the realm of rest and residue of the estate, be deemed subject to a *fidei commissum*?

These queries are raised principally upon the reason that according to the Last Will, the desire and intention of Benedict de Andrado was for his wife Violet, to be his executrix and have a life interest on the rest and residue of the estate and administer the estate and upon the death of Violet his wife, for the Archbishop of Colombo to fulfill the obligations therein, *viz.*, convert the rest and residue of the estate of Benedict de Andrado into cash and distribute the cash received, in the manner described in the Last Will of Benedict de Andrado.

It is trite law, that in interpreting a testament or a will, the intention of the testator should be given effect to and implemented. The intention could be ascertained from the terms of the testament or the will and from the surrounding circumstances. [see. **Mohamed v. Mohamed 30 NLR 225; Seneviratne v. Candappapulle et. al 16 NLR 150**]

It is manifestly clear from the reading of the Last Will **P1** [vide pages 254 to 256 of the brief] that the testator Benedict de Andrado's intention was to devise and bequeath a number of defined and described properties *to his wife Violet without any reservation whatsoever viz.* coconut land at Marawila and three lots bearing No 2,4 and 5 in plan No 349 at Grandpass/Madampitiya.

Similarly, it was the desire of the testator to bequeath certain properties depicted in the Last Will in detail, to a nephew without any reservation. However, one property described as No 148, Mahawatta Road, Madampitiya [not the subject matter No. 136, Mahawatta Road, Madampitiya] was bequeathed to the said nephew, *subject to the life interest of his wife Violet.*

There was also provision in the Last Will to make detailed cash donations, upon the testator's death to named persons, pay estate duty and other liabilities from defined sources

and also pay a sum of money as a legacy from the rest and residue of the estate as the first call to a named party.

Having specifically devised and bequeathed the above properties, the testator's Last Will ended with a rest and residue clause. Thus, Benedict de Andrado devised and bequeathed the ***life interest of the rest and residue of his estate*** *without remainder, reversion or exception nothing expected, to his wife Violet,* indicating his desire, that the rest and residue of his estate be converted to cash and be divided into 15 equal parts and distributed in the manner described in the Last Will.

Thus, it is apparent from the reading of the Last Will, that Benedict de Andrado bequeathed the properties in different ways. Firstly, a number of defined properties were expressly bequeathed to Violet his wife, unequivocally and unreservedly. Secondly, one defined and described property was bequeathed to a nephew subject to the life interest of his wife Violet. The rest and residue of his estate was bequeathed to the named beneficiaries with the express desire that **'the rest and residue of the estate be converted to cash and distributed in the manner provided in the testament'** subject however to the life interest of his wife. Thus, only the life interest of the rest and residue of the estate was bequeathed to Violet his wife under this clause.

From the foregoing facts, it is observed that the intention of the testator Benedict de Andrado was for certain legacies to take place upon his death and certain other legacies to happen consequent to the demise of his wife Violet, the life interest holder. To achieve his intention and desire, Benedict de Andrado appointed his wife as the executrix of the Last Will and upon her demise the ArchBishop of Colombo as his executor to fulfill his desire.

Undisputedly, the property in issue bearing assessment No. 136, Mahawatta Road, Madampitiya (depicted as 'lot one' in plan No 349 dated 14-08-1962 and described in detail in the schedule to the plaint) is not a legacy bequeathed to Violet his wife expressly. It is not even bequeathed to a 3rd party, named or unnamed, subject to the life interest of Violet his *wife viz-a-viz* assessment No. 148, Mahawatta Road, Madampitiya bequeathed to the testator's nephew, subject to the life interest of the testator's wife Violet.

The property in issue is neither described, defined nor expressly referred to, and or independently or separately identified in the Last Will **P1**. Hence, it will only fall within the parameters of the 'rest and residue' of the testator's estate.

There is no dispute between the parties that the residue of Benedict de Andrado's estate, was subject to the life interest of his wife Violet. The intention and the desire of the testator was to convert to cash, the rest and residue of the estate and distribute same in the manner provided. It had to be done only upon the demise of his wife, since she had a life interest over same. Incidentally, part of the money was to be used for the repose of her soul. The ArchBishop of Colombo was specifically named by Benedict de Andrado in his

Last Will to act as the executor, upon the demise of his wife, to fulfill his intention and desire unequivocally and as clearly laid down in the Last Will **P1**.

The plaintiffs being the beneficiaries of the sale proceeds of the rest and residue of Benedict de Andrado's estate, moved the District Court to obtain among other reliefs, declaratory relief with regard to their legacy, in so far as the property in issue is concerned. The District Court granted all the relief prayed for by the plaintiff. The High Court whilst upholding the said judgement restricted the relief granted. The High Court only granted the two declaratory relief sought and disallowed the consequential reliefs.

The contention of the appellant before this Court was that the finding of the trial court, upheld by the High Court, was erroneous for the reason *firstly,* that the property in issue created a *fidei commissum* in favour of Benedict de Andrado's wife Violet and *secondly,* with the passing of the Abolition of Fidei Commissa Act No. 20 of 1972, the aforesaid *fidei commissum* in favour of Violet was extinguished and the property in issue vested absolutely and free of any encumbrances on Violet. Hence, the appellant argued that Violet de Andrado was entitled to transfer, devise and bequeath the property in issue at her free will, to whom so ever she wished and thus the disposition of the said property by Violet upon her non-notarially executed Last Will to her nurse and maid *i.e.,* the 1st defendant, is in accordance with the law.

The learned President's Counsel for the appellant extended his argument to encapsulate the position that the deed of disposition by which the 1st defendant transferred the property in issue to the 2nd defendant is legal and valid and is in accordance with the law. The recital of the said deed of transfer by which the 1st defendant conveyed her interests to the 2nd defendant reads, "*Benedict de Andrado devised and bequeathed to his wife, Violet….lot 1 of plan …..".* Upon a plain reading of the Last Will **P1,** it is manifestly clear that Benedict de Andrado only devised the life interest of the rest and residue of the estate and not 'lot one' of plan No 349 or the title or domimum of 'lot one' in particular, as stated in the recital of the deed of disposition referred to above. Thus, in my view, the aforesaid contention is erroneous and misconceived and is a misstatement of the law.

I wish to pause at this juncture to refer to the argument put forward by the respondent before this Court. The learned President's Counsel vigorously contented that the Last Will of Benedict de Andrado (**P1**) did not create a *fidei commissum* with regard to the subject matter in favour of Violet his wife, as the dominium or the title to the property did not vest in Violet as a *fiduciary,* since she was only given a life interest. The attention of this Court was also drawn to the book titled **Law relating to Fidei Commissia by AJL Cruz Raj Chandra** and specifically to page 10 wherein the distinction between a trust, *fidei commissum* and life interest is discussed.

'Legacy' as we are very much aware is a bequest or a gift of a personal property by a Last Will or a Testament. A *fidei commissum* on the other hand, is a bequeath or a gift to

a person known as *fiduciary* subject to the condition that on the happening of a certain event (death or otherwise) the property will vest in a certain named person or persons known as *fidei commissury* or *fidei commissuries.*

In the matter in issue, Benedict de Andrado independent to the described and defined legacies bequeathed to his wife also devised and bequeathed to her, the life interest on the rest and residue of the estate. It is important to note by this legacy i.e., the rest and residue, the dominium or title to a property was not bequeathed or gifted to her. Thus, the dominium or title of 'lot one' of plan No 349 was not expressly or impliedly bestowed on her.

The rest and residue of the estate, among other moveable and immovable property also include the property in issue i.e., lot one in plan No 349. The intention and the desire of Benedict de Andrado, as the Last Will **P1** clearly spelts out, was for such rest and residue to be converted to cash and divided into 15 equal parts and distributed in the manner provided. This task had to be carried out by the 2nd executor named in the Last Will, as it had to be attended to consequent to the demise of his wife and executrix Violet, since she held the life interest to the rest and residue of the entire estate.

Hence, in my view there is no ambiguity whatsoever in the wording of the Last Will. Benedict de Andrado unequivocally and unreservedly granted his wife Violet only the life interest of the rest and residue of the estate. With regard to the subject property, Violet was not the *fiduciary*, nor were there any named *fidei commissury* or *fidei commissuries.* The dominium or the title of the subject property, 'lot one' in plan No 349 was not expressly transferred to Violet nor was it transferred to any other person by way of an instrument of transfer. It only comprised of a part or a segment of the rest and residue of the estate. Hence, in my view, transfer of only the life interest of the property not defined nor identified in the Last Will (**P1**), does not create a *fidei commissum* in favour of Violet, as strenuously argued before this Court by the appellant.

In the case of **Gunawardena v. Vishvanathan 24 NLR 225 and Pabilina v. Karunarathne 50 NLR 169**, this Court has considered the manner in which a *fidei commissum* is created. In the **24 NLR** case, whilst the Court held a *fidei commissum* was established, in the **50 NLR** case, the Court held that a *fidei commissum* was not established and went onto observe that the real intention of the donor should not be a matter of conjecture but has to be ascertained from the language used.

Similarly, in a comparatively recent case, **Bengamuwe Dhammadinna Thero v. Perera and another SC Appeal 15/2012 decided on 14-03-2017**, this Court observed, quoting many books [Prof. H.W. Thambiah Q.C. on Principles of Ceylon Law and Prof. T. Nadaraja on Fidei Commissum of Ceylon and especially **Laws of Ceylon by Walter Pereira**] that with regard to *fidei commissum*, a variety of views and expressions have been expressed but that no satisfactory test appears to be available to be applied to the question

whether any particular word or words in a particular document have the effect of creating a *fidei commissum.*

The words of Lascells CJ in **Fernando V. Perera 17 NLR 161**, that the most troublesome of all encumbrances is the *fidei commissum*, aptly demonstrate the complexity of *fidei commissum.*

I do not wish to get into an academic exercise with regard to formation or the creation of a *fidei commissum,* the material differences between a *fidei commissum* and *usufructus*, the implications of the term 'life interest' and 'life interest holder'. Suffice is to state, the primary function of a trial court is to give effect to the desire and the intention of the testator to be ascertained from the terms of the will, as observed in **Pabilina's case** referred to above and numerous other judgements of this Court.

In the instant appeal, the intention and the desire of Benedict de Andrado is apparent upon the reading of the Last Will **P1**. It was to gift, defined and described properties to his wife [and others] without any reservation whatsoever and whatever is remaining i.e., the rest and residue of the estate, to be converted to cash and equally distributed among the beneficiaries as stipulated therein, upon the demise of Benedict de Andrado's spouse Violet. The finding of the trial court, upheld by the High Court strikes to achieve the said objective and the intention of the testator and I see no reason to disturb or interfere with such finding.

It is further observed, that in coming to its findings both the District Court and the High Court made reference to a judgement of this Court, **Kularatne and another v. Gunatilleke** reported in **[1994] 2 SLR at page 258**. I wish to refer to the afore said case in detail, as the legal principles discussed therein are similar to the instant appeal.

In the said **Kularatne's case,** one Don Abraham by his Last Will bequeathed his property to his nephews and nieces. Among the beneficiaries were the two plaintiff's to whom a property was bequeathed *'to be vested after the deaths of the said Don Abraham and his wife'.* Within a month of Don Abraham's death in 1965, his wife by Last Will bequeathed the said property [which Don Abraham devised to the two nephews] to the defendant and her husband who attended to Don Abraham during his last stages. Don Abraham's wife died consequent to the passing of the Abolition of Fidei Commissa Act No 20 of 1972 and the question that was posed before this Court was whether the said Last Will created a *fidei commissum* in favour of Don Abraham's wife and whether the property passed onto the absolute ownership of Don Abraham's wife on the enactment of the Abolition of Fidei Commissa Act.

In the said case, Kulatunga J., (with GPS de Silva CJ and Ramanathan J, in agreement) considered the fact that Don Abraham refrained from making a devise in favour

of his wife and also the use of the language employed a creation of a *usufruct* in favour of the surviving spouse and at page 262 observed thus;

> "If the testator intended to give his wife the dominium in the property as the first beneficiary, he might have used more specific language. This he failed to do; and the facts indicate, that he was not interested in nominating *fidei commissaries* with inchoate rights but heirs to take over his estate except that the fulfillment of the legacy was deferred in order to provide for the needs of his wife during her life time. On this basis, the reasonable construction is that the Will gave only a life interest to the testators wife….and therefore [she was] not competent to bequeath the ownership of the property by Last Will…"

In the instant appeal, the wording of Benedict de Andrado's Last Will **P1** is much more clear and specific than the words and language used in the Last Will of Don Abraham, in the afore discussed **Kularatne's case**.

In the appeal before us, the testator Benedict de Andrado, only devised and bequeathed to his wife, the life interest on the rest and residue of his estate. No dominium in the subject property was granted to the wife expressly or impliedly, either as a first beneficiary or otherwise. Corollary, the dominium of the property could not be granted to the wife, as the Last Will **P1**, did not describe or define or depict the specific property. Thus, the subject property, together with other undefined movable and immovable property, could only be slotted and accommodated within the 'rest and residue of the estate.'

The intention of the testator was to bequeath to the wife Violet, only the 'life interest on the rest and residue of the estate'. The words of the testator are clear and precise. If he wished to bequeath 'lot one' also to his wife Violet, he could have specifically, without any ambiguity bequeathed it to her. He did not do so. As discussed earlier in this judgement, the testator expressly and unreservedly bequeathed and devised several other properties to her and 'lot one', the subject property is not one of those properties.

The testator's intention was for the rest and residue to be converted to cash and devolved on the persons nominated in the Last Will, consequent to the demise of the wife. Nominating the wife as the executrix and upon her death appointing the Archbishop of Colombo or his nominee to fulfill the said obligation, in my view, further exemplify and illustrate the intention of the testator which was only to create a life interest upon the rest and residue of the estate in the wife. In my view, the intention of the testator should be given effect to and his desire has to be fulfilled.

Thus, I have no hesitation in upholding the finding of the High Court. The surrounding facts and circumstances of this case, does not warrant or create a *fidei commissum* in favour of the wife as the dominum or title of 'lot one' never passed on to her. Hence, in my view, the Last Will of Benedict de Andrado (**P1**) does not envisage a *fidei commissum* situation. Thus, the passing of the Abolition of Fidei Commissa Law too, has no effect or bearing whatsoever, upon the property in issue, namely No 136, Mahawatta Road, Madampitiya/ Grandpass in Colombo.

Further, I see no rhyme or reason to disturb the finding of the High Court, that Violet de Andrado and or her alleged successors, i.e., the 1st and 2nd defendants, are not in receipt of any title or dominium to the property in issue.

Hence, for reasons more fully adumbrated in this judgement, I answer the **1st and 2nd questions of law** raised before this Court namely,

(i) Did the Civil Appellate Court err in holding that the Last Will (**P1**) did not create a *fidei commissum* in favour of Violet in respect of the property which is the subject matter of this action?

(ii) Did the Civil Appellate Court err in granting reliefs prayed for in paragraphs (a) and (b) of the plaint to the District Court?

in the negative and uphold the judgement of the High Court. Further, the two declarations referred to in prayer (a) and (b) of the plaint, affirmed and declared by the High Court in favour of the plaintiffs/respondents are also upheld.

The **3rd question of law** raised by the respondents as a consequential issue and the **4th question of law** raised by the appellant thereafter, are as follows;

(iii) Did the learned High Court Judges err in not granting the reliefs prayed for in paragraphs c,d,e and f of the plaint as granted by the learned District Court Judge?

(iv) The Respondents not having sought to canvass the judgement of the Court of Appeal by way of an application for leave, are they entitled in law to raise question No. 3 as aforesaid?

I do not wish to delve into greater detail or analyse the said two questions in depth, except to state that it is paramount for a trial court to look into and consider the terms of the Last Will and its surrounding facts when interpreting same, in order to ascertain the intention of the testator.

As discussed earlier, the desire of Benedict de Andrado undisputedly was to convert the rest and residue of his estate into cash and equally divide it into 15 parts and distribute the cash in the manner provided, consequent to the demise of Benedict de Andrado's

spouse Violet. By the terms of the Last Will, the testator appointed a succeeding executor to fulfill the said obligation and also to attend to other incidental matters.

Hence, my considered view is that there is no impediment whatsoever, for the relevant parties to take appropriate steps to fulfil the said obligation. In view of the said finding, I refrain from answering the two consequential questions of law raised before this Court.

In the aforesaid circumstances, the judgement of the Civil Appellate High Court is upheld. The appeal of the 2nd defendant-appellant-appellant is dismissed subject to costs fixed at Rs. 250,000.00 payable by the appellant to the plaintiffs-respondents-respondents.

Appeal is dismissed.

Judge of the Supreme Court

Aluwihare PC, J.

I have had the privilege of reading the judgements of his Lordship Amarasekara J and her Ladyship Fernando PC,J. With great respect I have not been able to agree with the conclusion reached by my brother Amarasekara J that this appeal should be allowed. When I consider the evidence placed in this matter, I am inclined however to agree with the views expressed by her Ladyship Fernando PC, J, that this appeal should be dismissed.

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 against the Judgment dated 30.05.2018 in the Court of Appeal Case No. 765/2000(F) in terms of Article 128 of the Constitution and Section 754(4) of the Civil Procedure Code.

S.C. Appeal No. 74/2019
SC/SPL/LA No.201/2018
C.A. No. 765/2000(F)
D.C. Pugoda 02 No. RE/31777L

Walimunidewage Indrasena,
No. 23, Radawana Road,
Kirindiwela.

Plaintiff

Vs.

1. Walimuni Dewage Wijewardena,
   Raddalana, Welpalla.

2. Ganegodage Wijeratne,
   No. 23, Radawana Road,
   Kirindiwela.

Defendants

AND BETWEEN

1. Walimuni Dewage Wijewardena (Deceased),
   Raddalana, Welpalla.

1st Defendant-Appellant (Deceased)

1a(1). Piyadasa Dissanayake (Deceased),
No. 739, Sudarshana Mawatha,
Kelaniya.

1a(1)1. Thalagala Thilaka,
No. 739, Sudarshana Mawatha,
Kelaniya.

1a(1)2. Thalagala Thilaka,
No. 739, Sudarshana Mawatha,
Kelaniya.

1a(1)3. Shamith Nirashan,
No. 739, Sudarshana Mawatha,
Kelaniya.

1a(1)4. Chandima Subashini Kanchana Dissanayake,
No. 739, Sudarshana Mawatha,
Kelaniya.

1a(2). Abeyratne Dissanayake,
No. 2/B, Hiswella, Kirindiwela.

Substituted 1st Defendant-Appellant

2. Ganegoda Wijeratne,
No. 23, Radawana Road,
Kirindiwela.

2nd Defendant-Appellant

Vs.

Walimunidewage Indrasena,
No. 23, Radawana Road,
Kirindiwela.

Plaintiff-Respondent

AND NOW BETWEEN

Walimunidewage Indrasena,
No. 23, Radawana Road,
Kirindiwela.

Plaintiff-Respondent-Appellant

Vs.

1. Walimuni Dewage Wijewardena (Deceased),
   Raddalana, Welpalla.

1st Defendant-Appellant-Respondent (Deceased)

1a(1). Piyadasa Dissanayake (Deceased),
No. 739, Sudarshana Mawatha,
Kelaniya.

1a(1)1. Thalagala Thilaka,
No. 739, Sudarshana Mawatha,
Kelaniya.

1a(1)2. Thalagala Thilaka,
No. 739, Sudarshana Mawatha,
Kelaniya.

1a(1)3. Shamith Nirashan,
No. 739, Sudarshana Mawatha,
Kelaniya.

1a(1)4. Chandima Subashini Kanchana Dissanayake,
No. 739, Sudarshana Mawatha,
Kelaniya.

1a(2). Abeyratne Dissanayake,
No. 2/B, Hiswella, Kirindiwela.

Substituted 1st Defendant-Appellant-Respondents

2. Ganegoda Wijeratne,
No. 23, Radawana Road,
Kirindiwela.

2nd Defendant-Appellant-Respondent

Before: L.T.B. Dehideniya, J.
Janak De Silva, J.
Arjuna Obeyesekere, J.

Counsel:

Chula Bandara with Anuradha Dias for the Plaintiff-Respondent-Appellant

Jayantha Bandaranayake for the 1a(1)1 to 1a(1)4 and 2nd Defendant-Appellant-Respondents

Written Submissions tendered on:

11.06.2019 by the Plaintiff-Respondent-Appellant

05.07.2021 by the Defendant-Appellant-Respondents

Argued on: 29.07.2021

Decided on: 23.02.2022

Janak De Silva, J.

The Plaintiff-Respondent-Appellant (hereinafter referred to as "Appellant") instituted the above styled action against the Defendant-Appellant-Respondents (hereinafter referred to as "Respondents") in the District Court of Pugoda praying inter-alia for the ejectment of the Respondents from the corpus. After trial, the learned District Judge entered judgment as prayed for by the Appellant.

Aggrieved by the said judgment, the Respondents appealed to the Court of Appeal. In the arguments, the Appellant raised a preliminary objection that the Respondents' notice of appeal was filed out of time and therefore the appeal should be dismissed *in limine*. The objection was based on the fact that the date stamp on the notice of appeal indicated that it was filed on 07.09.2000 which is after a lapse of 3 days from the stipulated time limit to file a notice of appeal under the Civil Procedure Code.

The Court of Appeal by Order dated 30.05.2018 overruled the preliminary objection and held that although the date stamp on the notice of appeal indicated that it was filed out of time, a minute contained in journal entry No. 82 dated 08.09.2000 stated that, "අභියාචනා දැන්වීම නියමිත කාලය තුල භාරදී ඇත".

At the Appellant's request, this Court gave special leave to appeal the following questions of law:

"19.

II. Has His Lordship in the Court of Appeal erred in Law by holding that the impugned minute which is to the effect that the Notice of Appeal had been tendered within the stipulated time, confirms the possibility that the date stamp was put on the notice later, when there was no evidence whatsoever to suggest the same?

III. Has his Lordship in the Court of Appeal erred in Law by failing to recognize that the minute contained in journal entry No. 82 is a consequence of the erroneous calculation of the person who entered the minute, i.e. the subject clerk?

IV. Has his Lordship in the Court of Appeal erred in Law by holding that the erroneous minute contained in journal entry No. 82 confirms that the Notice of Appeal had been tendered within the stipulated time of 14 days without giving due regard to the material facts appearing in the proceedings?"

The parties do not contest that the notice of appeal should have been filed no later than 04.09.2000. The question is on what date it was actually filed in the District Court Registry. Although the date stamp of the District Court found on the notice of appeal indicates that it was received in the registry on 07.09.2000 at 2.00 p.m., the Court of Appeal held that the minute in journal entry No. 82 "*confirms the possibility that the date stamp was put on the notice later*".

Much reliance had been placed on the decision in *Nachchiduwa v. Mansoor* [(1995) 2 Sri. L. R. 273] and the Court of Appeal stated that the placing of the date stamp on the notice of appeal later, is a common occurrence in the original Courts. Applying the presumption set out in section 114(d) of the Evidence Ordinance, the Court of Appeal ruled that the notice of appeal was filed in a timely manner. Hence, I will begin by examining the scope and application of this presumption.

Section 114(d) of the Evidence Ordinance

Section 114 of the Evidence Act reads:

> *"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case."*

This presumption may be invoked by the Court only where it thinks that the existence of any fact is likely after having regard to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case. The Court is not bound to apply the presumption in all cases. Its application depends on the facts and circumstances of each case. It is a rebuttable presumption.

Several illustrations of the application of the presumption have been provided and, for the purposes of this appeal, illustration(d) is relevant. It establishes that the presumption applies to judicial and official acts. Where appropriate, the Court may assume that judicial and official acts have been performed regularly. It is expressed by the Latin maxim, "*omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*", which may be shortened to "*omnia praesumuntur rite et solemniter esse acta*" or "*omnia praesumuntur rite esse acta*".

The filing of a notice of appeal by the Respondents is not a judicial or official act. As such the presumption in illustration (d) of section 114 of the Evidence Ordinance has no application to the act of filing of the notice of appeal by the Respondents.

Nevertheless, the Court of Appeal invoked that presumption on the basis of the entry in the journal entry No. 82. Section 92 of the Civil Procedure Code requires the Court to commence a journal in which shall be minuted, as they occur, all the events in the course of the action and each minute shall be signed and dated by the Judge, and the journal so kept shall be the principal record of the action.

This is a mandatory procedural requirement. As E. R. S. R. Coomaraswamy has stated in *The Law of Evidence* [Vol. II (Book 1)] at 414]:

> *"The presumption applies only to mandatory forms of procedure, since "regularly done" means "done with due regard to form and procedure". In the case of mandatory provisions of procedural law, in the absence of any evidence to the contrary, the court would presume that all rules and legal forms were complied with. But this presumption cannot be raised where the provision of the procedural law is not mandatory, but only enabling."*

Therefore, any events in the course of the action reflected in the journal entry may attract the presumption in section 114(d) of the Evidence Ordinance. In *S. Seebert Silva v. F. Aronona Silva and 4 others (*60 N.L.R. 272) it was held that the Court is entitled to presume that the journal entries made in a case in compliance with the requirements of section 92 of the Civil Procedure Code set out the sequence of events correctly.

However, in order for the presumption to apply, the journal entry must be made of an event as it occurred. That is what section 92 of the Civil Procedure Code calls for. The presumption cannot be applied to journal entries that do not comply with the requirements of section 92 of the Civil Procedure Code. In the present case, journal entry No. 82 simply states that the notice of appeal had been filed within the stipulated time. There is no journal entry as to when it was actually filed. Therefore, I am of the view that the Court of Appeal made a fundamental error in invoking the presumption in Section 114(d) of the Evidence Ordinance, to journal entry No. 82 to conclude that the notice of appeal had been filed within the stipulated time.

The Court of Appeal committed another fundamental error in relying on the presumption in the facts of the present case. The court record contained other direct evidence of the actual date of the filing of the notice of appeal which was overlooked by the Court of Appeal. In my view, presumptions should be invoked only when the court is deprived of any direct evidence on an important issue. Presumptions should not be relied on where there is direct evidence.

In this case, the District Court stamp on the notice of appeal states that it was received at the Registry on 07.09.2000 at 2:00 pm. However, the Court of Appeal disregarded it on the basis of journal entry No. 82 and the decision in *Nachchiduwa v. Mansoor* (supra) and concluded that the seal has been placed later. However, *Nachchiduwa v. Mansoor* (supra) concerned a case where the date stamp on the petition of appeal was placed when the petition of appeal was filed but the minute in the journal entry of its filing was made later. It was held there that the act of the registered attorney in tendering the petition of appeal to the Registrar and the act of the Registrar in placing the date stamp and his initials on the petition of appeal is what constitute a presentation of the petition of appeal and thus the petition of appeal had in fact been filed within the time. Hence, even in *Nachchiduwa v. Mansoor* (supra) the Court was guided by the date on the petition of appeal rather than the journal entry.

I am mindful that in *Seebert Silva v. Aronona Silva* (supra. 275) K. D. De Silva, J. held that the date-stamp on the plaint is by no means conclusive. Nevertheless, it is cogent evidence of the date on which the notice of appeal was filed. In fact, several other items of evidence in the court record supports the conclusion that the notice of appeal was in fact filed on 07.09.2000.

The motion by which the notice of appeal was filed is also dated 07.09.2000. This date was entered on the motion filed with the notice of appeal by the Respondents themselves. It reads:

> "වර්ෂ **2000**ක් වූ සැප්තැම්බර් මස **07** වෙනි දින ඉහත සඳහන් අභියාචනා දැන්වීම් පිටපත් පැමිණිලිකරුගේ නීතීඥ තැන වෙතද, පැමිණිලිකරු වෙතද ලියාපදිංචි තැපෑලෙන් යවා කුවිතාන්සි මේ සමඟ යා කර ඇත."

Moreover, the registered postal articles indicating that the notice of appeal has been given to the Respondents also bear the date 07.09.2000.

Thus, the irresistible conclusion, this Court can draw is that the minute contained in journal entry No. 82 is a consequence of the erroneous calculation of the person who entered the minute.

For all the foregoing reasons, I hold that the notice of appeal had been filed only on 07.09.2000 and hence is out of time. I answer all three questions of law in the affirmative and set aside the order of the Court of Appeal dated 30.05.2018.

I uphold the preliminary objection raised by the Appellant that the notice of appeal has been filed out of time. The appeal filed by the Respondents in the Court of Appeal is dismissed *in limine*.

The Appellant shall be entitled to his costs in this Court as well as in the Court of Appeal.

The Registrar is directed to take further action accordingly.

Appeal allowed.

JUDGE OF THE SUPREME COURT

L.T.B. Dehideniya, 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 to the Supreme Court in terms of Section 5 C 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.

Galdeniyalage Ukkuwa

of Polpitiya,Metikumbura

Plaintiff

S.C.Appeal No.77/2013

SC/HCCA/LA Application

No. .60/2013 **Vs.**

NWP/HCCA/KURU/129/2001(F)

D.C. Kurunegala, Case No. 3188/P

01. Galdeniyalage Podina
02. Parapayalage Devadasa
03. Parapayalage Karunawathie

All of Polpitiya, Metikumbura

Defendants

AND BETWEEN

01. Galdeniyalage Podina **(deceased)**

01.a). Parapayalage Devadasa

01.b). Parapayalage Karunawathie

All of Polpitiya, Metikumbura

Substituted-Defendant-Appellants

02. Parapayalage Devadasa

03. Parapayalage Karunawathie

All of Polpitiya, Metikumbura

2nd & 3rd Defendant-Appellants

Vs.

Galdeniyalage Ukkuwa(**deceased**)

Galdeniyalage Jasintha

of Polpitiya,Metikumbura

Substituted-Plaintiff-Respondent

AND NOW BETWEEN

01. Galdeniyalage Podina(**deceased**)

01a). Parapayalage Devadasa

01b). Parapayalage Karunawathie

All of Polpitiya, Metikumbura

SubstitutedDefendant-Appellant-Appellants

02. Parapayalage Devadasa

03. Parapayalage Karunawathie

2nd & 3rd Defendant-Appellant-Appellants

Vs.

Galdeniyalage Ukkuwa(deceased)

Galdeniyalage Jasintha

of Polpitiya,Metikumbura

Substituted-Plaintiff-Respondent-Respondent

****

BEFORE : MURDU N.B. FERNANDO, PC, J.
K.K. WICKREMASINGHE, J.
ACHALA WENGAPPULI, J.

COUNSEL : Lakshman Perera PC with Radeena Gunawardena for the Substituted-Defendant-Appellant-Appellants and 2nd and 3rd Defendant-Appellant-Appellants
Sudarshani Cooray for the Substituted-Plaintiff-Respondent-Respondent.

ARGUED ON : 03rd February, 2021

DECIDED ON : 21st January, 2022

****

ACHALA WENGAPPULI, J.

The Plaintiff-Respondent-Respondent (later substituted Plaintiff-Respondent- Respondent and hereinafter referred to as the "Plaintiff") instituted this action in the District Court of *Kurunegala*, seeking to

partition a land called *Udawattehena* in an extent of three seers of *Kurakkan,* according to the pedigree and the share entitlement of each party, as described in paragraph 11 of his second amended plaint of 12.12.1996. The Plaintiff, whilst claiming an entitlement of ½ share of the corpus to himself on paternal inheritance, allocated ¼ share each to the 2nd and 3rd Defendant-Appellant-Appellants and conceding only to a life interest of the 1st Defendant-Appellant-Appellant (later substituted by 1a and 1b Defendant-Appellant-Appellants and 2nd and 3rd Defendant-Appellant- Appellants, and hereinafter referred to as the 1st, 2nd and 3rd Defendants respectively).

It is averred by the Plaintiff that the original owners of the corpus are *Ukku Naide* and *Punchi Naide* who transferred their rights of the corpus to *Kirihapuwa* by deed No. 11680 of 05.06.1885. When *Kirihapuwa* died without a will, his title to the corpus had devolved on his two sons, *Singna* ("සිංඤ") and *Amangira,* who inherited ½ share each thereof. The Plaintiff claimed his ½ share from *Singna* on paternal inheritance. In describing the devolution of title of the 2nd and 3rd Defendants in the plaint, the Plaintiff averred that one *Menika* had acquired a ½ of the remaining ½ share of the corpus from *Amangira* on deed No. 15854 of 05.08.1938 and had thereafter transferred that ¼ share of the corpus to the 1st Defendant, on deed No. 43039 of 23.07.1954. The 1st Defendant had later transferred her title in favour of the 3rd Defendant on deed No. 6118 of 28.06.1984, subject to her life interest. The other ¼ share of the corpus was inherited by *Juwanis* alias *Jeewa* from *Amangira. Juwanis* had thereupon transferred his ¼ share to the 2nd Defendant, on deed No. 6117 of 28.06.1984.

The said three Defendants, by their common Statement of Claim, conceded that *Singna* and *Amangira* have inherited ½ share each of the

corpus from *Kirihapuwa*. They did not dispute the identity of the corpus. However, they sought dismissal of the partition action instituted by the Plaintiff on the basis that, contrary to the claim of the Plaintiff, *Singna* had mortgaged his ½ share, which had subsequently been bought over by *D.B. Welagedara* and *M.D.Banda* at an auction. The Defendants further claim that it was these two, who placed the 1st Defendant in possession of the corpus, sometime in 1972. The 1st Defendant had thereupon claimed she had acquired prescriptive title over the rights of the Plaintiff by long possession. They also assert that the Plaintiff never was in possession of the land.

The parties have suggested a total of twelve points of contest. Of the eight points of contest suggested by the 1st to 3rd Defendants, only points of contest Nos. 7 and 11 had been formulated in relation to the rights of the 1st Defendant. Point of contest No. 7 is in effect of whether lot Nos. 1 and 2 depicted in the preliminary plan were cultivated and possessed by her, while point of contest No. 11 was to the effect whether the plaint should be dismissed upon the acquisition of prescriptive title by the 1st Defendant against the right of the Plaintiff, which had devolved through *Singna.*

The trial Court had answered both these points of contest, i.e. Nos. 7 and 11, against the 1st Defendant as she did not prove any ouster. In delivering its judgment, the Court had allocated ½ share of the corpus to the Plaintiff, whilst allocating ¼ share each to the 2nd and 3rd Defendants, upon acceptance of the pedigree, as averred in the plaint. The 1st to 3rd Defendants, have thereupon preferred an appeal against the said judgment to the High Court of Civil Appeal, before which they unsuccessfully challenged the said judgment solely on the basis that the Plaintiff had failed to establish that he is the '*legitimate son*' of *Singna*.

They further contended that since parties are subjected to *Kandyan* law and in the absence of proof that the marriage between the Plaintiff's parents, namely, *Singna* and *Kiribindu* was registered, that factor would make the Plaintiff an '*illegitimate*' child of *Singna*. On that account, the 1st to 3rd Defendants contend that the Plaintiff has no entitlement to inherit his father's *Paraveni* property.

In dismissing the appeal of the 1st to 3rd Defendants, the High Court of Civil Appeal had held that since the 1st Defendant had failed to put in an issue on the question of legitimacy of the Plaintiff and therefore the trial Court was not called upon to determine that claim. It also held that the Plaintiff is the son of *Singna* and *Kiribindu* and the 1st Defendant, who contracted a *Deega* marriage, is not entitled to any rights over the corpus. Court further concluded that she had failed to establish her claim of acquisition of prescriptive title.

Being aggrieved by that judgment, the 1st to 3rd Defendants have moved this Court, seeking leave to appeal on several questions of law.

On 29.05.2013, this Court having afforded a hearing to the parties, thought it fit and proper to grant leave to appeal against the judgment of the High Court of Civil Appeal, on several questions of law, as set out in paragraph 10(i), (ii) and (iii) of the petition of the Defendants, dated 18.02.2013.

The questions of law, that had been formulated by Defendants, as contained in sub paragraphs 10(i),(ii) and (iii) of their petition, are as follows:

1. Has the High Court of Civil Appeal erred and misdirected itself in law as regards a burden of proof in relation to the title of the Plaintiff?

2. Has the High Court of Civil Appeal failed to consider that the Learned District Judge has failed to investigate the title of the Plaintiff as per the provisions of the Partition Law?
3. Has the High Court of Civil Appeal misdirected itself on the question of whether the said property is *Paraveni* Property or not in view of the provisions of section 10(1)(a) of the Kandyan Law Declaration and Amendment Act?

At the hearing of the appeal, learned President's Counsel for the Defendants contended that with the death of *Singna* without a will, his ½ share entitlement to the corpus has become *Paraveni* property as per the statutory provisions contained in section 10(1)(a) of the *Kandyan* Law Declaration and Amendment Act. He further contended that, since the parties are subject to *Kandyan* law, if the Plaintiff were to succeed to that ½ share of the *Paraveni* property of his late father, he must first prove that he is the *'legitimate'* son of *Singna* by producing his birth certificate.

Learned President's Counsel, having referred to the evidence that indicate *Singna* and *Amangira* were in an associated marriage relationship with the mother of the Plaintiff Kiribindu, contended that therefore it was incumbent on the trial Court to properly investigate into the claim of title that had been laid before the trial Court by the Plaintiff. In determining the Plaintiff's entitlement to paternal inheritance, it ought to have inquired into the validity of the Plaintiff's parents' marriage and his legitimacy, by applying the relevant legal principles. It was submitted by the learned President's Counsel that the Plaintiff is not entitled to inherit any *Paraveni* property due to his

illegitimacy and the failure of the trial Court to investigate into that aspect of the title of the Plaintiff, despite being obligated to do so under section 25 of the Partition Act, tainted the judgment entered in his favour. Similarly, the judgment of the High Court of Civil Appeal, in holding the said erroneous judgment in affirmation, also had fallen into error and therefore the Defendants seeks that both these judgments be set aside.

Learned Counsel for the Plaintiff submitted that the contention of the Defendants on the legitimacy of the Plaintiff was raised for the first time in the High Court of Civil Appeal and had been made without a point of contest being raised on that question of fact and in the absence of any item of evidence in support of such a contention. She further submitted that the Respondents are now seeking to advance a new argument, which is based purely on the fact that the Plaintiff is without a birth certificate. She claimed that owing to this reason, the Plaintiff was unable to refute the position put to him by the Defendants that he cannot state clearly who his father was, as his mother *Kiribindu,* who admittedly had a polyandrous relationship with the two brothers *Singna* and *Amangira*.

She further contended that the mere absence of a birth certificate does not necessarily make the Plaintiff an illegitimate child. She also submitted that the Defendants, by making that submission, have attempted to 'confuse' the issue by interweaving the question of legitimacy into the question of paternity, by simply placing reliance on the inability of the Plaintiff to state as to who his father is, since he could not produce a birth certificate at the trial. According to learned Counsel these are two independent and sperate factors altogether.

In the circumstances, undoubtedly it would be a profitable exercise, that the applicable principles of *Kandyan* law on marriage and inheritance are identified and referred to at the outset of this judgment, which would then facilitate this Court in discharging the task of determining the several questions of law and related questions of fact, after undertaking a careful consideration of the material presented before the trial Court.

It is a well-documented historical fact that, in the *Kandyan* kingdom, there were instances of polyandrous marriage relationships, generally referred to as associated marriages or joint marriages, following a customary practice that was prevalent during the 18th and 19th centuries, generally between brothers of one family, who had opted to co-habit with one wife. The Legislature, by enactment of several statutory provisions contained in Ordinance Nos. 13 of 1859 and 3 of 1870, made it obligatory on all persons subject to *Kandyan* law to register their marriages. Only such registered monogamous marriages were conferred with legal validation, whilst enacting specific provisions to prohibit the aforesaid customary practice of contracting polyandrous and polygamous marriages as practiced by some of the inhabitants of the *Kandyan* provinces.

Sections 14 and 15 of the *Kandyan* Law Declaration and Amendment Ordinance No. 39 of 1938, defined the terms '*legitimacy*' and '*illegitimacy*' of children, depending on the fact whether the marriages of their parents were registered or not. Only the issues of a registered and thus 'valid' marriages are considered as legitimate. The legal impact on the children of such customary marriages, created by the enactment of these statutory provisions, is that the children who were born to parents with polyandrous marriages have thus become

illegitimate children along with the children of any unregistered, monogamous marriages which in turn had an adverse impact on their rights on paternal inheritance, in relation to *Paraveni* property. *Paraveni* property had been defined in section 10(1)(a) of the said Ordinance. That section made immovable property to which a deceased person was entitled to by succession to any other person who has died intestate as *Paraveni* property.

Learned Counsel for the Plaintiff had quoted from the text of ***Sinhala Laws and Customs*** by *H.W. Tambiah*, where the learned author states (at p.125) that " … *the children of such associated marriage were regarded as the legitimate children of all the associated husbands*." This had been the position under *Kandyan* law, as practiced in the kingdom, before the statute law had specifically altered its applicability. At one point of time, Courts were of the view that the legality of a marriage has no direct impact on the principles of inheritance of the *Kandyan* customary law, as practiced in the *Kandyan* kingdom, following the judgment of *De Sampayo* J, in the case of ***Raja v. Elisa***, reported in Modeler's *Kandyan* Law page 510, 1 S.C. Civ. Min, 27.05. 1913., which stated that "*British legislation has, no doubt, provided a uniform and compulsory form of marriage for the Kandyans, but the principles of inheritance to be found in the ancient Kandyan law remain unaffected*". Learned Counsel for the Plaintiff may have relied on the above cited quotation from the text of ***Sinhala Laws and Customs*** (supra), in view of this judgment.

The extended application of this statement, beyond the context in which it was stated, was subsequently restricted by a full bench, which had authoritatively laid down its determination, in the judgment of ***Kuma v. Banda*** (1920) 21 NLR 294. The contention that had been

advanced before their Lordships was "*… in spite of the Kandyan Marriage Ordinance, No. 3 of 1870, the mutual rights of inheritance between parents and children do not depend upon the question whether the union of the parents was registered as a marriage under that Ordinance, but rather upon the question whether that union was in accordance with the principles of Kandyan customary law*". In rejecting that contention, *Bertram* CJ made the following pronouncement in law, on the questions of validity of a *Kandyan* marriage and legitimacy of its issues, in view of the statutory provisions contained in the said Ordinances:

> *"Ordinance No. 3 of 1870 abrogates the old laws of marriage and makes registration the sole test of the validity of marriage and consequently of legitimacy. There was no necessity to state in express terms that such registration was to be the sole test of legitimacy. Illegitimacy is involved in the conception of an invalid marriage. Even if the Kandyan idea of illegitimacy was different, we are here dealing with an Ordinance of 1870, and must give the words used by the legislator the ordinary meaning that they bear in British legislation. That the Legislature intended to make legitimacy depend on registration is indicated by the provisions of sections 24 and 30."*

Thus, when the Plaintiff instituted the instant partition action in 1988, the law had already been clearly laid down by the superior Courts and therefore his right to paternal inheritance over any *Paraveni* property of his father, who died without leaving a will, is dependent on the former's legitimacy, which in turn depended on the validity of the marriage of his parents.

In the amended plaint it is asserted that upon the death of *Singna,* who enjoyed a ½ share of the corpus, his rights were devolved on his son, the Plaintiff. The Defendants, in their joint amended statement of claim, have denied this statement. Thus, it was incumbent upon the Plaintiff to prove what he asserted, in relation to his claim based on paternal inheritance.

The parties, at the commencement of the trial, have admitted that the title of the corpus was devolved on *Kirihapuwa*, upon acquisition of title through deed No. 11880 of 05.06.1885 from *Punchi Naide* and *Ukku Naide,* who they accept as the original owners. Thereafter from *Kirihapuwa,* who died intestate, his sons, *Singna* and *Amangira* inherited title to the corpus on equal shares. They also agreed that the rights of *Amangira* had devolved on the 2nd and 3rd Defendants through his heirs.

The Plaintiff had suggested four points of contest while the Defendants have suggested eight. The trial proceeded on the acceptance of these twelve points of contest. It is significant to note that there was no admission by the parties that they are subjected to *Kandyan* law nor have they suggested a point of contest on that issue.

The Plaintiff gave evidence on his behalf and the 1st and 2nd Defendants have given evidence on behalf of the Defendants. The real contest was between the Plaintiff and the 1st Defendant, since the devolution of title to the 2nd and 3rd Defendants, as averred in the amended plaint, was not contested by the 1st Defendant. The Plaintiff claimed that he is the only son of *Singna* and since the 1st Defendant was given in *Deega* marriage, she is not entitled to any paternal inheritance.

The position that was taken in the amended statement of claim by the Defendants, that the ½ share of *Singna* was sold at an auction and

had been bought over by *D.B. Welgedera* and *M.D. Banda* and the Plaintiff therefore had no right over the corpus, was neither raised as a point of contest nor was established by presenting evidence. The Defendant had not confronted the Plaintiff with it during cross examination either.

The Plaintiff, in support of his claim that the 1st Defendant was given in *Deega* had produced her marriage certificate which confirmed that fact. When she initially denied her blood relationship to the Plaintiff, she was confronted with her evidence before Court in case No. 2297/P, in which she had admitted him as her elder brother. The 2nd Defendant also had admitted that the Plaintiff, being the eldest in the family, is the elder brother of his mother, the 1st Defendant.

The trial Court, having proceeded to trial on the points of contest already accepted and, on the evidence, placed before it by the parties, pronounced its judgment in favour of the Plaintiff by allocating a divided ½ share of the corpus to him upon acceptance of his pedigree, and conferred the other divided ½ share of *Amangira* on the 2nd and 3rd Defendants, as per the same pedigree.

It is relevant to note here that the Defendants have challenged the allocation of ½ share to the Plaintiff only on the basis that he is unable to say whether his father was *Singna* or *Amangira* since he had no birth certificate to produce. The questions whether *Singna* and *Kiribindu* have registered their marriage, whether there is a marriage certificate in conformation of that marriage or whether the Plaintiff is the legitimate son of *Singna* was never raised before the trial Court by the Defendants by suggesting points of contest or taking up that position at least in their evidence. Owing to that reason the issue of legitimacy has not

been presented as a disputed fact in issue or was considered by the trial Court.

It is only to the High Court of Civil Appeal, that the Defendants have raised the question of legitimacy of the Plaintiff for the first time as a ground of appeal in their petition of appeal. Learned President's Counsel had relied on this solitary ground of appeal in his written submissions that had been tendered to the appellate Court. In that submission, he contended that the Plaintiff has failed to prove that he is the *'legitimate'* son of *Singna.*

In view of the contention had been presented by the Defendants before this Court, it appears that their contention is founded on the premise that it was incumbent upon the Plaintiff in the instant partition action, not only to prove that he is a son of *Singna* but also his legitimate son, which in turn dependent on the validity of his parents' marriage. Earlier on in this judgment, the validity of this contention was accepted.

It is evident from the proceedings that during his cross examination, the Plaintiff admitted that he had no birth certificate to produce in support of his assertion that his father is *Singna.* When it was put to the Plaintiff that, without a birth certificate, he is unaware as to the name of his father, he did not reply. Based on this item of evidence, it was submitted to this Court that, as *Singna* and *Amangira* were in an associated marital relationship, and such forms of customary marriages were not caught up with the term married "*according to law*", as stated in section 14 of the Ordinance No. 39 of 1938. In view of the illegality of such a polyandrous relationship, clearly the Plaintiff could not be considered as a legitimate son and therefore he had failed in establishing that fact.

In the absence of any point of contest raised by the parties before the trial Court, learned President's Counsel contended that it was up to that Court to apply the law and raise the question whether the Plaintiff is the legitimate son of *Singna,* as an additional trial issue. It is his submission that in view of the evidence, the trial Court should have dismissed the Plaintiff's action seeking partition.

In view of the submissions of the parties as referred to above, it is convenient to examine them under the following considerations.

a. whether the Plaintiff had sufficiently discharged his evidentiary burden under the instant partition action to prove that he is not only the son of *Singna* but also his 'legitimate' son and,

b. whether the trial Court, in view of the material placed upon it, is obligated to inquire into the legitimacy of the Plaintiff, under section 25 of the Partition Law, since the legitimacy is a factor which in turn would determine his rights on paternal inheritance to *Paraveni* property under the principles of *Kandyan* Law, over the corpus.

In dealing with the first segment of the contention as referred to above, it is the Defendant's position that the Plaintiff had failed to prove that he is *Singna's 'legitimate'* son. learned Counsel for the Plaintiff termed this contention as an attempt to 'confuse' Court since the Defendants, in their cross examination, have capitalised on the Plaintiff's inability to prove his relationship to *Singna* by producing his

birth certificate. They never raised the issue of his legitimacy on the premise that there is no proof of a valid marriage.

Thus, this Court first examine the relevant evidence on the point. Relevant section of the proceedings is reproduced below, which indicate the line of cross examination adopted by the Defendants.

It is noted that despite the fact the Plaintiff's father's name was mentioned in the amended plaint as Singna (සිංඤා), his name has been erroneously recorded in the proceedings as Singho (සිංඤෝ).

ප්‍ර : තමා කියන හැටියට අමංගිරා හා සිංඤෝ එක පවුලේම හිටියද?

උ : ඔව්.

ප්‍ර : ඒ ඉන්න කොට තමයි පොඩිනා ඉපදුනේ?

උ : මම ඉස්සෙල්ලා ඉපදුනේ.

ප්‍ර : ඒ අනුව තමන්ට කියන්න බැහැ නේද, තමංගේ තාත්තා අමංගිරාද සිංඤෝද කියා?

උ : සිංඤෝ කසාද බැඳලා සිටි නිසා, මගේ තාත්තා සිංඤෝ බව මට කියන්න පුළුවන්.

ප්‍ර : තමාට උප්පැන්නයක් තියෙනවා ද?

උ : මට උප්පැන්න සහතිකයක් නැහැ.

ප්‍ර : ඒ අනුව තමාගේ උප්පැන්නයට දාලා තියෙන්නේ, පියා වශයෙන් සිංඤෝද අමංගිරාද කියන්න තමා දන්නේ නැහැ නේද?

උ : උත්තරයක් නැත.,

The same position is reflected further down during cross examination of the Plaintiff:

,ප්‍ර : ඇත්ත වශයෙන්ම, තමාගේ පියා සිංඤෝ බව පෙන්වන්න ඔප්පු කරන්න උප්පැන්න සහතිකයක් නැහැ නේද?

උ : නැහැ..,

Before venturing into consider whether the Plaintiff had failed to discharge the evidentiary burn on him to prove that he is the *'legitimate'* son of *Singna,* it is relevant to examine the nature and the extent of the

burden of proof that had been imposed on a plaintiff in a partition action by reference to judicial precedents.

This Court, in the judgment of ***Abubuker v. Fernando*** (1987) 2 Sri L.R. 225 at p.230 stated that it is his burden to prove that he has rights in the land which he seeks to partition. The question as to how he should prove his title is answered in the case of ***Appuhamy v. Punchihamy*** (1914) 17 NLR 271 at 274 with the statement that he must "*prove his title from the original owner of the land*". He is also expected "*… to establish his pedigree by legally admissible evidence*" per ***Cooray et al v. Wijesuriya*** (1958) 62 NLR 158 at 163, and, in addition, must prove "*the title of those parties to whom he has given shares*" ***Mudiyanse v. Ranaweera*** (1975) 77 NLR 501 at 505. If he relies on any deeds, in proof of his title, then he must prove them by adducing proof of due execution per ***Sabaratnam et al v. Kandavanam*** (1956) 60 NLR 35 at 38, and should place "*clear proof as to how the executant of a deed was entitled to the share which the deed purports to convey*" per ***Fernando v. Fernando and Others*** (2006) 2 Sri L.R. 188 at 192. However, it is not essential for a plaintiff to prove that "*common possession is inconvenient*" (***Perera and Others v. Fernando*** (1956) 60 NLR 229 at 232).

Thus, it is amply clear that the evidentiary burden on a plaintiff in a partition action is different from his counterpart, who had instituted an action under section 5 of the Civil Procedure Code, since the former is bound to prove his own title as well as the title of each of the defendant, as described in his pedigree. This he is expected to do by placing legally admissible evidence, in relation to the points of contest suggested by the parties. His failure to do so, particularly in relation to establishing his own title, would invariably result in the dismissal of his action as it had been stated by *Layard* CJ in ***Mather v. Tamotharam***

Pillai (1908) 6 NLR 246 at 250"… *unless he makes out his title, his suit for partition must be dismissed*" as " *it has been repeatedly held by this Court that the District Judge is not to regard the partition suit as merely to be decided on issues raised by and between the parties to the suit, and that the plaintiff must strictly prove his title, and, only when he has done so to the satisfaction of the Court, has he established his right to maintain such action*."

The words used by *Layard* CJ, "*… the plaintiff must strictly prove his title, …"* in describing the Plaintiff's duty to establish his title to the commonly held property and the pedigree through which he seeks to prove that title had been considered by *Gratian* J in ***Karunatatne v Sirimalie*** (1951) 53 NLR 444 (at 445), in view of the judgment of ***Golagoda v Mohideen*** **(**1937) 40 NLR 92, where the said statement was emphasised, in following terms;

> "*In accordance with this principle, the Court should not enter a partition decree unless, if I may adopt Fernando J's phrase in Golagoda's case, it is " perfectly satisfied " that the rights of possible claimants who are not parties to the proceedings have not been shut out accidently or by design. Subject however to this important qualification, the fact remains that a partition action is a civil proceeding, and I do not understand the authorities to suggest that, where all possible claimants to the property are manifestly before the Court, any higher standard of proof should be called for in determining the question of title than in any other civil suit.*"

In the instant partition action, the Plaintiff relies on the principles of *Kandyan* law, in support of his claim to ½ share of the corpus, which had devolved on him through paternal inheritance, as well as to

disinherit his sister on the basis she had contracted *Deega* marriage. That being his assertion, he also must prove that he is the legitimate son of *Singna* as rightly contended by the learned President's Counsel for the Defendants.

The preferred method of proving that fact is to present the best evidence of his parentage, through presentation of his birth certificate. But he didn't. He told Court that he does not have one. The High Court of Civil Appeal was of the view that "*being a partition case makes any difference because it has been decided that there is no additional burden of proof in a partition case to prove births, deaths and marriages, the production of relevant certificates is not mandatory*."

Under these circumstances, should the partition action of the Plaintiff be dismissed upon his mere failure to tender the birth certificate, in proof of his relationship to his father, through whom he claims paternal inheritance?

In view of the evidence that had been placed before the trial Court, I do not think it should. The reasons are as follows.

The Plaintiff, when cross examined on his failure to produce the birth certificate, stated that he does not have one. He was 74 years old when he gave evidence in 1998 and therefore may have been born in or around 1924. It could well be that his birth may or may not have been registered as his parents were in an associated marital relationship at

the time of his birth. In the absence of a birth certificate and in the absence of both his parents to offer direct evidence of his birth, the Plaintiff had thereupon relied on the evidence of family relationship, elicited through his sister, the 1st Defendant. She admitted in her evidence that *Signa* is her father and the Plaintiff is her elder brother. The 2nd Defendant too had admitted in his evidence of the family relationship of the Plaintiff to his mother.

To insist upon production of a birth certificate, in proof of the parentage of a person in such circumstances, as in the instant action, seemed an unreasonable proposition, in view of the statutory concession granted to such a party. Whilst it is always prudent and advisable to insist on formal proof of a birth, marriage or a death, with the production of the applicable certification, being the best evidence in support of a family relationship that had become a relevant fact in issue, at the same time it is important to note that there are statutory provisions contained in the Evidence Ordinance, which are meant to cater for such situations, when a party is unable to produce best evidence in support of such relationship, by providing with an alternative method of proof.

In a situation where a party on whom the burden of proof lies to prove that fact in issue, but has no formal proof available in the form of best evidence, in support of a family relationship, could therefore rely on hearsay evidence, in proof of that relationship, subject to fulfilment of certain pre conditions and thereby, facilitating a Court to form an opinion as to the existence of such a relationship. It must be stressed

here that proof of such a family relationship by placing reliance on statements of others, in the absence of best evidence in proof of such relationships, could effectively be countered by another party by producing evidence counter to such a claim and thus diminishing the reliability and weightage attached to such statements.

Sections 32(5) and (6) of the Evidence Ordinance, in order to cater for such situations, have recognised certain instances to admit statements made by others as an exception to hearsay rule, and had accordingly permitted admission of such statements as legal evidence, in proof of "*any relationship by blood, marriage, or adoption*", made by a person who, although not available as a witness, but had special means of knowledge of that fact and made that statement before the dispute arose (per ***Cooray et al v. Wijesuriya***(1958) 62 NLR 158 at 160)**.** Section 50 of the said Ordinance, in turn, had allowed a Court to form an opinion as to the existence of such family relationship of one person to another, upon yet another's opinion or conduct.

The rationale behind the enactment of the statutory provisions that are contained in sub sections (5) and (6) of section 32 of the Evidence Ordinance has been described by *Weerasoorya* J in ***Wijesekera v. Weliwiligoda*** (1958) 61 NLR 133 at 137 as follows:

> "*The provision is an exception to the rule against hearsay and has been enacted primarily to meet a situation where the matter sought to be established involves remote facts of family history, which are incapable of direct proof. In the words of Lord Blackburn in* ***Sturla v. Freccia*** *(1879) 5*

> *A.C. 623 at 641 'that the ground is that they were matters relating to a long time past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice* ".

The approach that should be adopted by Courts, in considering such infirmities in the evidence adduced by a plaintiff of a partition action in proof of the 'original owner' of the corpus, has been clearly stated by *G.P.S. de Silva* J (as he was then) in ***Perera v. Perera*** (1986) 2 Sri LR. 208 at 211. In view of the fact 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*" his Lordship stated that:

> "*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*."

In instituting the instant action, the Plaintiff clearly averred that he is entitled to a divided ½ share of the corpus upon paternal inheritance, being the "*only male child*" of *Singna*. It is correct that the Plaintiff did not describe himself as the only '*legitimate*' son of *Singna.* But when he averred in the plaint that he is the "*only male child*" of *Singna* and claims paternal inheritance, what in fact he expects the Court is to consider that he is the only legitimate son of *Singna*.

The question that arises here is, did he prove that fact?

Having referred to the 1st Defendant's disqualification to any inherited rights from their father by stating that she was given in a *Deega* marriage, the Plaintiff had clearly relied on *Kandyan* law principles of succession to assert his rights on paternal inheritance and accordingly presented his amended plaint on that premise. Point of contest No. 2 had been suggested by the Plaintiff to the effect whether the rights of *Singna* should devolve only on the Plaintiff indicates that it had been his position that he is entitled to paternal inheritance being the only legitimate son of *Singna.*

In its judgment, the trial Court had answered the point of contest No. 2 in the affirmative and in favour of the Plaintiff but focused its attention more on the only dispute presented for its determination, namely, whether the 1st Defendant is entitled to any share of the corpus, either on paternal inheritance or by prescription. The Court had decided against her on paternal inheritance, in view of the fact that she was given in a *Deega* marriage as per the Copy of Entry of Marriage in the *Kandyan* Marriage Register Book (P3) and her own admission of that fact, in a previous Court proceeding. The Court also concluded that she had failed to establish acquisition of prescriptive title.

The evidence presented before the trial Court clearly indicate that the Plaintiff and the 1st Defendant are elder brother and younger sister respectively and that the 2nd and 3rd Defendants are the children of the

1st Defendant. In the Copy of Entry (P3) one *Galadeniyalage Ukkuwa* had been a witness to the marriage of the 1st Defendant and the name appearing in the plaint as the Plaintiff too is *Galadeniyalage Ukkuwa.* The Plaintiff is the eldest child among six siblings, while the 1st Defendant was the 2nd child. It was elicited from the birth certificate of the 1st Defendant (1V1) that her father is *Galadeniyage Singna.* None of the Defendants ever challenged the status of the Plaintiff, who instituted the instant partition action claiming paternal inheritance, by confronting him with the allegation that he had instituted the instant action by falsely claiming to be a son of *Singna* and therefore is a total stranger to their family. Nor did they suggest that he is a son of *Amangira.* On the contrary, the 1st and 2nd Defendants have admitted that the Plaintiff is the eldest child in the 1st Defendant's family, headed by her father *Singna*.

The 1st Defendant, when referring to the Plaintiff as her elder brother, was probably relying on what she was told of her relationship to the Plaintiff by her late parents, as she was born after the Plaintiff. Owing to that reason, she could not have known as to who his parents are, on her own. Obviously, their parents, in introducing the Plaintiff's relationship to the 1st Defendant, had relied on their own direct knowledge of that relationship. Thus, her admission that the Plaintiff is the eldest in her family is qualified to be admitted as legal evidence and to have acted upon under section 32(5) of the Evidence Ordinance. In view of these evidence, I am of the considered view that the fact the Plaintiff is *Singna's* son had been clearly established, even in the absence of a birth certificate in support of that fact.

Producing a birth certificate at the trial by the Plaintiff would not have significantly contributed to resolve the issue of legitimacy, as contended by the Defendants, since legitimacy is dependent on the validity of the marriage of their parents. The validity of a marriage between persons subject to *Kandyan* law had to be decided upon application of relevant legal principles in *Kandyan* law, in the absence of a marriage certificate. The refence to the status of the parents reflected as 'married' as indicated in the birth certificate, is not conferred with the status of '*prima facie evidence*' of the validity of such marriage, as per section 57 of Births and Deaths Registration Act, as amended.

Hence, the remaining part of his assertion, whether the evidence did point to the fact that he is the legitimate son of *Singna* needed to be considered.

Learned President's Counsel's contention, that there was no proof of a valid marriage and therefore the Plaintiff is an illegitimate child, is entitled to succeed only if the evidence available as to the nature of the marriage relationship of the Plaintiff's parents points only to an associated marriage, which they may have commenced sometime before 1924, the year the Plaintiff was born. Clearly by then such form of customary marriages could not have been registered and thus have become illegal, rendering any offspring of such unions, illegitimate.

But that is not the only evidence before Court. It transpired from the evidence that *Singna* and *Amangira* were initially in an associated marriage relationship with the mother of the Plaintiff. In addition, it also transpired from evidence that the said polyandrous relationship did not persist for long and *Singna* and *Kiribindu* have thereafter married, a fact even the 1st Defendant had accepted.

The Plaintiff, having admitted that there was an associated marriage relationship of his parents with *Amangira,* however had thereafter stated in his evidence that his father *Singna* had '*married*' (කසාද බැන්දා) his mother *Kiribindu*. The term "කසාද බැන්දා" is generally used in vernacular to denote a formal marriage and the terms "දික්කසාදෙ" or "කසාදෙ කටු ගෑවා" indicate its formal dissolution. The 1st and 2nd Defendants also have testified that the associated marriage relationship of *Singna, Amangira* and *Kiribindu* were disrupted at a subsequent stage as the two brothers have parted their ways after a shooting incident. This has happened when the 1st Defendant was a young child. In conformation of that fact, the 1st and 2nd Defendants state that the rights of *Amangira* were devolved on the three children whom he had considered to have fathered, while the Plaintiff, the 1st Defendant and another sister (who did not wish to claim any share of the corpus), were left to claim inheritance under *Singna.* The associated marriage would not have survived for that long. What is important is that both Plaintiff and 1st Defendant have clearly stated in their evidence that their parents, namely *Singna* and *Kiribindu,* have thereafter "කසාද බැන්දා".

The identical words used by the two contesting siblings to describe the status of the '*marriage*' of their parents, "කසාද බැන්දා", in itself indicate that they speak of this event with their own knowledge, a factor in line with their evidence that the associated marriage was disrupted after the youngest of the six children was born. Therefore, the subsequent '*marriage*' of *Singna* and *Kiribindu* must have taken place, when they were old enough to understand its significance. Their evidence on this matter does not create an impression that they learnt of the said '*marriage*' from others who had come to know from their

parents. This evidence also indicates that once the customary marriage was effectively terminated at a subsequent point of time, *Singna* and *Kiribindu* have thereafter '*married*' to form a monogamous relationship and treated the Plaintiff as well as the 1st Defendant and her sister, as children fathered by *Singna*.

However, neither party produced any certificate of marriage, which would have been the best evidence of such a marriage. The evidence that *Singna* and *Kiribindu* were married at a later point of time however, remains as a fact not assailed by any of the Defendants. The acceptance of that fact also explains as to why the Defendants did not raise an issue on legitimacy of the Plaintiff during the trial. It must have been an accepted fact among the family members. Instead, the Defendants only utilized the evidence of the associated marriage only to highlight that the Plaintiff, in the absence of a birth certificate, is unable to say who his father is, only after the trial Court had rejected the 1st Defendant's claim of prescription. However, the subsequent marriage of *Singna* and *Kiribindu* had altered the status of the Plaintiff, the 1st Defendant and the other sister as legitimate children of apparently a valid marriage.

In delivering the judgment of the Court, in ***Ukku v. Kirihonda*** (1902) 6 NLR 104 at 107 (decided after Ordinance No.3 of 1870), *Moncrieff* CJ stated:

> *"… I am inclined to think that subsequent registration does date back to the original beginning of the connection between the parties, although it is quite true that the provisions of section 30 for rendering legitimate children procreated before*

> *registration might suggest that the intention of the Legislature was different. I therefore think there was in this case, and was intended to be by registration under section 31 of the Ordinance, a validation of what had been before a void marriage-a validation dating from the time the void marriage was entered into, and a validation also of the legitimacy of the children.*

Legislative provisions reflecting this reasoning are found in the proviso to section 14 of the *Kandyan* Law Declaration and Amendment Ordinance and section 7 of the Marriage and Divorce (Kandyan) Act No. 44 of 1952 as amended.

Withers J in the judgment of ***Ahugoda Ukku Etana et al v. Dombegoda Punchirala et al*** (1897) 3 NLR 10 at 11, had applied the presumption of legitimacy to fill in a situation, where insufficient details of a *Kandyan* marriage that had said to have taken place prior to Ordinance No. 3 of 1870 was available before that Court. *In* ***Maniapillai v Sivasamy*** (1980) 2 Sri L.R. 214, *Sosa* J refers to the '*presumption of legitimacy*' that had arisen upon the evidence presented under section 32(5) and 50 of the Evidence Ordinance, by a statement contained in a deed that had been relied upon by a party in a *Rei Vindicatio* action, had effectively been rebutted by the opposing party by production of a marriage certificate containing a clear contrary position.

In this instance too, with the unqualified admission of the subsequent monogamous '*marriage*' of *Singna* and *Kiribindu* by the contesting parties, the presumption of legitimacy arises in favour of the three children said to have been fathered by *Singna*, including the Plaintiff and the 1st Defendant.

These factors made the legitimacy issue settles in favour of the Plaintiff as even if at the time of his birth, his parents were not married "*according to law*", by subsequent registration of their union, as indicative from the term "කසාද බැන්ද", made him a legitimate child of those parents.

Thus, in the instant partition action, the decision of the trial Court, to hold with the Plaintiff on the basis that he had established that he is the son of *Singna* and also the fact that *Singna* had later '*married*' his mother, is well justified, in view of the evidence available before it and especially in the absence of any evidence in support of a contrary view. The parentage of the Plaintiff is sufficiently established by him in proof of his entitlement to a ½ share, by eliciting the evidence of the subsequent 'marriage' of his parents, through the 1st Defendant, which in turn had established his legitimacy. Since the claim of '*marriage*' of his parents is admitted by the Defendants in their evidence, the trial Court is well justified in accepting his right to paternal inheritance to the ½ share of the *Paraveni* property, on the basis that he is the only legitimate son of *Singna*. The High Court of Civil Appeal too was of the view that the Plaintiff did establish that fact when it stated in the judgment that "*… the 1st Defendant as well as the Respondent being in agreement that Singna was married to Kiribindu and not Amangira makes it possible for the Court to find that both 1st Defendant and Respondent are natural heirs of Singna who was validly married to Kiribindu*".

In view of the above reasoning, it is clear that the High Court of Civil Appeal had correctly decided the solitary ground of appeal that had been presented before it by the Defendants, in challenging the entitlement of the Plaintiff, on the available evidence and in latter's favour.

The other contention presented before this Court by the Defendants, in addition to what had already been raised before the High Court of Civil Appel, is that the trial Court had fallen into error in its failure to frame an additional point of contest on the question of the paternity and legitimacy of the Plaintiff and thereby failed to fulfil the statutory duty to investigate the validity of the title, as imposed by section 25 of the Partition law. The question, whether the trial Court should have raised an additional point of contest under these circumstances, in the absence of such a point of contest suggested by a party, needed to be answered, in the light of the applicable principles of law as well as the relevant judicial precedents relating to the statutory duty imposed on an original Court under section 25 and the instances in which a trial Court could act under section 149 of the Civil Procedure Code.

In this context, it is helpful to refer to the statutory provisions contained in section 25(1) of the Partition law at this point.

Section 25(1) of the Partition law reads thus:

> "*On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the Court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made.*"

This Court, in the judgment of ***Sopinona v. Pitipanaaracchi & Others*** (2010) 1 Sri L.R. 87, had reiterated the collective reasoning of a long line of judicial precedents, which have described the scope of the duty that had been imposed on a trial Court under section 25, with the statement that" … *in a partition action, it would be the prime duty of the Trial Judge to carefully examine and investigate the actual rights and titles to the land, sought to be partitioned. In that process it would be essential for the Trial Judge to consider the evidence led on points of contest and answer all of them, stating as to why they are accepted or rejected*".

The statement of Court that "… *it would be essential for the Trial Judge to consider the evidence led on points of contest and answer all of them*", refers to an important aspect of the duty of a trial Court under section 25. Section 25 made it obligatory for the trial Court "*shall hear and receive evidence*", in support of the title of each party and shall also try and determine all questions of law and fact arising in that action in regard to the right, share and interest of each party. This Court had therefore expressed its view that a trial Court must investigate the title of each party, not by undertaking an investigation on its own terms, but "*on the evidence led on points of contest*". This aspect highlights the requirement that it incumbent upon the respective parties to suggest their points of contest, along the lines on which they are at variance with the facts and law, relating to the respective positions taken up by each party. Once the points of contest are settled and accepted by the Court, to place evidence in support as well as in its opposition, in support of their respective individual rights, shares and interests. In ***Juliana Hamine v. Don Thomas*** 59 NLR 546, it had been stated that (at p. 549) "*it is indeed essential for parties to a partition action to state to the Court the points of*

contest interne and to obtain a determination on them…". But the Court also added that however "*the obligations of the Court are not discharged unless the provisions of section 25 of the Act are complied with quite independently of what parties may or may not do."*

Hence arises the question, whether the trial Court should, in this particular instance, have framed a point of contest on the question of legitimacy on its own, in the absence of a point of contest to that effect, in its investigation of title of the Plaintiff.

It is accepted by the full bench decision of ***Peiris v. Perera*** (1906) 10 NLR 41 at 43 that the framing of issues is a "*judicial decision"* and such issue need not necessarily be arising out of pleadings, per *Bertram* CJ in ***Silva v. Obeyesekera*** (1923) 24 NLR 97 at 107. It is also accepted that the parties could frame additional issues before the pronouncement of the judgment, as stated in ***Mohammed v. Lebbe & Others*** (1996) 2 Sri L.R. 62 at 65. Why it is important to have all the relevant issues before the Court during a trial is best explained by a quotation from a judgment of the High Court of *Gujarat*, inserted by *Prasanna Jayawardena* J, in an unreported judgment of this Court (***Seylan Bank Ltd v. Epasinghe and two Others*** S.C. Appeal No. SC CHC 39/2006 –S.C. minutes of 01.08.2017). His Lordship had, cited the following statement of an Indian Judge with approval, in dealing with the scope of framing of issues in a trial Court:

> "*... issues are backbone of a suit. They are also the lamp-post which enlightens the parties to the proceedings, the trial Court and even the appellate Court – as to what is the controversy, what is evidence and where lies the way to truth and justice*."

Thus, it is seen that the parties have an important role in framing the issues on the relevant contest points, by assisting a trial Court, in identifying and suggesting the points at which the parties are at variance and contest and thereby enabling the Court to rightly determine the dispute presented before it. This assumes a greater significance in partition actions as the trial Courts "*shall examine the title of each party*".

Section 19(1)(a) of the Partition Law requires any defendant to file a statement of claim along with a pedigree showing the devolution of title, "*if he disputes any averment in the plaint relating to the devolution of tile*". The Defendants, in their statement of claim, have collectively sought the dismissal of the Plaintiff's action. They would have easily achieved their desired objective, if the legitimacy of the Plaintiff was taken up when they filed their statement of claim. This was the opportunity for the 1st Defendant to present an alternative pedigree by disqualifying the Plaintiff on the basis of his illegitimacy. But due to a reason best known to the Defendants, they did not. Even the 1st Defendant, who should have had sufficient knowledge of such a disqualification on the part of the Plaintiff to claim title on paternal inheritance, did not aver that important factual position in her statement of claim. Even at the late stage of the trial she could have either amended her statement of claim in line with that challenge or at least could have suggested a point of contest on that basis, when she elicited from the Plaintiff that he had no birth certificate to prove who his father is and their parents were living in an associated marital relationship with *Amangira*.

It is clear that the Defendants have mounted their challenge on the Plaintiff's assertion that he is the son of *Singna* only on the basis of the absence of a birth certificate and that his parents were in an associated marriage. Therefore, the Defendants contend that the trial Court should have acted on that evidence in fulfilling its duty to investigate title of the Plaintiff and thereupon should have applied the relevant legal principle by framing an additional issue as to the legitimacy, in determining the Plaintiff's entitlement. The Defendants added that since the trial Court had failed in that task, and the resultant error in the judgment made it untenable.

In relation to the question, whether the Plaintiff did establish that he is the legitimate son of *Singna,* I have already dealt with the evidence that were placed before the trial Court and the justifiability of the conclusion reached by the Courts below on that issue. The evidence highlighted by the Defendants points out that *Singna* was in an associated marriage relationship which may have made the Plaintiff an illegitimate child, but the evidence also points to the subsequent monogamous '*marriage*' of *Singna* with the mother of the Plaintiff, which had erased that disqualification with the operation of law. If the evidence presented before the trial Court *prima facie* points to the fact that the Plaintiff is the legitimate son of *Singna,* in the absence of any challenge and any evidence pointing to a contrary position, the Court is justified in acting on that evidence. Dealing with the burden of proof in civil cases, *Coomaraswamy* in his text of The Law of Evidence, states (Vol. II Book I at p. 293) that "*Generally the initial burden to prove a prima facie case is on the plaintiff. The Defendant adduces rebutting evidence. After the entire evidence is led, if the tribunal is not in a position to decide which*

version is true, the tribunal must hold that party on whom the burden lay did not discharge it. Otherwise, the burden recedes into the background."

In these circumstances, I am not inclined to agree with the contention advanced by the learned President's Counsel that the trial Court should have raised an additional issue on its own under section 149, in relation to the legitimacy of the Plaintiff, in the absence of any evidence, warranting such an investigation. In fact, it is observed that the trial Court had raised an additional issue, though not in explicit terms, based on the available evidence and made a determination on it, when it decided that the parties are governed by *Kandyan* law.

The Court had taken that step when none of the parties did suggest such a point of contest nor made an admission as to the applicability of a personal law. Nonetheless, the trial Court had correctly decided that the parties are governed by *Kandyan* law and accordingly determined the rights of the parties by applying those principles of law. That course of action is amply justified as the Plaintiff, as averred in his amended plaint, had presented both oral and documentary evidence in support of the point of contest whether he '*alone*' is entitled to paternal inheritance, and the evidence so presented has clearly revealed that the 1st Defendant had contracted a *Deega* marriage and therefore is not entitled to any rights based on paternal inheritance of *Paraveni* property.

The trial Court, at that instance, had acted in line with the principle laid down in the full bench decision of ***Attorney General v. Punchirala*** (1919) 21 NLR 51 at 58 where *De Sampayo* J stated that "… *no*

Court should refuse to apply statute law, even though there be no formal issue stated on the point. If necessary, the Court should, in pursuance of the provision of the Civil Procedure Code in that behalf, frame an issue before delivering judgment."

In relation to question of the Plaintiff's legitimacy, there was no evidence which tend to touch upon the legal invalidity of the monogamous '*marriage*' of *Singna* and *Kiribindu* and that particular fact of their '*marriage*' therefore remains as an accepted and uncontested fact between the Plaintiff as well as the 1st Defendant. There was no further probe by the 2nd and 3rd Defendants, when the Plaintiff and the 1st Defendant claim their parents have "**කසාද බැන්ද**" and left the question of their marriage on that. This aspect had already been considered earlier on in this judgment in detail.

Even if the trial Court were to raise an additional point of contest on the question of legitimacy, without any evidence, the Defendants did not offer an explanation in their submissions as to why the trial Court should limit that question of legitimacy only to the Plaintiff. The evidence is clear that both *Singna* and *Amangira* were in an associated marriage with *Kiribindu*. If Plaintiff is an illegitimate son of *Singna* because of that '*invalid*' marriage, so are the descendants of *Amangira* namely *Juwanis/Jeewa* and *Menika,* through whom the 2nd and 3rd Defendants have derived their title to a ½ share of the corpus, respectively. If that is the case, then they too are not entitled to any rights devolved on paternal inheritance over *Paraveni* property on their predecessors in title. The trial Court is duty bound to investigate the right, title or interest claimed by all the parties before it and the Defendants are not exempted from that investigation simply because

there was no contest by the Plaintiff in his pedigree as to their rights. The Defendants, without disputing that fact, cannot seek to impose an additional burden on the Plaintiff of proving that he is not disqualified to bring in the instant action for want of a valid title, in seeking to partition a commonly held immovable property.

The issue of legitimacy of the Plaintiff was introduced for the first time only at the appeal stage when it was taken up by the Defendants before the High Court of Civil Appeal by placing reliance upon a section of evidence relating to an associated marriage that had existed at some point of time while conveniently ignoring the rest, and thereby effectively denying the Plaintiff of any opportunity to put across his version, in countering that allegation. Strangely, there was no objection raised by the Plaintiff for raising this question of law mixed with facts at that stage.

Returning to the question whether a trial Court on its own should frame additional issues, it is accepted that section 149 of the Civil Procedure Code does provide for such a course of action to a trial Court. Section 149 reads that a "… *Court may, at any time before passing a decree, amend the issue or frame additional issues on such terms as it thinks fit*." However, in the judgment of ***Seylan Bank Ltd v. Epasinghe and two Others*** (supra), this Court considered the legality of a trial Court, framing issues on its own before the judgment, but without affording an opportunity to the parties to present additional evidence and to address Court. *Prasanna Jayawadena* J had quoted from the judgment of ***Hameed v. Cassim*** (1996) 2 Sri L.R. 30 where *Dr. Ranaraja* J, defined the scope of section 149 of the Civil Procedure Code, in the light of the judgment of ***Silva v. Obeysekara*** (supra) as follows:

> *"The provisions of section 149 considered along with the observation of Bertram C.J. certainly do not preclude a District Judge from framing a new issue after the parties have closed their respective cases and before the judgment is read out in open court. It is not necessary that the new issue should arise on the pleadings. A new issue could be framed on the evidence led by the parties orally or in the form of documents. The only restriction is that the Judge in framing a new issue should act in the interests of justice, which is primarily to ensure the correct decision is given in the case. It also means that the Judge must ensure that when it is considered necessary to hear parties to arrive at the right decision on the new issue, that they be permitted to lead fresh evidence or if it is purely a question of law, that they be afforded an opportunity to make submissions thereon."* (emphasis added)

His Lordship was of the view that "… *while a trial judge does have the jurisdiction to frame additional issues at the stage of the judgment, that is a discretion which would, usually, be exercised sparingly and only in the circumstances where it is necessary to do so to ensure that justice is done and the correct decision is reached by the Court*." If the issue of legitimacy of the Plaintiff was not raised by the Defendants as a relevant fact in issue with which they are at variance and the pleadings does not require framing of such an issue by the Court at the commencement of the trial, then there must be legally admissible evidence that had sprung up during the trial, upon which a trial Court could justifiably act under section 149 of the Civil Procedure Code, either to amend an already settled issue or to frame an additional one based on that evidence.

It is obvious that the issue of legitimacy of a party in a partition action is not a pure question of law but a mixed question of law and fact. This is because the validity of the contention of the Defendants is depend on the body evidence presented before the trial Court, concerning the parentage of the Plaintiff, the validity of the marriage of his parents and also of his legitimacy, upon the application of the principles of *Kandyan* law on that evidence. But the body of evidence that had been presented before the trial Court does not warrant it to act under section 149 and to frame an additional point of contest in relation to the legitimacy of the Plaintiff, in the presence of the evidence already referred to and absence of any other evidence pointing to a contrary view. I derive support in forming that view as it has been stated in ***Nagubai Ammal v. Shama Rao*** (1956) AIR SC 593 at p.598 (a judgment quoted in ***Seylan Bank Ltd v. Epasinghe and two Others***) that " *the true scope of the rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence …".*

In view of the contention of the Defendants that it was the responsibility of the trial Court to have investigated into the legitimacy of the Plaintiff in fulfilling its statutory duty under section 25 of the Partition Law, and the reasoning contained in the preceding paragraphs, I am of the view that the following observations of *Anandacoomaraswamy* J, made in the judgment of ***Thilagaratnam v. Athpunadan & Others*** (1996) 2 Sri L.R. 66 are equally relevant to the instant appeal as well.

> *"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 …"*

Having reached the last segment of this judgment, it is also relevant to examine the proceedings, in order to satisfy whether the parties have acted in collusion before the trial Court to supress the disqualification of the Plaintiff as highlighted by the Defendants only in their appeal.

If the Plaintiff, being an illegitimate child, born out of an unregistered union of persons subjected to *Kandyan* law, in fact has had that disqualification to inherit *Paraveni* property, it is reasonable to expect the 1st Defendant to seek dismissal of the partition action instituted by the former on that very basis. As already noted, she should have personal knowledge of such a disqualification which could have been utilized to challenge the Plaintiff's status in instituting the instant action. The 1st Defendant in her evidence had initially denied any blood relationship with the Plaintiff and also denied that she was given in a *Deega* marriage. When confronted with her evidence in another action as to her relationship with the Plaintiff and the production of an extract of the Register of *Kandyan* marriages only she

did admit the relationship. Given the obviously strained relationship with her brother, as indicated by her conduct before the trial Court, it is highly improbable for her to conceal such a disqualification on the part of the Plaintiff, if that really existed.

There was no discernible reason for the 1st Defendant to concede that her parents have 'කසාද බැන්ද., a factor in favour of the Plaintiff, who had offered a limited evidentiary support of his claim. But instead of highlighting the said latent disqualification of her brother to inherit ½ share of the corpus, the 1st Defendant had acted contrary to her own position by tacitly admitting the devolution of title as described by the Plaintiff through paternal inheritance and claimed only acquisition of prescriptive against the title acquired by him through inheritance. This is significant, when the Plaintiff, in his amended plaint, had raised a disqualification to the 1st Defendant's claim of paternal inheritance on the basis that she is not entitled to any rights over the corpus as she had married in *Deega.* No point of contest was suggested on the legitimacy nor did the Defendants make any submissions on that point before the trial Court.

Clearly the issue of the legitimacy of the Plaintiff was not raised at the trial, because of a private arrangement that existed between the contesting parties. This situation is more in line with the proposition that the Defendants, including the 1st Defendant, have accepted the Plaintiff as a legitimate son of *Singna* and have acted on that premise up to the institution of the instant partition action. Their joint statement of claim, that had been tendered to Court on instructions to their Attorney, who would have advised them of the applicable law, is indicative of the said family belief that the Plaintiff had no such disqualification to begin with.

In view of the above, I answer all three questions of law, on which leave was granted, in the negative and against the Defendants. Accordingly, the judgments of the High Court of Civil Appeal as well as the District Court of *Kurunegala* are affirmed.

Accordingly, the appeal of the Defendants is dismissed with costs both here and in the High Court of Civil Appeal.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, 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 appeal from the Judgement of the High Court of the Western Province sitting in Mount Lavinia.

S.C. Appeal No. 77/2016
SC/HCCA/LA No 683/2014
WP/HCCA/MT/67/2012 (F)
D.C. Mount Lavinia No. 6359/09/M

Freedom of High Seas (Pvt) Limited,
No.5, Soysa Mawatha,
Templers Road,
Mount Lavinia.

Plaintiff

Vs

Kardin International (Pvt) Limited,
No. 206, Attidiya Road,
Attidiya,
Dehiwala.

Defendant

AND BETWEEN

Kardin International (Pvt) Limited,
No. 206, Attidiya Road,
Attidiya,
Dehiwala.

Defendant-Appellant

Vs

Freedom of High Seas (Pvt) Limited,
No.5, Soysa Mawatha,
Templers Road,
Mount Lavinia.

Plaintiff-Respondent

AND NOW BETWEEN

Kardin International (Pvt.) Limited,
No. 206, Attidiya Road,
Attidiya,
Dehiwala.

Defendant-Appellant-Petitioner/Appellant

Freedom of High Seas (Pvt.) Limited,
No.5, Soysa Mawatha,
Templers Road,
Mount Lavinia.

Plaintiff-Respondent-Respondent

Before: Buwaneka Aluwihare, PC, J.
Murdu N.B.Fernando, PC, J. and
P.Padman Surasena, J.

Counsel: Dr. Kanag-Ishvaran PC with Nigel Bartholomeusz, Lakshmanan Jeyakumar and Aslesha Weerasekara for the Defendant-Appellant-Appellant

Chandaka Jayasundere PC with Rehan Almeida and Sayuri Liyanasuriya for the Plaintiff-Respondent-Respondent

Argued on: 01.07.2020, 14.07.2020, 29.07.2020 and 07.09.2020

Decided on: 20.05.2022

Murdu N.B. Fernando, PC, J.

This Appeal arises from the judgement of the High Court of the Western Province sitting in Mount Lavinia ("High Court") dated 17th November, 2014.

The High Court upheld the judgement of the District Court of Mount Lavinia delivered on 15th March, 2012 and dismissed the appeal filed therein by the aggrieved party, namely Kardin International (Pvt) Limited, the Defendant-Appellant-Appellant ("the defendant/appellant") before this Court.

Freedom of High Seas (Pvt) Limited, the Plaintiff-Respondent-Respondent ("the plaintiff/respondent") sued the defendant for a sum of US $ 10,000, being the outstanding costs incurred in the supply of fresh water to a ship in distress named "MV Marina One" ("Marina One") which was drifting off the South-East coast of Sri Lanka.

The position of the defendant was that at all times, it acted only as an agent of a principal whose identity was disclosed and hence had no liability towards the plaintiff for the sum sued.

The defendant is now before this Court, having obtained leave in March, 2016 on the following two questions of law, referred to in paragraph 28 (c) and (d) of the Petition.

(i) Has the High Court grievously misdirected itself in fact and in law in failing to consider that the Petitioner was acting as an agent only and not as principal to be visited with any liability at all?

(ii) Has the High Court completely misdirected itself in fact and in law in failing to consider that the learned District Judge has erred in answering Issue 2 raised by the Respondent in the affirmative?

> *Issue 2 raised by the plaintiff in the District Court, referred to in the 2nd question of law reads as follows:*
>
> *"2. On or about 08.10.2008, did the defendant enter into an agreement with the plaintiff for the supply of fresh water to the vessel 'MV Marina One' positioned in the high seas, east of Sri Lanka?"*

The docket bears out that this Court has also granted leave on two additional questions raised by the respondent. The said two questions [now numbered as (iii) and (iv)] are reflected below.

(iii) Is the questions as raised in paragraph 28 (c) and (d), on which leave has been granted by the Supreme Court, questions of fact and not questions of law?

(iv) If so, can the Supreme Court set aside the judgement of the Civil Appellate High Court and the District Court on questions of fact in accordance with the provisions of the High Court of the Provinces (Special Provisions) Amendment Act No 54 of 2006?

At the hearing of this appeal the respondent did not pursue the aforesaid two questions of law now numbered (iii) and (iv).

Hence, this Court would proceed to examine only the questions of law bearing number (i) and (ii) in this analysis.

Prior to considering the said two questions of law, I wish to briefly refer to the facts pertaining to this appeal, bearing in mind the paramount issue in this appeal, i.e., whether a contract came into existence between the litigating parties, on the relevant date.

01. On 08-10-2008, Dinesh Hensman of the defendant company received a telephone inquiry from Captain Jeya of Silverline Maritime Sdn Bhd of Malaysia, Managers of the vessel Marina One ("the manager") for supply of fresh water to MV Marina One, which was in distress.

02. The defendant thereafter contacted the plaintiff company engaged in various maritime activities and obtained a quotation of US$ 11,600, for supply of 200 MT of fresh water to the ship Marina One.

03. The correspondence between all parties to this arrangement was by telephone, telegraph and e-mails and upon approval of the quotation by the Malaysian managers of the vessel, plaintiff supplied the fresh water to the ship and a sum of US$ 11,600 was paid to the plaintiff.

04. The contention of the plaintiff was that a further sum of US$ 10,000 was due from the defendant, whereas the position of the defendant was that the total sum agreed was paid to the plaintiff.

05. The plaintiff sued the defendant upon the basis that the defendant entered into this contract in its individual capacity and the defendant agreed to pay the plaintiff, a total sum US$ 21,600 being US$ 5000 per day for the hire of the barge and US$ 1,600 for the supply of fresh water and out of which only a part payment of US$ 11,600 was made leaving an outstanding sum of US$ 10,000 to be paid to the plaintiff by the defendant.

06. The defendant contended, that it entered into this contract only as an agent and for a lump sum payment of US$ 11,600 and there was no consensus or agreement with regard to a daily rate as alleged by the plaintiff and that the agreed lump sum was paid in full to the plaintiff.

07. At the trial, Captain Ranjith Weerasinghe of the plaintiff company gave evidence and marked in evidence a series of e-mails and an invoice. For the defense, Dinesh Hensman gave evidence and heavily relied upon the phraseology 'as agents only' in

the e-mail, wherein the quotation of the plaintiff was submitted to the manager by the defendant and strenuously argued before this Court, that the defendant acted only in the capacity of an agent of a divulged principal and not as the principal as contended by the plaintiff.

08. The District Judge gave judgement for the plaintiff. The defendant appealed to the High Court and the High Court endorsed the findings of the District Court.

Having referred to the background of this appeal, let me now consider the two Questions of Law for which answers are sought from this Court.

(i) Has the High Court grievously misdirected itself in fact and in law in failing to consider that the Petitioner was acting as agent only and not as principal to be visited with any liability at all?

(ii) Has the High Court completely misdirected itself in fact and in law in failing to consider that the learned District Judge has erred in answering Issue 2 raised by the Respondent in the affirmative?

I wish to refer to the 1st question in relation to the principal parties in this appeal, for the better understanding of this matter. *viz*.,

Did the defendant Kardin International, the appellant before this Court, only act as an agent of a disclosed principal Silverline Maritime of Malaysia, when it entered into an agreement with the plaintiff Freedom of High Seas, the Respondent before this Court and thus, can the agent Kardin International be visited with any liability by the respondent Freedom of High Seas for the sum sued?

The 2nd question raised before this Court, pertains to the veracity of the answer given to issue number two raised at the trial. By the said issue the plaintiff pointedly queried,

*Did the defendant enter into a contract with the plaintiff on or about **08-10-2008,** for the supply of fresh water to Marina One, positioned in the high seas?*

Thus, based upon the said Questions of Law, this Court would determine the correctness of the finding of the trial court, pertaining to the role of the defendant. Was the defendant 'an agent' as contended by the defendant? Or in the contrary, was the defendant an independent contractor, acting in the capacity of a principal himself, who entered into the impugned contract on 08-10-2008 as contended by the plaintiff?

In order to ascertain an answer to the said query, I wish to look at this matter from two perspectives, the factual aspect and the legal aspect.

Firstly, the factual aspect; The e-mails marked and produced at the trial by the plaintiff, through its only witness Captain Ranjith Weerasinghe. Three sets of e-mails bearing the date of dispatch 08th, 09th and 10th October, 2008 were marked and produced at the trial.

The 1st e-mail **P1A** is dated 08-10-2008 and is sent by the defendant, addressed to Captain Jeya of Silverline Maritime of Malaysia, the manager of Marina One. It is dispatched at 4.02 pm copied to the plaintiff and reads as follows:

"Dear Capt Jeya,

Reference your telecom.
Understand vessel is located close to Great Basses about 200 miles south of Colombo.
Based on above we are quoting as follows:

- 200 mt fresh water	*- US$ 1600.00*
- Delivery charges	*- US$ 10000.00*
- Handling charges	*- US$ 1000.00*
- Barge/ Tank Operator	*- Freedom of High Seas*
- Payment	*- Tomorrow - 09/10/2008*
- Delivery	*-Vessel can sail from Colombo tonight/early morning hours and can be at Great Basses area around 09-10/10/2008 AGW basis you confirm in next 30 minutes.*

If you could give the exact location we will recalculate and advise if we can reduce delivery charges.

Pleased to hear,
Best Regards,
As Agents only."

By **P1B**, the manager [Silverline] at 4.18 pm responds to the defendant with copy to the plaintiff and requests bank account number in order to pass it to its owner for payment and also the estimated time of arrival [ETM] assuming they confirm within next 30 minutes.

By **P1C**, Captain Ranjith Weerasinghe of the plaintiff company responds direct to the manager and indicates it will take at least 24 steaming hours from Colombo to the position indicated in **P1A** and also the earliest, the plaintiff could move is day time, on 09-10-2008. This e-mail is dispatched at 5.45pm and copied to the defendant as well.

By **P1D**, the owners of the vessel responds to Captain Jeya [the manager] and the defendant, with copy to the plaintiff and confirms the offer. This e-mail dated 08-10-2008 is dispatched at 6.44 pm and states to arrange the supply ASAP [as soon as possible] and revert the vessel name and the contact vhf channel to inform master [of the distressed vessel]. It also hopes the charges can be reduced finally and that remittance will be arranged on 09-10-2008.

The aforesaid four e-mails, **P1A, P1B, P1C** and **P1D** dispatched on **08-10-2008**, *prima facie* appears to demonstrate that a contract was entered into between the parties referred to therein. Furthermore, the said e-mails point to the fact, that the contract was entered into on 08-10-2008, the material date referred to in issue two raised by the plaintiff at the trial.

The fundamental rudiments of a contract is 'meeting of minds' i.e., an 'offer' and an 'acceptance'.

Thus, from the said e-mails dispatched on 08-10-2008, it appears that **P1A** was the *offer* and **P1D** the *acceptance*. The offer or the quotation given was *'as agents only'* and was to supply fresh water for the consideration therein to a ship in distress and the confirmation was clear and specific and was unconditional.

P1C dispatched by the plaintiff indicates that the plaintiff was aware of the principal. It was a named and a disclosed principal and the plaintiff directly corresponded with the principal and informed the duration of the journey and the earliest time the plaintiff could leave. *i.e.,* 09-10-2008, day time [as opposed to 'early morning hours' referred to in **P1A** since the vessel was engaged in some work on the night of 08-10-2008]. This e-mail was followed by **P1D**, whereby the owner accepted the quotation. Thus, upon a plain reading of those e-mails, it is apparent that an offer was made and it was accepted on 08-10-2008, within 3 hours of the initial request.

But the question before this Court is to ascertain who were the parties to this transaction. Was it only the plaintiff and the defendant? Or were the manager and the owner of the distressed vessel also parties to this arrangement? If so, did the defendant only act as an agent or a conduit of the manager and the owner?

The next set of e-mails exchanged on **09-10-2008**, and marked in evidence as **P2A to P2G** sheds more light to this transaction.

The 1st intimation on 09-10-2008 is the e-mail **P2A** dispatched at 7.49am. It is by the manager. It directly addresses the plaintiff [as well as the defendant] as follows;

"Dear Captain Ranjith,

As per telecom just now with Mr. Dinesh, he advised that you will be departing this morning from Colombo. Trust all is cleared up now and vessel can depart as scheduled. Meanwhile, please find as attached vessel particulars."

The next e-mail **P2G** is also by the manager. It is dispatched at 9.24am and directly addresses the plaintiff. It is not addressed to the defendant. It gives the location of the vessel, that it's drifting north and that the vessel is upright.

The plaintiff follows up the said e-mails by dispatching **P2E** and **P2F** on **09-10-2008** at 10.08am and 11.08am addressed to the manager and copied to the defendant.

By **P2E** the 1st mail, Ranjith Weerasinghe [of the plaintiff company] responds, to the query in **P2A** in the following manner;

"Dear Gentlemen,

Vessel is still busy with pre-arranged supplies at Colombo out harbor and has more promised supplies …. We are trying our best to do this amidst all other scheduled work…."

By **P2F,** the plaintiff requests the current position of the distressed ship, whether it is at anchor or drifting and the weather conditions.

The defendant also responds to the manager's mail **P2A,** by **P2B.** It is dispatched at 8.19am and reads;

"Dear Captain Jeya,

May I confirm again that the barge will be departing Colombo by noon today. Will keep you updated.

Captain Weerasinghe meant was in spite of his busy schedule he will do the job."

This is followed by **P2C**. It is from Captain Jeya [manager] addressed to the defendant and the plaintiff and reads *"Thanks Mr. Dinesh appreciate efforts. Await bank details."*

The aforesaid e-mails exchanged on **09-10-2008**, indicate the correspondence between the manager, the plaintiff and the defendant and that the plaintiff company was doing its best to perform the task given, at its earliest. The said correspondence also reveal that the plaintiff's barge

could not leave Colombo on 08th night or 09th early morning as per the quote marked **P1A**, in view of pre-arranged work.

The plaintiff fortified its case by producing two more mails dispatched on **10-10-2008**, **P3A** and **P3B.** They were also marked through the plaintiff's sole witness in examination in chief.

P3A is a significant e-mail. It has a notation 'Urgent'. It is sent by the plaintiff to the manager and the defendant at 2.41 pm on 10-10-2008 indicating that the plaintiff's vessel, High Sea Challenge, [the barge with fresh water] left Colombo at 22.30 on 09-10-2008.

It further states, '*the plaintiff now learns the vessel has drifted further'* and the estimated time of arrival at the distressed ship would be greater. The e-mail **P3A** goes onto read as follows;

> *"As said in our message to Mr. Dinesh copied below here, as we had no fixed position of the drifting vessel our offer was a day rate of US$ 5000 based Colombo/ Colombo (initially thought to be 2 days). We received no confirmation although we have dispatched the vessel last night.*
>
> *We would appreciate if **you could send us** immediate confirmation of the said payment terms of US$ 5000 per day rate for the supply vessel for the delivery of water to **your** vessel Marina One*" (emphasis added)

It is observed that this e-mail has been dispatched by the plaintiff on 10-10-2008 at 2.41pm, 16 hours after the barge with fresh water left the Colombo port and was in the high seas. It specifically **requests the manager** to confirm the new payment terms for delivery of water to the vessel, Marina One, belonging to the owner, Silver Line Maritime Ltd.

The next mail **P3B,** dispatched on **10-10-2008** at 3.12pm appears to be the bone of contention between the parties. This mail is sent by the defendant to the plaintiff pursuant to **P3A** and 17 hours after the plaintiff's barge with fresh water left the Colombo port.

It reads as follows;

> *"Dear Captain,*
>
> *Many thanks your e-mail last. As discussed, we will compensate additional payment"*

The only other documents marked by Captain Ranjith Weerasinghe, [the plaintiff's sole witness in his examination in chief] were **P4** the location map of the distressed ship, **P5** the invoice sent on 13-10-2008 for *job no Marina, performed on 11-10-2008, wherein the customer's name is given as Master/Owner/Charterer/Agent of MV Marina or c/o Kardin International,* for a total

payable sum of US$ 21,600 [being charges for high seas delivery of fresh water US$ 20,000 plus cost of fresh water US$ 1,600] and **P6** the letter of demand.

The plaintiff relied on the above e-mails and the evidence of Captain Ranjith Weerasinghe [the plaintiff's sole witness] to establish the plaintiff's case presented before the trial court, i.e., the defendant's liability based upon the contract the defendant was alleged to have entered with the plaintiff on 08-10-2008, as articulated in issue two raised before the trial court and which forms the foundation of the 2nd question of law raised before this Court.

When Captain Ranjith Weerasinghe was cross-examined [vide district court proceedings dated 21st March, 2011] another e-mail dispatched by the plaintiff to the defendant was marked in evidence as **P3C**. It reads as follows;

> *"Dear Dinesh,*
>
> *Position of the vessel noted. As you can see her drift is 40 odd miles a day.* ***High Sea Challenge was doing only 7Kts this morning*** *due to coastal current. At 7Kts it takes 30 hrs to the initial position. Now with such a drift it may take longer to reach Marina One.*
>
> *We kindly request your clear confirmation that the payment is based on a day rate of US$ 5000* ***as we cannot stick to a lump sum rate*** *for voyage to catch a drifting vessel*." (emphasis added)

This e-mail marked in cross-examination denotes that upon undertaking the voyage and sailing, and whilst in the high seas [doing 7kts in the morning] the plaintiff is seeking a variation of the terms of the contract for the reason that the journey may take longer time than expected to reach the vessel in distress. The mail further states **we cannot stick to a lump sum rate** and requests confirmation that the payment is based on a daily rate of US$ 5000.

This **P3C** intimation by the plaintiff to the defendant does not give a date or a time but clearly indicates it is dispatched when the plaintiff's barge, High Sea Challenger was at sea on its way to the distressed vessel. There is no doubt that High Sea Challenger, the plaintiff's barge with fresh water left the Colombo port at 22.30 hours on 09-10-2008. (vide **P3A**)

The plaintiff's two mails **P3A [**addressed to the manager and the defendant] and **P3C** demonstrate that the plaintiff is seeking a variation of the terms of contract, after undertaking the journey and whilst on the high seas on its way to the distressed vessel. *i.e.,* on 10-10-2008 to be specific.

The issue number two raised before the trial court and the 2nd question of law raised before this Court, refers to a contract entered into on or about 08-10-2008, between the plaintiff and the

defendant. Hence, it is apparent from the above two mails [**P3A** and **P3C**] that the plaintiff is seeking a variation to the terms of contract entered into on 08-10-2008. The words '*we cannot stick to a lump sum rate* 'in **P3C,** to me clearly indicates the intention of the parties as at the time the contract was initially entered into on 08-10-2008.

Thus, the question before this Court is twofold. Can the plaintiff move to vary its terms of contract after undertaking the contract? If so, from whom should the plaintiff seek variation of the terms of the contract?

Whilst, the 1st question is purely a matter of law, the 2nd question is not. It is wound around the facts of the instant appeal *i.e.,* Is the plaintiff seeking the variation from the defendant company in his individual capacity? Or is it from the defendant company acting as an agent of the principal *viz*., the manager/owner of the distressed vessel Marina One?

Prior to considering the said question in greater detail, I wish to refer to a few more e-mails marked in evidence at the trial.

The District Court proceedings reveal that in addition to the e-mail **P3C** marked in cross-examination discussed above, certain other threads of e-mails [annexed to the plaint] were also marked in cross-examination through the plaintiff's witness. Those e-mails were marked as **P7, P8** and **P9** and have been dispatched in December 2008 two months after the matter in issue *i.e.,* delivery of water to Marina One took place. They refer to the correspondence between the manager of the distressed vessel, the plaintiff and the defendant to resolve this issue, prior to the plaintiff resorting to legal action. All of the said e-mails (**P3C, P7, P8** and **P9**) marked in cross-examination together with the other e-mails and documents marked in examination in chief (**P1** to **P6**) were led in evidence when the plaintiff closed his case.

However, there is one other e-mail to which the attention of this Court was constantly drawn to at the hearing of this appeal. It's marked **P10.** It was not produced through the plaintiff's sole witness, either in evidence in chief or cross examination. It was not led in evidence when the plaintiff closed his case [only **P1** to **P9** were led] or at the conclusion of the trial.

The District Court proceedings denote that the said **P10** mail was produced by the counsel for the plaintiff, when the defendant's only witness Dinesh Hensman was cross-examined. *i.e*., at the tail end of the trial. **P10** is from the plaintiff to the defendant. It is dated 09-10-2008 and dispatched at 1.14pm, said to be the time, the barge entered the Colombo port after its previous engagement and was prior to sailing with fresh water for the distressed vessel, the undertaken voyage.

It reads as follows;

"Dear Dinesh,

> *This is to keep you informed that our vessel is just entering port….We* ***cannot keep to a fixed price****. Our offer was a day rate of US$ 5000/= per day. At that time we presumed the steaming time was 24 hrs considering the rough position of basses. It is a moving target. So please discuss* ***with owners and confirm that the price was US$ 5000 per day…."*** (emphasis added)

Thus, relying upon this e-mail the respondent vigorously argued before this Court, that the variation of the terms of contract was sought not when the barge was at sea, but prior to sailing from the Colombo port. Whilst appreciating the above submission of the respondent, this Court is mindful of the fact that the proceedings before the District Court does not disclose that the said mail **P10** was either marked, produced or led in evidence at the trial, though tendered to the trial court together with the other documents. Nevertheless, this Court is aware of the Order made by the district judge, at the time the said document was first shown to the defendant when he was cross examined by the counsel for the plaintiff.

This Court is further conscious of the fact, that by this mail the plaintiff requests the defendant to **discuss with owners** and confirm the per day rate, for the reason that the plaintiff cannot keep to a fixed price. This mail is followed by the mails **P3C, P3A** and **P3B** in chronological order and in my view should be read together and not in isolation, to understand the relationship between the parties to this transaction.

Having referred to the evidence led before the trial court, let me now move onto consider the nexus between the plaintiff and the defendant. Did the defendant act as an agent of the owner/manager or did the defendant independently enter into a contract with the plaintiff?

Corollary, did the defendant having entered into an agreement with the owner/manager, sub-contract with the plaintiff to perform the functions, which the defendant undertook to provide to the owner/manager?

The answer to the above queries in my view, would rest entirely on the understanding and the interpretation of the term 'agent'. Thus, the pivotal issue to be examined in this analysis, is who is an agent? What are the duties and functions of an agent in a contractual relationship, especially when it pertains to a shipping transaction?

At the hearing the learned President's Counsel for the appellant drew the attention of Court to a number of judicial authorities to substantiate his assertion that an agent is not personally liable, when he enters into a contract on behalf of a principal.

Mr. Kanang-Iswaran PC. particularity drew the attention of the Court to the case of **Gadd v. Houghton and another 1876 (1) Ex Div. 357** and to the observations of James L.J. at page 359, wherein it was observed;

> *"When a man says he is making a contract **on account of** someone else…, he uses the very strongest terms of the English language affords to shew that he is not binding himself but is binding his principal."*

The attention of this Court was also drawn to Bankes L.J.'s statement, in the case of **Ariadne Steamship and Co v. James and Co. 1922 (1) KB 518 Law Journal 408 at page 412,** wherein it was observed;

> *"I think it is in the interests of the commercial community that a signature **as agents** should have a generally accepted meaning as a deliberate expression of intention to exclude any personal liability of the signatory…"*

In the aforesaid case, Atkin L.J. at page 416 agreeing with Bankes L.J. observed;

> *"…. The defendants in this case, who were conceded below to have signed **as agents** […….] to be in the form plural and not singular, were not personally liable on the contract…"*

The House of Lord's decision in **Universal Steam Navigation Company Limited v. James Mckelvie and Co. 1923 AC 492** was another authority relied upon by the appellant to justify his contention. In the said case [pertaining to a charter party] Viscount Cave L.J. at page 495 observed;

> *"If the respondent had signed the charterparty without qualification, they would of course have been personally liable to the ship owners, but by adding to their signature the words **as agents** they indicated clearly that they were signing only as agents for others and had no intention of being personally bound as principals. I can imagine no other purpose for which these words could have been added; and unless they had that meaning, they appear to me to have no meaning at all."*

Similarly, Lord Shaw in the aforesaid case at page 499 observed thus;

> *"But I desire to say that in my opinion, the appending of the word **agents** to the signature of the party to a mercantile contract is, in all cases, the dominating factor in the solution of the problem of principal and agent… the appending of the word*

agent *to the signature is conclusive assertion of agency, and a conclusive rejection of the responsibility of a principal, and is and must be accepted in that twofold sense by the other contracting party."*

Responding to the aforesaid submissions, Mr. Chandaka Jayasndere P.C for the respondent relied on **Sealy and Hooley on Commercial Law- Text, Cases and Materials** [3rd ed] and drew the attention of Court to page 163, wherein it states;

firstly, that the liability of an agent depends on the objective intention of the parties and it is axiomatic to say that each case turns on the construction in its own context and having regard to the whole of its terms; and *secondly,* that generalization as to the effect of particular words and phrases is dangerous and therefore, certain general guidelines should be followed.

The respondent quoting **Sealy and Hooley** chapter and verse, went onto submit, that if an agent signs the contract in his own name he will be deemed to contract personally unless he can rely upon any term of the contract which plainly shows he was contracting as an agent and that the signature is merely a description and not a qualification of his personal liability, unless a contrary intention can be established from the whole of the contract or from the surrounding circumstances.

The learned counsel also relied upon the below mentioned observations of Brandon J. in **Bridges and Salmon Ltd v. The Swan (Owner) 'The Swan' [1968] 1 Lloyds Rep 5** to buttress his contention, that in the instant appeal the defendant is personally liable for the sum sued.

The said observation is as follows;

"…Where, as in the present case, the contract is partly oral and partly in writing the intention depends on the true effect, having regard again to the nature of the contract and the surrounding circumstances of the oral and written terms taken together" [vide page 12]

On the other hand, the learned counsel for the appellant whilst vigorously relying upon the House of Lord's observations in the **Universal Steam Navigation Co.,** and other decisions referred to earlier drew the attention of this Court to the basic principles of agency with regard to contracts by agents, as explained in **Friedman's Law of Agency** [5th ed] at page 187, which reads thus;

"A 'named' principal is one whose name has been revealed to the third party by the agent. In such circumstances the third party knows that the agent is contracting as an agent, and knows also the person for whom the agent is acting.

A 'disclosed' principal is one whose existence has been revealed to the third party by the agent, but whose exact identity remains unknown. The third party knows that the agent is contracting as an agent, but he is unaware of the name of the principal.

In both the foregoing instances the third party knows that he is not contracting with the agent personally, but with another person through the agent…"

Countering the aforesaid submissions, the counsel for the respondent drew the attention of this Court to **Cheshire, Fifoot and Furmstons Law of Contract** [15th ed] at page 602, which states,

"The question some time arises whether a man has acted as an agent or as an independent contractor in his own interest. The latter is a person who is his own master in the sense that he is employed to bring about a given result in his own manner and not according to orders given to him from time to time"

The learned counsel in his submission also referred to **Commercial Law by Roy Goode** [3rd ed] and drew the attention of Court to a foot note in page 176 which states;

"But it is difficult to be dogmatic about any particular form of words, for so much depends on the context and on the commercial understanding of the words used. So 'as agent' has sometimes been held sufficient to indicate a representative capacity and sometimes not."

The said net conclusion in the text book, the counsel argued, is based on the authority of **Universal Steam Navigation Co**., the House of Lord's decision the appellant is heavily relying upon to put forward the contention, which he submitted enhances the situation such as the instant appeal, where the agreement is created by way of written as well as oral communication.

Therefore, the respondent contended, merely because the appellant used the word "an agent" in **P1A**, that itself does not establish that the defendant was an agent. Thus, the respondent narrowed down its argument to focus on **P3B** and to pin down the responsibility on the defendant. The counsel further contend since the plaintiff was not privy to **P1A,** and it originated from the defendant, that the said contract is independent and made subsequent to the initial contract, which was not in writing. He went onto argue, that the said oral agreement the defendant contracted with the plaintiff, was in its personal capacity and entered into independent to the principal and therefore emphasised profusely that the defendant did not act as an agent as contended by the appellant.

However, upon perusal of the documents tendered to the trial court, especially the e-mails, **P1A, P1B, P1C, P1D, P2A, P2B, P2C, P2E, P2F, P2G, P3A, P3B, P3C, P10** and the surrounding circumstances, the contention put forward by the respondent does not stand to reason or merit and to my mind seems improbable and unacceptable.

The case presented by the plaintiff before the trial court begins with **P1A**, which contrary to the assertion by the respondent before this Court, the plaintiff was privy to, as well as to the rest of the e-mails, which were either originated or addressed to or were copied to the plaintiff.

It is observed by this Court that by **P1C, P2E, P2F and P3A,** the plaintiff directly communicates with the manager and by **P2A** and **P2G,** Captain Jeya of Silverline [the manager] communicates and directly writes to the plaintiff. In fact, **P2G** is only addressed to the plaintiff and not even copied to the defendant.

Further, this Court observes that by **P3C** and **P10,** two mails which the plaintiff did not mark and produce in examination in chief, the plaintiff unequivocally informs that ***'it cannot stick to a lump sum rate'*** and moreover, in **P10** pleads with the defendant, to ***'discuss with the owners and confirm'*** that the price was US$ 5000 per day, for the reason that the plaintiff cannot now keep to a fixed rate.

Another noteworthy factor that this Court observes is that the invoice **P5**, issued by the plaintiff on 13-10-2008 to the defendant, denotes the '*client as master/owner/charterer/agent of MV Marina*.' This notation by the plaintiff gives credence to the fact that the principal was very much known and disclosed and that the plaintiff was aware that the defendant acted as an agent.

The judgement of the district court does not refer to or analyze the e-mails **P1A** to **P1D, P2A** to **P2G, P7** to **P9** referred to above, except to observe that the plaintiff's sole witness Captain Ranjith Weerasinghe in his evidence stated that **P1A** never originated from him. The district judge went on to observe that since the mail **P3B** dispatched on 10-10-2008, which read '*we will compensate additional payment'*, follows **P10, P3C** and **P3A,** that the plaintiff and the defendant were the only parties privy to the contract of supplying fresh water and went onto conclude *'that the defendant has taken the contract from the managers of Marina and entered into a different contract with Captain Weerasinghe which the defendant has not honored as promised'.* In my view, this finding of the district court is conjecture and is based upon surmises and does not stem from the issues raised nor founded on any evidence led at the trial and for that reason and that reason alone is devoid of merit and reasoning.

Furthermore, the judgement of the district court does not analyze or examine the significance of the date of the contract 08-10-2008, referred to in issue two raised before the trial court. This is the day on which the e-mail **P1A** was dispatched, referring to the quotation of the plaintiff.

As discussed earlier, by **P1D** dated 08-10-2008, the owners of Marina One accepted the said quotation, wherein the delivery charge was US$ 10,000 and the delivery date was 9th/10th October 2008. The plaintiff was privy to both **P1A** and **P1D** dated 08-10-2008 and did not raise any concerns with regard to the matters stated therein, especially the fact that the 'delivery charges was US$ 10,000 or that the delivery charges were erroneously stated and or ought to be a daily rate and not a fixed sum as stated in **P1A**.

More over the district judge failed to examine and comprehend the effect of the e-mails **P2A** to **P2G** produced by the plaintiff wherein the plaintiff [upon being informed by the manager of the location of Marina One, that its upright and drifting] by **P2E,** clearly indicated that although the vessel is busy with pre-arranged work, '*we are trying our best to do this amidst all other scheduled work'*. Even at this stage, the plaintiff did not raise any query or issue with the manager and or the defendant, with regard to the delivery charges or that its quotation was only for a day rate and not a fixed or a lump sum rate, as was contended before the trial court.

It is also observed that the trial judge not only failed to see the significance of the date 08-10-2008 in **P1A, P1B, P1C** and **P1D** but also failed to see the significance of the said date *viz-a-viz*, 10-10-2008 the date referred to in the e-mails **P10, P3C** and **P3A** by which the plaintiff sought a variation of the terms of contract.

Similarly, the trial judge failed to examine and consider the following factors referred to in the mails. Firstly, the importance of plaintiff's request in **P10**. i.e., *'we cannot keep to a fixed rate…. so please discuss with owners and confirm that the price was US$ 5000 per day'*. Secondly in **P3A** the plaintiff's statement, *'our offer was a day rate (initially thought to be two days)'* and thirdly in **P3C,** the plaintiff's pleading, '*we cannot stick to a lump sum rate'*.

Clearly, the said e-mails **P10, P3C** and **P3A** were dispatched not on 08-10-2008 the date specified in issue two raised before the trial court, but thereafter *i.e.,* on 10-10-2008. By the said e-mails a **variation of the initial terms of contract** was sought. The trial judge failed to see the significance of the variation sought on 10-10-2008 *viz-a-viz* 08-10-2008 the date referred to in issue two raised before the trial court. Moreover, the trial judge failed to consider the request or the variation, the plaintiff sought of the initial terms of contract, when in simple language the plaintiff pleaded with the defendant to **discuss with the owners** and confirm the new rate.

Hence, to overlook and or disregard the significance of the date of the initial contract and the date on which the variation of terms of contract was sought, as well as the failure to consider the party from whom the concurrence was requested, namely the 'owner' and thereafter to conclude that the defendant and not the owner is solely liable for the additional payment, in my view is a wrong inference arrived by the trial judge. The said finding is thus devoid of merit, misconceived and amounts to a complete misdirection of the law.

The high court, upheld the district court judgement. In the impugned high court judgment reference is only made to the e-mails referred to in the judgement of the district court itself. It does not consider nor evaluate the evidence led at the trial. It does not independently examine the numerous documents marked by the plaintiff itself at the trial, in order to establish its case that the *defendant is solely liable* for the additional payment and not the owners of the ship in distress.

In a very short judgement, the judges of the high court come to the conclusion that since **P3B** '*does not state, he* [i.e., the writer] *is agreeing on behalf of the owner or agreeing to make additional payment as agent',* that the '*defendant acted as an independent contractor'* and that *'the plaintiff's communication with the owner or manager of the vessel is no relevance to prove that the defendant was acting as an agent'*. This reasoning too, in my view is devoid of merit. The high court appears to view **P3B** out of context and through a narrow lens, without looking at the bigger picture i.e., **P1** to **P10** which is the case presented by the plaintiff itself at the trial. The high court also failed to see the significance of the wording, especially the term **we** in plural form, in **P3B**, i.e., *'As discussed,* ***we*** *will compensate additional payment.'*

Moreover, it is observed that the district court and the high court failed to analyze the legal consequences that flow from the documents marked in the instant matter, especially the rudiments of a contract, *i.e.,* the offer and the acceptance, date of the contract, consideration, variation of the terms of a contract and specifically the significance of an agent and the law governing agency relationship *et al* but makes a sweeping statement, that the matter in issue is an 'independent contract' between the plaintiff and the defendant.

Similarly, the trial judge failed to see the significance of the two e-mails **P3C** and **P10,** which for reasons best known to the plaintiff, were neither referred, marked nor produced through the plaintiff's sole witness in examination in chief. Whilst **P3C** was marked in cross examination of the plaintiffs only witness, **P10** was marked when the defendant was cross examined. By the said two mails the plaintiff specifically informs that it '***cannot stick to a lump sum rate*** *and to* ***discuss with the owners*** *and confirm that the price was a day rate, because it cannot now keep to a fixed rate.'* It is ironic that the district judge and the judges of the high court thought it fit to completely ignore the said evidence and failed to consider, examine or evaluate same, when coming to its finding and conclusion.

The aforesaid words in **P3C** and **P10** in my view, and especially the words '**discuss with the owners'** clearly denotes that the plaintiff unequivocally sought a variation of the terms and conditions from the owners, *i.e.,* a variation of the terms with regard to the delivery charges US$ 10,000, initially agreed between the parties on 08-10-2008. This gives credence to the fact that the contract entered on 08-10-2008 evinced by **P1A** and **P1D** was for a lump sum contract and that it was entered into between the plaintiff and the owner/manager of the distressed ship, acting through an agent, *i.e.,* the defendant.

Thus.in my view, the case before us is a classic example of an agency relationship, where the principal is named and disclosed and the plaintiff cannot shy away from such fact.

This position and understanding is further strengthened by **P3A.** In **P3A** dispatched on 10-10-2008 on urgent basis, the plaintiff addresses the manager directly and says, '*as said in our message to Mr. Dinesh* [of the defendant company] *as we had no fixed position of the drifting vessel, our offer was a day rate of US$ 5000 based Colombo/Colombo* ***(initially thought to be 2 days)***. *We received no confirmation…We would appreciate* ***if you could*** *send us immediate confirmation…"*

The said communication, in my view, especially the *words 'as said in our message to Mr. Dinesh', 'we received no confirmation,' and 'we appreciate if* ***you*** [the manager] *could send us immediate confirmation'* clearly denote that not only the principal was known and disclosed, but the plaintiff had direct communication with the owner/manager. It also demonstrates that on 10-10-2008, the plaintiff unequivocally requested the manager for variation of the terms of the contract, which were initially agreed and decided upon on 08-10-2008 between the owner/ manager and the plaintiff.

In my view, the aforesaid e-mails should be considered, in the light of the issue bearing number two, raised by the plaintiff before the trial court *i.e.*, with regard to the date of the contract being 08-10-2008 and having in mind that the 2nd question of law raised before this Court is also founded on the same premise.

P10, P3C and **P3A** further denotes, that the plaintiff is seeking an amendment and or a variation or an enhancement of the initial terms of contract entered on 08-10-2008, with regard to the consideration and or the amount initially agreed to be paid for services provided, as a lump sum payment. The variation is to convert the consideration to a per day rate for the reasons stated therein *viz.*, it cannot now keep to a fixed rate. On 10-10-2008 by **P3B** the defendant acting in the capacity of the agent circumscribed to the said request, by stating *'we will compensate additional payment'*. The said wording in **P3B** in my view should be looked at and analysed taking into consideration the bigger picture and specifically the manner and circumstances of this case and not in isolation as done by the district court and the high court.

Hence, in my view, the agreement and or the consensus to vary the terms of contract in order to make additional payment rests and or lies entirely on the owner/manager of Marine One. It does not lie with the defendant, who only acted in the capacity of the agent of the owner/manager of Marina One. In coming to this finding, I am guided by the well-known legal principle that an **agent is not personally liable when he enters into a contract on behalf of a disclosed and named principal.**

I have also considered the exhaustive submissions and the numerous texts, authorities and material relied upon by both parties pertaining to an agent and the agency relationship. I do not think it is necessary for this Court, at this juncture to enter into an academic exercise in analysing the legal texts and authorities referred to by the parties with regard to principles of contract and agency and to come to a finding in respect of duties and liabilities of an agent or the merits and demerits of the submissions made by the appellant and the respondent.

Suffice is to state, that the cases referred to by both counsels, are land mark judgements in the regime of shipping and maritime law. The observations made by the Lordships and the learned judges of the United Kingdom in the said cases are without any exception illuminating and enlightening. Whilst appreciating that the findings and the observations therein have persuasive value in our legal system, the judicial dicta therein should be looked at not in isolation but in the light of the hierarchical court structure of the United Kingdom. Hence, I wish to examine the cases referred to by both parties in the said perspective.

The **Swan case**, referred to and relied upon by the respondent is a decision of the Admiralty Court of the Queen's Bench Division (a court of first instance), whereas the **Gadd case**, referred to by the appellant is a decision of the Exchequer Chamber, an appellate court, decided in the year 1876. Similarly, the **Ariadne Steamship Co. case**, [also cited in 1922(1) KB 518] referred to by the appellant is a case of the Court of Appeal of the United Kingdom. The appeal preferred against the judgement of the said **Ariadne case** was to the House of Lords and is reported to as the **Universal Steam Navigation Co. case,** which was relied upon by both the appellant and the respondent to substantiate its arguments.

In the said background, the observations made by Viscount Cave L.J. and Lord Shaw of the House of Lords, in the **Universal Steam Navigation case, [**referred to earlier at pages 13 and 14 of this judgement] in my view, have greater persuasive precedent than the rest of the dicta relied upon by the parties. Their Lordships observations, that the word 'agents' indicate clearly and precisely that the party so signs,' *signs as agents for others and not to be personally bound as principal'* and also the word 'agent' is *'conclusive assertion of agency and a conclusive rejection of the responsibility of a principal and is and must be accepted in that twofold sense by the other contracting party'*, have a great importance with regard to matters pertaining to shipping and shipping transactions.

I am mindful, that the observations in the **Universal Steamship Co. case** is in respect of a 'Charter Party' and the instant appeal is not and is in respect of providing emergency supplies for a ship in distress. Nevertheless, I am of the view, that the legal principles that govern, in either situation are similar. If a party signs a contract in the capacity of an agent, the agent is not personally liable and the liability falls fairly and squarely on the principal and the principal alone.

Thus, I am of the view that in the instant appeal, the use of the word 'agent' in **P1A**, clearly indicate that a principal existed. The plaintiff was privy to this document and was aware of the principal. Moreover, in view of the e-mail correspondence the plaintiff itself had with the said principal, who was named and disclosed, the liability for all acts and matters executed and done, rests entirely with the principal Silver Line Maritime Malaysia, the owner/manager of the shipping vessel Marina One.

When the principal is revealed and also named and disclosed, no responsibility lies upon an agent. Appending and the use of the word 'agent' with regard to an executing party in a contract or agreement is the dominating factor in deciding the relationship between the principal and agent. Significantly, the guiding light upon which a trial court should base its findings is the intention between the parties at its outset. Hence, undisputedly, the words in **P1A** have a greater bearing in deciding this appeal.

Thus, in the instance appeal, my considered view, is that the defendant company only acted in the capacity of an agent of a disclosed and named principal. Hence, there is no liability that can be attributed to the agent, Kardin International (Pvt) Limited, the appellant before this Court, to make good the additional payment of US$ 10,000 as pleaded by the plaintiff before the trial court.

The high court and the district court, in my view grievously misapprehended and misdirected itself, in fact and in law, in failing to consider that the defendant acted only in the capacity of an agent and cannot be sued to recover monies due and owing from the principal. Therefore, in my view, no liability can be pinned upon or visited upon the agent, the appellant before this Court, when the principal is named and disclosed. Furthermore, the defendant in any event cannot be considered as a principal as held by the lower courts.

In the said circumstances, I answer the **1st question of law** raised before this Court in the affirmative and in favour of the appellant.

The **2nd question of law**, as stated earlier, stems from the same facts and understanding as well as the principles and law governing agency relationships. As discussed in detail in this judgement, the agreement entered with the plaintiff on 08-10-2008 by the defendant, for the supply of fresh water to the vessel in distress 'Marina One' positioned in the high seas off the coast of Sri Lanka, was made in the capacity of an 'agent' and specifically as an agent of a disclosed and a named principal. Similarly, the defendant did not enter into any contract with the plaintiff as a principal as was contended by the plaintiff.

Moreover, the issue bearing number two raised by the plaintiff, speaks of the initial agreement dated 08-10-2008. It does not refer to nor contemplate the subsequent variation sought by the plaintiff, vide **P10**, **P3A** and **P3C**.Nevertheless, the trial judge emphasised its finding based

only on the said documents **P10**, **P3A** and **P3C** which were neither in the offing nor in existence on 08-10-2008 when the initial understanding was reached and a contract was formed and executed by and between the parties, namely, the plaintiff and the defendant on behalf of the owner/manager of Marina One.

Therefore, I am of the view, for reasons more fully discussed in this judgement, that *issue two* raised at the trial could not have been answered in the affirmative by the trial court. Hence, in my view, the said issue was erroneously answered in favour of the plaintiff.

The district court judgement together with the answer to the afore stated *issue two* was upheld by the high court. Thus, in my view, the high court too was in error in upholding the judgement of the district court, upon the basis and reasoning discussed above.

Hence, I answer the **2nd question of law**, that the high court misdirected itself in fact and in law in failing to consider that the district judge erred in answering the said issue bearing number two, raised by the plaintiff which crystalised the grievance of the plaintiff in the affirmative and in favour of the appellant.

The **3rd and 4th questions of law** raised by the respondents, when Leave to Appeal was granted by this Court, were not pursued before us, at the hearing. However, since the parties in the written submissions filed subsequent to the hearing of this appeal have made reference to the said two questions of law, I wish to briefly refer to them, at this stage.

The said two questions of law have been formulated upon the basis, that the 1st and 2nd Questions of Law raised by the appellants are not pure questions of law but are questions of fact and that in view of the provisions of section 5C of the **High Court of the Provinces (Special Provisions) Amendment Act No 54 of 2006** that the Supreme Court cannot set aside the judgement of the Civil Appellate High Court and the District Court on questions of fact.

In order to substantiate the said position, the respondent submitted that according to the aforesaid provisions of section 5C, when an appeal lies directly to the Supreme Court, with leave of the Court first had and obtained, the leave requested by a party aggrieved *shall be granted by the Supreme Court, where in its opinion the matters involve a substantial question of law or is a matter fit for review by such Court.*

The learned counsel further submitted that, when interpreting the word 'fit for review' referred to above, it should be considered with the *ejusdem generis* principle of interpretation and it must be only matters relating to issues of law and not matters relating to issues of fact. He also submitted that the two questions of law raised by the appellant are questions relating to facts and more so, the manner in which the trial judge and the high court looked into and interpreted same.

Thus, he contended that the said two questions of law should be answered in favour of the respondent.

Countering the said argument, the learned counsel for the appellant submitted that it is trite law that mistakes of fact have been grounds for setting aside judgements of lower courts and drew the attention of this Court to the observations of **Kennuman S.P.J. in Carthelis Appuhamy v. Siriwardena et al 49 NLR 529, at page 537** which states,

> *"On one matter, viz., whether the will can be regarded as an "unnatural or unreasonable" will- the Judge has come to a conclusion without weighing or deciding the facts on which he could base his inference, and I think this conclusion has coloured the attitude of the Judge to the other features in the case. I think this amounts to a misdirection and a serious one. To some extent the Judge has depended on conjectures and assumptions which cannot be justified. There have been a number of points decided by the Judge on an incorrect appreciation of the evidence. For some of his findings the Judge has given no reasons or inadequate reasons. And finally, though it was obvious and at one stage the Judge himself so felt-that there were some strong points in favour of the petitioner, the Judge has drawn a picture of the petitioner's case in unrelieved funeral colours".*

The learned counsel also cited **Ranchagoda v. Viola 1999 (2) SLR 1** a judgement of this Court, **Peiris v. Fernando 62 NLR 534** a decision of the Privy Council and the landmark decision **Colletes v. Bank of Ceylon 1984(2) SLR 253** to substantiate that in the instant appeal, when the trial judge drew wrong inferences upon documents produced and was influenced by irrelevant considerations which were not before the trial court to determine, that such judgement is based on mistakes of fact which amounts to mistakes in law.

I have considered the submission made, by both parties relating to the 3rd and 4th questions of law raised before this Court and am of the view that the provisions of the High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006 amply provides and grants this Court jurisdiction to consider matters, where there is a serious misdirection on primary facts which vitiates the judgement of the trial court. Moreover, my considered view is that in the said circumstances, the juridical power of the Supreme Court cannot be restricted in deciding of an appeal.

Hence, I answer the 3rd and 4th questions, in favour of the appellant and categorically hold that the 1st and 2nd questions of law based on paragraph 28 'c' and 'd' of the Petition of Appeal upon which leave was granted by this Court, are questions of law that can be considered by this Court in the exercise of its appellate jurisdiction.

In concluding, I answer the 1st and 2nd questions of law in the affirmative and the 3rd and 4th questions in law raised before this Court in favour of the appellant.

For the reasons more fully adumbrated herein, I allow the appeal of the defendant-appellant -appellant.

I set aside the judgement of the High Court of the Western Province sitting in Mount Lavinia dated 17th November, 2014 and the judgement of the District Court of Mount Lavinia delivered on 15th March 2012. The appellant is also entitled to costs of this appeal payable by the plaintiff-respondent- respondent.

Appeal is allowed.

Judge of the Supreme Court

Buwaneka Aluwihare, PC, J.

I agree

Judge of the Supreme Court

P.Padman Surasena, J.

I agree

Judge of the Supreme Court

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

Uduruwangala Gedarage Charaka
Pathum Galagedara,
No. 151, Punagala Road,
Dulgolla, Bandarawela.
Plaintiff

SC APPEAL NO: SC/APPEAL/78/2021
SC LA NO: SC/HCCA/LA/123/2021
HCCA BADULLA NO: UVA/HCCA/BDL/25/20(F)
DC BANDARAWELA NO: MB/630

Vs.

1. Geethika Sudhirani Samaraweera,
   No. 153, Pungala Road,
   Bandarawela.
2. Janaka Sampath Samaraweera,
   Lining Tex, No. 144/4,
   Keysar Street, Colombo 11.

Defendants

AND BETWEEN

Uduruwangala Gedarage Charaka
Pathum Galagedara,
No. 151, Punagala Road,

Dulgolla, Bandarawela.
Plaintiff-Appellant

Vs.

1. Geethika Sudhirani Samaraweera,
   No. 153, Pungala Road,
   Bandarawela.
2. Janaka Sampath Samaraweera,
   Lining Tex, No. 144/4,
   Keysar Street, Colombo 11.

Defendant-Respondents

AND NOW BETWEEN

Geethika Sudhirani Samaraweera,
No. 153, Pungala Road,
Bandarawela.
1st Defendant-Respondent-Appellant

Vs.

1. Uduruwangala Gedarage Charaka
   Pathum Galagedara,
   No. 151, Punagala Road,
   Dulgolla, Bandarawela.
   Plaintiff-Appellant-Respondent
2. Janaka Sampath Samaraweera,
   Lining Tex, No. 144/4, Keysar Street,
   Colombo 11.
   2nd Defendant-Respondent-Respondent

Before: P. Padman Surasena, J.
A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Ruvendra Weerasinghe for the 1st Defendant-Respondent-Appellant.

Chandrasiri Wanigapura for the Plaintiff-Appellant-Respondent.

Argued on: 12.01.2022

Written submissions:

by the 1st Defendant-Respondent-Appellant on 23.02.2022.
by the Plaintiff-Appellant-Respondent on 02.03.2022.

Decided on: 21.11.2022

Mahinda Samayawardhena, J.

The plaintiff filed this action against the two defendants in the District Court of Bandarawela seeking to recover a sum of Rs. 200,000.00 with interest lent to the mother of the defendants on a Mortgage Bond given as security. Although summons was duly served on the defendants, on their failure to file answer, the District Court fixed the case for *ex parte* trial in terms of section 84 of the Civil Procedure Code. A few days later, an oral application was made to the District Court seeking that the answer be accepted in terms of section 839 of the Civil Procedure Code. This has rightly been refused by the District Court as there is a clear provision under section 86 of the Civil Procedure Code to cater to this situation. *Ex parte* trial was concluded by affidavit evidence and, having considered the evidence, the District Court dismissed the plaintiff's action. The plaintiff appealed to the High Court of Civil Appeal of Badulla against the

judgment. The 1st defendant appeared in person before the High Court. By judgment dated 16.12.2020 the High Court set aside the judgment of the District Court and directed the District Court to enter judgment for the plaintiff. It is against this judgment of the High Court that the 1st defendant has filed this leave to appeal application.

Learned counsel for the plaintiff takes up a preliminary objection to the maintainability of this application on the basis that without the 1st defendant first purging her default in the District Court under section 86(2) of the Civil Procedure Code she cannot come before this Court against the judgment of the High Court.

Learned counsel for the 1st defendant referring to section 88(1) of the Civil Procedure Code, which states that an appeal does not lie against any judgment entered upon default, contends that once the District Court dismisses the plaintiff's action, the judgment ceases to be a judgment as contemplated under section 88(1) and the question of purging default does not arise and therefore the 1st defendant can prefer an appeal to this Court against the judgment of the High Court. Learned counsel further contends that in any event section 86(2), which allows a window of opportunity for a defendant to purge default, cannot be availed of by the 1st defendant in view of section 59 of the Mortgage Act No. 6 of 1949 since that provision is inapplicable to a defendant in a hypothecary action. Hence it is submitted that this Court shall entertain this leave to appeal application under section 839 of the Civil Procedure Code or by application of the rules of natural justice.

In terms of section 84 of the Civil Procedure Code, the District Court can fix *ex parte* trial against a defendant on two occasions: (a) failure to file the answer; and (b) failure to appear on the date of the hearing of the action. The defendant need not appear in person on the trial date and can be represented by an Attorney-at-Law, which is sufficient compliance with

section 84. In this case the 1st defendant's failure to file answer triggered the application of this section. Section 84 reads as follows: "*If the defendant fails to file his answer on or before the day fixed for the filing of the answer, or on or before the day fixed for the subsequent filing of the answer or having filed his answer, if he fails to appear on the day fixed for the hearing of the action, and if the court is satisfied that the defendant has been duly served with summons, or has received due notice of the day fixed for the subsequent filing of the answer, or of the day fixed for the hearing of the action, as the case may be, and if, on the occasion of such default of the defendant, the plaintiff appears, then the court shall proceed to hear the case ex parte forthwith, or on such other day as the court may fix.*"

How a defendant may purge default is set out in section 86 of the Civil Procedure Code. Two opportunities are available to the defendant: (a) before entering the judgment, the Court can purge the default with the consent of the plaintiff; and (b) after entering the judgment, the defendant can make an application to Court to purge the default within 14 days of service of the *ex parte* decree. Section 86(2) reads as follows: "*Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes application to and thereafter satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper.*" Section 86(2A) states "*At any time prior to the entering of judgment against a defendant for default, the court may, if the plaintiff consents, but not otherwise, set aside any order made on the basis of the default of the defendant and permit him to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear fit.*" According to section 86(3) "*Every application under this section shall be made by petition supported by affidavit.*"

In terms of section 87(1) of the Civil Procedure Code, the failure on the part of the plaintiff to appear before Court on the trial date warrants dismissal of the plaintiff's action. This does not mean that the plaintiff shall be physically present on the trial date. He can be represented by an Attorney-at-Law and that is sufficient compliance with section 87(1).

If the Court dismisses the plaintiff's action in terms of section 87(1) when the defendant is present and there is a claim in reconvention in the answer, the defendant can move to fix the case for *ex parte* trial against the plaintiff on such cross claim, as such cross claim has the same effect as the plaint in an action in terms of section 75(e).

Section 87(1) of the Civil Procedure Code reads as follows: "*Where the plaintiff or where both the plaintiff and the defendant make default in appearing on the day fixed for the trial, the court shall dismiss the plaintiff's action.*"

How a plaintiff may purge default is set out in section 87(3) of the Civil Procedure Code. In terms of section 87(3), the plaintiff can make an application to the District Court to purge default within a reasonable time from the date of the dismissal of the plaintiff's action. Section 87(3) reads: "*The plaintiff may apply within a reasonable time from the date of dismissal, by way of petition supported by affidavit, to have the dismissal set aside, and if on the hearing of such application, of which the defendant shall be given notice, the court is satisfied that there were reasonable grounds for the non-appearance of the plaintiff, the court shall make order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the action as from the stage at which the dismissal for default was made.*"

In terms of section 88(1) "*No appeal shall lie against any judgment entered upon default.*" This means a final appeal cannot be filed from an *ex parte*

judgment entered against a defendant for failure to file answer or for want of appearance of the defendant on the trial date. A final appeal also cannot be filed from a judgment entered against a plaintiff for want of appearance on the trial date. In such a situation, if the defaulter is the defendant an application under section 86(2) or if the defaulter is the plaintiff an application under section 87(3) shall first be made to purge the default before contesting the case of the opposite party on the merits.

In terms of section 88(2) as it stands now (after its amendment by the Civil Procedure Code (Amendment) Act No. 5 of 2022), the order made after such inquiry to purge default is appealable by the dissatisfied party with the leave of the High Court first had and obtained. Section 88(2) as it stands now reads: "*The order setting aside or refusing to set aside the judgment entered upon default shall accompany the facts upon which it is adjudicated and specify the grounds upon which it is made, and shall be liable to an appeal to the relevant High Court established by Article 154P of the Constitution, with leave first had and obtained from such High Court.*"

However, section 88(1) has no application when the plaintiff's action is dismissed on the merits (as in the instant case), not on the default of the plaintiff as contemplated in section 87(1). The contention of learned counsel for the 1st defendant that when the plaintiff's action is dismissed after the *ex parte* trial, the judgment ceases to be a judgment in terms of section 88(1) or that the defendants cease to be in default because the judgment is then in favour of the defendants, has no merit. The default will continue until it is purged. The further contention of learned counsel for the 1st defendant that in such circumstances this Court can grant relief under section 839 of the Civil Procedure Code or on the principles of natural justice also has no merit. This Court cannot grant relief to the 1st defendant under section 839 of the Civil Procedure Code. That section is applicable to the District Court, not to this Court. In any event, section

839 cannot be invoked when there are express provisions in the Civil Procedure Code to deal with the situation. There is no necessity to desperately look for ways to invoke the jurisdiction of the District Court or this Court to grant relief to the 1st defendant. Section 86(2) is very clear. The High Court has now directed the District Court to enter judgment for the plaintiff. Once the *ex parte* judgment is entered and the decree is served on the defendants, they can within fourteen days of service of the decree make an application by petition and affidavit to purge the default in terms of section 86(2) of the Civil Procedure Code. If they succeed, the *ex parte* judgment will automatically be rendered nugatory regardless of its merits or demerits and the defendants will get the opportunity to file answer and contest the plaintiff's case on the merits. If the defendants are unsuccessful in their application to purge the default, in terms of section 88(2) they can file a leave to appeal application against that order to the High Court. The 1st defendant is not without a remedy. There is no necessity to invoke the inherent powers of the Court or the principles of natural justice.

In terms of section 88(1), the 1st defendant could not have filed an appeal before the High Court if the *ex parte* judgment was entered against her by the District Court. If appeal does not lie against an *ex parte* judgment, no leave to appeal lies, since in the event leave is granted, the application becomes an appeal. What cannot be done directly cannot be done indirectly: *Quando aliquid prohibetur ex directo, prohibetur et per obliquum.*

Upon taking up the case *ex parte* against the defendant, if the District Court dismisses the plaintiff's action on the merits, the plaintiff can file an appeal to the High Court against that judgment. As I stated previously, in such an eventuality, section 88(1) has no application as the judgment was not entered against the plaintiff on his default. It is true that the defendant (defaulter) is made a party to such appeal. Once the defendant

is made a party, is the defendant entitled as of right to a hearing? The answer is in the negative. The defendant is made a party to be given notice that an appeal has been filed against the judgment of the District Court dismissing the plaintiff's action. The defendant, if he wishes, can appear before the High Court and be a passive observer or silent spectator to the proceedings. The defendant has no right of audience but the High Court in the exercise of its inherent powers may get any matters clarified through the defendant to come to a just conclusion. In any event, the defendant will not get the opportunity to fully present his case before the High Court because the High Court of Civil Appeal is not a trial Court but an appellate Court. *Vide Arumugam v. Kumaraswamy* [2000] BLR 55.

Under section 88(1) there is a statutory bar to filing an appeal against an *ex parte* judgment. What about other instances whereby Courts make numerous *ex parte* orders, not judgments? When an *ex parte* order is made, can the affected party straightaway go before the appellate Court against that order? The answer is in the negative. *Vide Jana Shakthi Insurance v. Dasanayake* [2005] 1 Sri LR 299 at 303, *Penchi v. Sirisena* [2012] 1 Sri LR 402 at 408. In *Hotel Galaxy (Pvt) Ltd v. Mercantile Hotels Management Ltd* [1987] 1 Sri LR 5, the Supreme Court, citing several authorities (*Loku Menika v. Selenduhamy* (1947) 48 NLR 353, *Habibu Lebbe v. Punchi Etana* (1894) 3 CLR 85, *Caldera v. Santiagopulle* (1920) 22 NLR 155 at 158, *Weeratne v. Secretary, D.C. Badulla* (1920) 2 CLR 180, *Dingirihamy v. Don Bastian* (1962) 65 NLR 549, *Bank of Ceylon v. Liverpool Marine & General Insurance Co Ltd* (1962) 66 NLR 472, *Nagappan v. Lankabarana Estates Ltd* (1971) 75 NLR 488), held "*A party seeking to canvass an order entered ex parte against him must apply in the first instance to the court which made it. This is a rule of practice which has become deeply ingrained in our legal system.*" This time-tested rule is applicable not only when an *ex parte* order is made by a Court of law but also by any tribunal, administrative or quasi-judicial body.

However, in an exceptional situation, the High Court can exercise revisionary jurisdiction to set aside an *ex parte* judgment or order made by the original Court provided it is palpably wrong, perverse and results in a manifest failure of justice (*Mrs. Sirimavo Bandaranayake v. Times of Ceylon Limited* [1995] 1 Sri LR 22). The judgment in *Mrs. Sirimavo Bandaranayake*'s case shall not be misinterpreted to argue that as a general rule the law provides for the invocation of the revisionary jurisdiction of the High Court to canvass *ex parte* judgments or orders on the merits. This is what M.D.H. Fernando J. stated at 40:

> *I hold that an ex parte default judgment cannot be entered without a hearing and an adjudication. I further hold that having regard to the facts and circumstances of this case, there has been no adjudication at all; it was not a mere error in exercising a judicial discretion, or in assessing the credibility of a witness, or the weight of evidence; judgment in favour of the Plaintiff was unreasonable and perverse insofar as it was based on the assumption that the Defendant had published the impugned statements; the Plaintiff's lawyers failed in their duty to the Court; the substantial rights of the Defendant were prejudiced, and there has been a manifest failure of justice. The exercise of the revisionary jurisdiction of the Court of Appeal was both lawful and proper.* (emphasis mine)

The revisionary jurisdiction of the High Court cannot be invoked citing *Mrs. Sirimavo Bandaranayake*'s case to thwart the express provisions of section 88(1) of the Civil Procedure Code. The rule is that before an *ex parte* judgment or order is challenged on the merits, the default shall be purged.

It appears that the main reason for the 1st defendant to come before this Court against the judgment of the High Court without purging default is, according to learned counsel for the 1st defendant, that there is a statutory

bar to the 1st defendant making an application to purge default under section 86(2) because section 59 of the Mortgage Act debars the 1st defendant from making an application under section 87(3) of the Civil Procedure Code when the *ex parte* judgment has been entered in a hypothecary action.

Section 59 of the Mortgage Act as it appears in the 1980 (unofficial) revised edition of the Legislative Enactments reads as follows: "*Where a hypothecary action is heard ex parte under section 84 and 85 of the Civil Procedure Code, the decree entered thereunder shall not be set aside under the provisions of section 86 of that Code, and the judgement entered thereunder shall not be deemed to be a judgement entered upon default for the purpose of section 88 of that Code*." It is stated by way of an explanation in the revised edition that "*This section has been recast as reference to "decree nisi" and "decree absolute" in section 84 and 85 of the Civil Procedure Code have been omitted by a 1977 amendment of that Code*." It is this formulation of section 59 of the Mortgage Act that has been relied upon by learned counsel for the 1st defendant. According to the 1956 (official) edition of the Legislative Enactments, section 59 of the Mortgage Act reads as follows: "*Where a hypothecary action is heard ex parte under section 85 of the Civil Procedure Code, the decree shall be a decree absolute and not a decree nisi*."

As clearly explained in *Sitthi Maleena and Another v. Nihal Ignatius Perera and Others* [1994] 3 Sri LR 270, the change made to section 59 of the Mortgage Act by the learned authors of the 1980 (unofficial) edition of the Legislative Enactments does not represent the correct position of the law and therefore need not be adopted. Although the Civil Procedure Code, by the Civil Procedure Code (Amendment) Act No. 20 of 1977, underwent radical changes including the repeal and replacement of Chapter XII which provides for proceedings in the event of default in appearance, section 59

of the Mortgage Act which makes reference to the original section 85 of the Civil Procedure Code was not amended in line with the Civil Procedure Code amendment. The original section 85 of the Civil Procedure Code specifically referred to hypothecary actions and stated that if the defaulter was a defendant in a hypothecary action, instead of decree *nisi*, decree absolute should be entered straightaway. However the original section 87 of the Civil Procedure Code further provided that when decree absolute was so entered, the defendant could apply to the District Court within a reasonable time to have it vacated, thus providing the defaulter an opportunity to challenge the decree. By Act No. 20 of 1977 *inter alia* references to decree *nisi* and decree absolute were removed and the common word decree was used instead. These changes are not reflected in section 59 of the Mortgage Act as it presently stands.

Section 16(1) of the Interpretation Ordinance No. 6 of 1949 states "*Where in any written law or document reference is made to any written law which is subsequently repealed, such reference shall be deemed to be made to the written law by which the repeal is effected or to the corresponding portion thereof*." Hence the default of a defendant in a hypothecary action is governed by the present provisions of Chapter XII of the Civil Procedure Code and therefore the contention of learned counsel for the 1st defendant that section 86(2) of the Civil Procedure Code cannot be availed of by the 1st defendant is misconceived in law. Once the *ex parte* decree is served on the defendants they can make an application to purge default in terms of section 86(2) of the Civil Procedure Code and take further steps in accordance with the law. It is unfortunate that judges and lawyers still rely on section 59 of the Mortgage Act as it incorrectly appears in the 1980 (unofficial) edition of the Legislative Enactments (e.g. *Australanka Exporters Pvt Ltd v. Indian Bank* [2001] 2 Sri LR 156) and this must be stopped.

For the aforesaid reasons, I uphold the preliminary objection raised by learned counsel for the plaintiff and dismiss the appeal with costs.

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 SURPEME COURT OF THE DEMOCRATIC REPUBLIC SOCIALIST REPUBLIC OF SRI LANKA

Ushettige Vinodanie Preethika Dayadarie
Perera of No. 532, Weligampitiya, Ja-Ela.

PLAINTIFF

SC Appeal: 80/2016
SC.HC.CALA.No: 286/2015
HCCA/NWP/K/61/2007(F)
DC Chilaw Case No: 2017/2005 -M

VS

Herathpathirannehelage Ranjan Hera
of Punchi Vileththewa,
Mugunawatawana.

DEFENDANT

AND BETWEEN

Herathpathirannehelage Ranjan Herath
of Punchi Vileththewa,
Mugunawatawana.

DEFENDANT-PETITIONER

VS

Ushettige Vinodanie Preethika Dayadarie
Perera of No. 532, Weligampitiya, Ja-Ela.

PLAINTIFF-RESPONDENT

AND BETWEEN

Herathpathirannehelage Ranjan Herath
of Punchi Vileththewa,
Mugunawatawana.

DEFENDANT-PETITIONER-APPELLANT

VS

Ushettige Vinodanie Preethika Dayadarie
Perera of No. 532, Weligampitiya, Ja-Ela.

PLAINTIFF-RESPONDENT-RESPONDENT

AND NOW BETWEEN

Herathpathirannehelage Ranjan Herath
of Punchi Vileththewa,
Mugunawatawana.

DEFENDANT-PETITIONER-APPELLANT-APPELLANT

VS

Ushettige Vinodanie Preethika Dayadarie
Perera of No. 532, Weligampitiya, Ja-E
la.

PLAINTIFF-RESPONDENT-RESPONDENT-RESPONDENT

Before : Priyantha Jayawardena PC, J
E. A. G. R. Amerasekera, J
Yasantha Kodagoda PC, J

Counsel : Ikram Mohamed PC with J. M. Wijesundara, Nadeeka Galhena and Charitha Jayawickrema for the Defendant-Petitioner-Appellant-Appellant.

Dr. Sunil Cooray for the Plaintiff-Respondent-Respondent-Respondent

Argued on : 13th May, 2020

Decided on : 1st of April, 2022

Priyantha Jayawardena PC, J

This is an appeal filed by the defendant-petitioner-appellant-appellant (hereinafter referred to as the "appellant") against the judgment of the High Court (Civil Appeal) of the North Western Province holden in Kurunegala, which affirmed the order of the District Court of Chilaw refusing the appellant's application made under section 86(2) of the Civil Procedure Code as amended (hereinafter referred to as "the Code") to set aside the *ex parte* judgment entered against him for failure to file the answer on the day fixed for filing the same.

Facts of the case

The plaintiff-respondent-respondent-respondent (hereinafter referred to as the "respondent") had filed an action in the District Court claiming a sum of Rs. five million (Rs. 5,000,000/-) as damages from the appellant for seduction.

On the 14th of December 2005, which was the first summons returnable date, the Attorney-at-Law for the appellant (hereinafter referred to as the "instructing attorney for the appellant") had filed a proxy on behalf of the appellant and had moved for a date to file the answer. Accordingly, the court had fixed the 01st of March, 2006 as the second date to file the answer.

However, on the 01st of March 2006, when the case was called to file the answer, the said instructing attorney had moved for further time to file the answer. Hence, the court had fixed the 17th of May, 2006 as the third date to file the answer.

When the case was called on the 17th of May 2006, neither the appellant nor the respondent had been present in court. Further, the said instructing attorney had informed court that the appellant had not given instructions despite the several reminders and the registered letter that was sent to the appellant requesting for instructions to proceed with the trial.

As the appellant had failed to file the answer on the 17th of May 2006, the learned District Judge had fixed the case for *ex parte* trial. At the *ex parte* trial held on the 22nd of May 2006, the respondent had given evidence. Thereafter, considering the evidence given at the *ex parte* trial, the learned District Judge had delivered an *ex parte* judgment on the 05th of July 2006, in

favour of the respondent and awarded a sum of Rs. five million in damages as prayed for in the plaint, and a decree had been entered accordingly.

Subsequently, the appellant had filed an application in the District Court under section 86(2) of the said Code to set aside the judgment and decree entered against him on the basis that he had reasonable grounds for his default for not filing the answer on the answer due date.

During the inquiry held into the said application for purged default, whilst giving evidence, the appellant had produced a letter dated the 20th of February 2006, marked as "V1", whereby the respondent had allegedly instructed her registered attorney to withdraw the action under reference instituted against the appellant.

The appellant in his evidence had further stated that the said letter was given to him by the respondent and that the appellant did not file his answer on the 17th of May, 2006 because he believed that the said action would be withdrawn by the respondent's instructing attorney as per the instructions given to him in the said letter marked as "V1".

Therefore, the appellant stated that he had reasonable grounds for his default in filing the answer and that the *ex parte* judgment entered against him should be set aside in terms of section 86(2) of the said Code.

Furthermore, the appellant stated that the respondent had not given any evidence during the aforesaid purged default inquiry denying that she had given the said letter to her instructing attorney requesting to withdraw the action. However, the proceedings of the purged default inquiry revealed that the respondent's lawyer had cross-examined the appellant at length. This aspect is dealt with in detail under the subheading, submissions of the respondent.

At the conclusion of the said inquiry, the learned District Judge had delivered the order dated the 25th of March 2009, refusing the appellant's application for vacation of an *ex parte* judgment on the ground that he had failed to satisfy the court that he had reasonable grounds for his default in terms of section 86(2) of the said Code. Aggrieved by the above order, the appellant had appealed to the High Court.

Judgment of the High Court

After hearing the parties, the High Court held that the appellant had not satisfied the learned District Judge that he had reasonable grounds for his failure to file the answer on the third date fixed for filing the answer by court.

It was further held that, had the appellant believed that the action would be withdrawn as per the said letter dated the 20th of February 2006, he would have given instructions to his instructing attorney of the same. Particularly since his instructing attorney had sought instructions from him.

The court further observed that, notwithstanding the said letter dated the 20th of February 2006, the respondent had not withdrawn the action filed against the appellant on the 01st of March 2006, when the case was called to file the answer for the second time.

Furthermore, although the appellant was made aware of the fact that the court had granted a further date to file the answer by his instructing attorney in writing and sought for instructions from the appellant, he had nevertheless failed to give necessary instructions to his instructing attorney.

Thereafter, the High Court held that it did not have any basis to interfere with the District Court judgment as the defendant had not given sufficient reasons for his default.

Appeal to the Supreme Court

Being aggrieved by the aforementioned judgment of the High Court, the appellant appealed to this court and was granted special leave to appeal on the following questions of law:

“

i. Does the evidence adduced at the inquiry before the District Court to vacate the *ex parte* decree establish a reasonable ground for purging the default of the appellant within the meaning of Section 86(2) of the Civil Procedure Code contrary to the judgment of the Civil Appeal High Court and the order of the learned Additional District judge?

ii. Have the learned judges of the Civil Appeal High Court erred in law in not considering the fact that the respondent had in fact represented to the appellant that she had decided to withdraw the said action and/or had given instructions to her Registered Attorney to

withdraw the action by the said letter dated 20/02/2006 marked "V1", in interpreting the term "reasonable ground" in section 86(2) of the Civil Procedure Code in the said judgment?"

Furthermore, the learned counsel for the respondent had raised the following question of law at the time special leave was granted:

"As this is not a revision application, can the quantum of damages awarded in the *ex parte* decree be contested in these proceedings for purging default?"

Submissions of the appellant

The learned President's Counsel for the appellant submitted that, in terms of section 86(2) of the Civil Procedure Code, the appellant must satisfy the court that he had "reasonable grounds" for such default in order to get the judgment and decree entered against the appellant set aside for default in filing the answer.

It was further submitted that the appellant did not file the answer on the 17th of May, 2006 because he had believed that the respondent would withdraw the said action instituted against him in view of the said letter marked as "V1". Therefore, it was submitted that he had reasonable grounds for his default.

Further, it was contended that the term "reasonable grounds" in the said subsection 86(2) of the said Code should be interpreted by applying a subjective test in lieu of an objective one, which the District Court and High Court had failed to do.

In support of the above submission, the learned President's Counsel cited ***Kala Traders (Pvt) Limited v Sanicoch Group of Companies*** **S.C. (C.H.C.) Appeal No.08/2010 SC Minutes 02nd October, 2015**, where it was held:

"Section 86(2) of the Code contemplates of a liberal approach emphasising the aspect of reasonableness as opposed to a rigid standard of proof ... Much emphasis needs to be placed in interpreting Section 86(2) of the Code. Court must use the yardstick of a subjective test rather than having resorted to an objective test in determining what is reasonable".

It was further submitted that the respondent had neither filed objections to the application made by the appellant under the said section 86(2) nor given any evidence denying that she had given the said letter to the appellant.

The learned President's Counsel drew the attention of this court to section 115 of the Evidence Ordinance and submitted that the appellant is entitled to rely on the letter "V1" in terms of the said section. Further, the respondent is estopped in law from denying the representation made to the appellant by the said letter**.** Thus, the appellant had urged reasonable grounds at the inquiry to set aside the *ex parte* judgment and the decree.

Moreover, it was submitted that the District Court had awarded damages as prayed for by the respondent although the loss suffered was not established by evidence and that, therefore, the judgment entered for payment of the said damages is contrary to law.

In support of the above submission, the learned President's Counsel drew the attention of this court to the cases of ***Mrs. Sirimavo Bandaranaike v Times of Ceylon Limited*** **[1995] 1 SLR 22** and ***Cisilin Nona v Gunasena Jayawardana*****, SC Appeal No. 190/2012 SC Minutes 05th May, 2016**.

In the circumstances, it was submitted that the aforesaid District Court order refusing to set aside the *ex parte* judgment and the decree, and the High Court judgment should be set aside.

Submissions of the respondent

The learned counsel for the respondent submitted that during cross-examination, the appellant had admitted that he had three (03) original copies of the said letter produced, marked as "V1". Further, it was submitted that the appellant had admitted that he had neither given the copies of the said letter to his instructing attorney nor informed his attorney that the said action instituted against him would be withdrawn by the instructing attorney of the respondent in compliance with the said letter "V1".

Thus, the counsel for the respondent contended that the appellant had not believed that the said action would be withdrawn in accordance with the said letter and that, therefore, the appellant had failed to establish that he had reasonable grounds for his default.

Further, the respondent submitted that, in any event, the said letter was dated the 20th of February, 2006. However, the appellant's instructing attorney had appeared in court on the 1st

of March, 2006, the date fixed for filing the answer for the second time, and had moved for a further date to file the answer without referring to the said letter "V1".

Therefore, the counsel for the respondent submitted that neither party to the said action had acted on the said letter marked as "V1" and, hence, the appellant had no reasonable grounds for failing to file the answer on the 17th of May, 2006.

Moreover, it was submitted that the appellant had obtained the said letter from the respondent by using force on her and that she had written the said letter under duress and had lodged a Police complaint stating the same. As such, no court should act on a document that has been obtained by using force and/or undue influence.

The learned counsel for the respondent further submitted that the appellant has no right to canvass the quantum of damages awarded in the *ex parte* judgment in a purge default inquiry. Further, it was submitted that as section 88(1) of the said Code states that "*No appeal shall lie against any judgment entered upon default*", the merits of the default judgment cannot be considered in an appeal filed against an order either refusing or allowing to vacate an *ex parte* judgment and the decree.

In the circumstances, it was submitted that the appeal should be dismissed.

Has the appellant satisfied the court that he had reasonable grounds for his default?

In the instant appeal, one of the questions of law that needs to be considered is whether the appellant had satisfied the learned District Judge that he had reasonable grounds for his default in terms of section 86(2) of the said Code.

In order to consider the above, it is necessary to consider the relevant provisions in the said Code.

Section 73 of the said Code states:

> *"If the defendant does not admit the plaintiff's claim, he shall himself, or his registered attorney shall on his behalf, deliver to the court a duly stamped written answer."*

Therefore, it is incumbent on the appellant to file his answer if he is denying the claim of the Plaintiff.

Further, section 84 of the said Code states:

> "*If the defendant fails to file his answer on or before the day fixed for the filing of the answer, or on or before the day fixed for the subsequent filing of the answer or having filed his answer, if he fails to appear on the day fixed for the hearing of the action, and if the court is satisfied that the defendant has been duly served with summons, or has received due notice of the day fixed for the subsequent filing of the answer, or of the day fixed for the hearing of the action, as the case may be, and if, on the occasion of such default of the defendant, the plaintiff appears, then the court shall proceed to hear the case ex parte forthwith, or on such other day as the court may fix*." [Emphasis added]

Thus, section 84 of the said Code requires a defendant to file his answer on the day fixed by the court for filing the same or the subsequent date fixed for filing the answer. Moreover, the said section confers power on the court to fix the case for *ex parte* trial if the defendant fails to file his answer on the date fixed or the subsequent date fixed for answer, if the court is satisfied that the defendant has been duly served with summons, or has received due notice of the day fixed for the subsequent filing of the answer.

In the instant appeal, it is common ground that on the 14th of December, 2005 which was the summons returnable date, the appellant's instructing attorney had filed the proxy on behalf of the appellant and moved for a date to file the answer. Accordingly, the court had fixed the 1st of March, 2006 as the second date to file the answer.

However, on the 1st of March, 2006 the instructing attorney for the appellant had once again moved for further time to file the answer. Consequently, the court had given a further date to file the answer and fixed the 17th of May, 2006 as the third date to file the answer.

As stated above, on the 17th of May 2006, the appellant had been absent in court and the instructing attorney for the appellant had informed the court that the appellant had not given instructions to proceed with the case, although he had sought instructions from the appellant.

If a client fails to give instructions to proceed with a case, a registered attorney is entitled to inform court that he does not appear for the defendant on that occasion, even though he has filed the proxy for the party. Otherwise, his appearance in court will *ipso facto* be an appearance for his client. When such a matter is brought to the notice of court, it should be recorded forthwith as a journal entry in the case record by the learned District Judge and the case should

be fixed for *ex parte* trial unless the defendant is present in court and moves for a date to defend the action.

It is pertinent to observe that such a practice would prevent disputes arising thereafter in respect of whether there was or was not an appearance for the relevant party. It further prevents the subsequent raising of allegations against the instructing attorney.

Any such statement by the registered attorney is admissible in the inquiry held under section 86(2) of the said Code. In the current context, the appellant not only did not dispute the said statement of the registered attorney but also admitted that he did not give the necessary instructions to his registered attorney.

In the instant case, the appellant's answer had not been filed in court even on the third date fixed for filing the same. Accordingly, the court had acted in terms and under section 84 of the said Code and fixed the case for *ex parte* trial.

Section 86(2) of the said Code sets out the recourse available to the defendant who has had an *ex parte* decree entered against him:

> "*Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes application to and thereafter satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper."* [Emphasis added]

In the case of ***Mrs. Sirimavo Bandaranayike v Times of Ceylon*** **[1995] 1 SLR 22**, it was held;

> *"Insofar as a remedy in the District Court is concerned, the general rule would apply that the judge is functus officio, and cannot review its own judgment. However, section 86 makes an exception, by conferring jurisdiction on the District Court to set aside a default judgment if it was flawed in procedural respects – but not on the merits. The necessary implication of the grant of that jurisdiction is that the District Court is not competent to review a default judgment on the merits. That is, beyond question, the long-established practice of the District Court."*

The abovementioned provision confers jurisdiction on the District Court to set aside an *ex parte* judgment and a decree.

In the case of ***The Ceylon Brewery Ltd. v Jax Fernando, Proprietor, Maradana Wine Stores***, **[2001] 1 SLR 270**, it was held that the jurisdiction of the court in respect of a section 86(2) inquiry is subject to two conditions being satisfied. Firstly, the application should be made by the defendant within fourteen days of the service of the decree on the defendant. Secondly, the defendant must satisfy the court that he had reasonable grounds for the said default. Accordingly, the learned judge must reach a finding on whether the defendant had reasonable grounds for his default based on the evidence led at the inquiry held under section 86(2) of the said Code. Once the said conditions are satisfied, it is imperative that the court vacate the *ex parte* judgment.

Further, in terms of section 86(2), it is evident that the burden of proof lies on the party in default to satisfy the court that he had reasonable grounds for such default. In ***Rani Lokugalappaththi v H. H. D. De Silva*, SC/Appeal No/117/2013 SC Minutes 02nd October, 2015**, it was held that:

> *"It must be noted that the burden of proof cast upon an Applicant who makes an application under section 86(2) of the Civil Procedure Code is not similar to a proof of balance of probability. It is much less than that. What is required under Section 86(2) is that to adduce 'reasonable grounds for default' to the satisfaction of Court".*

The sole explanation of the appellant during the inquiry held under section 86(2) of the said Code was that the defendant did not file his answer on the 17th of May, 2006 because he believed that the said action instituted against him would be withdrawn by the respondent's instructing attorney in compliance with the instructions given in the said letter "V1". Therefore, the appellant had stated that he had reasonable grounds for his default in terms of section 86(2) of the said Code.

During the said inquiry, the appellant had produced an original of the said letter dated 20th of February 2006, marked as "V1", by which the respondent had instructed her registered attorney to withdraw the said action instituted against the appellant.

Further, during cross-examination at the said inquiry the appellant had admitted that he had known that the court had fixed the 01st of March, 2006 as the second date to file the answer.

Moreover, the appellant admitted that the respondent had given him three (03) original copies of the said letter before the 01st March, 2006. Further, he admitted that he had failed to inform his instructing attorney of the receipt of the said letter or the contents thereof.

In particular, the appellant admitted at the said inquiry that his instructing attorney had by registered letter, informed him that the court had fixed the 17th of May, 2006 as the third date to file the answer and had requested the appellant's instructions before the said date to proceed with the case. He has further admitted that, after receiving the said letter, he had neither contacted his instructing attorney nor given instructions that were required to proceed with the said action.

Furthermore, the appellant admitted that, after receiving the said letter, he had not taken any steps to verify whether the said action instituted against him had been withdrawn on the 1st of March, 2006.

It is evident from the above facts that the appellant had received the said letter dated the 20th of February, 2006 marked as "V1" before the 01st of March, 2006, which was the second date fixed by the court for filing the answer. Therefore, had the appellant believed that the said action would be withdrawn as per the said letter, he would have informed his instructing attorney before the 01st of March, 2006 that the said action would be withdrawn.

However, the appellant had admitted that he did not inform his instructing attorney about the said letter. As a result, his instructing attorney had appeared in court on the 01st of March, 2006 and moved for a further date to file the answer.

It is also significant to note that, after the 1st of March, 2006, the appellant's instructing attorney had informed the appellant by registered letter that he was required to file the answer on the 17th of May, 2006. Therefore, the appellant had become aware that the said action had not been withdrawn as per the said letter of the respondent produced marked as "V1".

Further, the appellant had admitted that he neither inquired from his instructing attorney nor the Court Registrar whether the said action had been withdrawn by the respondent. From the date of receiving the letter marked as "V1" on the 01st of March, 2006 until the 17th of May, 2006, the appellant had not taken any steps to verify whether the action instituted against him had been withdrawn.

It is useful to consider if the defendant was entitled to rely on the letter marked as "V1" alleged to have been written by the plaintiff as a reasonable ground for not filing the answer on the 17th

of May, 2006 which was the third date fixed for the answer. It was submitted by the appellant that the said letter amounted to an agreement between the parties not to file an answer.

In an action filed under regular procedure, the defendant shall file his answer on the day fixed for answer, or obtain further time to file his answer, either personally, through a registered attorney, or by his recognized agent referred to in section 24 of the said Code, if he does not admit the plaintiff's claim. The wording of section 73 and section 84 when read together contemplate that a court can grant more than one extension of time. Accordingly, if further time is granted to file the answer, the defendant shall file the answer on the subsequent day fixed for filing of the answer. Granting of an extension of time is within the discretion of the court and such discretion shall be exercised judicially.

The Civil Procedure Code as amended stipulates the procedure applicable to regular actions and summary actions. It stipulates the procedure that should be followed by the court as well as the parties. The procedural law facilitates the administration of justice and to adjudicate cases by applying substantive law. Although some requirements in procedural law are directory, the others are mandatory. If a specific step in a procedural law is mandatory it cannot be circumvented by the consent of parties. The word "shall" used in section 73 of the said Code makes it mandatory for the defendant to file an answer if he does not admit the plaintiff's claim.

Accordingly, the mandatory requirement imposed by section 73 of the said Code on the appellant to file his answer on the date fixed by the court could not have been circumvented by an agreement of the parties, as fixing a date for an answer is a judicial act.

Further, parties by agreement cannot circumvent the procedure stipulated by a statute unless the statute provides for such an agreement. Furthermore, such practices or arrangements would adversely affect the administration of justice.

Moreover, such agreements would be against public policy. In any event, parties cannot interfere with a judicial act that is required to be performed under the law.

Such agreements or arrangements are quite different from agreements to settle cases by the parties. Even in an arrangement to settle a case in court, the court has a duty and a right to consider whether such an arrangement is according to law and is in the interests of all the parties concerned, as entering into such settlement in court would become a judicial act.

Although courts should encourage settlement of disputes, common law prohibits a court from entering a consent decree under the guise of a judicial act if it violates the law or public policy. In the circumstances, the duty to file an answer subsequent to an order made by a court cannot be circumvented by consent of the parties as it amounts to a violation of the said provisions of the said Code and the judicial order granting a date to file the answer.

The learned President's Counsel for the appellant drew the attention of court to section 115 of the Evidence Ordinance and submitted that the learned District Judge should have allowed the application for vacation of the *ex parte* judgment as the appellant relied on the letter marked "V1" and acted according to the contents of the said letter.

Section 115 of the Evidence Ordinance states:

> "*When one person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing"*.

In light of the above, the learned President's Counsel for the appellant stated that the respondent is estopped in law from denying the representation made to the appellant by the said letter**.**

However, as the aforementioned facts show that the appellant has not acted on the letter marked and produced as "V1", section 115 of the Evidence Ordinance has no application to the instant appeal.

Moreover, the said section has no application for acts performed contrary to public policy. In the present context, as stated above, the said letter was an attempt to circumvent the course of the administration of justice. When an agreement or undertaking is tainted with illegality, such agreement or undertaking cannot be enforced through courts.

A similar view was expressed in the case of ***Jayasuria v Kotalawala*** **23 NLR 511**, wherein the defendant was in prison when he was sued on a bond. Being deceived by the plaintiff, he made no effort to appear in the action and judgment was entered for the plaintiff. He moved to re-open judgment. The reason given by him as to why the defendant did not appear in the action was not that he was prevented by misfortune from appearing to show cause, and as such, it was held that his proper remedy was to apply for *restitutio in integrum* or seek damages for fraud.

In the current circumstances, the facts establish that the appellant's default was effectuated by his own inaction and lack of due diligence in respect of his duty to file the answer on the date fixed by court.

Further, a defendant is entitled under section 86(2) to adduce evidence to prove that he was prevented from appearing in court by reason of accident or misfortune or not having received due information of the proceedings about the case. However, in the instant appeal, the appellant had failed to discharge the burden of satisfying the court that he had reasonable grounds for his default in terms of section 86(2) of the said Code.

The above conduct of the appellant demonstrates that he was negligent in instructing his instructing attorney to file his answer on the 17th of May, 2006.

Can the legality of the quantum of damages awarded in the *ex parte* decree be contested in proceedings for the vacation of the said *ex parte* decree?

Learned President's Counsel for the appellant submitted that the District Court had awarded damages as prayed for by the respondent although the loss suffered was not established by evidence and that, therefore, the judgment entered for payment of the said damages is contrary to law. In support of the above submission, the learned President's Counsel drew the attention of the court to the cases of ***Mrs. Sirimavo Bandaranaike v Times of Ceylon Limited*** *(supra)* and ***Cisilin Nona v Gunasena Jayawardana*** *(supra).*

In the circumstances, it was submitted that the aforesaid District Court order and High Court judgment should be set aside.

In response to this submission, the learned counsel for the respondent raised the following question of law at the time special leave was granted:

> *"As this is not a revision application, can the quantum of damages awarded in the ex parte decree be contested in these proceedings for purging default?"*

A plain reading of section 86(2) shows that the scope of an inquiry under section 86(2) of the said Code is only limited to satisfy court that the defendant had reasonable grounds for such default. Further, if the defendant satisfies court that the defendant had reasonable grounds for such default, the word "shall" used in the said section makes it mandatory for the court to set

aside the *ex parte* judgment and decree entered against the defendant and permit him to proceed with the case.

In this context, it is necessary to consider whether the District Court has the jurisdiction to consider the legality of the *ex parte* judgment and the decree entered against the defendant at an inquiry to vacate an *ex parte* order and set it aside if the judgment is contrary to law. In other words, whether a defendant is entitled to invite the District Court to reconsider the *ex parte* judgment under the pretext of vacation of an *ex parte* judgment. If the answer to the above is in the affirmative, even if the defendant failed to satisfy court that he had reasonable grounds for his default, he should be entitled to get the *ex parte* judgment set aside on the basis that the said judgment is contrary to law.

In this regard, it is useful to consider the judicial power of a District Court to re-consider a judgment delivered by the same court. Once a judgment is delivered by a court, it becomes functus as far as the legality of the judgment is concerned, and it cannot re-open the case.

However, section 189 of the said Code has conferred jurisdiction on the court to correct any clerical or arithmetical mistakes in any judgment or order or any error arising therein from any accidental slip or omission, or to make any amendment which is necessary to bring a decree into conformity with the judgment.

This view was expressed in ***Muttu Raman v Mohammadu* 21 NLR 97, at page 98**, where it was held; "A Court has no jurisdiction to alter or amend its decree, except in conformity with the provisions of section 189 of the Code, in order to bring the decree into harmony with the judgment or to rectify a clerical or arithmetical error."

Further, in ***Deonis v. Samarasinghe et al* 15 NLR 39 at 41**, ***Charles Bright & Co., Ltd v. Sellar* (1904) 1 K.B. 6** was cited with approval, wherein it was held that a court cannot correct a mistake of its own after the judgment has been perfected, even though the error is apparent on the face of the judgment.

The exception to this rule is set out in section 86 of the said Code, which allows for an *ex parte* judgment and the decree entered against the defendant to be set aside if the defendant satisfies the court that he had reasonable ground for default. However, in such instances, the court has no power whatsoever to consider the legality of the *ex parte* judgment.

Thus, a court that delivers an order or a judgment cannot sit in appeal to review its own order or judgment.

Further, section 88 of the said Code states:

> *"(1) No appeal shall lie against any judgment entered upon default.*
>
> *(2) The order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made, and shall be liable to an appeal to the Court of Appeal."*

In the circumstances, the scope of the inquiry under section 86(2) of the said Code should be considered in the light of section 88 of the said Code.

It is clear that when the legislator has specifically excluded the right to appeal against a judgment entered upon default, the question of whether the same court could review its own judgment cannot arise. In this regard, the doctrine of "*quando aliquid prohibetur ex directo*" which states that when anything is prohibited directly, it is not possible to do it indirectly, is applicable. Thus, when section 88(2) of the said Code acts as an ouster clause for appeals in respect of default judgments, it is not possible in law to use an inquiry for *ex parte* vacation as a means of appeal against an *ex parte* judgment.

Thus, in an inquiry under section 86(2) of the said Code, the court is not conferred with the power to consider the legality of an *ex parte* judgment delivered by the said court. However, if a court comes to a finding that there were reasonable grounds for default by the defendant, it is incumbent on the court to set aside the judgment and decree and permit the defendant to proceed with his defence.

However, though it is not possible to canvass the legality of the *ex parte* judgment in an inquiry held under and in terms of section 86(2) of the said Code, a defendant who is served with an *ex parte* judgment is not without a legal remedy. He can canvass the merits and legality of such a judgment either by invoking the revisionary jurisdiction of an appropriate court or by way of an application for *restitutio in integrum* under Article 138 of the Constitution.

In the case of ***Mrs. Sirimavo Bandaranayike v Times of Ceylon*** *(supra),* it was held:

> *"No specific remedy has been provided to correct errors in respect of the substance of an ex parte default judgment. Section 88(1) confers no remedy, but merely excludes an appeal; from that exclusion it is not permissible to infer an exclusion of revision as well. On the contrary, the express exclusion of an appeal*

justifies the inference that it was intended to permit other remedies, such as revision.

I am therefore of the view that a default judgment can be canvassed on the merits of the Court of Appeal, in revision, though not in appeal, and not in the District Court itself."

Further, it is important to note that sections 86 and 88 were amended by section 23 of Law No. 20 of 1977 and, therefore, the judgments that were decided on the repealed sections 86 and 88 of the said Code have no application in interpreting the present sections 86 and 88 of the said Code.

Thus, a defendant who was served with an *ex parte* decree cannot invoke section 86(2) of the said Code to revisit an *ex parte* judgment and if he is unsuccessful in his attempt to set aside the *ex parte* judgment in such proceedings, to file an appeal under section 88(2) of the said Code to canvass the order refraining to vacate the *ex parte* judgment.

In the circumstances, I affirm the judgment of the High Court, which upheld the order of the District Court.

The appeal is dismissed. I order no costs.

Judge of the Supreme Court

E. A. G. R. Amarasekera, 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

Jayasinghe Arachchige
Thilakeratne,
Pannala Post,
Galayaya
Plaintiff

SC APPEAL NO: SC/APPEAL/82/2020
SC LA NO: SC(HC)CALA/244/2014
HCCA KURUNEGALA NO: NWP/HCCA/KURU/130/2010 (F)
DC KULIYAPITIYA NO: 10705/P

Vs.

1. Jayasinghe Arachchige Wijesena
   (Deceased)

1A. Jayasinghe Arachchige
   Wimalawathie,
   Pannala Post, Galayaya

2. Jayasinghe Arachchige Piyadasa,
   Belvian Market, Hingurakgoda

3. Jayasinghe Arachchige
   Karunawathie,
   Pannala Post, Galayaya

4. Jayasinghe Arachchige
   Wimalawathie

5. Jayasinghe Arachchige
   Weerasinghe,

Pothuwatawana Post,
Pothuwatawana

6. Don George Lionel Senarath,
   Pannala Post, Galayaya
7. Warnakulasuriya Patrick
   Valentine Fernando,
   Sudharshni Ulu Mola, Negombo
   Road, Galayaya
8. Guruge Mervyn Dharnawardene,
   No. 884, Ja-ela Post,
   Weligampitiya
9. A.M. Shanthi Sagarika Kumari,
   Pannala Post, Galayaya
10. Ranhamige Sarath Wickremapala
11. W.M.U. Rohana Parakrama,
    Gonawila Post, Makandura
12. L.A. Lal Pathirana
13. M.M. Hemantha Kumara,
    Gonawila Post, Makandura
14. Herath Hitihami Appuhamilage
    Lenard Krishantha
15. Rajakaruna Mudiyanselage
    Chandrasiri Janaka of Mukalana
16. Ranasinghe Arachchilage Leena
    Damayanthi
17. Wijesuriya Arachchige Sheron
    Crishantha
18. Dombawala Hitihamilage Anura
    Crishantha
19. Dona Harriet Somalatha
20. Indrani Padmalatha

21. Indrani Sandhya,
All of Pannala Post,
Galayaya
Defendants

AND BETWEEN

1. A.M. Shanthi Sagarika Kumari,
Pannala Post, Galayaya
2. Ranhamige Sarath Wickremapala,
Pannala Post, Galayaya
3. W.M.U. Rohana Parakrama,
Gonawila Post, Makandura
4. L.A. Lal Pathirana,
Pannala Post, Pallama
5. M.M. Hemantha Kumara,
Gonawila Post, Makandura
6. Herath Hitihami Appuhamilage
Lenard Krishantha,
Pannala Post, Galayaya
7. Rajakaruna Mudiyanselage
Chandrasiri Janaka of Mukulana
8. Ranasinghe Arachchilage Leena
Damayanthi,
Pannala Post, Galayaya
9. Wijesuriya Arachchige Sheron
Crishantha,
Pannala Post, Galayaya
10. Dombawala Hitihamilage Anura
Crishantha,
Pannala Post, Galayaya

11. Dona Harriet Somalatha,
    Pannala Post, Galayaya
12. Indrani Padmalatha,
    Pannala Post, Galayaya
13. Indrani Sandhya,
    Pannala Post, Galayaya

    9th to 21st Defendant-Appellants

    Vs.

    Jayasinghe Arachchige
    Thilakeratne,
    Pannala Post, Galayaya
    Plaintiff-Respondent

1. Jayasinghe Arachchige Wijesena
   (Deceased)

1A. Jayasinghe Arachchige
    Wimalawathie,
    Pannala Post, Galayaya

2. Jayasinghe Arachchige Piyadasa,
   Belvian Market, Hingurakgoda
3. Jayasinghe Arachchige
   Karunawathie,
   Pannala Post, Galayaya
4. Jayasinghe Arachchige
   Wimalawathie,
   Pannala Post, Galayaya
5. Jayasinghe Arachchige
   Weerasinghe,

Pothuwatawana Post,
Pothuwatawana

6. Don George Lionel Senarath,
   Pannala Post, Galayaya
7. Warnakulasuriya Patrick
   Valentine Fernando,
   Sudharshni Ulu Mola, Negombo
   Road, Galayaya
8. Guruge Mervyn Dharnawardene,
   No. 884, Ja-ela Post,
   Weligampitiya

Defendant-Respondents

AND NOW BETWEEN

Jayasinghe Arachchige
Thilakeratne,
Pannala Post, Galayaya

Plaintiff-Respondent-Petitioner

Vs.

1. Jayasinghe Arachchige Wijesena
   (Deceased)

1A. Jayasinghe Arachchige
Wimalawathie,
Pannala Post, Galayaya

2. Jayasinghe Arachchige Piyadasa,
   Belvian Market, Hingurakgoda

2A. Jayasinghe Arachchige
Chandrasekara,

Belvian Market, Hingurakgoda

3. Jayasinghe Arachchige
Karunawathie,
Pannala Post, Galayaya

4. Jayasinghe Arachchige
Wimalawathie,
Pannala Post, Galayaya

5. Jayasinghe Arachchige
Weerasinghe,
Pothuwatawana Post,
Pothuwatana

6. Don George Lionel Senarath
(Deceased)

6A. Malani Senarath,
Pannala Post, Galayaya

7. Warnakulasuriya Patrick
Valentine Fernando (Deceased)

7A. Warnakulasuriya Mary Theres
Thamel

7B. Warnakulasuriya Donald Suresh
Fernando

7C. Warnakulasuriya Rovin Suwinda
Fernando

7D. Warnakulasuriya Ramya Shamoli
Sudarshika Fernando
All of Sudharshni Ulu Mola,
Negombo Road, Galayaya

8. Guruge Mervyn Dharnawardene,
No. 884, Ja-ela Post,
Weligampitiya

1st to 8th Defendant-Respondent-Respondents

9. A.M. Shanthi Sagarika Kumari,
   Pannala Post, Galayaya
10. Ranhamige Sarath Wickremapala,
    Pannala Post, Galayaya
11. W.M.U. Rohana Parakrama,
    Gonawila Post, Makandura
12. L.A. Lal Pathirana,
    Pannala Post, Pallama
13. M.M. Hemantha Kumara,
    Gonawila Post, Makandura
14. Herath Hitihami Appuhamilage
    Lenard Krishantha,
    Pannala Post, Galayaya
15. Rajakaruna Mudiyanselage
    Chandrasiri Janaka of Mukalana
16. Ranasinghe Arachchilage Leena
    Damayanthi,
    Pannala Post, Galayaya
17. Wijesuriya Arachchige Sheron
    Crishantha,
    Pannala Post, Galayaya
18. Dombawala Hitihamilage Anura
    Crishantha, Pannala Post,
    Galayaya
19. Dona Harriet Somalatha,
    Pannala Post,
    Galayaya
20. Indrani Padmalatha,

Pannala Post,
Galayaya

21. Indrani Sandhya,
Pannala Post, Galayaya
Defendant-Appellant-Respondents

Before: L. T. B. Dehideniya, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Ranjan Suwandaratne, P.C., with Ramith Dunusinghe for the Plaintiff-Respondent-Appellant.

Lahiru Abeyrathna for the 2A, 3rd, 4th and 5th Defendant-Respondent-Respondents.

Dr. Sunil Coorey for the 6A Defendant-Respondent-Respondent.

Saumya Amarasekera, P.C., with Subash Gunathillake for the 7th Defendant-Respondent-Respondent.

Chathura Galhena with Dharani Weerasinghe for the 8th Defendant-Respondent-Respondent.

Lakshman Livera instructed by M. Munasinghe for the 9th, 11th, 12th, 13th and 15th Defendant-Appellant-Respondents.

Chandrasiri Wanigapura for the 10th, 16th & 19th Defendant-Appellant-Respondents.

Senany Dayaratne with Eshanthi Mendis for the 14th, 17th, 18th and 21st Defendant-Appellant-Respondents.

Argued on: 08.03.2022

Written submissions:

by the 6A Defendant-Appellant-Respondent on 04.05.2021 and 14.03.2022.

by the Substituted 7A-7D Defendant-Respondent-Respondents on 06.05.2021 and 15.03.2022.

by the 17th, 18th and 21st Defendant-Appellant-Respondents on 16.03.2022.

by the 9th to 21st Defendant-Appellant-Respondents on 30.04.2021.

by the 8th Defendant-Respondent-Respondent on 28.04.2021 and undated post-argument written submissions.

by the Plaintiff-Respondent-Petitioner on 18.01.2021.

Decided on: 23.09.2022

Mahinda Samayawardhena, J.

Introduction

The plaintiff filed this action in the District Court of Kuliyapitiya to partition the land known as *innawatta* morefully described in the schedule to the plaint among the plaintiff and the 1st to 6th defendants. The 1st to 5th defendants filed a statement of claim accepting the pedigree set out in the plaint. The 6th defendant neither filed a statement of claim nor raised issues but gave evidence at the trial for the 8th defendant. Although the 7th defendant filed a statement of claim, it is not clear whether he

seeks partition of the land or dismissal of the action. Nor did he raise issues at the trial.

In practical terms, the only contesting defendant was the 8th defendant, a land developer and land seller who bought a portion of *innawatta* (essentially lot 2 in the preliminary plan) from the 6th defendant by two deeds marked 8V7 and 8V8. The deeds marked 8V9 to 8V24 are the transfer deeds executed by the 6th and 8th defendants in favour of the 9th to 21st defendants upon blocking out lot 2. In the prayer to the statement of claim, the 8th defendant prayed for the exclusion of lot 2 from the corpus. This was the relief sought by the 8th defendant in his evidence as well. The 9th to 21st defendants filed a joint statement of claim seeking exclusion of their lots.

At the trial, apart from the plaintiff, only the 8th defendant raised issues. The 8th defendant raised three main issues. They relate to (a) the exclusion of lot 2, (b) acquisition of lot 2 by deeds and prescription and (c) identification of the corpus. After trial, the learned District Judge answered these three issues against the 8th defendant and delivered the judgment partitioning the land as prayed for by the plaintiff. Three appeals had been filed against the judgment of the District Court, and after considering the appeals the High Court of Civil Appeal of Kurunagala by judgment dated 24.04.2014 set aside the judgment of the District Court and allowed the appeals. The plaintiff's action was dismissed with costs on the basis that **the plaintiff filed the action to partition a land in extent of 3 *lahas* of kurakkan sowing area and 3 *lahas* of kurakkan sowing area is equivalent to 3 acres and the preliminary plan shows a land more than double the extent (6 acres, 1 rood and 11 perches) and therefore the**

plaintiff's action must fail since the land has not been properly identified. Hence this appeal by the plaintiff to this court.

This court granted leave to appeal against the judgment of the High Court only on the question of identification of the corpus. The question of law upon which leave was granted reads as follows:

> *Have the High Court judges erred in law by arriving at a finding that the petitioner has surveyed a larger land than the corpus described in the schedule to the plaint especially in considering the fact that no other party has taken any steps to show a different property as the corpus of the said partition action and also have not contested during the course of the trial that the areas of different properties are included into the corpus depicted in the preliminary plan X?*

Execution of deeds after the registration of *lis pendens*

The plaint was filed on 04.08.1993 and the *lis pendens* was registered on 16.08.1993. The dates of execution of the two deeds (8V7 and 8V8) through which the 8th defendant acquired rights to the land from the 6th defendant are significant. The deed 8V7 dated 03.01.1993 had been executed seven months before the *lis pendens* was registered and the deed 8V8 dated 01.12.1994 was executed after the *lis pendens* had been registered. The deeds marked 8V9 to 8V24 are the transfer deeds executed by the 6th and 8th defendants in favour of the 9th to 21st defendants upon sub-division of lot 2. Of these, except for 8V9 and 8V12, all the other deeds have been executed after the *lis pendens* was registered: 8V9 was executed one week before and 8V12 was

executed two days before the institution of the action. No issue was raised at the trial challenging due registration of the *lis pendens*. All these deeds executed after the *lis pendens* was duly registered are void in terms of section 66(2) of the Partition Law, No. 21 of 1977 (*Virasinghe v. Virasinghe [2002] 1 Sri LR 1*). Section 66 of the Partition Law reads as follows:

> *66(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 entry of a decree of partition under section 36 or by the entry of a certificate of sale.*
>
> *(2) Any voluntary alienation, lease or hypothecation made or effected in contravention of the provisions of subsection (1) of this section shall be void;*
>
> *Provided that any such voluntary alienation, lease or hypothecation shall, in the event of the partition action being dismissed, be deemed to be valid.*
>
> *(3) Any assignment, after the institution of a partition action, of a lease or hypothecation effected prior to the registration of such partition action as a lis pendens shall not be affected by the provisions of subsections (1) and (2) of this section.*

But this section does not prohibit alienation, lease or hypothecation of an interest to which a co-owner may ultimately become entitled by virtue of the decree in a pending action (*Sirisoma v. Sarnelis Appuhamy (1950) 51 NLR 337, Sillie*

Fernando v. Silman Fernando (1962) 64 NLR 404, Karunaratne v. Perera (1966) 67 NLR 529). The contesting defendants' deeds do not fall into this category. They are voluntarily executed outright transfers of defined portions.

Was the identification of the corpus a real issue before the District Court?

In the prayer to his statement of claim, the 8th defendant only sought exclusion of lot 2 in the preliminary plan from the corpus, not the dismissal of the action, on the basis that the corpus has not been properly identified. However, at the trial, the 8th defendant raised the following vague issue (issue No. 6) on the identification of the corpus:

> *Is the land proposed to be partitioned not properly shown on the preliminary plan?*
> *If so, can the plaintiff maintain this action?*

It is important to realise that there is a distinction between contesting the case on the basis that the land to be partitioned is not properly depicted in the preliminary plan and seeking exclusion of a particular lot depicted in the preliminary plan on a different basis such as prescription.

The reason I say the above issue is vague is because the 8th defendant does not say whether a larger land is surveyed or a smaller land is surveyed or from which side of the land (boundary) the expansion or shrinkage, if at all, has taken place. In my view, given the scheme of the Partition Law, it is unfair to allow a party in a partition action to raise such an unspecific and vague issue/point of contest for the first time at the trial.

Issues are raised to narrow down the scope of the trial and for the trial to be conducted with discipline. Issues must be specific for the opposite parties to meet and the presiding Judge to understand the real dispute or disputes between the parties and answer them properly. Technically, it is the duty of the presiding Judge to raise issues but practically it is the duty of counsel for the respective parties to raise correct issues. Practitioners of the District Court know this ground reality.

The preliminary plan was tendered to court on 08.09.1998 (Journal Entry No. 28) and the court gave several dates to consider the preliminary plan: *vide inter alia* JE No. 30 dated 24.11.1998, JE No. 31 dated 23.02.1999, JE No. 33 dated 04.05.1999, JE No. 39 dated 05.10.1999 and JE No. 40 dated 18.01.2000.

Although the 8th defendant filed his statement of claim dated 25.04.2000 more than 1 ½ years after the preliminary plan had been tendered to court, he never stated in his statement of claim or at any time thereafter until the said vague issue No. 6 was raised at the trial that the land to be partitioned was not properly depicted in the preliminary plan and therefore the plaintiff's action must fail.

If the land to be partitioned was not properly depicted in the preliminary plan, what should the 8th defendant have done?

I accept that there is an overarching obligation cast upon the District Judge hearing a partition action to satisfy himself that the land is properly identified. If the corpus cannot be properly identified, investigation of the title does not arise. The title needs to be investigated on a properly identified corpus. However, this

does not mean that identification of the corpus is exclusively left to the District Judge. It is the duty of the relevant parties to assist the court and make applications for the court to make incidental orders to identify the corpus if there is a question on the identification of the corpus.

In the case of *Dharmaratana Thero v. Siyadoris [1995] 2 Sri LR 245*, the contention of counsel for the petitioner was that the District Judge was in serious error when he refused the application to register the *lis pendens* in respect of the larger land on the basis of belatedness by first failing to carry out the imperative duty imposed upon the District Judge under section 19(2)(b) of the Partition Law which reads "*Where any defendant seeks to have a larger land made the subject matter of the action as provided in paragraph (a) of this sub-section,* ***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.*" In response to this contention, G.P.S. de Silva J. (later C.J.) held at 246-247:

> *It would appear that on a literal reading of the section, the duty is cast on the court to specify the party by whom an application for the registration of the action as a lis pendens in respect of the larger land has to be filed. But the relevant question is, at what point of time does such duty arise? It seems to me that the duty of the court arises only upon the party defendant interested in having the larger land partitioned moving the court to make the appropriate order in terms of the section. This is a matter which would normally*

> *come up in the course of the motion roll and it was surely the duty of the Attorney-at-Law representing the petitioner to have invited the court to make the required order. How else is the court to be made aware of the need to make an order in terms of section 19(2)(b)? The interpretation contended for on behalf of the petitioner would place an undue burden on the court.*

Concluding a partition case is a costly and time-consuming process. The law makes provision for a defendant who raises concerns about the identification of the corpus to do so before the case is taken up for trial and during the course of the trial. Without taking such steps, a defendant in a partition action cannot scuttle the whole process, which has run into several decades, by taking up the position that the corpus has not been properly identified for the first time on appeal. Merely raising an open-ended issue on the identification of the corpus is insufficient. A partition case is not a criminal case to create doubt about the plaintiff's case and remain silent. Although technically there are plaintiffs and defendants in a partition case as in any other civil case, practically all parties play a dual role in a partition action; a defendant today can become the plaintiff tomorrow and *vice versa* for the prosecution of the action to termination (section 70 of the Partition Law).

In terms of section 16(1) of the Partition Law, the court issues a commission to survey the land and prepare the preliminary plan depicting the land sought to be partitioned. According to section 16(2), on the application of any party, the court can direct the surveyor to survey any larger or smaller land than that pointed out by the plaintiff to the surveyor.

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.*

Such an application was not made by the contesting defendants including the 8th defendant. Nor did the 8th defendant get a separate commission issued to another surveyor and have that plan superimposed on the preliminary plan for the court to understand the real issue on the identification of the corpus and come to a correct conclusion.

Section 19(2) of the Partition Law lays down a detailed procedure to be followed by a defendant who seeks to have a larger land partitioned. In short, such a defendant shall take afresh all the steps that a plaintiff in a partition action shall take, which include compliance with the provisions of sections 12-18 of the Partition Law.

Section 18(1) deals with the return of the surveyor's commission after the preliminary survey. Section 18(2) enacts *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.*

At the trial, the preliminary plan and the report were marked X and X1 respectively by the plaintiff. If any of the contesting defendants thought that a larger land had erroneously been included, such defendant could have summoned the surveyor to give evidence and sought clarifications. This was not done.

What was the real issue put forward by the 8th defendant at the trial?

The 8th defendant (by issue No. 7) sought exclusion of lot 2 on the basis that lot 2 is a defined portion of *innawatta*, which he acquired on deeds and prescription:

> *Is the 8th defendant entitled to lot 2 of the preliminary plan on deeds and prescription as stated in the statement of claim of him?*

The exclusion of lot 2 in favour of the 9th to 21st defendants was the only concern of the 8th defendant at the trial. The 8th defendant in his evidence has not gone into the conversion of traditional land measures to English equivalents.

In my view, there was no live issue at the trial that the preliminary plan depicts a land double in extent of the land sought to be partitioned as concluded by the High Court of Civil Appeal.

Is a land double in extent of the land sought to be partitioned depicted in the preliminary plan?

The 8th defendant purchased lot 2 in the preliminary plan from the 6th defendant. According to the 6th defendant, after his father's testamentary case (8V2), *innawatta* devolved on him and his elder brother. In the testamentary case, *innawatta* was described as a land of 4 acres.

Thereafter, upon an arrangement between the 6th defendant and his brother, the deed of exchange 8V3 dated 09.01.1981 had been executed conveying the rights of the 6th defendant's brother in *innawatta* to the 6th defendant. In 8V3, *innawatta* was described as a land in extent of <u>about</u> 5 acres, not 4 acres or exactly 5 acres.

The 6th defendant got plan 8V4 dated 19.11.1984 prepared after this arrangement. According to this plan, *innawatta* comprises 5 acres, 1 rood and 28 perches.

The 7th defendant in paragraph 2 of his statement of claim (filed more than one year after the preliminary plan was sent to court) states that the plaintiff cannot maintain this action as the plaintiff has filed the action to partition a portion of *innawatta*. In other

words, his contention was that a smaller land is shown in the preliminary plan.

As seen from pages 270 and 272 of the brief, even counsel for the 9th to 21st defendants suggested to the plaintiff during cross-examination that a portion on the northern boundary has been left out in the preliminary plan, suggesting that a smaller land had been surveyed.

When it was suggested to the plaintiff by counsel for the 9th to 21st defendants at page 269 of the brief that one *laha* of kurakkan sowing area in the north western province is equivalent to one acre, the plaintiff has denied it and stated that one *laha* of kurakkan sowing area is equivalent to two acres, although he has later admitted by answering a leading question at page 271 that 3 acres means 3 *lahas*.

The 6th defendant at pages 355 and 363 of the brief has admitted in cross-examination that 3 *lahas* of kurakkan sowing area is equivalent to around six acres of land.

It is clear that there was uncertainty about the extent of *innawatta*.

During the argument, it was stated that the exclusion of lot 2 is sought based on an amicable partition identifying lot 2 as a long-standing distinct and defined portion.

According to the original plan 8V4, the line between lot 1 and 2 drawn on that plan in red is an artificial line drawn by the surveyor but not found on the ground. The northern point of that line is a “stake” and the southern point is a “hik” tree. Far from proof of adverse possession, there is no cogent evidence to say

that lot 2 was a defined portion for well over 10 years before the institution of this action to claim prescriptive title to lot 2.

The contesting defendants find fault with the plaintiff for not producing the alleged amicable partition deed No. 24134 dated 17.03.1939, which the plaintiff has referred to in paragraph 8 of the plaint. At the argument, learned President's Counsel for the plaintiff stated that the plaintiff does not have this amicable partition deed but referred to it since one deed (1V1) refers to the amicable partition deed. The plaintiff does not accept this amicable partition deed. The exclusion of lot 2 is sought not by the plaintiff but by the contesting defendants. If the contesting defendants rely on this deed to say that lot 2 in the preliminary plan was a divided lot from the rest of the land from the time the alleged amicable partition deed was executed, the burden is on them to prove it *inter alia* by producing that deed. This was not done.

By deed No. 24137 executed on 17.03.1939 (1V1), the predecessor in title of the 6th defendant and the 8th defendant, namely Lewis Senerath, transferred an undivided 1 rood out of lot A of *innawatta* in extent of 2 acres and 2.5 perches to David Appuhamy, and David Appuhamy in turn transferred that portion to the 1st defendant by deed P6 dated 21.08.1985. These two deeds are accepted by the 6th and 8th defendants.

The present 1st defendant filed partition action No. 10524/P (8V1) against the present 6th defendant and others based on deed P6. It is misleading to say that according to 8V1, *innawatta* comprises only 2 acres and 2.5 perches; this is only part of *innawatta* which has been identified as lot A of *innawatta*.

Although a partition action cannot be settled in this manner, as seen from page 567 of the brief, the said partition action was settled between the present 1st and 6th defendants allowing the present 1st defendant to demarcate 1 rood with the assistance of a surveyor. If lot 2 was entirely possessed by the 6th and 8th defendants and their predecessors as a separate and defined lot, there was no reason for the 6th defendant to arrive at such a settlement. Although the 8th defendant tendered selected documents of the said partition action compendiously marked as 8V1, he did not tender any of the plans referred to in the plaint and settlement in that case.

The deed 8V5 dated 09.06.1993 was tendered by the 8th defendant. The original of 8V5 was marked by the plaintiff as P7. The schedule of 8V5 (which I have reproduced below) goes to show that *innawatta* of about 5 acres in extent was still an undivided land in 1993. By this deed, the 6th defendant had transferred 3 perches to the 1st defendant (in terms of the settlement reached in 10524/P) out of 5 acres, not out of lot A comprising 2 acres and 2.5 perches.

> ඉහත කී විකුණුම්කාර මට වර්ෂ 1981 ක්වූ ජනවාරි මස 09 වන දින එච්.පී.පී. බංඩා ප්‍රසිද්ධ නොතාරිස් සහතික කල අංක 4999 දරණ හුවමාරු කිරීමේ ඔප්පුව පිට අයිතිව නොකඩවා නිරවුල්ව භුක්ති විඳගෙන එන වයඹ පළාතේ කුරුණෑගල දිස්ත්‍රික්කයේ කටුගම්පල හත්පත්තුවේ කටුගම්පල මැදපත්තු බස්නාහිර කෝරළේ ගලයාය පිහිටි 'ඉන්නාවත්ත' නමැති ඉඩමට මායිම්:- උතුරට:- ප්‍රසිද්ධ පාර සහ බේලින්ට සහ තව අයට අයිති ඉඩම්ද, නැගෙනහිරට:- පහල ගලයායට යන පාර සහ වලෝසිංඤෝගේ උරුමක්කාරයින්ට අයිති ඉඩමද, දකුණට:- සාපින් මුදලාලිට අයිති ඉඩම සහ මුදියන්සේගේ සහ පුංචප්පුහාමිගේ උරුමක්කාරයින්ට අයිති ඉඩම්ද, බස්නාහිරට:- සාපින් මුදලාලි, මුදියන්සේගේ උරුමක්කාරයින්ට සහ අබරන් අප්පුට ද, ඩිංගිරි මැණිකාට අයිති ඉඩමද, යන මායිම් තුල අක්කර පහක් පමණ විශාල කුලියාපිටිය ඉඩම් ලියා

පදිංචි කිරීමේ කාර්යාලයේ එල් 59/49 ලියා පදිංචි කොට ඇති ඉඩමෙන් බෙදා වෙන් කර ගත් වර්ෂ 1993 පෙබරවාරි මස 18 වන දින සුමනරත්න බී. අබේකෝන් බලයලත් මිනින්දෝරු මැන සෑදූ අංක 2873 දරණ පිඹුරේ නිරූපනය කොට ඇති ලොට් 1 ඒ 1 දරණ ඉහත කී ගලයාය පිහිටි 'ඉන්නවත්ත' නමැති බෙදූ ඉඩම් කොටසට ඉහත කී පිඹුරේ ප්‍රකාර මායිම් :-

උතුරට :- ඉහත කී අංක 2873 දරණ පිඹුරේ ලොට් ඒ 2 දරණ කොටස

නැගෙනහිරට :- මෙම මුල් ඉඩමේ කොටසක් වන ජේ. ඒ. විජේසේනට සහ තව

අයට අයිති බී අක්ෂරය දරණ කැබැල්ල

දකුණට :- මෙම මුල් ඉඩමේ කොටසක් වන දැනට ඩී. ජී. එල්. සෙනරත්ට අයිති අංක ඒ 1 දරණ කැබැල්ල

බස්නාහිරට :- මෙම මුල් ඉඩමේ කොටසක් වන දැනට ඩී. ජී. එල්. සෙනරත්ට අයිති අංක ඒ 1 දරණ කැබැල්ලද,

යන මායිම් තුල පර්චස් තුනක් විශාල බෙදූ ඉඩම් කොටස සහ එයට අයත් සියලු දේත් වේ.

As I have already stated, the 6th defendant had prepared plan 8V4 after the execution of deed of exchange 8V3. When 8V4 is compared with the preliminary plan, there is no issue regarding the northern, southern and western boundaries of *innawatta*. Those three boundaries tally. The only boundary at variance is the eastern boundary.

It is significant to note that according to 8V3, although the eastern boundary of *innawatta* is the road leading to Pahala Galayaya and the land of the heirs of Chalo Sinno, the eastern boundary of 8V4 does not extend up to the road, but the eastern boundary in the preliminary plan does. This means plan 8V4 does not depict the eastern boundary of *innawatta* correctly.

All this indicates that the summary disposal of the long-drawn-out partition case by the learned High Court Judges, without analysing any evidence but by the mechanical application of a standard formula that 1 *laha* of kurakkan sowing area is equivalent to 1 acre and therefore the land depicted in the preliminary plan is double in extent of the land to be partitioned and hence the plaintiff's action must fail, is clearly erroneous.

Where did the High Court of Civil Appeal go wrong?

The finding of the learned High Court Judges which is reflected in the following paragraph of the judgment is contradictory.

> *The preliminary plan shows a land of 6 acres 1 rood and 11 perches. The plaintiff has admitted in evidence that the northern boundary of the land has not been properly demarcated, hence the subject matter is not correctly depicted and that the land sought to be partitioned is 3 lahas of kurakkan sowing which is equivalent to 3 acres. The land shown in the preliminary plan is more than double that extent.*

On the one hand, the learned High Court Judges say that a portion of the northern boundary has been left out (i.e. the entire land has not been included in the preliminary plan) and on the other hand they say that more than double the extent has been included in the preliminary plan.

The learned Judges of the High Court of Civil Appeal presupposed that one *laha* of kurakkan sowing area is one acre. They considered this a rigid, fixed formula whereas it is not so.

In the case of paddy land, it was held in *Ariyawathie De Silva v. Wijesena* (*CA/608/2000/F, CA Minutes of 01.04.2019*) that there was "*no hard and fast rule that one amunam or five pelas of paddy sowing area shall necessarily equal to 2 ½ Acres*".

As held in *Hapuarachchi v. Podi Nilame* (*SC/APPEAL/52/2018, SC Minutes of 10.06.2021*), it is wholly unreliable to convert ancient land measures to English standard equivalents in identifying the corpus in a partition action. The extent of *innawatta* described in the old deeds tendered by the plaintiff is 3 *lahas* of kurakkan sowing area (P1 executed in 1893, P2 executed in 1903, P3 executed in 1916, P5 executed in 1939). The schedule to the plaint is a reproduction of the land described in these old deeds executed more than a century ago. Without surveyor plans being available, the extent of the land given in these old deeds is speculative. 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.

I accept that according to standard conversion tables found in various sources, one *laha* of kurakkan sowing area is equal to one acre (*vide The Ceylon Law Recorder*, Parts VI and IX of Vol XXII, *Ratnayake v. Kumarihamy [2002] 1 Sri LR 65 at 81*); but the court cannot strictly go by this formula disregarding all other factors in deciding the extent of the land. The question of identification of the corpus is not a mathematical question where mechanical application of a standard formula is appropriate. It is a question of fact and not a question of law which can be raised for the first time on appeal. This is amply demonstrable by the judgment in *Ratnayake v. Kumarihamy* itself where the standard conversion table is reproduced.

In *Ratnayake v. Kumarihamy*, 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 in extent (which is the same argument taken up in the instant case). However, upon consideration of the totality of the evidence led in the case, the District Court held that the preliminary plan depicts the correct land to be partitioned, which was affirmed by the Court of Appeal. 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*. Justice Udalagama 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. In those days, the surface area was measured by the quantity of seed required to sow the land. The plaintiff reproduces in the schedule to the plaint the schedule to old deeds prepared decades if not centuries ago as the land to be partitioned, as in the instant case, whereas the surveyor commissioned to prepare the preliminary plan shows the existing boundaries of the land, not the old boundaries stated in the schedule to the plaint. The surveyor further shows 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 English standard equivalents.

There is no rigid correlation between surface extents and sowing extents although surface extent is decided on sowing extent. Such a correlation depends on various factors including 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, 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.

Law Recorder Miscellany, page xxx, in *The Ceylon Law Recorder*, Vol XXII, Part VI records:

> *The amount of seed required varied according to the varying degrees of fertility in different parts of the Island, as fertile soil does not require as much seed as poor soil. For instance, an amunam in a fertile area will sometimes be twice as many square feet as an amunam in an unfertile area.*

It is also relevant to note that the sizes (capacity) of the traditional measures such as *lahas* and *neliyas* differ not only between districts but also within districts. In the instant case the measure under consideration was *laha.* In this regard, Law Recorder Miscellany, page xlv, in *The Ceylon Law Recorder*, Vol XXII, Part IX, reproducing an extract from a paper presented by the then Superintendent of Surveyors, states:

> *The Laha was also a measure of varying size. Within the same district and sometimes in the same Chief Headman's division, in different parts, a different size of Laha was in use. In the North-Western Province alone, in different parts, these are in use even today, four sizes of Lahas containing in capacity, 4, 5, 6 and 7 Neliyas respectively. The largest size of Laha according to my investigations is one in use in the Inamaluwa Korale of Matale North, and contains twelve Nelis.*

This is not a recent phenomenon. The following observation made by Canekeratne J. as far back as in 1948 in the case of *Noordeen Lebbe v. Shahul Hameed 49 NLR 274 at 276* highlights the imprecise nature of traditional land measures and the necessity to look for other evidence in deciding the extent of the land:

> *Though the description by paddy sowing extent is not an absolutely precise measurement, it can be determined within a fairly definite limits and most villagers in the locality would be able to show the extent: the evidence led shows that one pela is about ¾ of an acre. Then one comes to the boundaries.*

When there is a question of identification of the corpus, the court cannot merely go by the extent given in the deed. The court must take into consideration all the facts and circumstances of that particular case, including the boundaries given in the deeds, the conduct of the parties and the totality of the evidence led at the trial to come to the correct conclusion.

In *Noordeen Lebbe v. Shahul Hameed (1948) 49 NLR 274*, two contiguous lots of land referred to as the eastern lot and the western lot were sold in execution of a mortgage decree. The auctioneer's conveyance described each lot separately but further described the two lots by way of a survey plan which erroneously depicted only the western lot. The son of the original owner took up the position that only the western lot was conveyed by the auctioneer's conveyance. Although the District Court accepted this position, on appeal, the Supreme Court reversed this finding and held "*both lots passed to the purchaser on the conveyance. The addition of an erroneous plan did not vitiate an adequate and sufficient definition with certainty of what was intended to pass by the deed.*" The Supreme Court at page 275 observed "*the Court must look at the conveyance in the light of the circumstances which surrounded it in order to ascertain what was therein expressed as the intention of the parties*" and further explained at 276-277 "*where there are several descriptions which, when evidence of surrounding facts is admitted, are not consistent with each other, the Court must in every case do the best it can to arrive at the true meaning of the parties upon a fair consideration of the language used and the facts properly admissible in evidence. The description by reference to the plan when taken with the earlier part of the schedule is inaccurate and misleading. The descriptions contained in the earlier part of the schedule are certain and unambiguous.*"

In the instant case there is no inconsistency as to the extent because that matter cannot be decided solely on what is stated in conversion tables. Even assuming there is such an inconsistency, if the boundaries are clearly ascertainable, discrepancy in the extent can be reconciled or disregarded.

In *Gabriel Perera v. Agnes Perera [1950] 43 CLW 82*, the boundaries of the land were given in the deed without reference to a plan and the extent was stated to be about 1 rood and 5 perches whereas it was in fact 1 rood and 22 perches. Basnayake J. at page 88 held:

> *It is settled rule of interpretation of deeds that, where the portion conveyed is perfectly described, and can be precisely ascertained, and no difficulty arises except from a subsequent inconsistent statement as to its extent, the inconsistency as to extent should be treated as a mere falsa demonstratio not affecting that which is already sufficiently conveyed.*

In *Silva v. Ismail (1943) 44 NLR 550* it was held that in describing the property in a conveyance, if specific dimensions of the premises sold are given <u>at the beginning of the schedule</u> (e.g. in *Silva*'s case, seventy and a half feet in length and thirty feet in width together with the entire boutique), those specific dimensions must control the description of the boundaries given <u>at the end of the schedule</u>.

Appuhamy v. Gallella (1976) 78 NLR 404 is a similar case where in the deed the extent of the land was followed by the boundaries, not *vice versa* as usually happens. The question was whether only 10 perches or the entire land containing about 40 perches was

transferred by the deed. The uncertainty arose from the inconsistent descriptions of the extent: the area description covered 10 perches while the boundary description was about 40 perches. Taking all the circumstances into account, the Supreme Court set aside the judgment of the District Court and held that the deed conveyed only 10 perches and not the entire land falling within the boundaries in the schedule. The Supreme Court expounded the governing principles in the following manner:

> *Where the extent of a grant of land is stated in an ambiguous manner in a conveyance, it is legitimate to look at the conveyance in the light of the circumstances which surrounded it in order to ascertain what was therein expressed as the intention of the parties. It is permissible to resort to extrinsic evidence in order to resolve the ambiguity relating to the subject matter referred to in the conveyance. In such circumstances it is proper to have regard to the subsequent conduct of each of the parties, especially when such conduct amounts to an admission against the party's proprietary interest.*

In my view, the description of *innawatta* contained in the 6th defendant's deed of exchange marked 8V3 (where the eastern boundary of *innawatta* is the road) read with the 6th respondent's plan marked 8V4 (where the eastern boundary of *innawatta* is not the road) makes it clear that the preliminary plan marked X (where the eastern boundary of *innawatta* is the road) depicts the entire extent of *innawatta* (6 acres, 1 rood and 11 perches) and it is erroneous to say that the preliminary plan shows a land more than double in extent of *innawatta*.

Application of previously decided cases

The learned High Court Judges and learned counsel for the contesting defendants strongly rely on *Sopaya Silva v. Magilin Silva [1989] 2 Sri LR 105* to justify the dismissal of the partition action by the High Court on the basis that there is a significant discrepancy in the extents of the lands described in the plaintiff's deeds and the preliminary plan. Learned counsel for the 6th defendant in her written submissions even cautions that the principles enumerated in *Sopaya Silva*'s case should be upheld and consistency in the law regarding identification of the corpus maintained.

The principles of law enunciated in one case have no universal application to all future cases of the same species indiscriminately unless the facts are similar. Bearing in mind the established principles of law, each case must be decided on the unique facts and circumstances of that particular case. The *ratio decidendi* in *Sopaya Silva*'s case cannot be mechanically applied whenever there is an issue in relation to the identification of the corpus in a partition action.

In *Sopaya Silva*'s case the plaintiff filed action to partition a land in extent of 8 acres, 3 roods and 29 perches but the surveyor prepared the preliminary plan in extent of 11 acres, 1 rood and 33 perches. There was no contest in the case. Having found this discrepancy at the time of writing the judgment regarding the extent of land sought to be partitioned and the land surveyed, the District Judge dismissed the action on the basis that a larger land had been surveyed. This he did without hearing the parties on that matter. On appeal, the Court of Appeal held that the dismissal of the action without hearing the parties was wrong and

what the District Judge ought to have done was to reissue the commission with instructions to survey the land as described in the plaint or to permit the plaintiff or any of the defendants to seek partition of the larger land after taking steps including the registration of a fresh *lis pendens*.

The facts in the instant case are totally different. In the instant case there was no denial of a hearing to the parties on the issue of the identification of the corpus or any other matter. More importantly, in *Sopaya Silva*'s case the plaintiff sought to partition a specific extent of land, namely, 11 acres, 1 rood and 33 perches, presumably identified by way of a plan, whereas in the instant case the extent given was not specific as it was stated in an ancient Sinhala land measure, namely 3 *palas* of kurakkan sowing area. Hence the learned High Court Judges erred in concluding that the guidelines given in *Sopaya Silva*'s case should have been followed in this case.

The other case the learned High Court Judges cite is *Jayasuriya v. Ubaid (1957) 61 NLR 352*. In *Jayasuriya*'s case, the plaintiff filed action to partition lot 160/6 in T.P. 269370 in extent of 3 acres, 1 rood and 7 perches. The plaintiff claimed ½ share and pleaded that the other ½ share should go to the 1st defendant. The 1st defendant disputed the corpus. At the trial, the preliminary plan was not marked in evidence. When this was raised by counsel for the 1st defendant at the closing submissions, the District Judge, without issuing summons to the surveyor who prepared the preliminary plan, issued a fresh commission to another surveyor in the belief that the first surveyor would not be available. The 1st defendant did not take part in the further hearing. When the new surveyor gave evidence on the new plan, it transpired that the

land which the plaintiff in fact wanted to partition was not lot 160/6 in T.P. 269370 but lot 1 in T.P. 269370 and two other lots that fell outside the said Title Plan. The District Judge delivered the judgment on the mistaken assumption that the first plan and the second plan both depicted the same corpus. On appeal, the judgment of the District Court was rightly set aside and retrial was ordered. It is in this backdrop that the Supreme Court observed "*there was a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it was always open to him to call for further evidence in order to make a proper investigation*". I need hardly emphasise that the facts in *Jayasuriya*'s case and the instant case are incomparable.

Although learned counsel for some of the contesting defendants state that a larger land than that sought to be partitioned was ultimately partitioned without a new *lis pendens* being registered, there was no necessity to register a fresh *lis pendens* for a larger extent of land because no larger land is depicted in the preliminary plan.

Conclusion

On the facts and circumstances of this case, the finding of the District Court that the preliminary plan depicts the land sought to be partitioned is justifiable. The finding of the High Court of Civil Appeal that the corpus has not been properly identified and therefore the plaintiff's action is bound to fail cannot be allowed to stand. I answer the question of law upon which leave to appeal was granted in the affirmative and set aside the judgment of the High Court of Civil Appeal and restore the judgment of the District Court and allow the appeal of the plaintiff with costs.

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 application for Leave to Appeal from an Order of the Provincial High Court of the Western Province Holden in Negombo dated 29th June 2018 in HC/ALT/332/2017, under section 31DD of the Industrial Disputes Act, as amended and the High Court of the Provinces (Special Provisions) Act No. 10 of 1990. Read with the Rules of the Supreme Court.

Case no.: SC Appeal 94/2020

Leave to Appeal No: SC/HC/LA/ 80/2018

High Court Case No: HC/ALT 332/2017

Labour Tribunal No.: 21/123/2012

Walihingage Karunarathne Silva,

No.53/G,

Gonagaha,

Makawita.

APPLICANT

vs.

Polytex Garments Ltd,

Minuwangoda Road,

Ekala, Ja-E1a.

RESPONDENT

AND BETWEEN

Polytex Garments Ltd,

Minuwangoda Road,

Ekala, Ja-E1a.

RESPONDENT – APPELLANT

Vs

Walihingage Karunarathne Silva,

No.53/G,

Gonagaha,

Makawita.

APPLICANT-RESPONDENT

AND NOW BETWEEN

Esquel Sri Lanka Ltd (Formerly

known as Polytex Garments Ltd)

Minuwangoda Road,

Ekala, Ja-Ela.

RESPONDENT – APPELLANT-PETITIONER

Vs

Walihingage Karunarathne Silva,

No.53/G,

Gonagaha,

Makawita.

APPLICANT-RESPONDENT-RESPONDENT

BEFORE : **MURDU FERNANDO, PC, J**
S. THURAIRAJA, PC, J AND
KUMUDUNI WICKREMASINGHE, J

COUNSEL : Chula Bandara with Gayathri Kodagoda for the Respondent-Appellant-Petitioner
P.K Prince Perera for the Applicant-Respondent-Respondent

WRITTEN SUBMISSIONS : Respondent-Appellant-Petitioner on 1st April 2021
Applicant-Respondent-Respondent on 27th April 2021

ARGUED ON : 18th February 2022

DECIDED ON : 22nd July 2022

S. THURAIRAJA, PC, J.

The Applicant-Respondent-Respondent, namely Mr. W. K. Silva, ("Hereinafter referred to as the "Respondent") filed application in the Labour Tribunal of Negombo against the Respondent-Appellant-Petitioner company (Hereinafter referred to as the "Appellant"), formerly registered under the name Polytex Garments Ltd and currently under the name Esquel Sri Lanka Ltd as amended by amended caption dated 29th March 2019, praying for reinstatement with back wages, or damages without reinstatement, costs and other reliefs. In this instance, The President of the Labour Tribunal delivered judgment in favour of the Respondent awarding damages without reinstatement.

Upon Appeal to the Provincial High Court of Negombo by the Appellant against the above judgment, Judgment was delivered dismissing the Appeal. In due course,

the Appellant filed Leave to Appeal application in the present Court by Petition dated 8th August 2018 and Leave to Appeal was granted on 16th September 2020 on the following question:

> *"Have the Learned President of the Labour Tribunal and the Learned High Court Judge erred in law by awarding exorbitant compensation."*

As such I find it pertinent to examine the surrounding circumstances of this case and the Judgments by the President of the Labour Tribunal and the Provincial High Court.

The Facts

In the application preferred to the Labour Tribunal of Negombo dated 20th September 2012, the Respondent stated that the Respondent joined the Appellant Company as a driver on 7th December 1992. The Respondent stated that he had been able to gain annual salary increases despite the fact that Appellant had served the Respondent with several warning letters. By letter dated 15th May 2012 the Respondent had been placed under interdiction without pay with effect from the same date stating that on 11th May 2012 and 14th May 2012 there had been certain irregularities committed by the Respondent in respect of fuel in vehicles driven by him and for being a bad influence on other employees.

Thereafter charge sheet dated 12th June 2012 had been issued to the Respondent by the Appellant on four charges directing the Respondent to show cause before 19th June 2012. Consequently, letter dated 18th June 2012 was forwarded by the Respondent to the Appellant containing reasons for his innocence. The Respondent states that in this same letter, he had requested that in the instance that the Appellant proceeds to hold a domestic inquiry that he be granted the assistance to appoint a defence officer to represent him at the inquiry. The Respondent states that Domestic Inquiry was held on 10th July 2012 where his request was denied, and copies of journal entries were not to be made available to him citing company procedure.

By the Answer dated 11th October 2012 in the Labour Tribunal the Appellant sates that the explanation tendered by the Respondent was unsatisfactory and therefore unacceptable to the management of the Appellant and as such domestic inquiry was conducted into the charges preferred against the Respondent by an external independent inquiring officer. The Appellant highlights that the Respondent had a poor past record of services during his period of employment. The decision of the inquiring officer was communicated to the Respondent by letter dated 29th August 2012 finding the Respondent guilty of three out of four charges, thus terminating the Respondent's services with immediate effect.

The Respondent had filed replication dated 30th October 2012 denying the averments contained in the Appellant's answer. Thereafter upon admitting witnesses and Written Submissions on behalf of both parties, the President of the Labour Tribunal Negombo made Order on 17th July 2017 in favour of the Respondent granting damages calculated at 3 months per each year of the Respondent's service (19 years on his last drawn basic salary of Rs. 16,985)

Being aggrieved by the above Order the Appellant appealed to the High Court of Negombo by a Petition dated 21st August 2017 praying for the Order by the Labour Tribunal to be set aside and for relief prayed for in the Petition. Judgment was delivered on 29th June 2018 upholding the Order of the Labour Tribunal and dismissing Appellant's Appeal with no order for costs. Aggrieved by the same the Appellant preferred Appeal to this Court by Petition dated 8th August 2018.

At this juncture it is important to note the circumstances under which the Respondent was interdicted by the letter dated 15th May 2012. The Respondent had been an employee for the Appellant company for a period of 19 years. The Appellant company had received several reports of theft of fuel from their vehicles over a period of time and the company had taken steps to monitor the problem by attaching Global Positioning Systems (GPS) for vehicles. The company which fitted the system was

capable of locating the vehicle at any given time as well as keeping track of fuel consumption, speed, and route real-time. This system was initially fixed only to the lorry driven by the Respondent in order to test the new technology.

On 11th May 2012 and on 14th May 2012, the company noted suspicious activity as there was a record that the vehicle was stopped at certain locations at which, between the engine being stopped and restarted, there had been a drastic drop in the fuel level of the vehicle. As per Siphon Consumption report marked R5, on 11th May 2012, there had been a drop of 22 Litres within 9 seconds, and on 14th May 2012 (as per Siphon Report marked R7) there had been a drop of 15 Litres within 5 seconds.

The charge sheet issued by the Appellant Company dated 12th June 2012 indicate four charges including the theft of approximately 30 Litres of fuel from a vehicle driven by him, teaching another driver employed by the company how to commit the same theft, compelling 2 of his assistants to aid in the commission of theft, and conducting himself in a manner destroying the trust placed upon him in regard to company property.

Both the Learned President of the Labour Tribunal and the Learned High Court Judge had expressed doubts in contemplating whether the technology was accurate and whether such a significant amount of fuel could be drained within such a short span of time due to certain discrepancies in the data and admissions by the Appellant's witnesses during proceedings at the Labour Tribunal. It was held that there was a lack of sufficient evidence presented to justify the termination of the Respondent.

Taking the question of law at hand into account, I believe this Court has not been called upon by the Appellant to disturb the decision of the Labour Tribunal pertaining to the course of action leading to the termination of the Respondent's services. As such, I will not attempt to disturb the merits of this case any more than necessary to address whether the compensation granted by the Labour Tribunal as affirmed by the High Court is of an exorbitant value.

Calculating compensation

The President of the Labour Tribunal, by judgment dated 17th July 2017, decided that it would be redundant to order reinstatement of the Respondent and instead held that the Respondent is entitled to reasonable compensation under Section 33(5) and 33(6) of the Industrial Disputes Act. Accordingly, compensation was calculated to be awarded was for 3 months salary for each year of service on the last drawn basic salary of Rs. 16,985.00, which totalled to an amount of Rs.968,145.00 .

The Appellant in their Written Submission clarifies that the contention of the Appellant is not based upon the computation itself but the failure of the Learned President of the Labour Tribunal to consider relevant factors in the said calculation, resulting in an award for excessive compensation. In considering whether the awarded compensation is exorbitant, an examination of the provisions of the Industrial Disputes Act 43 of 1950 (as amended) is necessary.

As per Section 33 (1) (d), any order of a labour tribunal may contain decisions;

> *"as to the payment by any employer of compensation to any workman, the amount of such compensation or the method of computing such amount, and the time within which such compensation shall be paid"*

The Labour Tribunal is well within their powers to have awarded compensation in lieu of reinstatement as Section 33(6) clarifies that the Tribunal may include in an award or order a decision as to the payment of compensation as an alternative to reinstatement, in any case where the court, tribunal or arbitrator thinks fit so to do. However, the Industrial Disputes Act does not contain a predetermined formula for the calculation of compensation, nor does it outline any list of factors to be considered by Tribunals in calculating the same, exhaustive or otherwise. While this allows for Tribunals to consider all factors in determining an amount to be deemed reasonable, as is in line with the objects of the legislation, it leaves room for ambiguity in reference to the statue alone.

In light of the same, I wish to examine other legislation regarding formula for compensation or payment for workmen, i.e. the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971, The Workmen's Compensation Ordinance 19 of 1946, and the Payment of Gratuity Act, No. 12 of 1983.

As per the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 (as amended), Section 6D states that:

> *"Any sum of money to be paid as compensation to a workman on a decision or order made by the Commissioner under this Act, shall be computed in accordance with such formula as shall be determined by the Commissioner in consultation with the Minister, by Order published in the Gazette"*

The calculation formula is found in the schedule of Gazette Extraordinary No. 1384/7 dated March 15, 2005, which utilises the number of years of service completed at the date of termination by the employee as the variable. Accordingly, the number of years of service completed at the date of termination by the employee directly coordinates with the number of months salary to be paid as compensation for each year of service, and it outlines the Maximum Cumulative Compensation for each category. As of 2021 the maximum compensation payable under the formula was increased to Rupees 2.5 Million while retaining the existing calculation formula.

Applying a similar formula to an instance as the present case of 19 years, the formula sets the number of months' salary to be paid as compensation for each year of service at 1.5 months' salary with a maximum cumulative compensation for 38 months.

The Workmen's Compensation Ordinance 19 of 1946 (as amended) operates on a different basis as the Ordinance intends to compensate workman who have suffered personal injury. Schedule IV to this same sets out the amount of compensation to be paid considering the salary range of a workman as the variable, with varying amounts

of compensation for each category based on the nature of injury; death of workman, permanent total disablement of workman, or half-month compensation for temporary disablement of workman. The Act was more recently amended by the Workmen's Compensation (Amendment) Act No.10 of 2022, as certified on 19th March 2022 for increased amounts of compensation and an introduction of a Section 6A which takes the nature of employment of a workman into account in relation to any injury in the case of permanent or partial disablement of a workman.

Given the distinct purpose of this Act the same scheme of calculation of compensation cannot be considered for compensation for termination of employment.

As per Part II of the Payment of Gratuity Act, No. 12 of 1983, Section 6 stipulates the rate of payment of Gratuity for a workman as follows:

> *" A workman referred to in subsection. (1) of section 5 shall be entitled to receive as gratuity, a sum equivalent to-*
>
> *(a) half a month's, wage or salary for each year of completed service computed at the rate of wage or salary last drawn by the workman, in the case of a monthly rated workman; and*
>
> *(b) in the case of any other workman, fourteen days' wage or salary for, each year of completed service computed at the rate of wage or salary last drawn by that workman:"*

While neither of the above tests can be strictly adopted for the purposes of the Industrial Disputes Act, they may Act as a certain guide for maximum compensation in deciding upon the number of months of salary for years of service and for the ascertainment of reasonable compensation.

Given the discretion left to tribunals in regard to the calculation of compensation, a wealth of cases has examined the elements to be considered in the allocation of compensation.

As per Lord Denning in **Ward v James 1965 1 AER 564**,

> *"When a statute gives a discretion, the Courts must not fetter it by rigid rules from which a Judge is never at liberty to depart. Nevertheless the Courts can lay down the considerations which should be borne in mind in exercising the discretion and point out those that should be ignored"*

In the context of the Industrial Disputes Act it was clarified by His Lordship Justice Sharvananda in **Caledonian Estates Ltd. vs. Hillman (1977) 79(i) NLR 421** aptly noting that:

> *"The Legislature has wisely given untrammelled discretion to the Tribunal to decide what is just and equitable in the circumstances of each case. Of course, this discretion has to be exercised judicially. It will not conduce to the proper exercise of that discretion if this Court were to lay down hard and fast rules which will fetter the exercise of the discretion, especially when the Legislature has not chosen to prescribe or delimit the area of its operation. Flexibility is essential. Circumstances may vary in each case and the weight to be attached to any particular factor depends on the context of each case."*

Despite this view, the unbridled discretion granted to tribunal's should not suggest inconsistency in the computation of compensation without clear direction as to the relevant factors to be considered by tribunals. The above followed the case of **Ceylon Transport Board vs. Wijeratne (1975) 77 NLR 481** wherein His Lordship Justice Vythialingam observed:

"The Labour Tribunal should normally be concerned to compensate the employee for the damages he has suffered in the loss of his employment and legitimate expectations for the future in that employment, in the injury caused to his reputation in the prejudicing of further employment opportunities. Punitive considerations should not enter into its assessment except perhaps in those rare cases where very serious acts of discrimination are clearly proved. ***Account should be taken of such circumstances as the nature of the employer's business and his capacity to pay, the employee's age. the nature of his employment, length of service, seniority, present salary, future prospects, opportunities for obtaining similar alternative employment, his past conduct, the circumstances and the manner of the dismissal including the nature of the charge levelled against the workman, the extent to which the employee's actions were blameworthy and the effect of the dismissal on future pension rights and any other relevant considerations.*** *Account should also be taken of any sums paid or actually earned or which should also have been earned since the dismissal took place. The amount however should not mechanically be calculated on the basis of the salary he would have earned till he reached the age of superannuation..."*

(Emphasis Added)

Building upon the same, the case of **Jayasuriya vs Sri Lanka State Plantations Corporation (1995) 2 SLR 379** broke ground in terms of computation of compensation. His Lordship Justice Dr. Amerasinghe was correctly of the view that there must be a stated basis for the computation, taking the award beyond the realm of mere assurance of fairness. He considered that:

"While it is not possible to enumerate all the circumstances that may be relevant in every case, it may be stated that the essential question, in the

determination of compensation for unfair dismissal, is this: What is the actual financial loss caused by the unfair dismissal? for compensation is an "indemnity for the loss"."

"What are the matters to be considered? There ought to be at least an approximate computation of immediate loss, i.e. loss of wages and benefits from the date of dismissal up to the date of the final Order or Judgment, and another with regard to prospective, future loss, and a third with regard the loss of retirement benefits, based as far as possible on a foundation of solid facts given to the Tribunal by the parties."

Mental hardship or injured feelings were considered non-compensable in the absence of evidence that they could be translated into calculable financial loss. In regard to financial hardship :

"With regard to financial loss, there is, first, the loss of earnings from the date of dismissal to the determination of the matter before the Court, that is, the date of the Order of the Tribunal, or, if there is an appeal, to the date of the final determination of the appellate court. ***The phrase "loss of earnings" for this purpose would be the dismissed employee's pay (net of tax), allowances, bonuses, the value of the use of a car for private purposes, the value of a residence and domestic servants and all other perquisites and benefits having a monetary value to which he was entitled****. The burden is on the employee to adduce sufficient evidence to enable the Tribunal to decide the loss he had incurred."*

Thereafter:

"Once the incurred, i.e., the ascertainable past, losses have been computed, a Tribunal should deduct any wages or benefits paid by the employer after termination, as well as remuneration from fresh employment… If the employee had obtained equally beneficial or financially better alternative

employment, he should receive no compensation at all, for he suffers no loss… And compensation should be reduced by the amount earned from other, less remunerative employment. The principle is this: He is entitled to indemnity and not profit."

Additionally, consideration may also be given to any failure of the applicant to mitigate losses incurred, and for certain future losses. In the calculation of future losses, Justice Vythialingam expressed opinions on the date of retirement being viewed as an outer limit in **Ceylon Transport Board vs. Wijeratne (Supra)** in that:

"He may die. His services may be terminated for misconduct or on account of retrenchment. The business may cease to exist or close down."

It is agreeable that there are no guarantees that the applicant, even if he were to remain in employment, would have reached the age of retirement or stayed in the same position till such date. However, Hon. Justice Dr. Amerasinghe, argues against the factors considered by His Lordship Vythialingam, J, with the view that assuming for certainty all the disadvantageous possibilities and to take no account of the advantageous, seems hardly fair.

In light of the same, his Lordship Justice Dr. Amerasinghe found it pertinent to consider the time remaining for retirement as one of the many factors in awarding compensation for termination in the case of **Jayasuriya vs Sri Lanka State Plantations Corporation.**

In the case of **United Industrial Local Government & General Workers' Union v. Independent Newspapers Ltd. (1973) 75 NLR 529** it was considered that:

" Before making an order that is just and equitable as provided for in section 31 C of the Act, the tribunal must consider, in cases where reinstatement may be one of the reliefs the question whether it is a fit case for an order for compensation to be made as an alternative to

reinstatement. ***Evidence placed before the tribunal in regard to the previous conduct of the workman will be very relevant in this connection***."

(Emphasis Added)

Taking all the above into account there appears to be a plethora of elements to be considered by a Tribunal in awarding compensation. The nature of the employer's business, the employer's capacity to pay, the age of the employee, 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, the effect of the dismissal on future pension rights, the actual financial loss suffered by the dismissal, any benefits enjoyed by the employee (including allowances, bonuses, and any property or services provided for the employee's private purposes which may have an ascertainable monetary value), deductions for any payments made by the employer to the employee subsequent to and in relation to such dismissal, remuneration from employment subsequent to dismissal, any failure of mitigation of losses by the employee, and future losses taking the remaining period to date of retirement into due account all with the view of exercising discretion in a just and equitable manner. While this is not an exhaustive list of factors to be considered in awarding compensation, it is of course reasonable to be of the understanding that not all factors are relevant to every case and as such only those factors as suited for the circumstances of each application need be considered by Tribunals.

In awarding just and equitable compensation, it must be noted that the discretion given is not to be exercised arbitrarily. In exercising such discretion, the Tribunal must provide reasons justifying the compensation awarded with the circumstances of a case. In this endeavour, attention is to be paid to any of the factors mentioned above or any other relevant circumstances present in a given case.

To this effect, I am inclined to agree with the outlook expressed by Hon. Justice Aluwihare, PC in the case of **Inter Company Employees Union vs Asian Hotels Corporation Ltd S.C. Appeal 101/10 (S.C Minutes dated 24.7.2018)** in which the following was expressed in regard to just and equitable orders determining the quantum of compensation:

> *"It is not satisfactory to simply say that a certain amount is just and equitable. There should be a stated basis for the computations, supported by the factors taken into consideration, in arriving at the amount of compensation awarded. In the case of* ***Brook Bond (Ceylon) Ltd v. Tea, Rubber, Coconut and General Produce workers Union (supra)*** *it was held that "for an order to be just and equitable it is not sufficient for such order merely to contain a just and equitable verdict. The reasons for the verdict should be set out to enable the parties to appreciate how just and equitable the order is. In the absence of reasons, it would not be a just and equitable order."*

In the instant case, the Order by the President of the Labour Tribunal examines the evidence before the Tribunal in holding in favour of the Respondent but does not at any juncture state the basis upon which compensation has been calculated. The consequent decision by the High Court Judge dismissing the Appeal of the Appellant does not rectify this matter and merely reconsiders the evidence placed before the Labour Tribunal. Regardless of the judgment of the High Court stating that compensation has been computed according to law, neither decision has elucidated the basis and circumstances upon which the awarded compensation is justified.

As such I find it pertinent to attend to several prominent factors, including the previous conduct of the Respondent. The Appellant highlights that the dismissal of the Respondent follows multiple infractions occurring over the period of employment.

The documents R16 to R21 were marked in the evidence of one Nammuni Saman Dapunu Kumara ie. Manager Human Resources and Administration of the Appellant.

The document marked R16 in the Appeal Brief refers to a document from the General Manager to the Respondent dated 5th November 2003, the contents of which refer to a domestic inquiry at which the Respondent has been found guilty of the charges on a charge sheet dated 14th October 2003, for having met with a number of accidents and for driving far below the expected standards of caution and safety resulting in damage to the company vehicles. The same warns the Respondent that should the company vehicles meet with an accident while being driven by him or owing to his carelessness, his services shall be terminated.

The document marked R17 refers to a document from the General Manager to the Respondent dated 30th January 2003 seemingly warning the Respondent for unnecessary delay and for going on unauthorised work without returning to the factory promptly given an incident of a long period of delay from leaving the premises for a drop off and returning to the premises 4 hours later.

The document marked R18 refers to a document from the General Manager to the Respondent dated 12th March 2003 drawing attention to failure of the Respondent in carrying out duties allocated to him and the loss of 1 and half hours of production due to his negligence by forgetting to report for work on a given date, resulting in suspension for 3 days and a severe warning.

The document marked R19 refers to a document from the General Manager to the Respondent dated 25th May 2005 noting a severe warning for failure to check the Driver's Instruction Book and leaving company premises as well as for manhandling a security officer under the influence of alcohol.

The document marked R20 and R21 refers to documents from the Manager Human Resources and Administration to the Respondent in 2009 regarding driving

while under the influence of alcohol, acting in a disruptive and indecent manner while on a recreational company trip under the influence of alcohol. R21 is a final warning letter reinstating the Respondent without backwages after the suspension from service stating that any future infractions will result in the termination of his employment.

The Respondent in his witness statement admits that he is 54 years of age and discloses that he had approximately 5 years of service remaining prior to retirement (page 231 of brief). In regard to the Respondent's financial position subsequent to termination of employment it has been admitted by the Respondent that despite lack of permanent employment, the Respondent was earning a monthly income between Rupees 18,000 and 20,000, which is a higher amount than that earned via his employment with the Appellant Company.

In light of the previous conduct of the Respondent, the multiple letters of warning issued by the Appellant, the resulting deterioration in the relationship between the Appellant Company and the Respondent, as well as the fact that the Respondent has managed to secure non-permanent remuneration sufficient to compensate for the salary he earned while employed by the Respondent, the compensation awarded by the Labour Tribunal as affirmed by the High Court seems excessive in nature.

The Respondent had a maximum of 5 years of service left with the Appellant. However, the multiple blemishes on his service record in the 19 years of service, the penultimate of which resulted in suspension with a warning for termination of employment for future infractions must be noted. Thus, there is no assurance that the Respondent would have remained employed by the Appellant if not for this infraction resulting in termination. As such, the termination was not an isolated incident and I do not find that future losses of the Respondent can be a reasonable element to be considered in these circumstances.

Based on all the facts and circumstances before this Court, I find that the computation of compensation at a rate of three months per each year of service is exorbitant. For the reasons stated above, the Order of the Labour Tribunal and the Judgment of the High Court are amended to compensation calculated at one month per each year of the Respondent's service (ie. 19 years of service), on his last drawn basic salary of Rupees 16,985. As such compensation is to be valued at a total of Three Hundred Twenty-Two Thousand Seven Hundred and Fifteen Rupees (Rs. 322,715/=) in addition to any other legal entitlements, to be paid to the Respondent by the Appellant. I make no order as to costs.

Appeal Allowed.

JUDGE OF THE SUPREME COURT

MURDU FERNANDO, PC, J

I agree.

JUDGE OF THE SUPREME COURT

KUMUDUNI 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 appeal with Leave of the Supreme Court first had and obtained in terms of section 5C of the High Court of the Provinces (Special provisions) (Amendments) Act No 54 of 2006 read with Article 127 and 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal 96/2013
SC /HCCA/LA No. 519/12
SP/HCCA/Galle No. 9/10/RA

Senok Trade Combines (Pvt) Ltd.
03, R.A. De Mel Mawatha,
Colombo 05.

Petitioner-Petitioner-Appellant

Vs.

Mirama, Beach Hotel Limited
137, Vauxhall Street,
Colombo 02.

Respondent-Respondent-Respondent

Before : Jayantha Jayasuriya, PC, CJ

L.T.B. Dehideniya, J

Murdu N.B. Fernando. PC, J.

Counsel	:	Kuvera de Zoyza PC with Shabry Haleemdeen instructed by M.J.S. Fonseka for the Petitioner-Petitioner -Appellant.
		Uditha Egalahewa PC, with Nisal Kohona for the Respondent-Respondent-Respondent.
Written submissions		
filed on	:	11.09.2013 and 19.01.2022 by the Petitioner.
		07.10.2013 by the Respondent.
Argued on	:	01.12.2021
Decided on	:	24.03.2022

Jayantha Jayasuriya, PC, CJ

The petitioner-petitioner-appellant (hereinafter called the "appellant") invoked the jurisdiction of the District Court seeking an order under section 29P of the People's Bank Act No 29 of 1961 as amended by Act No 32 of 1986. The appellant sought an order for delivery of possession against the respondent-respondent-respondent (hereinafter referred to as the "respondent") as provided under the aforesaid section. The appellant *inter alia* prayed for an order to eject the respondent together with his servants and agents from the property described in the schedule to the petition and affidavit and hand over the possession of the said property to him. The District Court refused to issue notices on the respondent and rejected the application. The appellant's application to the Civil Appellate High Court to revise the aforesaid Order of the District Court was dismissed.

This Court having considered the leave to appeal application of the appellant had granted leave on the following questions of law:

(i) Is the said judgment of their Lordships in the Civil Appellate High Court of Galle contrary to the express provisions of the People's Bank (Amendment) Act No 32 of 1986?

(ii) Had their Lordships in the Civil Appellate High Court of Galle had erred in law in interpreting 'the purchaser' as contemplated in the People's Bank (Amendment) Act No 32 of 1986?

(iii) Have their Lordships in the Civil Appellate High Court of Galle failed to appreciate that the Petitioner comes within the ambit of 'the purchaser' as contemplated in section 29P of the People's Bank Act as amended?

(iv) Have their Lordships in the Civil Appellate High Court of Galle failed to appreciate 'the purchaser' as contemplated in section 29P of the People's Bank (Amendment) Act No 32 of 1986 is the 'purchaser for the time being'?

(v) Have their Lordships in the Civil Appellate High Court of Galle given the wrong interpretation to the other provisions of the People's Bank Act?

(vi) Had their Lordships in the Civil Appellate High Court of Galle erred in holding that only the person holding a Certificate of Sale is entitled to invoke the said provision 29P of the People's Bank Act?

(vii) Was the scheme set out in section 29A-29R of the People's Bank Act as amended, intended to cover the purchaser, other than the purchaser referred to in section 29N?

Before this Court, there is no dispute on the manner in which the appellant obtained the title of the land in question. The appellant had purchased the property in question from one Vidanelage Krishantha Ruwan De Mel on 19th November 2004, as described in the deed of transfer No. 1281, attested by M.P.C.Joseph Notary Public. Furthermore, there is no dispute on the following facts: Mercantile Credit Limited at one time placed the property in question as security and obtained a financial facility from the People's Bank. The Directors of the People's Bank acting in terms of the People's Bank Act as amended adopted a resolution to sell the property in question at a public auction as the said Mercantile Credit Limited defaulted the repayment. The

People's Bank itself purchased the said property, as there were no bidders at the public auction and the certificate of sale No 1215 attested by W.A.R.S.Abeyratne Notary Public on 31st December 2003 was issued as provided by law. Thereafter on 19th November 2004, Vidanelage Krishantha Ruwan De Mel bought the said property from the People's Bank and the resale endorsement No 1397 of 19th November 2004 attested by W.A.R.S.Abeyratne Notary Public, was issued accordingly. There is also no dispute on the legality of the aforementioned transactions.

The main contention in this matter is whether the appellant who purchased the property from aforesaid V.K.R.De Mel on 19th November 2004 is entitled to invoke the jurisdiction of the District Court and obtain an 'Order for delivery of Possession' as provided under section 29P of the 'People's Bank Act, as amended' (hereinafter referred to as the 'Act').

Section 29P(1) of the Act reads as follows:

"The purchaser of any immovable property sold in pursuance of the preceding provisions of this Act shall, upon application made to the District Court of Colombo or the District Court having jurisdiction over the place where that property is situated and upon production of the certificate of sale issued in respect of that property under section 29N, be entitled to obtain an order for delivery of possession of that property".

Section 29P(2) provides that an application under the aforesaid provision be made and disposed of by way of summary procedure in accordance with the provisions of Chapter XXIV of the Civil Procedure Code.

The learned District Judge refused the application made on behalf of the appellant mainly on two grounds. First, the court observed that the right to invoke the jurisdiction of the court under section 29P of the Act vests on a person in whose name a certificate of sale has been issued under the Act. Secondly, the Act does not make provision to invoke the aforesaid provision to a person who had obtained the title of the property through an ordinary deed of transfer.

The learned President's Counsel for the appellant before this Court submitted that the aforesaid findings of the Learned District Judge are contrary to the intention of the legislature namely not to limit the benefit of the special procedure provided under the scheme introduced through sections 29A, 29B, 29C, 29D, 29E, 29F, 29G, 29H, 29J, 29K, 29L, 29M, 29N, 29P, 29Q, 29R, 29S, and 29T of the People's Bank Act as amended by Act No 32 of 1986. Furthermore, it was contended that the restrictive interpretation of section 29P by the learned District Judge makes the provisions of section 29R redundant. It was further submitted that the decisions in People's Bank v Hewawasam, 2000 (2) SLR 29, Chandrasena v Leela Nona and others, 1997 (3) SLR 373 and Dassanayake v Sampath Bank Ltd 2002 (3) SLR 268 supports the appellant's case.

The main contention of the learned President's Counsel for the respondent is that the appellant does not come within the ambit of 'the purchaser' as contemplated in section 29P of the Act. It was further contended that the provisions relating to '*parate execution*' in the People's Bank Act have to be given a restrictive interpretation. It was contended that the term 'purchaser' in section 29P cannot be interpreted to include a 'purchaser' who had acquired the title of the property through deed of transfer executed under the general law even though the property concerned was subjected to '*parate execution*' process provided under the Act, at a prior stage.

It is pertinent to observe that section 29P has been introduced to the People's Bank Act by the People's Bank (amendment) act No 32 of 1986. By this amendment *inter alia* a series of sections namely 29A, 29B, 29C, 29D, 29E, 29F, 29G, 29H, 29J, 29K, 29L, 29M, 29N, 29P, 29Q, 29R, 29S, and 29T were introduced after section 29 of the Act. Through these provisions, a new

scheme was introduced in relation to situations where a party defaults in the payment of any sum due on a loan. Section 29D makes provision for the Board of the Bank, by resolution, to authorize a person to sell by public auction any property mortgaged to the Bank as security for any loan in respect of which default has been made and recover the dues. Sections 29F to 29M make provision relating to matters arising from the adoption of a resolution under section 29D and the recovery of dues by the Bank through a public auction of the property concerned.

It is also pertinent to observe that section 29N requires the Board of the Bank to issue a certificate of sale to the purchaser who purchases a property at an auction contemplated under the aforesaid provisions and all rights, title and the interest of the debtor to and in the property so auctioned shall vest on the purchaser. Such certificate will be issued to the Bank if the Bank purchased the said property at the auction. However, in situations where the Bank purchased the property and a certificate of sale is issued in the Bank's name, the Board, as provided under section 29R, is entitled to resell the property and transfer the property by endorsement on a certified copy of the 'certificate' so issued and transfer to a new purchaser, all the rights, title and interests which would have been acquired by him if he purchased the property at the initial sale.

Examination of these sections reveal that either any person or the bank can purchase the mortgaged property on which the Board had adopted a resolution to sell a mortgaged property due to the default on the payment by the borrower. In either of the two situations when a property is sold under such circumstances, a duty is cast on the Board of Directors to issue a 'certificate of sale' and such certificate of sale stands as conclusive proof with respect of the sale of the property and of all provisions of the Act relating to such sale having been complied with. Furthermore, all the rights, title and interest of the debtor to and in the property concerned vests in the purchaser, upon the issuance of such certificate.

It is in the backdrop of this legislative scheme, that section 29P makes provision for the purchaser to invoke jurisdiction of the District Court by way of summary procedure and move

for an order of delivery of possession of such property sold upon the resolution adopted by the Board of the Bank. The object and purpose of section 29P is to make provision to ensure that all the rights derived by the purchaser through the provisions of the Act are further strengthened by granting him a further right to invoke jurisdiction of the District Court by way of summary procedure and obtain possession of the property, through a judicial order. Such a deviation from the normal practice and procedure relating to delivery of possession of a property through judicial process under the law available to any other purchaser of any other property, encourages a person to purchase property sold through this special scheme as the legislative scheme provided in the Act ensures an efficient mechanism to obtain possession. The Court of Appeal in Chandrasena (supra) when considering provisions in the State Mortgage and Investment Bank Law No 13 of 1975 which are similar to the relevant provisions in the Act, observed that,

> *"The sale had to carry with it a reasonable securement that it would recover what had been lent. To achieve this result it provided for sale by public auction and an adequate guarantee for the buyer to recover possession of the property sold. ……..An ordinary action by way of regular procedure is not unknown to be a cumbersome process. No buyer is going to invest money to purchase a property without possession being guaranteed"* (at 376-377).

The Court of Appeal further observed that

> *"The thinking of the legislature in my view has been to see that the State Mortgage & Investment Bank which is a State Lending Institution recovered amounts lent by it with interest. In order to do so it assured the buyer by legislation a quick and effective method of recovery of possession. If not for such provisions no prospective buyers would dare bid at a public auction held under the provisions of the State Mortgage and Investment Bank Law No 13 of 1975 and the Bank would not be able to recover what it had lent."* (at 377).

In Dassanayaka (supra) the Court of Appeal in examining provisions in the Recovery of Loans by Banks (Special Provisions) Act No 4 of 1990 observed that,

"it provides for expeditious mode of recovery of the property, which has already been vested in the purchaser by an issuance of a certificate of sale in terms of the provisions of the said Act" (at p 270).

However, it is also pertinent to observe that this Court in its' determination on "Recovery of loans by Banks (Special Provisions) (Amendment Bill)" (SC SD 22/2003 - Decisions of the Supreme Court of the Republic of Sri Lanka Under Articles 120, 121 1nd 122 of the Constitution of the Democratic Socialist Republic of Sri Lanka for the Years 1991 to 2003 – Vol VII, page 427 at 429) observed:

"The enforcement of a right as against another by seizure and sale of property without the intervention of a Court, is described as "parate execution". The Roman Dutch Law being our common law, has looked upon this process described as "parate execution" with extreme disfavor. The preceding analysis of judicial power, its scope and exercise demonstrates that our constitution frame-work is set against any recourse to "parate execution", in our law. The Constitution positively assures to every person the protection, vindication and enforcement of his rights by an institution established or recognised by law for the administration of justice. Since any transaction which may result in a dispute, involves rights and duties of parties inter se, the constitutional guarantee is a two-way process which should ensure equally to the benefit of both parties".

Therefore, these judicial pronouncements in my view, support the proposition that, an interpretation of the provisions in the Act that grants rights and benefits to any person arising through the *'parate execution'* and the connected provisions recognised therein should not extend the rights and benefits other than to an extent that is necessary to give effect to the statutory scheme provided by the provisions of the Act. In my view this Court should desist from adopting an interpretation that would have an effect of perpetuating such special rights to all subsequent

persons who purchase a property outside the special scheme envisaged under the Act, even though such property was subject to '*parate execution'* process at a prior point of time. Therefore, in interpreting the relevant provisions of this Act the court should desist from adopting an interpretation that would extend the rights and benefits of a person who purchases a property within the scheme provided under the Act, which is a special law, to a person who acquires rights as a purchaser, under the normal law, subsequently.

The learned President's Counsel for the appellant relied on the judgment of this Court in Bakmeewewa, Authorised Officer of People's Bank v Konarage Raja [1989] 1 SLR 231 to substantiate his submission that the right, title and interest created and vested through the statutory scheme of the Act is a "new independent statutory title and is a Title Paramount".

This court in Bakmeewewa (supra) considered the provisions in Finance Act No 11 of 1963 as amended by the Finance and Ceylon State Mortgage Bank (Amendment) Law No 16 of 1973 in deciding the effect of the vesting order made by the Minister. Under the statutory scheme that was considered the Court observed that "Once the minister publishes the "vesting order" in the gazette, the premises vest in the Bank "absolutely" and "free from all encumbrances" (sections 72(2) and (3) of the Act)" (at p 234). It is in this context that the court cited with approval the decision of this Court in Sathir Najeare (1978) 79 (2) NLR 126 at 135 where it was held that "The title of the Bank to the premises in question is clearly a title paramount". (at p 235). However, according to the statutory scheme of the Act under consideration in these proceedings, the effect of a certificate of sale is set out in Section 29N. According to section 29N(1) it is "all the rights title and interest of the debtor to and in the property" that vests in the purchaser. Therefore, in my view Bakmeewewa (supra) cannot be relied upon, in determining the issues that are raised in these proceedings.

The transaction between the appellant and the seller in relation to the property concerned in these proceedings, in their respective capacities as 'vendor' and 'purchaser' is aptly described in the

deed No 1281, executed by M.P.C.Joseph on 19th November 2004. The execution of the said deed is completely outside the scope of the provisions in the Act relating to *'parate execution'*. The fact that the 'vendor' had been the 'purchaser' of the said property when the Bank resold the property and transferred all the right, title and interest of the property by endorsement on the certificate of sale, as provided under section 29R of the Act, in my view does not give rise to the appellant exercising any rights other than rights accrued under the common law. Therefore, the appellant cannot exercise any rights assigned to a purchaser under the Act, as the process of '*parate execution*' envisaged by the Act is complete with the resale of the property by the Bank to the purchaser who had become a vendor, subsequently.

In view of foregoing findings all questions of law on which leave was granted are answered in the negative and the appeal is dismissed.

Chief Justice

L.T.B. Dehideniya. J.

I agree.

Judge of the Supreme Court

Murdu N.B. Fernando, PC. J.

I agree.

Judge of the Supreme Court

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

In the matter of an Application for Special Leave to Appeal against the order dated 15th February 2017 of the Court of Appeal Application No. CA 608/1999(F).

SC (Appeal) 103/2018

SC (SPL) LA 62/2017

CA Application No.
CA608/1999(F)

D.C. Colombo: 16262/MR

Thiremuni Peter,
Morakale- Opposite the School,
Upper Kottaramulla.

Plaintiff

Vs.

1. A. S. Jayawardene,
   Secretary to the Treasury,
   The Secretariat,
   Colombo.

2. Daya Liyanage,
   Deputy Secretary to the Treasury,
   The Secretariat,
   Colombo.

3. Seemasahitha Wennappuwa
   Janatha Santhaka Pravahana
   Sevaya,
   Dummaladeniya,
   Wennappuwa.

Defendants

AND BETWEEN

1. A. S. Jayawardene,

Secretary to the Treasury,
The Secretariat,
Colombo.

1A. Punchi Bandara Jayasundara,
Secretary to the Treasury,
The Secretariat,
Colombo 01.

1B. Ranepura Hewage Samantha Samaratunga,
Secretary to the Treasury,
The Secretariat,
Colombo 01.

2. Daya Liyanage,
Deputy Secretary to the Treasury,
The Secretariat,
Colombo 01.

2A. Sajith Ruchika Artigala,
Deputy Secretary to the Treasury,
The Secretariat,
Colombo 01.

Defendants – Appellants

Vs.

Thiremuni Peter,
Morakale- Opposite the School,
Upper Kottaramulla.

Plaintiff - Respondent

Seemasahitha Wennappuwa
Janatha Santhaka Pravahana
Sevaya,
Dummaladeniya,
Wennappuwa.

Defendant - Respondent

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

Substituted 3rd Defendant-Respondent

AND NOW BETWEEN

Thiremuni Peter,
Morakale- Opposite the School,
Upper Kottaramulla.

Plaintiff-Respondent-Appellant

Vs.

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

Substituted 3rd Defendant-Respondent-Respondent

BEFORE: **L.T.B. DEHIDENIYA, J.**
K.K. WICKREMASINGHE, J.
JANAK DE SILVA, J.

COUNSEL: Chula Bandara for the Plaintiff-Respondent-Appellant

Ranjith Ranawake with Ravinath Ranawake instructed by Ms. Kosala Perera for the Substituted 3rd Defendant-Respondent-Respondent.

WRITTEN SUBMISSIONS: By the Plaintiff-Respondent-Appellant on 22nd January 2020.

By the Substituted 3rd Defendant-
Respondent-Respondent on 17th of May 2019.

ARGUED ON: 17.03.2021.

DECIDED ON: 06.10.2022.

K. K. WICKREMASINGHE, J.

This is an appeal from the judgment of the Court of Appeal dated 15.02.2017. The crux of this matter centers around the question of law based on which leave to appeal was granted, which is;

"Did the Court of Appeal err by dismissing the case filed by the Petitioner before the District Court as regard to the Substituted 3rd Defendant-Respondent-Respondent whereas he had not appealed against the judgment of the learned District Judge to the Court of Appeal?"

Therefore, this discussion hinges on whether a party to an action should be allowed to lawfully invoke an objection to, or dispute a finding in, a lower court's judgment even if the said party had not filed an appeal against the said judgment of the lower court.

The facts of the case are stated briefly as follows:

The Plaintiff-Respondent-Appellant (hereinafter sometimes referred to as the Appellant) was, by letter dated 27.06.1991 (marked P3), appointed as the Executive Director of the Board of the 3rd Defendant-Respondent-Respondent Company (hereinafter sometimes referred to as the 3rd Respondent). Thereafter, the Appellant was also appointed as the General Manager of the 3rd Respondent Company by letter dated 29.06.1991 (marked P4).

The original 1st and 2nd Defendants who were respectively the Secretary and Deputy Secretary to the Treasury had, in their capacity as holders of 50% of share capital of the 3rd Respondent Company, removed the Plaintiff-Respondent-Appellant and three others from the Directorate of the 3rd Respondent and appointed 4 others as Directors. The Appellant filed action in the District Court of Colombo against the original Defendants praying *inter alia* for a declaration that the removal of the Appellant as a director

was illegal, null and void and thereby claiming a sum of Rs. 500,000/- as compensation for pain of mind, and social and financial loss suffered as a result of his removal.

The original Defendants jointly filed their Answer to dismiss the Appellant's action stating that the removal of the Appellant from his position was lawful and in accordance with the terms of Article 10 of the Articles of Association of the 3rd Respondent Company.

The Learned District Judge delivered judgment on the 12th of July 1999 in favour of the Plaintiff-Respondent-Appellant granting him Rs. 200,000/- in damages payable by the 1st-3rd Defendants jointly or severally. The original 1st and 2nd Defendants then preferred an appeal to the Court of Appeal. However, the 3rd Defendant refrained from appealing to the Court of Appeal.

During the pendency of the application before the Court of Appeal, the original 3rd Defendant, *Seemasahitha Wennappuwa Janatha Santhaka Pravahana Sevaya*, was substituted by the Sri Lanka Transport Board established under the Sri Lanka Transport Board Act No. 27 of 2005. By virtue of section 3 (2) (e) of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act, No. 23 of 1987, all actions and proceedings instituted by or against the amalgamated bus companies, of which the 3rd Defendant company was one, were vested with the Sri Lanka Transport Board, thus enabling the Board to be substituted as the 3rd Defendant-Respondent.

The Court of Appeal delivered judgment on the 15th February 2017 allowing the Appeal and dismissing the action filed by the Plaintiff-Respondent-Appellant in the District Court. The Court held that the Learned Trial Judge had misapplied Article 10 of the Articles of Association and that the termination of the Appellant's services was not illegal, null and void. Moreover, the granting of compensation to the Appellant was held to be unsubstantiated and bad in law.

Being aggrieved by the said judgment, the Appellant filed a Special Leave to Appeal application to the Supreme Court. The Supreme Court, while granting leave, rejected the legal issues stated in the Petition of Appeal and discharged the 1B and 2A Defendant-Appellant-Respondents from the proceedings, on the basis that the Appellant did not pursue any relief against them.

As Leave to Appeal was not granted on the merits of the Appellant's action, such merits will not be extensively delved into by me at this instance.

Rather, my analysis will be confined to examining the aforesaid question of law based on which leave was granted. In this respect, the question arisen before this Court is whether the Court of Appeal could dismiss the judgment of the District Court granted against the predecessor of the Substituted 3rd Defendant-Respondent-Respondent, even though the aggrieved Substituted 3rd Defendant-Respondent-Respondent had not filed an appeal against such judgment. As this issue rests at the root of this case, the principles of law relating to this contention will be considered by me hereafter.

The Learned Counsel for the Appellant in his submissions observed that the 3rd Respondent Company had refrained from appealing against the District Court judgment. It was further contended that neither has it filed a 'written objection' under Section 772 of the Civil Procedure Code conveying its intent to object to the judgment. Thus, the Learned Counsel for the Appellant submits that the 3rd Respondent had accepted the judgment of the District Court and is thus not entitled to the relief granted by the Court of Appeal which was allegedly not prayed for by him at the said instance.

Section 772 of the Civil Procedure Code provides for written objections or 'cross objections' to be filed as follows;

> *(1) Any respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the court below, but take any objection to the decree which he could have taken by way of appeal, provided he has given to the appellant or his registered attorney seven days' notice in writing of such objection.*
>
> *(2) Such objection shall be in the form prescribed in paragraph (e) of section 758.*

Section 772 of our Civil Procedure Code is noticeably similar in nature and scope to Order 41 Rule 22 of the (First) Schedule to the Indian Civil Procedure Code of 1908 (as amended), which reads as follows;

> *(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for*

hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

(2) Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

Sir John Woodroffe and Ameer Ali, in their Commentary on *The Code of Civil Procedure, 1908, [5th edition]* recognize two distinct rights a Respondent has in an appeal under Rule 22– they are; to either support, or to attack the lower Court's decree.

> *"Sub-rule 1 of Rule 22 is in two parts. The first part enables any respondent to support the decree as well as to canvass the correctness of the finding against him in the Court below and urge that issue ought to have been decided in his favour. The second part enables him to attack the decree even without filing appeal against the decree by filing cross-objections to the decree within one month from the date of service of notice of hearing of the appeal. Thus, it is clear that the respondent has a right not only to support the decree on any ground whether decided in his favour or against him without filing any appeal or cross-objections to the decree assailed against, but also to challenge the decree by filing cross-objections against any finding or part of the decree."*

These two distinctive rights are also recognized in Prasanna Jayawardena, PC, J.'s judgment in ***Parana Mannalage Amara Wijesinghe and others v. Sudu Hakurage Swarnalatha and others (SC Appeal No. 72/2012)*** which stated that;

> *"Thus, where an appellant from a decree entered by an original Civil Court has filed an appeal seeking to set aside or vary that decree: the first limb of section 772 recognises the right of a respondent to that appeal to resist the appeal and support the decree on any grounds including those decided against him by the trial court, without filing a written objection under section 772; and the second limb of section 772 enables a respondent to the appeal who is dissatisfied with some specific finding in or aspect of the decree but has not filed an appeal to canvass it, to dispute that finding or aspect of the decree and seek to have it set aside or varied or decided in his favour by the appellate court, provided he has duly filed a written objection under section 772."*

However, as the 3rd Respondent in this case had not filed any written objection under Section 772, the question remains as to whether he could rightly object to the judgment of the original Court under such circumstances. This issue was dealt with by Middleton J. in ***Rabot v. De Silva ([1905] 8 NLR 82)*** which held that party defendants to an action, notwithstanding that they themselves had not appealed, and notwithstanding that they had filed no objections under section 772 of the Civil Procedure Code, can challenge the District Judge's decision.
Furthermore, Sharvananda C.J., in the decision of ***Ratwatte v. Goonesekera ([1987] 2 Sri LR 260)*** allowed for a wide and flexible interpretation of section 772 as follows;

> *"This section requires the respondent, if he had not filed a cross-appeal, to give the appellant or his Proctor seven days' notice in writing to entitle him to object to the decree or any part of the decree, entered by the trial court. Only if he had duly given the said notice, will he have a right to object to the decree; if he had failed to give such notice, he cannot claim, as a matter of entitlement, the right to take any objection to the decree; but the provision does not bar the court, in the exercise of its powers to do complete justice between the parties, permitting him to object to the decree, even though he had failed to give such notice. The Court of Appeal has inherent jurisdiction to grant or refuse such permission in the interest of justice."*

Therefore, it is now settled law that, even though a Respondent who has not duly filed a written objection cannot claim the right to object to a decree as an *entitlement*, an Appellate Court has the discretion, by virtue of its inherent jurisdiction, to permit such objection in the interests of justice.

The next point of contention is whether the scope of the application of written objections under section 772 allows for such objections to be brought by a Respondent against another Respondent– and not merely against an Appellant. The general rule postulated states that any such objection can be invoked by a Respondent only against an Appellant. Accordingly, a Respondent to an appeal cannot, for the most part, challenge a finding in the judgment or decree granted in favour of *another Respondent*.

However, exceptions to the aforesaid general rule have been identified in several notable judicial decisions of both Sri Lankan and Indian Courts.

The Supreme Court of India in ***Mahant Dhangir and another v. Madan Mohan and others (AIR 1988 SC 54)*** noted that;

"It is only by way of exception to this general rule that one respondent may urge objection as against the other respondent. The type of such exceptional cases are also very much limited. We may just think of one or two such cases. For instance, when the appeal by some of the parties cannot effectively be disposed of without opening of the matter as between the respondents inter se. Or in a case where the objections are common as against the appellant and co-respondent. The Court in such cases would entertain cross-objection against the co-respondent."

Drieberg J. in ***Doloswela Rubber & Tea Estate Co. v. Swaris Appu (31 NLR 60)*** made a similar observation that;

"It has been held that section 772 is not available to a respondent who wishes to question the decree in favour of other respondents; if he wishes to do so he must appeal, in which the possibility of certain exceptions was recognized; an exception may be allowed in cases where there is an identity of interests between the appellant and the respondent against whom the statement of objections is directed"

The exception to the general rule in instances where similarities exist between the interests of the Appellant and the Respondent was also observed in the Indian decision of ***Syed Mohammad Hasan v. Syed Mohammad Hamid Hasan And Ors. (AIR 1946 All 395).*** In this case, Malik, J. held that,

"So far as this Court is concerned, the law is now well settled that as a general rule a respondent can file a cross-objection only against an appellant and it is only in exceptional cases where the decree proceeds on a common ground or the interest of the appellant is intermixed with that of the respondent that a respondent is allowed to urge a cross-objection against a co-respondent."

Prasanna Jayawardena, PC., J, in the judgment of ***Parana Mannalage Amara Wijesinghe*** which was quoted above, supported this position stating that,

"If a party who is dissatisfied with the judgment, fails or neglects to exercise that right of appeal or sees no need to exercise that right of appeal, he should not, ***other than in exceptional circumstances****, be given a carte blanche to belatedly resort to section 772 in an appeal filed by another party to which he is a respondent and* ***re-agitate his dispute with the other respondents*** *in whose favour the judgment was entered."*

His Lordship further elaborated on two distinct 'exceptional circumstances' where a cross-objection can be directed against a co-respondent as follows;

> *"Section 772 cannot be invoked by a respondent to an appeal [who has not filed his own appeal], to challenge a finding in the decree in favour of another respondent other than in exceptional circumstances such as: in instances where a determination of the relief sought by the appellant will necessarily require the Appellate Court to examine the lawfulness of the reliefs granted in the decree inter se the respondents; or where the interests of the appellant and the interests of the respondent against whom a written objection under section 772 is filed, are identical or substantially similar."*

In considering the facts of the case at hand, it is evident that, if proceeded on the basis of the general rule, the 3rd Respondent Company who did not file an appeal to the Court of Appeal would not be able to invoke section 772 to challenge the District Court judgment granted in favour of the Plaintiff-Respondent. Therefore, it now becomes necessary to scrutinize the existence of any of the aforesaid exceptional circumstances which would justify the 3rd Respondent's objection to the decree granted in the Plaintiff-Respondent's favour.

I will firstly consider the second type of exceptional circumstance iterated in the above decision- that is, whether the interests of the Appellant and the interests of the Respondent against whom a written objection under section 772 is filed, are identical or substantially similar.

In the case of ***(Mirza) Husain Yar Beg v. (Sahu) Radha Kishan And Ors. (AIR 1935 All 134)***, the circumstances of which are similar to that at hand, one of the Defendant-Respondents filed a cross-objection in an appeal between the Appellant and the Plaintiff-Respondents. A preliminary objection was taken by the Plaintiff-Respondents that the cross-objections which were directed only against them, and not to any extent against the Appellant, are not maintainable under Order 41, Rule 22 of the Civil Procedure Code. It was held that the cross-objections filed by the Defendant-Respondents which were directed solely against the Plaintiffs-Respondents were not maintainable under Rule 22, and as such, were dismissed.

Accordingly, Niamatullah, J. held that,

> *"The expression "cross-objection" is clearly indicative of the fact that it should be directed against the appellant, but it may be taken against a*

co-respondent also if there is a community of interest between the latter and the appellant. It is clear to us that where the cross-objection is directed solely against a co-respondent, whose case has nothing in common with that of the appellant but proceeds on the same grounds on which the appeal does, it is not maintainable."

In a similar manner, when this case was before the Court of Appeal, the Court dismissed the action filed by the Plaintiff- Respondent Director (who is now the Appellant) in the District Court questioning the termination of his services as regard to the Substituted 3rd Defendant- Respondent who was the Sri Lanka Transport Board. However, the objections taken up by the 3rd Defendant- Respondent Company were directed solely at the Plaintiff-Respondent Director and not to any extent against the 1st and 2nd Defendant-Appellants, who were respectively the Secretary and Deputy Secretary to the Treasury. Accordingly, the Plaintiff-Respondent Director's case has nothing in common with that of the Defendant-Appellants, who assert the legality of his termination. Thus, as their interests cannot be considered similar, the second type of exceptional circumstance enumerated above cannot be said to exist.

I will now consider the first type of exceptional circumstance set out above, that is, whether the determination of the relief sought by the Appellant will necessarily require the Appellate Court to examine the lawfulness of the reliefs granted in the decree *inter se* the Respondents.

The 1st and 2nd Defendant-Appellants, in preferring an Appeal to the Court of Appeal had prayed to set aside the verdict of the Learned District Judge holding in favour of the Plaintiff-Respondent Director. The central contention of the said Defendant-Appellants in the Court of Appeal was that the Learned Trial Judge had misinterpreted Article 10 of the Articles of Association of the 3rd Respondent Company in holding that the Plaintiff's termination was illegal. Therefore, at this point it is necessary to ascertain whether the nature of the said relief sought by the Defendant-Appellants was such that it became necessary for Court to examine the lawfulness of the relief granted by the lower Court.

The Learned Judges of the Court of Appeal in delivering judgment had identified the relief sought by the respective parties, and had analyzed the provisions of Article 10 and its implications, in holding that the removal of the Plaintiff-Respondent from his Directorship was not illegal, thus allowing the appeal of the Defendant-Appellants. In arriving at this conclusion, the Court had also scrutinized judicial decisions including the judgment of S. N. Silva, J. in ***Mendis v. Seema Sahitha Panadura Janatha Santhaka***

Pravahana Sevaya and Others **([1995] (2) Sri LR 284)** which held that the appointment and removal of Directors of a company are comprehensively regulated by its Articles of Association. Therefore, I am of the opinion that due to the nature of the relief sought by the Defendant-Appellants, it has been necessarily required for the Court of Appeal to examine the lawfulness of the reliefs granted by the District Court in the Plaintiff-Respondent's favour. Accordingly, I hold that there were exceptional circumstances in this case which justify the cross-objections directed by the Substituted 3rd Defendant- Respondent- Respondent towards his co-respondent, who in this case is the Plaintiff- Respondent- Appellant.

In conclusion, based on the principles of law pronounced in Section 772 of the Civil Procedure Code and those of notable judicial decisions in Sri Lanka as well as India, it is now evident that the Substituted 3rd Defendant-Respondent- Respondent Company may lawfully invoke an objection as against the Plaintiff- Respondent- Appellant, even if it has not appealed against the lower Court's judgment. In view of the above findings, I hold that the question of law raised by the Supreme Court at the onset in determining the granting of leave to this application should be answered in the negative, and in favour of the Respondent.

Therefore, I see no necessity in interfering with the decision of the Learned Judges of the Court of Appeal in dismissing the case filed by the Plaintiff-Respondent-Appellant before the District Court.

The appeal would accordingly stand 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

Aluthgama Hewage Ariyapala Amaradasa,
No. 555/16B, Elhenewatte,
Gonahena, Kadawatha.
Plaintiff

SC APPEAL NO: SC/APPEAL/108/2019
SC LA NO: SC/HCCA/LA/175/2018
HCCA CASE NO: WP/HCCA/GPH/28/2013 (F)
DC GAMPAHA CASE NO: 3735/M

Vs.

Hewaralalage Dulani Dilrukshi,
No. 555/16A, Elhenawatte,
Gonahena, Kadawatha.
Defendant

AND BETWEEN

Hewaralalage Dulani Dilrukshi,
No. 555/16A, Elhenawatte,
Gonahena, Kadawatha.
Defendant-Appellant

Vs.

Aluthgama Hewage Ariyapala Amaradasa,

No. 555/16B, Elhenewatte,
Gonahena, Kadawatha.
Plaintiff-Respondent (deceased)

Gamlath Ralalage Chandrawathie,
No. 555/16B, Elhenewatte,
Gonahena, Kadawatha.
Substituted-Plaintiff-Respondent

AND NOW BETWEEN

Gamlath Ralalage Chandrawathie,
No. 555/16B, Elhenewatte,
Gonahena, Kadawatha.
Substituted-Plaintiff-Respondent

Vs.

Hewaralalage Dulani Dilrukshi,
No. 555/16A, Elhenawatte,
Gonahena, Kadawatha.
Defendant-Appellant-Respondent

Before: P. Padman Surasena, J.
Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Sudarshani Coorey for the Substituted Plaintiff-Respondent Appellant.
Defendant-Appellant-Respondent absent and unrepresented.

Argued on : 16.12.2021

Written submissions:

by the Plaintiff-Respondent-Appellant on 26.06.2019

Decided on: 02.12.2022

Mahinda Samayawardhena, J.

The plaintiff filed this action against the defendant in the District Court of Gampaha seeking to recover a sum of Rs. 200,000/- with interest. The defendant filed answer seeking dismissal of the action. After trial, the District Court entered judgment for the plaintiff. On appeal, the High Court of Civil Appeal of Gampaha set aside the judgment of the District Court and allowed the appeal. This appeal by the plaintiff is against the judgment of the High Court. This Court granted leave to appeal against the judgment of the High Court on the following two questions of law (reproduced verbatim):

(a) Did the learned High Court judges err in failing to appreciate that the mere fact that the two letters were obtained on the same day, does not show that the two transactions are the same, especially when there is overwhelming evidence to show that the jewellery was obtained earlier by the defendant from the plaintiff's wife and the money was obtained at a later date from the plaintiff?

(b) Did the learned High Court judge disregard and/or misunderstand the evidence placed before court by the parties and the learned High Court judge set aside the District Court judgment and dismissed the Plaintiff's action?

Notwithstanding the fact that the defendant was served with notice several times, the defendant was absent and unrepresented before this Court.

The defendant is a close relation of the plaintiff and his wife. Before the marriage, the defendant had helped the plaintiff and his wife in their

household chores for a considerable length of time. According to the evidence of the defendant, she has studied up to the G.C.E. Ordinary Level examination.

The case for the plaintiff is that after the defendant's marriage on 06.03.2003, the defendant borrowed Rs. 200,000/- to construct a house but that money was not returned. P1 dated 08.07.2009 written by the defendant corroborates this. It is in her handwriting. By that letter the defendant has agreed to repay the said money in monthly instalments of Rs. 5,000/-. The fact that a sum of Rs. 180,000/- was withdrawn by the plaintiff from the Bank was corroborated through the evidence of a Bank officer although there is no evidence to say that that money was entirely given to the defendant.

The defendant's position as stated in the answer is that: the plaintiff's wife gave her Rs. 75,000/- as a wedding gift but later wanted the money back on the insistence of the plaintiff's son; since the defendant was not able to pay back, the plaintiff's wife gave the defendant jewellery to pawn and pay the son; P1 was signed as security for giving the jewellery. The defendant gave evidence at the trial.

The plaintiff and his wife gave evidence at the trial. Their position is that the jewellery was taken by the defendant from the plaintiff's wife to return after the wedding and Rs. 200,000/- was taken from the plaintiff after the wedding to construct a house. According to the plaintiff and his wife, these are two different transactions. This evidence is acceptable.

The defendant has neither returned the money nor the jewellery; instead the jewellery has been pawned by the defendant and the money taken has been used by her.

Regarding the failure to return the jewellery, the wife of the plaintiff has filed a separate action in the District Court and it has been settled, in that

the defendant has agreed to redeem the jewellery and return it to the plaintiff's wife (the plaintiff in the other case). The instant case was pending at the time of entering into the settlement in the other case but this matter was not mentioned in the other case. If P1 was relevant to the dispute on the jewellery, the parties could have informed the District Court of the same and arrived at an overall settlement. The instant case has not even been mentioned in the settlement in the other case.

If the plaintiff or his wife gave money to the defendant which was not returned, it is very unlikely that the plaintiff's wife would give jewellery to the defendant to pawn and pay the money back. There is no logic in that argument. If the plaintiff's wife wanted to satisfy her son, she herself could have pawned her jewellery and pretended to her son that the defendant had paid the money. Why did the plaintiff's wife need to give the jewellery to the defendant? What is the connection between P1 and handing over jewellery to the defendant? There is no connection. This is the evidence of the defendant regarding the connection between P1 and the jewellery.

> ප්‍ර: තමුන්ට යෝජනා කරනවා, පැ. 1 ලේඛනයට අනුව රුපියල් ලක්ෂ දෙකක මුදලක් ගෙවන්න තමුන් බැදිලා ඉන්නවා කියලා?
>
> උ: රත්රන් බඩු උගස් කල එකට තමයි අත්සන් කර දුන්නේ.
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> ප්‍ර: පැ. 1 ලේඛනයේ රත්රන් බඩු වලට අදාලව කිසියම් ප්‍රකාශයක් සඳහන් කර නැහැ කියා යෝජනා කරනවා?
>
> උ: එම ලේඛන දෙකටම අත්සන් කළේ එකම දවසේ.
>
> ප්‍ර: පැ. 1 ලේඛනයේ රත්රන් බඩු ගැන ලියා තිබෙනවා ද?
>
> උ: නැහැ. නැන්දා අසනීප නිසා මාමා කිව්වේ අත්සන් කරන්න කියා. රත්රන් බඩු සින්න වෙන නිසා බඩු භාගයක් ගත්තා. ඉතුරු ටිකට පොලිය දෙන්නම් කියා කිව්වා. නමුත් පොලිය දුන්නෙත් නැහැ.

There is no reason for signing P1 as security; there is no meaning to it. It is an absolutely meaningless and false stand taken up by the defendant.

Even if this argument of the defendant is accepted, still the plaintiff's money needs to be repaid for the reason that the money generated from the pawned jewellery does not belong to the defendant.

V1 dated 08.07.2009 is relevant to the jewellery dispute. By V1 the defendant has promised to redeem the jewellery before a particular date. V1 is also in the defendant's handwriting.

The brief judgment of the High Court is completely unsatisfactory. No reasons acceptable to this Court have been given for setting aside the judgment of the District Court. The High Court Judge says the fact that P1 and V1 bear the same date corroborates the defendant's story. ("එමෙන්ම, එකී පැ1 දරන ලේඛනය අත්සන් කරන ලද 2009.07.08 වන දිනම වී1 ලෙස ලකුණු කොට ඉදිරිපත්කර ඇති ලේඛනයටද විත්තිකාරිය අත්සන් කර ඇති බැවින් විත්තිකාරිය විසින් දරන ලද ඉහත සඳහන් ස්ථාවරය සාක්ෂි මගින් තහවුරු වන බව පෙනේ.") But as I have already explained, there is no correlation between P1 and V1. The High Court Judge also says (without stating any reason) that P1 is security for pawning the jewellery. There is no basis for this finding. ("විත්තිකාරිය විසින් අදාල මුදල් පැමිණිලිකාරියගේ පුතාට ගෙවීමට එකඟ වුවද එසේ ගෙවීමට අපොහොසත් වීම මත පැමිණිලිකාරියගේ භාර්යාව විසින් ඇයගේ ස්වර්ණාභරන උකස් කර අදාල මුදල් ගෙවා දැමීමට විත්තිකාරිය සහාය වී ඇති අතර පැමිණිලිකාරියගේ බිරිඳගේ ස්වර්ණාභරන උකස් කිරීම අනුව එකී උගස බේරා දෙන තෙක්, ඊට සුරැකුමක් ලෙස පැමිණිලිකරු විසින් විත්තිකාරියගේ පැ-1 දරන පොරොන්දු නෝට්ටුවට අත්සන් ලබාගෙන ඇති බවය. එහෙත් පැමිණිලිකරුගේ භාර්යාව විසින් උකස් කරන ලද ස්වර්ණාභරන වලට අදාල මුදල් විත්තිකාරියගෙන් අයකර ගැනීම සඳහා 3737 දරන මුදල් නඩුව ගම්පහ දිසා අධිකරණයේ පවරා පවත්වාගෙන යන අතර සමථයකට පත්වීම මත මෙම නඩුව මගින් පැමිණිලිකරුට, එකී ස්වර්ණාභරන උකස් කිරීම පිළිබඳව ගනුදෙනුවේ මුදල් අයකර ගැනීමට නඩු නිමිත්තක් පැන නොනගින බවට තීරණය කරමි.")

I answer both questions of law in the affirmative and set aside the judgment of the High Court and restore the judgment of the District Court. 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

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 Section 9(a) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1990.

SC Appeal No: 109/2017

Leave to Appeal No: SC/SPL/LA/245/16

High Court Case No: HC Kandy- 41/2015

Magistrate Court No:M.C. Theldeniya 80953

Officer in Charge,

Police Station,

Wattegama.

COMPLAINANT

vs.

Puwakgahakumbure Gedara William Wijesinghe,

120A, Kudugala Road,

Wattegama.

ACCUSED

AND BETWEEN

Puwakgahakumbure Gedara William Wijesinghe,

120A, Kudugala Road,

Wattegama.

ACCUSED-APPELLANT

Vs

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

RESPONDENT

2. Officer in Charge,
   Police Station,
   Wattegama,

COMPLAINANT-RESPONDENT

AND NOW BETWEEN

Puwakgahakumbure Gedara William Wijesinghe,

120A, Kudugala Road,

Wattegama.

ACCUSED-APPELLANT-PETITIONER

Vs

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

RESPONDENT-RESPONDENT

2. Officer in Charge,
Police Station,
Wattegama,

COMPLAINANT-RESPONDENT-RESPONDENT

BEFORE : **S. THURAIRAJA, PC, J**
A.H.M.D. NAWAZ, J AND
A.L SHIRAN GOONERATNE, J

COUNSEL : A. S. M. Perera, PC with P. Kumarawadu for the Accused-Appellant- Appellant
Induni Punchihewa, SC for the Respondent-Respondent

WRITTEN SUBMISSIONS : Respondent-Respondent on 14th January 2020
Accused-Appellant-Appellant on 29th October 2017

ARGUED ON : 24th February 2022

DECIDED ON : 28th September 2022

S. THURAIRAJA, PC, J.

The Accused-Appellant-Petitioner, namely Puwakgahakumbure Gedara William, ("Hereinafter referred to as the "Accused") filed application before this Court preferring Appeal against order by the High Court of Kandy dated the 13th October 2016.

This Application precedes from a Plaint filed by the Complainant-Respondent-Respondent, the Officer in Charge of the Wattegama Police Station, (hereinafter referred to as the "Complainant" at the Magistrate Court of Theldeniya which contained the following 3 charges against the Accused:

a) A charge under Section 177 of the Penal Code, that the Petitioner being a person who was legally bound to state the truth on any subject to a public servant, namely SI./ Upali Chandrasiri of the Wattegama Police, refused to answer the questions demanded of him.
b) A charge under Section 344 of the Penal Code, that the Petitioner obstructed a public servant, namely, the said SI./ Upali Chandrasiri from performing duties, and
c) A charge under Section 186 of the Penal Code, that the Petitioner threatened a public servant, namely the said SI./ Upali Chandrasiri, of injury

At the conclusion of the trial, judgment had been delivered on 24th July 2015 finding the accused guilty of the first and second count and acquitting him on the third count. The Accused was sentenced on 07th August 2015 imposing fines of LKR 100 on the first count, and LKR 1500 on the second count.

Being aggrieved by the same, the Accused had preferred appeal to the High Court of Kandy to have the judgment of the Magistrate set aside. After hearing submissions of both parties, the Learned High Court Judge delivered order on 13th October 2016 dismissing the appeal and affirming the Judgment of the Magistrate.

The Accused appears before this Court seeking both above judgments to be set aside on the grounds set out in the Petition dated 23rd November 2016. On 02nd June 2017, Court was inclined to grant Leave to Appeal on the following question of law upon hearing both counsel in support of their respective cases;

"Has the prosecution complied with the provisions contained in Section 135(1)(a) of the Criminal Procedure Code in obtaining the sanction of the Hon. Attorney General before filing plaint under Section 177 of the Penal Code"

In ascertaining the same, the facts and circumstances of this application are as enumerated below.

The Facts

The facts of the case as per the evidence led by the prosecution are such that a complaint had been made on 7th January 2001 by the virtual complainant Chandani Wijayanthimala Ekanayake against the Accused that the Accused had failed to return some jewellery which he had taken from her and that the Accused was then required to attend an inquiry into such complaint on 15th January 2007.

As such the evidence of the six witnesses was called by the prosecution, namely two police officers; SI./ U.G.R. Mudiyanselage Upali Chandrasiri and PS/5942 T. Mudiyanselage Thilakaratne Bana, the complainant; Chandani Wijayanthimala Ekanayake, the complainant's sister; Roshini Ekanayake and two persons who witnessed the encounter, namely Herath Pahala Gedara Abeyratne and P.G. Yasarathne Banda.

As per the narration of facts by SI Upali Chandrasiri, as supported by the statements of PS Thilakaratne Banda, SI Upali Chandrasiri had commenced inquiring into the said complaint against the Accused relating to the misappropriation of some jewellery and cash belonging to the complainant. He states that at the time the appellant used offensive language on him, obstructed the performance of his duties and the Accused attempted to squeeze his own neck.

H.P Abeyratne and P. Yasarathne Banda had been present at the Wattegama Police on the relevant day for matters unrelated to the present application. The former

states that at the time, 30 to 40 persons were present at the police station and that when the relevant inquiry relating to the Accused was taken up, the Accused used offensive language and attempted to squeeze his own neck, upon which he had been taken inside the police station. The evidence of the latter corresponds with the same narration of facts and he identified the Accused as the person who behaved in such a manner.

The narration of facts as per the Accused is such that he had attended the inquiry on 15th January 2007 with his Attorneys at Law, who had left the police station subsequent to making representations to SI Upali Chandrasiri and being given the indication that he needed to record a statement from the Accused. The Accused states that when he attempted to sit on a chair nearby for the purpose of making said statement, SI Upali Chandrasiri and PS Tillakaratne had inquired from him as to who asked the Accused to sit and had severely assaulted him, notwithstanding the accused having indicated to the police that he was being treated for a heart condition at the time. He further states that he was thereafter locked up and was later produced the Teldeniya Magistrate on a B Report.

The Accused took up the position that at the time the Accused was asked to attend the said inquiry on 15th January 2007, there had been no complaint recorded against him. On behalf of the Accused, evidence was led to the effect of corroborating this stance by one M.G. Jayawardena, one Kumari Abeyratne who was the translator of the MC Panwila and Chief Inspector Samarakoon Mudiyanselage Jayantha in that the Complaint had been made against the Accused only on the date of inquiry, the 15th January 2007, itself.

At the conclusion of the trial the Hon. Magistrate delivered judgment finding the Accused guilty on the 1st and 2nd counts as enumerated above and acquitted him on the 3rd count. Upon appeal to the High Court of Kandy (Central Province) being set aside, this Court granted Leave on the following singular question of law, which I will

reiterate and endeavour to address without disturbing the findings of the lower courts in terms of the substantive matters beyond the following particular question of law:

> *"Has the prosecution complied with the provisions contained in Section 135(1)(a) of the Criminal Procedure Code in obtaining the sanction of the Hon. Attorney General before filing plaint under Section 177 of the Penal Code"*

Compliance with the Sections of the Code of Criminal Procedure Act

The ground of appeal stems from the first charge against the Accused being under Section 177 of the Penal Code. Section 177 of the Penal Code pertains to the refusal of any person legally bound to state the truth on any subject to any authorised public servant refusing to answer such questions demanded of him. The maximum sentence as under the same provision is of simple imprisonment for a maximum term of six months, or with a maximum fine of Hundred Rupees or with both. While the contents of this provision are of little concern to the question of law at hand, it becomes pertinent as under Section 135 of the Code of Criminal Procedure Act No.15 of 1979 as amended, which states as follows:

> *"(1) Any court shall not take cognizance of -*
>
> > *(a) any offence punishable under sections 170 to 185 (both inclusive) of the Penal Code except with the previous sanction of the Attorney-General or on the complaint of the public servant concerned or of some public servant to whom he is subordinate;"*

As such, in order for any complaint under Section 177 of the Penal Code to be made, the previous sanction of the Attorney General or the Complaint of a public servant or the complaint of some public servant who is his superior is required. As such, it is clear that any one of such; the sanction or either complaints, would suffice to fulfil this requirement.

The Accused argues that the above provision has not been complied with, leading to a patent lack of jurisdiction in the instant case. The Accused enumerates that there is no sanction of the Attorney-General, which is a fact that is not contested by the Respondents. As such, the Accused interprets the term "complaint", which is a prerequisite as per the above provision in the absence of such sanction, to exclude the procedure followed by the Respondents.

The Accused examines the first and second subsections of Section 136 of the Code of Criminal Procedure Act to afford an interpretation to the term "complaint". The relevant portion of Section 136 have been reproduced below for ease of reference:

> *"(1) Proceedings in a Magistrate's Court shall be instituted in one of the following ways: -*
>
> > *(a) on a complaint being made orally or in writing to a Magistrate of such court that an offence has been committed which such court has jurisdiction either to inquire into or try:*
> >
> > *Provided that such a complaint if in writing shall be drawn and countersigned by a pleader and signed by the complainant; or*
> >
> > *(b) on a written report to the like effect being made to a Magistrate of such court by an inquirer appointed under Chapter XI or by a peace officer or a public servant or a servant of a Municipal Council or of an Urban Council or of a Town Council; or ....."*

Accordingly, the Code of Criminal Procedure identifies complaints made orally or in writing separately from written reports to the Magistrate of such court by a public servant. It is the Accused's position that owing to the same, the mere filing of a B report by the Respondent is insufficient to fulfil the requirements as a report can be distinguished from a complaint, and the B report squarely falls within the definition of a "report" as opposed to a "complaint" as is required under Section 135. On this

interpretation, the Respondent disagrees in that the B report indeed amounts to a complaint as is required under the aforementioned provisions.

To substantiate the same, the Accused appears to rely on the case of **R.P Wijesiri Vs. the Attorney General 1980 2 SLR 317**, wherein an indictment was presented to the High Court of Kandy under Section 480 of the Penal Code and the preliminary objection of non-compliance with Section 135(1)(f) of the Code of Criminal Procedure was raised. In this particular case there was no previous sanction of the Attorney-General nor was there a complaint to the effect, as such the Preliminary objection was upheld in that the High Court lacked competence.

However, it must be noted that the case of Wijesiri can be distinguished from the present case as the charges levelled in the two cases are drastically different in nature, secondly the applicable provision of the Code of Criminal Procedure in that case was Section 135(1)(f) whereas Section 135 (1)(a) is being considered at present. The requirements of complaint and sanction under Section 135 (1)(f) vary from that of Section 135(1)(a) and therefore different standards and procedure are expected in instances falling within the scope of either provision. As per Section 135(1)(f) sanction is required "with" a complaint, whereas Section 135 (1)(a) requires the sanction of the Attorney general or the complaint of the public servant concerned or their superior.

Despite the above, the views of Hon. Ranasinghe J in relevance to the concept of sanction and complaint are notable in relation to the instant case. Hon. Ranasinghe J examined the objects and reasons for the requirement of the Attorney General's "sanction" set out in Section 147 of the previous Code (which is the counterpart of Section 135 of the present Code) as are set out in **Dias Commentary on the Ceylon Criminal Procedure Code at. p. 381**, quoting:

> *"the object of such legislation is two-fold, viz (1) to prevent the process of the Criminal Courts from being prostituted for the purpose of harassing an enemy by way of revenge or out of spite, and (ii) to enable the authorities to*

discourage false and vexatious cases, and to keep under control the number of prosecutions by requiring some public officer or Court to examine the facts of the case before a prosecution is sanctioned. Such legislation is a 'precautionary measure, in order to prevent frivolous or otherwise undesirable proceedings by private persons' - R v Meera Saibo"

As quite aptly framed above, the purpose of the legislation in terms of Section 135 is to discourage malicious prosecution and to mitigate the filling of any unnecessary cases through having a preliminary process of scrutiny by either public officials in the specified capacity or the Attorney General prior to bringing a matter to the attention of the relevant competent court. This acts as a measure of safeguarding persons accused of the offences specified without the intervention of Courts.

As such, Section 135 can be distinguished from Section 136. Section 135 outlines conditions necessary for initiating proceedings in terms for the prosecution of certain Penal Offences whereas Section 136 differs in scope as it pertains to the method of initiation of proceedings before the Magistrate's Court. As such, Section 136 does not refer to any specific offences, outlines a different procedure from that of Section 135, and even forms part of a different chapter (Chapter XIV) as opposed to Section 135 (Chapter XII), thus it exists to serve different occasions than that of Section 135.

For this reason, I find that the interpretation of complaint or report cannot be specifically drawn from Section 136 when the Code of Criminal Procedure clearly provides for an interpretation of this term in Section 2, which is reproduced as follows for ease of reference:

""complaint" means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence; "

It must be noted that despite an interpretation of "report" not being provided in Section 2, the relevant sections referring to reports have outlined the prerequisites of the required reports in those sections itself as necessary.

In reference to the above interpretation in conjunction with the mentioned requirement for complaints under Section 135, all that would be required is a written or oral allegation made to the Magistrate by the public servant concerned or a public servant to whom he is subordinate, made with the view of taking action action under the Code that some person, whether known or unknown, has committed an offence.

In the instant case, the person is identified as the person who is alleged to have committed an offence. It is my view that by the B report bearing no. B 44/2007, dated 01.01.2007 by the Complainant; the Officer in Charge of Wattegama Police station who is the superior officer of the concerned public officer in the instant case, a written complaint has indeed been made to the Magistrate with the view of taking action under the Code by a public officer to whom the concerned police officer is subordinate. The report outlines the related incident and the relevant surrounding circumstances and includes the offences allegedly committed in sufficient detail. As such I find the prerequisites of Section 135 (1)(a) have been fulfilled in the present instance.

While I am of the view that the above enumerated reasons suffice to satisfy the Question of Law at hand concisely, I wish to further address relevant points raised by both parties in order to comprehensively address this matter.

In substantiating their position, the Respondent relies on Section 39 of the Judicature Act No.02 of 1978 in order to state that the petitioner is not entitled to object at this point in proceedings as any objections must have been raised prior. Section 39 of the Judicature Act is reproduced as follows for ease of reference:

" Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party

shall afterwards be entitled to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter:

Provided that where it shall appear in the course of the proceedings that the action, proceeding or matter was brought in a court having no jurisdiction intentionally and with previous knowledge of the want of jurisdiction of such court, the Judge shall be entitled at his discretion to refuse to proceed further with the same, and to declare the proceedings null and void."

The Respondent is of the position that as the Accused has only raised this objection before this Court and has not made any endeavour to assert the same either before the Magistrate or the High Court, this application cannot be entertained. The Accused adopts the stance that as non-compliance with Section 135 (1)(a) of the Code of Criminal Procedure amounts to a patent lack of jurisdiction which may be raised at any point in proceedings, there was no reason for the Accused to take cognisance of Section 39 of the Judicature Act.

As per Section 39 of the Judicature Act, any objection must be raised at the earliest possible opportunity and the failure of this amounts to a waiver wherein the court is considered to have jurisdiction over the action. However, it is commonly accepted that in instances where it is a patent lack of jurisdiction, objection to jurisdiction can be taken at any time in proceedings as was held in **Baby V Banda (1999) 3 Sri L R 416.**

The landmark Judgement of **Beatrice Perera Vs The Commissioner of National Housing 77 N.L.R. 361 at p. 366,** distinguished between "patent" and "latent" lack of jurisdiction as follows:

"Lack of competency in a Court is a circumstance that results in a judgment or order that is void. Lack of competency may arise in one of two ways. A

Court may lack jurisdiction over the cause or matter or over the parties; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court. Both are jurisdictional defects ; the first mentioned of these is commonly known in the law as a ' patent' or ' total' want of jurisdiction or a defectus jurisdictionis and the second a ' latent' or ' contingent' want of jurisdiction or a defectus triationis. Both classes of jurisdictional defect result in judgments or orders which are void. But an important difference must also be noted. ***In that class of case where the want of jurisdiction is patent, no waiver of objection or acquiescence can cure the want of jurisdiction****; the reason for this being that to permit parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to litigation to create new jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature;* ***the proceedings in cases within this category are non coram judice and the want of jurisdiction is incurable****. In the other class of case, where the want of jurisdiction is contingent only, the judgment or order of the Court will be void only against the party on whom it operates but acquiescence, waiver or inaction on the part of such person may estop him from making or attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction..."*

(Emphasis Added)

This approach has been adhered to and further developed by this Court as in the case of **Kekul Kotuwage Don Aruna Chaminda v Janashakthi General Insurance Limited and others SC Appeal No. 134/2018 (SC minutes dated 09.10.2019)** wherein a wealth of cases both before this Court itself as well as before

the Court of Appeal was acknowledged in terms of determining a question of jurisdiction in the same case.

Given all expressed above, in the instance that non-compliance with Section 135 is considered a patent lack of jurisdiction, the juncture at which the objection to jurisdiction is raised becomes an irrelevant consideration in contrast to it being a latent lack of jurisdiction.

In order to ascertain the nature ascribed to want of sanctions, cases as **Kanagarajah v The Queen (1971) 74 NLR 378** considered the previous opinions of Hon. Mosley S.P.J. in **Brereton v. Ratranhamy (1940) 42 NLR 149** pertaining to Section 425 of the previous Code of Criminal Procedure, which was identical to Section 537 of the Indian Criminal Procedure Code. A long line of decisions of the Privy Council and of the Supreme Court of India had held that the absence of a complaint or sanction as required by certain provisions is a defect which vitiates the proceedings and is not an irregularity curable under s. 537 of the Indian Criminal Procedure Code.

In the case of **In re Subramaniam A. I. R. (1957) Madras 442 at 446,** , Ramaswami, J. stated that:

> *" The 'want' of a complaint as required by law will affect the 'competency' of a magistrate to deal with a case and is not a curable error. The ' want' of a sanction required under any provision of law will similarly affect the competency of the Court and is not curable under this Section. But quite different would be irregularities in sanctions granted and in such cases irregularities in sanctions will be curable to the extent permissible under s. 537 Cr. P. C.*
>
> *Thus* ***a sharp distinction is drawn between initiation of proceedings without sanction as required by the sections and irregularities in sanctions granted****, the former being a defect which vitiates the proceedings*

ab initio and not an irregularity curable under s. 537 Cr. P. C. and the latter sharing that of other irregularities of a like nature being curable to the extent laid down in s. 537 Cr. P. C. ***To sum up, want of sanction cannot be cured but irregularities in sanctions can be cured***."

(Emphasis Added)

To clarify in considering the relevance of decisions based on the previous Code of Criminal Procedure, similarly to Section 436 of the present Code, Section 425 of the previous Code of Criminal Procedure provided that no judgment of a Court of competent jurisdiction shall be reversed on appeal on account, inter alia, of the want of any sanction required by section 147, unless such error, omission, irregularity, or want has occasioned a failure of justice. It must be noted that Section 147 (a) of the previous Code of Criminal Procedure Code is similar to Section 135 (1)(a) of the present Code.

Thereinafter the case of **Kanagarajah v The Queen (1971) 74 NLR 378** indicated that a non-compliance with requirements such as are contained in the current Section 135(1) would not only taint a preliminary inquiry in the Magistrate's Court where such an inquiry is held with a view to a committal for trial before a higher Court, but it would also render the High Court not competent to have proceedings in respect of such an offence. As such, a complete want of sanction or complaint would amount to a patent lack of jurisdiction that may be raised before this Court despite not having been considered before the Magistrate Court or the High Court previously.

In invoking Section 436 of the Code of Criminal Procedure, even if it were an event of a want of sanction under Section 135, it is stated that:

"Subject to the provisions hereinbefore contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account –

(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this Code; or

(b) of the want of any sanction required by section 135,

unless such error, omission, irregularity, or want has occasioned a failure of justice."

As such the occasioning of a failure of justice owing to such lack of sanction must be present in order to reverse or alter the judgment made in the instant case. As it stands the sentencing of the Accused found the Accused guilty of the first and second count and acquitting him on the third count, imposing fines of LKR 100 on the first count, and LKR 1500 on the second count. The Maximum sentence allowed under Section 177 is punishment which may be simple imprisonment for a term which may extend to six months, or with fine of one hundred rupees or with both. In the given circumstances a fine of One Hundred Rupees is not intended to hinder the Accused monetarily in any sense and I believe it is an entirely justified penalty for the crime he is convicted of under Section 177.

Given that Section 135 solely pertains to the first count, the sentencing and fine under the second count is not a relevant consideration before this Court. As a complaint has been made in the form of a B report, a sanction is not necessary to the filing of the present case before the Magistrate and the requirements under Section 135 (1)(a) have been sufficiently fulfilled, as such there is no necessity occasioning the invoking of this provision in the instant case nor is there a failure of justice occasioned by a lack of sanction, or by the non-revision of the decisions of the lower courts.

In the instant case I find that the B report bearing no. B 44/2007, dated 1st January 2007 by the Complainant; the Officer in Charge of Wattegama Police station amounts to compliance with Section 135 (1)(a) of the Code of Criminal Procedure and

I find no justifiable grounds to set aside the judgment delivered by the Magistrate Court on 24th July 2015 or the order by the High Court of Kandy dated the 13th October 2016 dismissing the appeal, as there is no failure of justice warranting the exercise of Section 436 of the Code of Criminal Procedure. As such, I find this Appeal dismissed and I order cost of Ten Thousand Rupees to be paid by the Appellant.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, 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 under and in terms of the article 128 of the Constitution of the Democratic Socialistic Republic of Sri Lanka read with Section 5 C of the High Court of the Provinces (special Provisions) act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC Appeal No. 110/2016

SC Appeal No. 111/2016

SC Appeal No. 112/2016

SC Appeal No. 113/20160

HCCA Trincomalee Revision App.
16/2016
DC Trincomalee Case No.
763/97
764/97
765/97
766/97

Shamali Arunika de Zoysa,
No.532/20 A, Siebel Place,
Kandy

Plaintiff

Vs.

1.Lilani Oosha Ramanaden,
No. 532/20 A, Siebel Place,
Kandy.

2.Ranjithan Justin,
Tambimuttu Casinader,
38, Denbigh Road,
Armadale 3143,
Victoria,
Australia
Appearing by his Attorney
the 1st Defendant.

3.Victorine Sounderam Rogers,
(dead)
C/O Mrs. Y Nadaraja,
13, Ebenezer Avenue,
Dehiwala.

3A. Daphne Seevaratnam,
146/8, Poorwarama Road,
Colombo 05.

Defendents

1. K. Sarojinidevi,
28/5, Central Road,
Orr's Hill,
Trincomalee.

2. A. Sellathangam,
28/4, Central Road,
Orr's Hill,
Trincomalee.

3. Chndramugam Mahendran,
(dead)
28/3, Central Road,
Orr's Hill,
Trincomalee.

3A.Mahenthiran Saraswathy,
28/3, Central Road,
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4. J. Vartharajah,
24, Konespuram, Orr's Hill,
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5. S. E Chandrabose,
   26D5, Central Road,
   Orr's Hill,
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6. N. Sritharan,
   26F, Central Road,
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7. A. Vallliamma,
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8. G. Parashakthi (dead)
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8A.T. Gopalasingham
   26 D 1, Central Road,
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9. K. Indrani
   26 G, Central Road,
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   Trincomalee.

Added Defendants

AND

Shamali Arunika de Zoysa,
No.532/20 A, Siebel Place,
Kandy

Plaintiff-Petitioner

1.Lilani Oosha Ramanaden,
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Shamali Arunika de Zoysa,
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Plaintiff-Petitioner-Petitioner-Petitioner

Vs.

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9. K. Indrani
   26 G, Central Road,
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   Trincomalee.

Added Defendant-Respondent-Respondent-Respondents

Before: Jayantha Jayasuriya, PC, CJ.
L.T.B Dehideniya, J.
S.Thurairaja PC, J.

Counsels: Faisz Musthapha, PC, with Gamini Hettiarachchi instructed by Sanath Wijewardena for the Plaintiff-Petitioner-Petitioner-Appellant.

Uditha Egalahewa, PC, with Ranga Dayananda for the 1st and 2nd Defendant-Respondent-Respondent-Respondents

K.V.S Ganesharajan with S. Ragul and K. Nasikethan for the 9th added Defndant-Respondent-Respondent

Argued on: 08.09.2020
Decided on: 07.06.2022

L.T.B Dehideniya, J.

Plaintiff-Petitioner-Petitioner-Petitioner (hereinafter sometimes referred to as the Petitioner) instituted a partition action in the District Court of Trincomalee to Partition the lot 2 of the land called "Orr's Hill", described in the schedule to the Plaint amongst the Plaintiff and the 1st to 3rd Defendants-Respondents-Respondents-Respondents (hereinafter sometimes referred to as the Respondents). Subsequently, the 1st to 9th added Defendants-Respondents-Respondents-Respondents (hereinafter sometime referred to as the 1st to 9th added Defendants) were added as parties at their request and they filed their statements of claims. At the trial, a settlement was proposed by the added Defendants to buy the portion of land they were in possession of, for the price of Rupees 200,000/- per perch. The Petitioner led evidence and concluded the trial marking documents P1 to P34. The other Defendants have not led any evidence. The learned District Judge delivered the judgement accepting the Petitioner's evidence and giving shares as prayed for in the Plaint. The learned District Judge has considered the proposed settlement

and stated in his judgement that the parties have reached a settlement and the added Defendants are willing to buy the said portion. Thereafter, the said conditions were entered in the interlocutory decree.

The Petitioner made an application to the District Court in terms of Section 839 of the Civil Procedure Code to set aside and/or cancel the relevant part of the judgement in relation to the settlement, on the basis that the parties have not entered into a proper settlement. The learned District Court judge disposed the inquiry by way of written submissions and delivered his order dated 31.05.2010 refusing the application holding that the parties had entered into a valid settlement.

Being aggrieved by the said order, the Petitioner filed a revision and *restitutio in integrum* application to the High Court of Civil Appellate in Trincomalee. After hearing the application the learned High Court Judge dismissed the revision application by the judgement dated 14.10.2013. It is from the aforesaid judgement that this appeal is preferred.

This Court granted Leave to Appeal on the following questions of law;

1) Is the judgement of their Lordships' the judges of the Civil Appellate High Court contrary to law and the materials placed before the Court?
2) Have their Lordships' the judges erred in law by failing to consider that the purported settlement is vague, uncertain and therefore cannot be implemented?
3) Have their Lordships' the judges erred in law by failing to consider that the express consent of the Plaintiff and the 1st to 3rd Defendants for the purported settlement were not obtained?
4) Have their Lordships' the judges erred in law by failing to consider that the parties have not expressly agreed on specific terms and conditions necessarily required for a consent decree?

5) Have their Lordships' the judges erred in law by failing to consider that the nature of the settlement was not explained to the parties before entering of the purported settlement?
6) Have their Lordships' the judges erred in law by failing to consider that the purported settlement was made violating Section 408 of the Civil Procedure Code?
7) Have their Lordships' the judges erred in law by failing to consider that the purported settlement was against the intention of the Plaintiff and the 1st to 3rd Defendants?
8) Have their Lordships' the judges erred in law by failing to consider that the said order of the learned District Judge is tantamount to gross miscarriage of justice?

The Petitioner's Appeal is based on the ground that the judgement of the High Court of Civil Appeal in Trincomalee, is contrary to law and against weight of the evidence led before the Court leading to a gross miscarriage of justice.

The land in question became an effected property within the definition of the terms under the Rehabilitation of Persons and Property and Industry Authorities Act No.29 of 1987 and vested with the state from 1987 to 1989. On 20th December 1989, the said allotment of the land was divested under the provisions of the said Act, free of encumbrances to the Petitioner and the 1st to 3rd Respondents. The Petitioner and the 1st to 3rd Respondents instituted the instant partition action in 1997. Therefore, according to the provisions of the Rehabilitation of Persons and Properties And Industries Authority Act No.29 of 1987 it is evident that the added Defendants cannot claim prescriptive rights to the subject matter.

It is a settled law that parties to a partition action could compromise their disputes and enter into a settlement with the mutual consent of all the parties to the partition action.

In the cases of ***Caroline Perera and Another v. Martin Perera and Another*** [2002] 2 Sri L.R 1 and ***Faleel v. Argeen and Others*** [2004] 1 Sri L.R 48 it was held that;

"It is possible for the parties to a partition action to compromise their disputes provided that the Court has investigated the title of each party and satisfied itself as to their respective rights."

A similar view was expressed in the case of ***Kumarihamy v. Weeragama et al.***(1942) 43 NLR 265, where Justice de Kretser held that, an agreement which is entered into in a partition action affecting only the rights of the parties inter se and which is expressly made subject to the Court being satisfied that all parties entitled to interests in the land are before it and are solely entitled to it, is binding on the parties and is not obnoxious to the Partition Ordinance.

A question with great importance before this court is whether the terms of settlement referred to in the District Court established a valid partition settlement under the existing legal context.

According to the proceedings dated 09.09.2008, the proposed terms of settlement are as follows;

"පැමිණිලිකාරිය සිටී

ඇය වෙනුවෙන් නීතිඥ ඕ.එල්.එම් ස්මයිල් මහතාගේ උපදෙස් මත නීතිඥ අසේල රැකව මහතා පෙනී සිටී.

විත්තිකරුවන් සිටී

01, 02 සහ 03 විත්තිකරුවන් වෙනුවෙන් නීතිඥ ඇන්ටනි මහතාගෙ උපදෙස් මත නීතිඥ මාධව රූපසිංහ මහතා පෙනී සිටී. 05 සහ 08 විත්තිකරුවන් වෙනුවෙන් නීතිඥ ඒ. පේගසෝදි මහතා පෙනී සිටියි.10 සහ 12 විත්තිකරුවන් වෙනුවෙන් නීතිඥ තිරුකුමාරනාදන් මහතා පෙනී සිටින අතර අද දින ඒ මහතා පෙනී නොසිටී.

අද දින මෙම නඩුවට රාමනාදන් යන විත්තිකරු සහ කාසිනාදන් යන විත්තිකාරිය පෙනී සිටියි. ඔවුන් දෙදෙනා මෙම නඩුවට අදාළ ඉඩමේ නොමැති බව කියා සිටියි. රෝයස් යන විත්තිකරු මිය ගොස් ඇත. ඩී. ඩී සිලරත්නම් යන විත්තිකරු අද දින අදිකරණයට නොපැමිණි අතර ඔහු

එම ඉඩමේ පදිංචි වී නොසිටින බව අධිකරණයට පවසා සිටී. සරෝජිනී යන විත්තිකාරිය අද දින අධිකරණයට පමිණ නැත. සෙල්ලතම්බි යන විත්තිකාරිය අද දින අධිකරණයේ පෙනී සිටී. මහේන්ද්‍රන් යන විත්තිකරු මිය ගොස් ඇත. සරස්වතී විත්තිකාරිය අද දින අධිකරණයේ පෙනී සිටී. වරධරාජා, චන්ද්‍රබොස්, ඉන්ද්‍රානි, ගෝපාලසිංහම් යන විත්තිකරුවන් අද දින අධිකරණයේ පෙනී සිටී. පරාශක්ති යන විත්තිකාරිය මිය ගොස් ඇති හෙයින් ඇයගේ ඇටෝර්නි බලකරු වශයෙන් ඇයගේ ස්වාමි පුරුෂයා වන පද්මනාදන් යන අය අධිකරණයේ පෙනී සිටී.

අද දින අධිකරණයේ පෙනී සිටින ලද සියලුම විත්තිකරුවන් තම තමන් භුක්ති විඳින ඉඩම් කොටස් සඳහා රු.200,000/- (ලක්ෂ දෙක) බැගින් ගෙවා මිලට ගැනීමට එකඟ වේ. ඉහත කී යෝජනාවට එකී පමිණිලිකාරිය කැමත්ත පළ කර සිටී. සියලුම විත්තිකරුවන් අධිකරණයට පැමිණීමෙන් පසු පමිණිලිකාරියගේ අයිතිවාසිකම් අධිකරණය මගින් පරීක්ෂා කිරීමෙන් අනතුරුව මෙම නඩුව සමථයට පත් කිරීමට අධිකරණයට ඉඩ දීමට කැමැත්ත පළ කර සිටී.

එම නිසා මෙම නඩුව සමථයට පත් කිරීමට කැමත්ත පළ කිරීම නිසා සමථයට නඩුව කල් තබනු ලැබේ..”

Proceedings dated 18.11.2008;

‘‘පැමිණිලිකරු සිටී.

පැමිණිලිකරු වෙනුවෙන් නීතිඥ ඕ.එල්.එම් ස්මයිල් මහතාගෙ උපදෙස් මත නීතිඥ අසේල රැකව මහතා පෙනී සිටී.

01 වන විත්තිකාරිය සිටී.

02 වන විත්තිකාරියගෙ ඇටෝර්නි බලකරු සිටී.

01 සහ 02 විත්තිකරුවන් වෙනුවෙන් නීතිඥ ඇන්ටනි මහතාගෙ උපදෙස් මත මාධව රූපසිංහ මහතා පෙනී සිටී.

02, 05, 06, 07, 08, 11 වන විත්තිකරුවන් සිටී.

04 වන විත්තිකරු නැත.

...

..මෙම නඩුව මීට පෙර සටහන් කර ඇති පරිදි ආරවුලට අදාළ දේපලේ එක් එක්කෙනා භුක්ති විඳින කොටස් වලට පර්චස් 01 ක් රු.200,000/- බැගින් ගෙවා මිලදී ගැනීමට කැමැත්ත පළ කර ඇත. එම කරුණු මත මෙම නඩුව තවදුරටත් විභාගයට ගෙනයාමේ අවශ්‍යතාවයක් නොමැති බව පාර්ශවකරුවන්ගේ නීතිඥ මහත්වරුන් කියා සිටී..''

The terms of settlement as referred in the judgement of the District Court dated 09.01.2009 are in the following manner; (p.4)

"..What the settlement is that added Defendants indicated their consent to purchase from the Plaintiff and the 1st Defendant the Lots that they are now in possession at the rate of Rs.200,000/- per perch. To this, the Plaintiff and the 1st Defendant showed their consent to the Court."

Even though the law permits the parties to a partition action to compromise their disputes, the Court has to thoroughly investigate the terms of the settlement and title of each party, before allowing such partition settlement. According to **Section 25 (1)** of the Partition Law (No. 21 of 1977), learned trial Judge has a duty to examine the title of each party to the action and to hear and receive evidence in support in order to determine all questions of law. The above legal context has been discussed and accepted in a long line of case law. In the case of ***Richard and Another v. Seibel Nona and Others*** [2001] 2 Sri L.R 1 it was held that it is the duty of the Judge to fully investigate into the title to the land and shares. A similar view was expressed in the case of ***Sopinona vs. Pitipanaarachchi And two others*** [2010] 1 Sri L.R 87 Saleem Marsoof J. held that basic principle in all the enactments on Partition Law is that where there has been no investigation of title, any resulting partition decree necessarily has to be set aside. Similarly, in the case of ***Gangoda Mudiyanselage Wijewathi Podimenike of Mahawelegedara***

v. Pathirennehelage Leelawathie of Mahawelgedera (SC Appeal No. 178 /2013, SC minutes dated 14.12.2016) per Eva Wanasundera PC J., in the course of investigation of title to the land sought to be partitioned by parties before Court, prior to deciding what share should go to which party is more the duty of the judge than the contesting parties.

In the present application, according to the judgement dated 09.01.2009 and the order dated 31.05.2010, the Learned District Judge had investigated the title of the Petitioner and the 1st – 3rd Defendants considering the evidence led by the said parties. However, the District Judge has not investigated the title of the Added Defendants. When the case was taken up for trial, Added Defendants did not lead evidence and further decided not to contest the title. Consequently, the Added Defendants entered into the purported partition settlement. Therefore, it is evident that the Learned District Judge had no opportunity to investigate the title of the Added Defendants for the reason that they had not led evidence.

Moreover, it is a well-established legal concept that several legal aspects need to be fulfilled in order for a settlement to be valid before the law.

In the case of ***Gunawardena v. Ran Menike and Others*** [2002] 3 Sri L.R 243, Weerasuriya J. (P/CA) held with approval of the case ***People's Bank v. Gilbert Weerasinghe*** (1986) 2 CALR,

> At p.244-245
>
> *..an agreement must be expressed in clear an unambiguous terms to have a binding effect on the parties to give it the effect of amounting to an implied waiver of the right to appeal.*
>
> *Therefore, it is vital that the first instance to ascertain whether there was a settlement by all parties who have a right to this land on clear and unambiguous terms to have a binding effect on the parties."* [emphasis added]

In the present application, the subject matter is co-owned by four co-owners (Petitioner and the 1st to 3rd Respondents) and nine added Defendants were claiming prescriptive title to several portions of it. There has been a failure to mention the terms of the compromise, namely in what manner and to what extent the rights of the parties are affected. Therefore, it is uncertain which co-owner is entitled to which allotment and which co-owner is entitled to receive the payments from which added Defendant. Further, there is no express term regarding an exact time period to fulfil the purported settlement and no indication of consequences if one or more parties to the settlement failed to act in accordance with the settlement.

It appears that certainty and precision, which are considered as basic attributes of a partition settlement, cannot be found in the aforesaid settlement. Further, the learned District Court Judge has failed to investigate the reliability of the terms of settlement, which affects the rights of the parties. Thereupon, this settlement cannot be enforced by law and cannot be considered as binding upon the parties.

Except for the precision of the terms of settlement, it is noteworthy that where there has been a settlement or compromise, it must be in strict compliance with the **Section 91 and 408** of the Civil Procedure Code. Section 91 of the Civil Procedure Code provides that;

> **Section 91**
>
> *"Every application made to the court in the course of an action, incidental thereto, and not a step in the regular procedure, shall be made by motion by the applicant in person or his counsel or registered attorney, and a memorandum in writing of such motion shall be at the same time delivered to the court."* [emphasis added]

Section 408 of the Civil Procedure Code provides for the adjustment of actions and reads as follows;

Section 408

> *"If an action be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the action, such agreement, compromise, or satisfaction shall be notified to the court by motion made in presence of, or on notice to, all the parties concerned, and the court shall pass a decree in accordance therewith, so far as it relates to the action, and such decree shall be final, so far as relates to so much of the subject-matter of the action as is dealt with by the agreement, compromise, or satisfaction."* [emphasis added]

A basic question of law to be decided is whether the purported settlement was made violating Section 408 of the Civil Procedure Code. Section 408 of the Civil Procedure Code require any settlement to be notified to the Court by way of Motion made in the presence of or on notice to all the parties to the settlement. The above legal context has been discussed and accepted in a range of case law.

In the case of ***Ukku Amma v. Paramanathan*** (1959) 63 NLR 306 Weerasooriya J. held that, Section 408 provides that an agreement or compromise shall be notified to Court by motion. It was further held that the decree entered in terms of the settlement should be vacated, where in a purported settlement of a case was not complied with Section 408 and 91 of the Civil Procedure Code.

In the case of ***Gunawardena v. Ran Menike and Others*** [2002] 3 Sri L.R 243 it was held that where there has been a settlement or compromise it must be in strict compliance with the provisions of Section 91 and Section 408 of the Civil Procedure Code.

Further, in the case of ***Caroline Perera and Another v. Martin Perera and Another*** [2002] 2 Sri L.R 1 per Justice Weerasuriya;

At p.4

*"In **Babyhamine v. Jamis** (46 CLW 5) at the trial where the points in dispute were settled among the parties before the evidence was led and the interlocutory decree entered so as to give effect to the settlement but the compromise was lacking in precision and did not strictly conform to section 91 and 408 of the Civil Procedure Code it was held that in the interest of justice , the purported settlement and the judgement should be set aside and the trail should proceed de novo upon the issues framed."*

A similar view was expressed in the case of ***Avenra Gardens (Private) Limited v. Global Project Funding AG*** (S.C. Appeal No. 157/2019 decided on 23.02.2022), Per Justice Janak De Silva.

At p. 7

*" The foundation of a consent decree is the consensus ad idem of the parties. For this reason, section 408 of the Civil Procedure Code directs that the Court should pass a decree in accordance with the terms of the settlement. Case law emphasizes the need to comply with this and other relevant provisions to ensure that any settlement entered is based on the mutual consent of the parties. Any settlement or compromise must conform strictly to the provisions of sections 91 and 408 of the Civil Procedure Code. If the compromise was lacking in precision and did not strictly conform to sections 91 and 408 of the Civil Procedure Code and it leads to confusion and uncertainty, any decree entered on it could be attacked on the ground of want of mutuality **[Faleel v. Argeen and Others** (2004) 1 Sri.L.R. 48]. Thus, in **Dassanaike v. Dassanaike** (30 N.L.R. 385 at 387), Fisher, C. J. observed: "It is fundamentally necessary before section 408 can be applied that it should be clearly established that what is put forward as an agreement*

or compromise of an action by the parties was intended by them to be such." [emphasis added]

At p. 7-8

"..It directs that "such agreement, compromise, or satisfaction shall be notified to the court by motion…". In my view, these words require the terms of the settlement to be incorporated into a motion signed by the registered attorney for all parties to the settlement. There can be no room for any dispute once terms are recorded in a motion and the parties concerned have indicated their consent by the registered attorney-at-law signing the motion containing the terms of the settlement." [emphasis added]

Nevertheless, when carefully considering the present Application, it appears that the terms of settlement have not been produced by way of a motion as required by law. Instead, the terms were recorded in open court on 09.09.2008. Further, according to the proceedings of the District Court dated 09.09.2008 and 18.11.2008, some of the added Defendants were absent and some of them were deceased at the time when the terms of settlement were recorded in the open court. Therefore, it is evident that the learned District Judge has failed to consider the following legal factors, when entering the Partition Decree:

i. Terms of settlement was not incorporated into a motion as required by law.
ii. Terms of settlement was recorded in the open court without the mutual consent of all the parties to the case.
iii. Terms of Settlement was lacking in precision and did not strictly conform to sections 91 and 408 of the Civil Procedure Code and it leads to confusion and uncertainty.

It is a trite law that, settlement of a partition action between the parties is welcome. The settlement between parties should be allowed by the Court to the extent possible in the law. On that account, in my view, pursuant to evidence and case law discussed, there is a significant absence of precision and certainty in the terms of settlement in this case. Moreover, it is apparent that the purported settlement was made violating Sections 91 and 408 of the Civil Procedure Code. Therefore, in the eyes of law, the purported terms of settlement in the present application is invalid and cannot be enforced before law.

I answer the questions of law as follows;

1) Yes
2) Yes
3) Yes
4) Yes
5) Yes
6) Yes
7) Yes
8) Yes

Under these circumstances, the settlement is invalid and should be set aside.

The Petitioner has also prayed for the cancellation of the settlement, contesting that the said settlement has been commissioned violating the provisions of law. When looking at the proceedings of the District Court, it appears that the added Defendants did not lead evidence, relying on the proposed settlement.

Therefore, I set aside the District Court judgement dated 09.01.2009 and the interlocutory decree entered upon the said judgement and direct the learned District Court judge of the

District Court of Trincomalee to proceed with the trial from the point where the Petitioner closed the case after leading evidence. I allow the Appeal, set aside the order dated 31.05.2010 of the District Court of Trincomalee, set aside the interlocutory decree, set aside the judgment dated 14.10.2013 of the Civil Appellate High Court of Trincomalee, and set aside the settlement.

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 Special Leave to Appeal from the Judgment of the High Court of the Provinces holden in Panadura in terms of Article 154 P (3) read together with Section 9(1) of the High Court of the Provinces (Special Provisions) Act.

SC Appeal No. 115/2019
SC SPL No. 188/2019
High Court Panadura Case No. HCMCA 17/2017
Horana Magistrate Court Case No. 29028

Officer-in-Charge,
Horana Police Station,
Horana.

Complainant

Vs.

Sirimanna Hettige Jayasena,
45, Srimaha Vihara Mawatha,
Kalubowila,
Dehiwala.

Accused

And Between

Sirimanna Hettige Jayasena,
45, Srimaha Vihara Mawatha,
Kalubowila,
Dehiwala.

Accused-Appellant

Vs.

Officer-in-Charge,
Horana Police Station,
Horana.

Complainant-Respondent

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

Respondent

And Now Between

Sirimanna Hettige Jayasena,
45, Srimaha Vihara Mawatha,
Kalubowila,
Dehiwala.

Accused-Appellant-Petitioner

Vs.

Officer-in-Charge,
Horana Police Station,
Horana.

Complainant-Respondent-Respondent

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

Respondent-Respondent

Before: **Murdu N.B. Fernando, PC, J.**

A.L. Shiran Gooneratne, J.

Arjuna Obeyesekere, J.

Counsel: Saliya Pieris, PC with Varuna de Seram **for the Accused-Appellant-Petitioner.**

G. Wakishta Arachchi, SSC **for the Complainant-Respondent-Respondent.**

Argued on: 11/01/2022

Decided on: **04/04/2022**

A.L. Shiran Gooneratne J.

The Accused-Appellant-Petitioner (hereinafter sometimes referred to as "the Petitioner"), was charged before the Magistrates Court of Horana, in Case Bearing No. 29028, for committing the following offences on or about 05/05/2007, whilst driving Vehicle Bearing No. WP-HI-2390.

1. Negligent driving - an offence punishable under Section 214(1)(a) of the Motor Traffic Act read with Section 151(3) and Section 217(2) as amended, of the said Act.
2. Failure to avoid an accident - an offence punishable in terms of Section 149(1) read with Section 224 of the said Act.
3. Failure to report an accident - an offence punishable in terms of Section 161(1) read with Section 224 of the said Act.

4. Causing grievous injuries to an individual by reckless or negligent driving - an offence punishable under Section 329 of the Penal Code.

At the conclusion of the trial, the learned Magistrate by Judgment dated 23/01/2017, convicted the Petitioner on counts 1, 2 and 4, stated above, and by Order dated 27/02/2017, sentenced the Petitioner to pay a fine of Rs. 5,000/- and Rs. 2000/- on counts 1 and 2 respectively, and on count 4, a fine of Rs. 1500/- and 3 months Simple Imprisonment suspended for 5 years.

Being aggrieved, by the said Judgment and the said Order made by the learned Magistrate, the Petitioner, made an application dated 13/03/2017, to the Provincial High Court of Panadura in Case Bearing No. HCMCA 17/2017, to have the said Judgment and the Order set aside. At the conclusion of hearing, the learned High Court Judge, by Order dated 30/04/2019, affirmed the said conviction and the sentence imposed on counts 1 and 2. On count 4, the fine imposed was affirmed, however, the sentence of 3 months Simple Imprisonment suspended for 5 years was varied to be an active sentence of 3 months Simple Imprisonment.

By application dated 12/05/2019, the Petitioner sought Special Leave to Appeal from this Court, *inter alia*, to set aside and/ or vary the said Order made by the Provincial High Court of Panadura and the Judgment and the sentencing order made by the Magistrates Court of Horana.

Having heard submissions of both Counsel, this Court was inclined to grant Special Leave to Appeal on the following question of law;

"Did the High Court give an opportunity to the parties to address the enhancement of the sentence before the sentence was enhanced."

The learned Magistrate, prior to imposing the said discretionary sentence, has made reference to the consideration of mitigatory circumstances. The prosecution did not object to such consideration nor did it seek an enhancement in sentence imposed on the

Petitioner. Similarly, when this matter was taken up in appeal in the Provincial High Court, there was no application by the State for enhancement of sentence placed before the Court to be heard and decided.

In the circumstances, the position of the Petitioner is that no opportunity was afforded to him to show cause as to why the said variation of sentence should not be carried out.

The learned Senor State Counsel appearing for the Respondent contends that both parties have been heard and the learned High Court Judge addressed his mind to the mitigatory and the aggravating factors before varying the sentence. However, the learned Counsel concedes that the Respondent has not sought an enhancement of sentence in proceedings before the High Court.

In the said Order, the learned High Court Judge states that when considering the circumstances of this case the sentence imposed is not adequate and accordingly, has proceeded to vary the sentence imposed on count 4. The learned Judge did not state reasons for his decision when varying the relevant part of the sentence.

The learned President's Counsel for the Petitioner has cited the case of ***Bandara vs. Republic of Sri Lanka (2002) 2 SLR 277.*** In the said case the Counsel appearing for the Hon. Attorney General invited the attention of Court to Section 336 of the Code of Criminal Procedure Act No. 15 of 1979, on the basis that the sentence imposed by the learned Magistrate was manifestly inadequate. In this case, prior to considering a variation in sentence, Gamini Amaratunga, J. at page 279, held that;

"We, therefore, called upon the accused-appellant to show cause why his sentence should not be enhanced and we give him time to show cause".

In this case, the learned Magistrate having stated reasons for his decision, convicted and sentenced the Petitioner on counts 1, 2 and 4. On count 4, apart from the fine, a sentence of 3 months Simple Imprisonment was imposed and was suspended for 5

years. By the said variation of sentence, the 3 months Simple Imprisonment was made operational.

The learned President's Counsel has also drawn the attention of Court to Case Bearing No. **SC/SPL/LA 39/2018.** In the said case no opportunity was given to the accused to show cause before the sentence was enhanced by the learned High Court Judge who revised the sentence in appeal. The Supreme Court cited with approval the Judgment in case **SC/SPL/LA No. 201/2006,** where it was held that;

"it is a cardinal Principal that the accused person ought to be given an opportunity to present to court any argument that he might have against the enhancement of the sentence"

The question of law raised by the Petitioner is based upon a failure of natural justice by not affording an opportunity to the Petitioner to be heard, prior to the said variation in sentence. A basic principle of procedural safeguard is that a man's defence must be heard fairly. *"An omission to give a party to a suit an opportunity of being heard is not merely an omission of procedure, but is a far more fundamental matter in that it is contrary to the rule of natural justice embodied in the maxim audi alteram partem"* ***(Darmadasa vs. Piyadasa 2008 B.L.R 208)***

It is observed that, the conviction and sentence imposed by the learned Magistrate is not irregular and is sanctioned by law. The learned High Court Judge affirmed the conviction for reasons stated in the said Order, however, failed to give reasons for varying the sentence. When the High Court Judge interfered with an exercise of judicial judgment, the necessary factors leading to such interference should be stated. Also, when the Judge is inclined to a variation of sentence, the Judge should permit the Counsel to address Court as to the appropriateness of the varied sentence and to what extent should it be varied. I observe that the High Court Judge has failed to afford an opportunity to the Petitioner to be heard and to give reasons. A bald statement, as in this case, to justify a variation in sentence, does not suffice.

Accordingly, the question of law raised by the Accused-Appellant-Petitioner is answered in the negative.

Therefore, I affirm the conviction on count 1, 2, and 4 and also affirm the sentence imposed on count 1 and 2, made in Order dated 30/04/2019, made by the Provincial High Court of Panadura. The sentence on count 4 is varied to read as follows;

A fine of Rs. 1,500/- and 3 months Simple Imprisonment suspended for 5 years.

The Judgment dated 23/01/2017, and the Order dated 27/02/2017, made by the learned Magistrate is affirmed.

Appeal allowed.

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 SOCISLIST REPUBLIC OF SRI LANKA

In the matter of an Appeal under and in terms of Article 128 of the Constitution and in terms of Section 5C of High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006, from the Judgment of the Provincial High Court of Civil Appeals of the Western Province holden in Negombo, dated 14th December,2018.

S.C.Appeal No.116/2020
SC/HCCA/LA Application No. 47/2019
HCCA Negombo Case No. WP/HCCA/NEG/03/2014(F)
D.C. Negombo Case No. 6906/L

N. Dinesha Marita Amarasekera
No. 736, Negombo Road,
Maththumagala, Ragama.

Plaintiff

Vs.

M.T. Theobald Perera
"Sriyawasa",
St. Sebastian Mawatha,
Kandana.

Defendant

And

M.T. Theobald Perera (Deceased)
1(a). Hetti Kankanamlage Dona Filamina Jasintha
1(b). Jenita Samanthi Perera

1(c). Anil Susantha Perera
1(d). Amitha Chandima Perera
1(e). Manel Gayani Perera
All of "Sriyawasa",
St. Sebastian Mawatha,
Kandana.
Substituted-Defendant-Appellants

Vs.

N. Dinesha Marita Amarasekera
No. 736, Negombo Road,
Maththumagala, Ragama.
Plaintiff-Respondent

AND NOW BETWEEN

N. Dinesha Marita Amarasekera
No. 736, Negombo Road,
Maththumagala, Ragama.
Plaintiff-Respondent-Appellant

Vs.

M.T. Theobald Perera (Deceased)
1(a). Hetti Kankanamlage Dona
Filamina Jasintha
1(b). Jenita Samanthi Perera
1(c). Anil Susantha Perera
1(d). Amitha Chandima Perera
1(e). Manel Gayani Perera
All of "Sriyawasa",
St. Sebastian Mawatha,
Kandana.
Substituted-Defendant-Appellant-Respondents

BEFORE	:	**L.T.B. DEHIDENIYA, J.** **MURDU N.B. FERNANDO, PC, J.** **ACHALA WENGAPPULI, J.**
COUNSEL	:	M. Adamaly with Aeinsley Silva for the Plaintiff-Respondent-Appellant instructed by Ms. Shanya Wickramarathna. Ms. Sudarshani Cooray for the (b), (c), (d) and (e) Substituted-Defendant-Appellant-Respondents
ARGUED ON	:	09th February, 2021
DECIDED ON	:	07th October, 2022

****

ACHALA WENGAPPULI, J.

The Plaintiff-Respondent-Appellant (hereinafter referred to as "the Plaintiff") instituted two separate actions in the District Court and the Additional District Court of *Negombo,* under case Nos. 6901/L and 6906/L respectively, against the Defendant-Appellant-Respondent, later substituted by 1(a) to (e) Substituted-Defendant-Respondents (hereinafter referred to as "the Defendant") upon his death. With the institution of the said actions, the Plaintiff sought declaration from Court of her title to lots D3 and E, morefully described in the respective schedules to the plaints and as depicted in Plan No. 685 of 11.03.1967, prepared by licenced surveyor *M.D.J.V. Perera*. She also sought eviction of the said Defendant and his agents therefrom along with an award of damages quantified at Rs. 700,000.00. The Defendant, in his answer had, in addition to seeking dismissal of the Plaintiffs actions, also sought a

declaration of his title over the said two lots by claiming that he had acquired prescriptive title of the same.

Parties proceeded to trial in both cases after marking several admissions and settling for 20 trial issues between them in case No. 6906/L and 31 trial issues in case No. 6901/L respectively. Learned District Judge as well as the learned Additional District Judge, with pronouncement of their separate judgments on 07.03.2014 and 01.11.2013, have held with the Plaintiff and rejected the claim of prescription of the Defendant. Being aggrieved by the said judgments, the Defendant had preferred sperate appeals to the High Court of Civil Appeal in *Negombo* under appeal Nos. WP/HCCA/NEG/03/2014 (F) and WP/HCCA/NEG /39/2013(F). The High Court of Civil Appeal had accordingly pronounced two separate judgments in respect of each of the said appeals on 14.12.2018 and allowed them.

The Plaintiff had thereupon sought Leave to Appeal from this Court in SC Application No. SC/HCCA/LA/47/2019 against the judgment of the High Court of Civil Appeal in Appeal No. WP/HCCA/NEG/03/2014(F) while seeking Leave to Appeal in SC Application No. SC/HCCA/LA/48/2019 against the judgment of the High Court of Civil Appeal in WP/HCCA/NEG/39/2013(F). This Court, having considered both these applications of the Plaintiff on 25.06.2020, was inclined to grant leave on the following question of law, in relation to both of these applications:

> *Whether the learned Judges of the High Court erred in law in failing to appreciate that the Defendant failed to show an overt act or adverse possession against the*

Plaintiff's predecessors namely, the Defendant's sisters, during the period 1969-1994?

With grating of Leave to Appeal, SC Application No. SC/ HCCA/LA/47/ 2019 was renumbered as SC Appeal No. 116 of 2020, whereas SC Application No. SC/HCCA/LA/48/2019 was renumbered as SC Appeal No. 117 of 2020. Since both these appeals will have to be decided on the identical question of law arising out of the impugned judgments, that had been pronounced against the backdrop of almost identical factual situation as revealed from the body of evidence presented before trial Courts in both cases, on the invitation of the parties at the hearing both appeals were heard together, and thus a common judgment is pronounced in relation to each of the said appeals but under the relevant captions.

Before I proceed to consider the said question of law, in the light of the submissions made by the respective learned Counsel, it is helpful if the respective cases that had presented before the trial Courts by the two parties are referred to at the outset *albeit* briefly, as indicated in their pleadings, issues and in their evidence.

One *Malwana Tudugalage David Barlin Perera,* who was married to *Padukkage Lawarina Perera* had fathered three children, namely *Malwana Tudugalage Theobold Perera, Malwana Tudugalage Juliet Perera and Malwana Tudugalage Lilian Perera*. *Barlin Perera*, became entitled to two allotments of land in total extent of 69.4 Perches, depicted as lots D and E, in Plan No. 436P dated 30.04.1954, that had been carved out of a larger land called *Midellagahawatta* alias *Delgahawatta,* upon a final partition decree in Case No. 1720/P of the District Court of *Gampaha* dated 30.04.1954. In the year 1967, *Barlin Perera*, through plan No. 685 of

11.03.1962 of licenced surveyor *M.D.J.V. Perera* (P1), had subdivided the said lot D of plan 436P into three subdivided parcels of land, depicted in the said subsequent plan as lots D1, D2 and D3, while retaining lot E of the partition plan No. 436P as it is. Thus, in Plan No. 685, the subdivided lots D1, D2, D3 and lot E (as depicted in plan No. 436P) are shown as sperate and distinct allotments of land. Lot D1 is in extent of 20 Perches. Lot D2 is in extent of 24.62 Perches, while lot D3 is in extent of 17.38 Perches. Lot E as per partition plan and plan No. 685, is in extent of 7.4 Perches. Lots D3 and E too shared a common boundary.

Thereupon, *Barlin* Perera and his wife, by execution of three Deeds of Gift, have transferred their title to the said three subdivided lots along with lot E to their three children on 05.06.1967. The Defendant, being the eldest of the three children of *Barlin Perera*, and the only male child, had received title to lot D2, through the Deed of Gift No. 2572 (V2a). Deed of Gift No. 2571 (V3) was executed in favour of *Malwana Tudugalage Juliet Perera,* and she was given title to lot D1 of plan No. 685. The youngest girl of the family, *Malwana Tudugalage Lilian Therese Perera* received lot D3 and E of plan No. 436P, through Deed of Gift No. 2573 (V1).

In the same year, *Lilian Perera* had gifted her title to lots D3 and E to sister *Juliet Perera* by Deed of Gift No. 6983 of 20.12.1980. Thus, *Juliet Perera* became entitled to lot D1, D3 and E. After a period of eight years since the execution of the said deed of gift, *Juliet Perera* had transferred her title over lot D1, D3 and E to *Dinapala de Silva* through Deed of Transfer No. 1188 on 18.01.1988. Said *Dinapala de Silva* had died intestate and his heirs have thereafter transferred title to lots D1, D3 and E back to *Juliet Perera* on 10.12.1993 through Deed of Transfer No. 181, who then made another transfer of the title to lots D1, D3 and E, in

favour of *Don Calistus Gamini Ponweera* by Deed of Transfer No. 208, on 10.04.1994. The Plaintiff had acquired ownership to lots D3 and E, through the Deed of Transfer No. 333 (P3), executed by said *Gamini Ponweera,* who retained title to lot D1 to himself.

In instituting action in case No. 6901 on 10.07.2007, the Plaintiff sought a declaration of Court of her title to lot D3 and in case No. 6906, instituted on 19.07.2007, she sought a declaration of her title to lot E. The Plaintiff also sought ejectment of the Defendant from both these lots. The Plaintiff, by suggesting several issues (Nos. 2, 3 and 10 in case No. 6901/L, Nos. 2B, 3B and 8 in case No. 6906/L), had sought determinations from Court as to the possession of the disputed parcels of land. These trial issues were suggested to the effect, whether she had possessed the disputed land after *Gamini Ponweera* transferred its title by Deed No. 333, whether the Defendant was placed in possession upon execution of the decree of Case No. 1343/RE of District Court of Negombo and whether the Defendant is in illegal possession of the land since 14.06.1994. The Defendant too had suggested trial issues on the question of possession in issue Nos. 11 and 12 in SC Appeal No. 116/20 and 13 and 14 in SC Appeal 117/20.

The Defendant, in his answer as well as in evidence, had admitted the execution of all the title deeds that had been relied upon by the Plaintiff in support of her description of devolution of title, as averred in the plaints. Since these two actions are considered *Rei Vindicatio* actions by the trial Courts, with the said admission of Plaintiff's title to lots D3 and E by the Defendant, both Courts have held that she had established her title over same. Then, it was for the Defendant to establish that he possessed the disputed lots D3 and E on a superior title to that of the Plaintiff. The Defendant's position was that

he had acquired title to these two lots through prescription and suggested issues on that premise. The issues of the Defendant referred to whether the Plaintiff or her predecessors in title never possessed the lands as described in the 3rd, 4th and 5th schedule to his answer (lots D2, D3 and E respectively) and whether the Defendant had adversely and exclusively possessed these parcels of lands against the rights of "others" ("අන් අයගේ") independently for an uninterrupted period of over forty years commencing from the year 1969.

In support of the said claim on prescription, the Defendant had asserted that he had possessed lots D1, D2, D3 and E as one contiguous land ever since his father was conferred with title to same upon a partition decree in 1954. It is his position that despite the subdivision of lot D by Plan No. 685 and execution of Deeds of Gift in 1967, none of his sisters ever came to possess the sub divided lots that are allocated to them. He further asserted it was his father who built a house on that land, and then put up a parapet wall right around the entire property which consisted of four lots and installed a gate. The Defendant however claims that the house standing on the said property was rented out by his father later by him. The Defendant also claimed that he only had appropriated its rent throughout.

In 1977, when the then tenant *Simion Perera* had fallen into arrears of rent, it was the Defendant who had instituted Case No. 1343/RE (P10) on 27.06.1987, and thereby seeking to evict the defaulting tenant. In the schedule to the plaint, the Defendant, for reasons best known to him, had described the boundaries of land on which the rented-out premises stood, by copying the description of boundaries as given in the partition decree. The Defendant made no reference in that

description to the subsequent plan No. 685, which subdivided lot D of partition plan No. 436P into three lots D1, D2 and D3 in the year 1967.

The trial against *Simion Perera* had proceeded *ex parte* and the Court held in the Defendant's favour. The Defendant was thereafter placed in possession by the Fiscal by executing the writ of possession on 02.02.1987. *Simion Perera* at that stage had sought to purge his default and was successful in his endeavour. Therefore, he was restored back in possession by an order of Court on 01.04.1991. The Defendant preferred an appeal against the said order to the Court of Appeal in appeal No. CA 139/89(F). The appellate Court set aside the said order in favour of *Simion Perera.* With the death of *Simion Perera,* his son *Lesley Perera* was substituted to prosecute the Special Leave to Appeal application No.170/98, by which the said judgment of the Court of Appeal was impugned.

On 08.12.1998, this Court had refused granting leave to the said application. Thereupon, the Defendant was placed back in possession on 14.06.1999 by the fiscal, after evicting said *Lesly Perera* from the land, as described in the schedule to the plaint in Case No. 1343/RE. In that process the Plaintiff and *Gamini Ponweera,* who claims to have been in possession of their respective lots up to that point of time, were also evicted. They moved the trial Court under section 328 of the Civil Procedure Code. On the day of inquiry into the application of *Gamini Ponweera,* the Defendant had conceded to the former's possession over lot E and recorded a settlement. The application of the Plaintiff was dismissed by the Court due to her failure to pursue same diligently. In 2007, the Plaintiff instituted the instant actions, seeking eviction of the Defendant from lots D3 and E.

At the conclusion of the two trials instituted by the Plaintiff, the District Court as well as the Additional District Court, in their respective judgments, rejected the claim of the Defendant that he had acquired prescriptive title to lot Nos. D3 and E upon being in possession for a long period of time. However, in allowing appeals of the Defendant, the High Court of Civil Appeal held that the Defendant had possessed the land from the year 1954 and had specifically commenced prescription at least in the year 1988 which continued for well over a period of ten years against a complete outsider *Dinapala de Silva*, who had acquired title to the disputed lots from the sister of the Defendant, *Juliet Perera,* in 1988 and therefore is entitled to a declaration of title in his favour.

In seeking to set aside the impugned judgments of the High Court of Civil Appeal and in addressing the question of law to which this Court granted leave, learned Counsel for the Plaintiff presented his submissions primarily on the following grounds;

a. the Defendant's possession of lots D3 and E were clearly with the consent of his sister *Juliet Perera* and therefore the character of the Defendant's possession not being adverse to the rights of his sibling and, as such, his mere possession of same would not give rights under prescription,

b. the determination of the High Court of Civil Appeal that the Defendant commenced his adverse possession in 1988, in itself is a confirmation of the Plaintiff's contention that the Defendant's possession of lots D3 and E was with the permission of his sister *Juliet Perera,* and,

c. the Defendant failed to establish that there was adverse possession for an uninterrupted period of ten years commencing from the year 1988, as erroneously held by the appellate Court.

In an effort to fortify the said contentions, learned Counsel for the Plaintiff had submitted in relation to his first ground that there was no adverse possession established by the Defendant against his sister because the disputed parcels of land remained a co-owned property since their father's death. In support of that contention, learned Counsel had highlighted certain items of evidence which indicate that the Defendant, being the eldest male in the family, had been in permissive possession of same on behalf of his younger sisters during their father's lifetime. It was also contended that since their father's death in 1969, the same state of affairs had continued without a change of its character until 1988, the year in which *Juliet Perera* made a transfer of her title to *Dinapala de Silva.* Hence, in the absence of an '*overt act*' on the part of the Defendant, any secret intention entertained by him to possess lots D3 and E against the interest of his sibling, will not accrue to his benefit in a claim under section 3 of the Prescription Ordinance. Learned Counsel also relied on the principles referred to in the judgment of *Basnayake* CJ in ***Gunawardene v Samarakoon et al*** (1958) 60 NLR 481, in support of the said contention.

Learned Counsel for the Defendant, in their respective submissions have sought to counter the said contention on the basis that with the subdivision made to lot D in 1967, each of the four subdivided lots had acquired a distinct and an identity of their own, quite independent of the larger land of lot D and also of each other subdivided individual lots and due to this reason, there was no co-

ownership. He further contended that in such circumstances there was no requirement for him to establish an overt act.

Perusal of judgments of both the District Court and the Additional District Court reveal that the original Courts had rejected the Defendant's claim of prescriptive title to lots D3 and E by adverse possession for a period of over ten years. The appeals that had been preferred by the Defendant against the said two judgments were allowed by the High Court of Civil Appeal by setting aside the said judgments of the trial Courts. The appellate Court, in doing so, was of the view that the evidence indicated that the Defendant did not give any produce from the land to his sisters and had taken the rent entirely for his benefit, and therefore his claim of prescription had been established to the required degree of proof, by satisfying the requirements, as stipulated by section 3 of the Prescription Ordinance. However, it also appears that the High Court of Civil Appeal was not convinced fully with the Defendant's position that he had commenced his adverse possession in 1957. Nonetheless, the appellate Court decided to allow the Defendant's appeals on the basis that he had established a period of ten years of undisturbed and uninterrupted possession, which the said Court found to have commenced in 1988, after his sister *Juliet Perera* transferred her title over lots D3 and E to *Dinapala de Silva,* a total outsider to their family. The appellate Court had stated in the impugned judgment *"… that the Defendant had possessed the land in dispute from the year 1954 and had specifically commenced prescription at least against Dinapala de Silva in the year 1988, who is a complete outsider, when the Defendant's sister transferred her right to Dinapala de Silva".* This statement is common to both the judgments

pronounced by the High Court of Civil Appeal, in allowing the two appeals that had been preferred by the Defendant.

The Defendant's claim of acquisition of prescriptive title to lots D3 and E is therefore founded essentially upon two pillars. The first is the Defendant's assertion that after the execution of the deeds of gift, none of his sisters ever came to possess their respective lots and he was in exclusive possession thereof, which had commenced even before his father's decision to subdivide same and gift to his three children. The other is, the Defendant's claim of possession of the three lots as one contiguous land through his tenant for over a long period of time, as indicative from the fact of institution of legal proceedings, by which he successfully ejected the defaulting tenant.

There was no evidence to indicate that after 1969, none of his sisters ever had possession over the lots D1, D3 and E. Thus, the Defendant had either occupied or possessed lots D3 and E after his father's death in 1969. But whether the Defendant had possessed same in the context of the principles of law that are applicable to acquisition of prescriptive title, as laid down in section 3 of the Prescription Ordinance, is an important consideration demanding attention of this Court.

In view of the factual basis on which the High Court of Civil Appeal has held in Defendant's favour, I find it convenient to consider his claim of being in adverse possession of lots D3 and E for over a period of four decades, by dividing that period of over forty years into two parts. The period commencing from 1954, the year in which his father was conferred with title to 1988, the year in which *Juliet Perera* had transferred her title to totally an outsider, shall be considered in the

first part. The balance part of the said four-decade long period, which commenced from the year 1988 and ended with 1994, the year in which the Plaintiff was evicted upon execution of decree in case No. 1343/RE, shall be considered thereafter.

Since the Defendant had admitted the devolution of title of the Plaintiff in the instant actions by which she sought declarations of her title to lots D3 and E and laid out a prescriptive title to same, it was his burden to establish that he had acquired prescriptive title by satisfying all the requirements as envisaged by the provisions of section 3 of the Prescription Ordinance.

In support of discharging his burden in relation to the claim of prescription, it was incumbent upon the Defendant to establish a starting point, on which he had commenced his adverse and uninterrupted possession of lots D3 and E for a period of ten years. This requirement was insisted upon by *Gratiaen* J in ***Chelliah v Wijenathan et al.*** (1951) 54 NLR 337 with the statement (at p. 342) that "*where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights*". This principle of law was reiterated by *G.P.S. De Silva* CJ in ***Sirajudeen and two others v Abbas*** (1994) 2 Sri L.R. 365.

It appears from the transcript of the proceedings before the trial Courts that the Defendant was clearly inconsistent with his stance taken in relation to the starting point of his adverse possession, when compared with the one taken in his answers and the one in giving evidence. In setting up his claim of prescriptive title in his answers, the

Defendant had averred that he possessed lots D1, D3 and E since 1969 for an uninterrupted period of over forty years, adverse to the title of his sisters. He had raised issues in both trials to the effect whether he was in adverse and uninterrupted possession for over forty years since 1969 (issue No. 14 in case No. 6901/L and issue No. 12 in case No. 6906/L respectively) in line with his assertions in the answers.

During his examination-in-chief the Defendant had asserted that, after his father subdivided the land in 1967 and gifted same to each of his three children, none of his sisters ever came to possess their respective lots nor did they separate their respective lots with fences after the said execution of deeds. He further asserts that irrespective of the said subdivision and execution of deeds of gift in favour of his sisters, he had exclusively possessed the entire land as one contiguous land from the year 1967 onwards and thereby advanced the point of commencement by two years. However, during cross-examination the Defendant had once again advanced the starting point from 1967 to the year 1954 aligning with the time of his father's, conferment of title upon the partition decree, contradicting the position indicated in his pleadings and issues.

The claim that he commenced adverse possession from the year 1954 was challenged by the Plaintiff. It was suggested to him during cross-examination by the Plaintiff that in spite of him being a minor of 16 years of age at that point of time and still dependent on his father for sustenance, the said claim that he alone possessed the land in its entirety since the acquisition of title to the lots D and E through the said partition decree in 1954 was an improbable one. He then added that his father, since acquisition of its title in 1954, never possessed the land until his death in 1969. Thus, it was the position of the Defendant that

he had exclusive possession of the entirety of land, inclusive of lots D1, D3 and E, for well over four decades and is therefore entitled to a decree in his favour.

The Defendant's assertion that ever since his father had acquired title to the disputed land in 1954 on a partition decree, he had possessed same adverse to the interests of his own father, whilst being in his father's care, is obviously a fanciful claim and had been rejected by the trial Courts on account of its inherent improbability. In addition to the said reason, there is yet another compelling reason to reject that claim. That is because the Defendant had conceded of accepting his father's decision to subdivide the land and gift same to the latter's three children, with his head "*bowed down*" in deference, despite his continued possession of the property from 1954 against rights of his father. Having admitted the fact that he was aware as to the nature of possession he ought to have in proof of his prescriptive title during cross examination by the Plaintiff, the Defendant nonetheless admitted occupying the land under his father's ownership throughout this period and thereby wiping out the character of adverse possession from his occupation of the property.

Thus, it was clear from the evidence that the Defendant himself had nullified his own claim of adverse possession that commenced from 1954, by admitting that he had chosen to surrender his "exclusive possession over the property" to the will of his father without a whimper of protest when their father decided to gift the subdivided lots of the said land in 1967 to his three children and thus conceding to the rights of his father over the land in dispute.

The trial Courts have rejected the Defendant's claim of prescriptive title altogether but the High Court of Civil Appeal, despite the trial issue framed by him on the basis that he commenced adverse possession in 1969 and his oral assertion of being in possession of the land since 1954, had taken the year 1988, as the starting point of his adverse possession. In my view, the Defendant's assertion relating to the starting point of his adverse possession of lots D3 and E, is not a credible and reliable claim, owing to its aforesaid inherent limitations, and was rightly rejected by the trial Courts. The remaining aspect of the Defendant's contention that whether the fact of his long possession of the land for over four decades, in itself justifies drawing the presumption of ouster against the Plaintiff and her predecessors in title shall be considered in the next segment of this judgment. But first, I shall proceed to consider the nature of possession the Defendant claims to have had over lots D3 and E during the period commencing from the year 1954 and ending with the year 1999.

The Plaintiff, in seeking to counter the claim of the Defendant that none of his sisters have ever possessed the sub divided lots since execution of deeds of gift in 1967 and he only controlled and derived income from same, had advanced a contention on the basis that the possession he claims to have had over lots D3 and E is of permissive one in nature. By advancing this contention, the Plaintiff may have sought to explain the obvious inaction of her predecessor in title, namely *Juliet Perera,* in not asserting her rights over lots D3 and E, with the execution of the deed of gift or at least from the point of her father's death in 1969. Thus, it appears from the said contention that the fact only the Defendant was in possession of the disputed property during the period 1954 to 1988, is admitted.

It is relevant to note that the said contention of permissive possession had been specifically advanced by the Plaintiff before the High Court of Civil Appeal as well. The impugned judgments of that Court indicate that it made reference to the said submissions of the Plaintiff but had proceeded to reject same on the basis that "the *Defendant had specifically stated in evidence that he did not give the produce from the land to his sisters*".

In the circumstances, the contention of the Plaintiff, that the Defendant, being the eldest brother of *Juliet Perera,* had only permissive possession over lots D3 and E, ought to be considered and determined in the backdrop of the evidence presented before the trial Courts, upon the principles that are enunciated in judicial precedents, which dealt with similar factual situations.

In this context, it must be noted that the said contention of permissive possession was presented before the High Court of Civil Appeal as well as this Court is based on the issues suggested by the Plaintiff as well as the Defendant before the trial Courts. The Defendant, in particular had suggested two trial issues in each case that are in relation to the very nature of possession the Plaintiff had over the lots D3 and E, on which he sought determinations by Court.

These issues (namely issue Nos. 11 and 12 in SC Appeal No. 116/20 and 13 and 14 in SC Appeal 117/20) dealt with the disputed factual positions of the parties, namely, whether the Plaintiff or her predecessors in title have never possessed in whatever form ("කිසිදු ආකාරයක බුක්තියක්") to the lands as described in the 3rd, 4th and 5th schedule to his answer (lots D2, D3 and E respectively) and whether the Defendant had adversely and exclusively possessed these parcels of

lands against the rights of "others" ("අන් අයගේ") independently and for an uninterrupted period of over forty years, commencing from the year 1969.

It is evident that the Defendant, in suggesting the said trial issues, had raised them on the basis that neither the Plaintiff nor her predecessors in title ever had any form of possession over the disputed lots D3 and E. He also sought a determination of Court on his claim of acquisition of title to these two lots by adverse possession for a long period of time which over four decades by suggesting the other issues. Thereby the Defendant had invited the District Court as well as the Additional District Court to determine one of the primary facts in dispute, namely whether the Plaintiff and her predecessors in title, never possessed the disputed parcels of land, in whatever form of possession known to law. Thus, the contention of the Plaintiff, based on permissive possession of a sibling, must be considered in the light of the reasoning adopted by the Courts below and the evidence presented before the trial Courts along with inferences that could reasonably be drawn from such evidence.

Before I proceed to consider the evidence on this aspect, it is helpful to take note of an approach, which the superior Courts have consistently applied, when dealing with situations such as the one that had been presented before this Court in the instant appeals.

When one relies on adverse possession in setting up a claim of prescriptive title against another under provisions of section 3 of Prescription Ordinance, it appears that the Superior Courts have applied a slightly different criterion in assessing validity of such a claim, depending on the fact whether there is a familial relationship in

existence between the contesting parties, *vis a vis* the criterion they had adopted in the assessment of such a claim that had been laid against a total stranger.

The judgment of ***Maduwanwela v Ekneligoda*** (1898) 3 NLR 213, relates to an instance where a sister of one *Tikiri Banda,* who was allowed to live in the latter's house with charitable intentions of the former and to take fruit and produce as she pleased from the land when she had no means of support. She had subsequently executed a lease on that property. Upon her death, her children claimed that their mother had acquired prescriptive title to the property and relied on the act of execution of a lease, in support of that claim. *Bonser* CJ, agreed with the finding of the trial Court that the sister of *Tikiri Banda* is merely an occupier and "*she had no possession of this property, but had merely occupation under licence of her brother."* Similarly, the judgment of ***Abdul Majeed v Ummu Zaneera et al***. (1959) 61 NLR 361 is in relation to an instance where a co-owner had set up a prescriptive claim against the other members of his family. In the course of the said judgment *De Silva* J, stated (at p.371) that "*Our social customs and family ties have some bearing on the possession of immovable property owned in common and should not be lost sight of. Many of our people consider it unworthy to alienate ancestral lands to strangers. Those who are in more affluent circumstances permit their less fortunate relatives to take the income of ancestral property owned in common. But that does not mean that they intend to part with their rights in those lands permanently. Very often if the income derived from such a property is not high the co-owner or co-owners who reside on it are permitted to enjoy the whole of it by the other co-owners who live far away. But such a co-owner should not be penalised for his generous disposition by converting the permissive possession of the recipient of his benevolence to adverse possession".*

His Lordship, in dealing with the 13th defendant's position that his mother *Muttu Natchia* had '*put him in complete possession*' of the property and by being in sole and exclusive possession of it he had acquired a prescriptive title to the entire property, had rejected that claim by stating (at p.370) *"It would not be strange if the 13th defendant collected the rent and looked after the building and before him his father did so. Of the three children of Muttu Natchia, the 13th defendant's father was the only male. That being so it is quite natural, these parties being Muslims, that the 13th defendant's father, the only male in the family, was in charge of the premises and collected the rent. On the death of the father the son may well have taken over those duties without any objection from the other co-owners."* An appeal from the judgment of ***Abdul Majeed v Ummu Zaneera et al*** (supra) had been preferred to Privy Council by the appellants. In determining the said appeal the Privy Council, in its judgment of ***Hussaima v Ummu Zaneera*** (1961) 65 NLR 125, had affirmed the rejection of the said claim of prescription, and noted the point made by *De Silva* J, that the 13th defendant was the only son of the original grantor's wife.

The judgment of ***De Silva v Commissioner General of Inland Revenue*** (1973) 80 NLR 292 dealt with a situation where a son had claimed acquisition of prescriptive title against his mother over a land in extent of over 200 acres called *Dewatawatta* on the basis that he had possession of same in its entirety from 1951 to 1965, appropriated its income, paid acreage taxes, paid wealth and land taxes on that land. In delivering the judgment, *Sharvananda J* (as he was then) had laid down the principles of law that are applicable in relation to consideration of such a claim of prescription. It is necessary to quote extensively from his Lordship's pronouncement of the applicable principles of law, in

order to retain its context and clarity. His Lordship stated thus (at p. 295);

> *"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. It will not enable the possession to acquire title by adverse possession. Where possession commenced with permission, it will be presumed to so continue until and unless something adverse occurred about it. The onus is on the licensee to show when and how the possession became adverse. Continued appropriation of the income and payment of taxes will not be sufficient to convert permissive possession into adverse possession, unless such conduct unequivocally manifests denial of the perimeter's title. In order to discharge such onus, there must be clear and affirmative evidence of the change in the character of possession. The evidence must point to the time of commencement of adverse possession. Where the parties were not at arms-length, strong evidence of a positive character is necessary to establish the change of character."

In a more recent pronouncement of this Court in ***Jayasinghe Pathman v Somapala*** (SC Appeal No. 6/14 - decided on 19.11.2021), *Dehideniya* J too had adopted a similar approach in holding that "*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 averse to him/her*."

Returning to the said contention of the Plaintiff, that the Defendant only had permissive possession of lots D3 and E, it must be observed that the Plaintiff did not call any witness who could speak that the Defendant was merely permitted to occupy the land by his sister. Except for the reference to that the action to evict *Simion Perera*

was instituted by the Defendant was for and on behalf of his sister as well, there was no other evidence to support such an inference. But it is the Defendant who had set up a prescriptive claim and he should satisfy Court that he had possessed the property in the manner as set out in section 3 of the Prescription Ordinance and establish his claim of possession, as per issue Nos. 11, 12, 13 and 14 respectively. The Defendant, however asserted that he only possessed the land in addition to advancing the position that none of his sisters ever had any possession. This claim of inaction by his sisters *Lilian* and *Juliet* to assume his exclusive possession over lots D3 and E could be due to various reasons, including the one asserted by the Defendant. It could be that the Defendant may have had possessed the property adverse to the rights of his sister.

But it is also equally possible that *Juliet Perera* was under the impression that her brother's continued possession of the property after the demise of their father is merely a continuation of his act of managing the property under her permissive possession as her father did, when he was alive. There is also the probability that she may have acquiesced the conduct of the Defendant in possessing the property and collecting the rent or that she may have even abandoned her rights over that property in favour of the Defendant. Therefore, the evidence must justify exclusion of the other probable reasons which explain the said conduct attributed particularly to *Juliet Perera,* except the one that the Defendant had relied on, in support of his claim of adverse possession.

In this context, if the said contention of the Plaintiff is to be accepted as the more probable reason to explain *Juliet Perera's* conduct of inaction, there must be evidence to suggest that Juliet *Perera* had abandoned her rights over the disputed property or that she had

acquiesced the continued possession and enjoyment of her property by the Defendant. When one considers the relative probabilities of *Juliet Perera* abandoning her rights simply due to the reason of her conduct of not taking any positive action to possess the two lots upon their father's death, it must be noted that the evidence however points in favour of a contrary situation. After *Lilian Perera* was gifted with title to lots D3 and E in 1967 by her father *Barlin Perera*, she had gifted same to her sister *Juliet Perera* in 1980 by Deed of Gift 6983. *Juliet Perera*, after retaining title over lots D1, D3 and E for over two decades, transferred same to *Dinapala de Silva* in 1988, for valuable consideration. *Dinapala de Silva* had no familial relationship to *Juliet Perera.* When heirs of *Dinapala de Silva,* have re-transferred the title over these lots after a period of five years back to her, *Juliet Perera* had thereupon executed a transfer of her title to all three lots, D1, D3 and E, in favour of another stranger *Gamini Ponweera* in 1994, once again for valuable consideration.

This series of transactions indicate that *Juliet Perera* and *Lilian Perera* were alive to their rights over the designated lots that were gifted to them and had regularly exercised one of the attributes of ownership, i.e., their right to alienate property. These positive actions of the two sisters indicate that they had not abandoned their rights over the lots D1, D3 and E, at any point of time during 1967 to 1988.

The other probable reason for *Juliet Perera's* said conduct, whether she had acquiesced to the Defendant's possession and enjoyment of the income, is necessarily interwoven with the Plaintiff's contention of permissive possession and her knowledge that the permissive possession of the Defendant over lots D3 and E had transformed into adverse possession, which is in denial of her title to the property. Hence, the question whether it is probable that she had acquiesced the

Defendant's adverse possession should be considered along with the question whether *Juliet Perera* granted permissive possession to the Defendant.

In view of the contention of permissive possession, that had been advanced by the learned Counsel for the Plaintiff, it is necessary to refer to the nature of evidence upon which the said contention was founded.

The Plaintiff did not call any of the Defendant's sisters to give evidence on her behalf, particularly in support of permissive possession. They are undoubtedly the best witnesses to confirm or deny granting such permission. The witness for the Plaintiff, who testified on her behalf, could only speak to the events which followed the acquisition of title to these two lots by his wife. Thus, the only evidence relating to the exact nature of possession and the circumstances under which the land in its entirety was possessed during the period commencing from 1967 to 1988, the year *Juliet Perera* transferred her rights to *Dinapala de Silva*, had been tendered by the Defendant.

Thus, the assessment of the relative probabilities of the Plaintiff's contention of allowing the Defendant to be in possession of lots D3 and E by his sister to manage same on her behalf or she had acquiesced his possession with the knowledge that he holds the property against her rights, will have to be assessed from the evidence of the latter for only he had knowledge of relevant facts and circumstances and therefore could give direct evidence on those aspects.

Seeking to counter the Defendant's assertion that he only instituted action to evict the overholding tenant, in support of his claim that he had possessed the lots D3 and E adverse to the interests of *Juliet Perera,* the witness for the Plaintiff stated in his evidence that although

the action for eviction of *Simion Perera* was instituted by the Defendant but it was on behalf of his sister as well. He then explained the reason as to why such a course of action was followed. The witness for the Plaintiff said in evidence that " **අපි දන්න පරිදි තියොබෝල්ඩ් පෙරේරා නඩුව දාලා තියෙන්නේ. එයා එක්ක ඉඳලා තියෙනවා නංගිලා දෙන්නෙක්. එකම සහෝදරයා නිසා මුළු ඉඩමටම මෙයා තමා නඩු දාලා තියෙන්නෙ**". However, it must be noted that the said reference to an institution of a joint action by the witness for the Plaintiff was apparently based on what he may have learnt from his predecessors in title, for he had no direct knowledge of the same and therefore could be termed as hearsay evidence.

The significance of this item of evidence is that it is consistent with the contention that had been advanced by the Plaintiff seeking to justify an inference of permissive possession and as such, the action for eviction of tenant could well have been instituted by the Defendant in 1985 with the blessings of *Juliet Perera,* who acted on the belief that her eldest brother in her permissive possession of lots D3 and E, and is continuing in that capacity even after sixteen years since their father's death, taken action to evict an overholding tenant. Not only the Defendant had failed to specifically negate this aspect of the Plaintiff's case in his evidence, but had tacitly admitted that position, in admitting that he merely continued to manage the property in the same manner even after his father's death.

There is no dispute that *Barlin Perera*, after being quieted in possession following the execution of partition decree in 1954, had possessed the entirety of the said land *ut dominus*. He constructed a house on that land and also constructed a parapet wall around the property and had thereafter rented it out. When the deeds of gift were executed, the said tenant of *Barlin Perera* was already in possession of

one of the buildings, despite the fact that after the subdivision in 1967, the house the tenant occupied now stood on lots D3 and E while the 'hut' shifted to lot D2. During the two-year period between 1967 and 1969, *Barlin Perera* had continued to be in possession of the entire land through his tenant and had continued to collect rent from the tenant through his son, the Defendant.

There is no evidence that the Defendant had assumed the status of landlord although he collected rent on his father's behalf, during latter's lifetime. There was no assertion by the Defendant that, before the execution of deeds of gift, he was considered to be the landlord of the tenant who occupied the house standing on lots D3 and E, either by his father or by the tenant, despite him collecting rent. In effect their father was managing the property, through the Defendant, for and on behalf of all three of his children, even though he had no title over the property remaining in him by then, except for the life interest. None of his children had objected to their father's said conduct nor did any of them demanded a share from the rent. They have silently accepted their father's dominance over the affairs in relation to the property and its income. In other words, having gifted each of his three children with the title of sub-divided lots, their father had thereupon continued to be in possession of the land in its entirety along with the buildings standing thereon, and managed the same for and on behalf of his three children. This particular state of affairs indicates that the three children had tacitly permitted their father to possess their respective lots for and on their behalf. Thus, it is evident that the nature of the 'possession' the Defendant's father had over lots D1, D2 D3 and E, during the period of 1967 and 1969 is clearly a one of permissive possession.

A relevant question that arises in these circumstances is whether the said status of permissive possession had changed with the death of *Barlin Perera* in 1969?

In fact, the Defendant himself concedes that it did not. During his cross examination in case No. 6901/L he admitted that after the death of his father, he had merely continued to manage the property in the same manner as he did during his father's lifetime. In order to assess the context in which the said admission was made, it is helpful if that segment of evidence is reproduced below in its entirety.

"ප්‍ර: තමුන් උසාවියට කියා සිටියා නඩුවකින් පසුව 1954 තාත්තාගෙන් තමුන්ට බුක්තිය ලැබුනා කියලා. මොකක්ද ඒ නඩුව?

උ: බෙදුම් නඩුවක්.

ප්‍ර: ඒ බෙදුම් නඩුවෙන් මේ ඉඩම සම්පූර්ණ ඉඩමද තාත්තාට ලැබුණේ?

උ: එහෙමයි.

ප්‍ර: තාත්තා තමුන්ට බුක්තිය භාරදුන්නා කියන එකෙන් අදහස් කරන්නේ මොකක්ද?

උ: මට ඒක බලාගන්න කියලා තමා දුන්නේ.

ප්‍ර: තමාගේ අනිත් සහෝදර සහෝදරියෝ දන්නවාද?

උ: මමයි පිරිමියා. තාත්තා මටයි දුන්නේ බලා ගන්න.

ප්‍ර: තමුන්ගෙන් ප්‍රශ්න කළා 1969 ද මොකද කලේ?

උ: 1969 දී තාත්තා මළා.

ප්‍ර: ඒ ඉඩම ගැන මොකද කළේ තමුන්?

උ: ඒ ඉඩම කුලියට දීපුවා ඒ විදියටම කරගෙන ගියා. එක ඉඩමක් හැටියට තිබුණේ. වටේට තාප්පයක් බැඳලා. ගේට්ටුවක් දාලා තිබුනා."

As indicative from the segment of evidence that had been reproduced above, it is reasonable to assume that after the execution of deeds in favour of the two younger sisters, the permissive possession of

the Defendant had over the lots D1, D3 and E, was continued without a change, keeping with the said family arrangement, even after the death of their father. Thus, with the death of their father, it is more probable that the Defendant had substituted himself to the shoes of his father who had permissive possession over the lots D1, D3 and E, for and on behalf of the two younger females.

The segment of evidence reproduced above also indicates that the Defendant had conceded to the position that, being the eldest and the only male child in the family, he was asked by his father only to 'look after' the property. The Defendant asserted that his father gave the property to "**බලාගන්න**". None of his sisters were married at that time. Hence, it is evident that his father's intention would have been to entrust the property in its entirety to the Defendant, with the expectation that his son would protect the interests of his sisters over same, whilst looking after his own lot D2. The very word used by his father in asking the Defendant to look after ("**බලාගන්න**") the property is significant in this context. It indicates that the Defendant was merely entrusted with the task of looking after the lots D1, D3 and E, for and on behalf of his two sisters. Instead of using the words "**අරගන්න**" or "**තියාගන්න**", which indicate a clearer intention of renouncing whatever the interest he might have had over the property at that point of time, *Barlin Perera* had used the word "**බලාගන්න**", in entrusting the Defendant with the responsibility of looking after the property. The said intention of *Barlin Perera* attributed to his act of asking the Defendant to "**බලාගන්න**" is clearly manifests from his act of gifting each of the subdivided lots to all of his three children, instead of gifting same as one contiguous land to one of them or particularly to the Defendant, who was already managing it under his permission.

This consideration is therefore more in line with intention of *Barlin Perera* of making the subdivision of the land and gifting his children with same. It is also relevant to note that having owned several other properties to make an equitable distribution of wealth among all his three children, there is no other probable reason other than the one referred to above in order to explain the conduct of *Barlin Perera,* in relation to this particular property. Similarly, there is no justifiable reason that can be attributed to the act of *Barlin Perera* as to why he had undertaken an extra effort to subdivide the land through a surveyor at a significant cost and thereafter gift those individual subdivided lots to all of his children, when he had the more convenient option of gifting the land in its entirety to one of them, as it existed at that particular point of time.

Obviously, the two sisters of the Defendant would have been made aware of this arrangement their father had put in place to manage their share of property through the Defendant even before its subdivision was made. Hence, mere entrustment of the property to the Defendant does not indicate that he was given exclusive rights over that property to the detriment of his other sibling's rights. The Defendant's contention of the failure of his two sisters to possess their respective lots no sooner they were gifted with same, is based on the proposition that immediately after the deeds of gift were executed, his two sisters should have commenced possessing same, at least by fencing off the boundaries they shared with lot D2, owned by the Defendant.

When one considers certain cultural traditions and practices of our society, it is not unusual for the two young females, who still are under their father's guardianship, for showing some hesitation and reluctance in asserting their newly conferred rights over the respective

lots, no sooner they were gifted with title to same. It was noted earlier on in this judgment that our Courts have considered claims of prescription by one member of a family against the others with some circumspection and accepted such claims only after considering their validity against the backdrop of the nature of their relationship, whilst being alive to the prevailing social and cultural practices in the society. At times, the Courts have preferred not to draw the presumption of ouster, after evaluating the nature of the relationship of such a claimant, taking cognisance of such social norms and realities.

In applying that assessment criterion to the instant appeal, it is observed that not only the two daughters of *Barlin Perera,* the Defendant also, in accordance with the prevailing cultural norms and family values, had accepted his father's possession of the land with his head bowed down, despite harbouring an undisclosed intention in his mind to possess the property in its entirety all by himself, even before the deeds of gift were executed. Thus, when considered in the light of such social and cultural norms, it is highly probable that *Barlin Perera* had permissive possession of all four subdivided lots after 1967 on behalf of his three children until his death in 1969. The evidence of the Defendant also indicate that said permissive possession had continued even after *Barlin Perera's* death in 1969.

There is no evidence that the relationship between the three siblings was strained or of any hostility that had erupted between them at any point of time, forcing them to part their ways upon strained family ties. Thus, in the mind of *Juliet Perera,* the Defendant had merely succeeded to the responsibility of managing the land on her behalf, in place of her late father. Under these circumstances, the culturally expected a role of the eldest male child of a family in relation to his

younger unmarried sister, especially after their father's death, would undoubtedly have contributed to the brotherly trust that had been placed in the Defendant by his sister. In these circumstances, it is reasonable to infer that *Juliet Perera* would have assumed that the Defendant, being her eldest brother, would not act in any manner whatsoever against her interests and continue to possess and manage lots D3 and E on her behalf as he did when their father was alive.

It is observed that the Defendant, although claimed that he had possession ("බුක්තිය") of lots D3 and E since 1954 but opted to keep his intention to possess same, against the ownership of *Juliet Perera,* to himself without disclosing it. He did not at least once indicate his intention to hold possession of the same against the interests of his sister. Eventually, he was compelled to make his secret intention declared in public, when the Plaintiff instituted the instant actions, seeking declarations of her title to those two lots. The continuation of permissive possession over the said two lots after the death of their father by the Defendant could easily be inferred in the absence of any significant change in the circumstances relating to nature of his possession. The Defendant admits that he is aware *Juliet Perera* had made several transfers through several notarially executed instruments over the said two lots, but he was content with merely to continue to be in "බුක්තිය" regardless of such transfers. Hence, it is clear that at no point *Juliet Perera* was made aware that the permissive possession of the Defendant had turned adverse to her interests.

This factor, namely the knowledge on the part of *Juliet Perera* of her brother's change of character in relation to possession, being an integral component of the requirement of the starting point of an adverse possession, thus remained an obscure factor. The knowledge of

Juliet Perera that her brother is holding the property against her rights is a must for the prescriptive claim laid out by the Defendant to succeed by satisfying the component of her acquiescence. This is evident from the judgment of ***Appu Naide v Heen Menika et al*** (1948) 51 NLR 63, which was pronounced in relation to an instance where a *Kandyan*, who had permitted his sisters who have contracted *Deega* marriages but nonetheless to possess their share of the land for a long period of time. The Court held that he cannot be permitted to deny their rights due to his acquiescence. In delivering the said judgment *Basnayaka* J (as he was then), had quoted the following statement of *Thesiger* L.J., from the judgment of ***De Bussche v. Alt*** *(1878) L. R. 8 Ch. D. 286* (at p. 314), in defining the doctrine of acquiescence. It is stated by *Thesiger* L.J in the said judgment that;

> *"If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act…".*

In my view, due to the factors that are enumerated above, the last of the probabilities referred to earlier on this segment, namely the probability of *Juliet Perera's* acquiescence to the Defendant's possession adverse to her interests after the death of their father is therefore reduced to a mere probability, especially in the absence of any knowledge on the part of *Juliet Perera* about the Defendant's intention to hold the property in adverse possession against her rights and her belief that he held the property in permissive possession.

The judgment of ***Perera v Perera*** (1897) 2 NLR 370, deals with almost an identical factual situation that arose in the instant appeal. This judgment refers to an instance where a father had donated a parcel of land to his daughter immediately before her marriage. Having accepted the gift, she had handed it back to her father for safe keeping. She never entered into possession of the land donated, but her father continued to possess same and let it to tenants who paid him rent and repaired the buildings on it during the donee's lifetime, who continued to be on the best of terms with her father. When she died, her father claimed that he had acquired prescriptive title to the said land. *Lawrie* ACJ was of the view (at p. 371) that although the father was given the deed and continued to possess the land *"… he certainly at first possessed in trust for his daughter as her caretaker and agent. That title to possess must be held to have continued until by some overt act the possession for the daughter was changed into a possession on a title adverse to her."* The only important factor that is dissimilar to the factual position in the instant appeals to that of ***Perera v Perera*** (supra) is the fact that donee had expressly entrusted the land along with the deed of gift back to her father, whereas in this instance, it had to be inferred from the conduct of the parties upon the evidence presented before the trial Courts. Since the probabilities factor weigh in favour of the Plaintiff in support of her contention that the Defendant only had permissive possession of lots D3 and E from *Juliet Perera,* said deficiency in her case as to the nature of possession of the Defendant had over the land, could be supplemented with a reasonable inference drawn in favour of permissive possession, particularly in the absence of any evidence adduced by the Defendant to indicate a contrary position, except for his repetitive assertion that he was in "බුක්තිය ".

In view of the items of evidence referred to above, I hold that the Defendant is deemed to be a licensee of *Juliet Perera,* who entered into occupation and possession of lots D3 and E, upon permissive possession. The said conclusion was reached by applying the test, which formulated by Lord *Denning* and applied in ***Errington v Errington and Woods*** (1952) 1 KB 290, in order to determine whether a party is a tenant or a licensee. This is the test adopted by *Gratiaen* J, in the judgment of ***Swami Sivgnananda v The Bishop of Kandy*** (1953) 55 NLR 130, in relation to an instance where a person was permitted to occupy a premises on an agreement to sell but failed to complete the purchase as agreed, refused to vacate when the owners have sold the premises to the plaintiff and taken up the position that he is a tenant and is entitled to protection of the provisions of the Rent Restriction Act. *Gratiaen* J adopted Lord Denning's test to determine the said dispute (at p. 132) and reproduced same as follows; *"… if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only"*.

In the above context, I think the time is ripe to consider another facet of the contention advanced by the learned Counsel for the Plaintiff. During the course of his submissions, learned Counsel made an attempt to present the status of the Defendant and his sisters by referring to them as co-owners. With his attempt to term the litigating parties to the instant appeal as co-owners, learned Counsel sought to apply an important principle of law applicable to such co-owners, namely when one or more of them opted to lay out a claim of acquisition of prescriptive title over the co-owned property or a part of

it, against the rights of the others, such claim must precede with an overt act.

In ***Maduwanwela v Ekneligoda*** (supra), having rejected the contentions that if a person allows another out of charity to occupy his house, the Courts are bound to presume that occupation is possession and that the license to occupy means license to possess *ut dominus, Bonser* CJ had laid down the principle that a person(at p. 215), who is let into occupation of property as a tenant or a licensee, must be deemed to continue to occupy that property on the same capacity in which he was initially admitted, until by some overt act he manifests his intention to occupy it in another capacity and no secret act will avail to change the nature of his occupation. This principle of law was acted upon by Lord *Mac Naghten* in the Privy Council judgment of ***Nauda Marikkar v Mohammadu*** (1903) 7 NLR 91, in rejecting a claim of prescription of the added defendant, who had "*never got rid of character of agent*". His Lordship, in delivering the Privy Council judgment of ***Corea v Iseris Appuhamy*** (1911) 15 NLR 65, had reiterated the same principle once more by stating that (at p.78), it is not possible for a co-owner "*… to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result*." This principle of law was pronounced and acted upon in relation to instances where a claim of prescription is laid out against a co-owned property by one of the co-owners. The judgment of *Basnayaka* CJ, in ***Gunawardene v Samarakoon et al*** (supra), is an authority relied on by the learned Counsel for the Plaintiff, in support of his contention of overt act is needed to change the character of possession. This judgment too had followed the principle of law that the possession of one co-owner is the possession of the other co-owners and such a possession

cannot be ended by any secret intention, entertained in the mind of the possessing co-owner.

In a recent judgment of this Court (***Chaminda Abeykoon v Anthony Fernando and Others*** SC Appeal No. 54A/2008 – decided on 02.10.2018), after undertaking an analysis of the judicial precedents that were pronounced on the presumption of ouster, especially in relation to a claim of prescription by a licensee, *Prasanna Jayawardena* J had stated that " *… the requirement that the possession of one co-owner is the possession of the other co-owners and that an overt act in the nature of ouster must occur to demonstrate a change of the character of that possession and start running of prescription in favour of one co-owner, applies with equal force to instances where a licensee or an agent possesses a property in a subordinate character. In such instances, an overt act must occur to demonstrate change in the character of that possession and start the running of prescription in favour of the erstwhile licensee or agent*", after rejecting the submission of the licensee that, "*the requirement of an overt act applies only in the case of claims of prescription between co-owners*."

This is because, his Lordship added, "*it is well-established principle of law that, as long as a person possesses a property as the licensee or agent of the owner, that person cannot acquire prescriptive title to that property. Instead, the running of prescription can commence only upon the licensee or agent committing some "overt act" which demonstrates that he has cast aside his subordinate character and is now possessing the property adverse to or independent of the owner of the property and without acknowledging any right of the owner of the property. The overt act is required to give [or deem to give] notice to the owner that his erstwhile licensee or agent is, from that time onwards, claiming to possess the property adverse to or independent of the owner."*

Thus, the said judgement treats a licensee, who claims acquisition of prescriptive title to a land, in the same status of a co-owner who had laid out a prescriptive claim to the co-owned land and as such he too must establish the change of his former character of a licensee to a that of one who possess adversely by establishing an overt act. Whilst in respectful agreement with the said pronouncement of *Jayawardena* J and, in view of the considerations referred to above, I am of the opinion that it is appropriate to apply the said principle in relation to the instant appeals as well, since the Defendant too had entered into possession of lots D3 and E with permission of his sister as a licensee. I am fortified in this view as *Lawrie* ACJ in ***Perera v Perera*** (supra) stated (at p. 371) that *"… he certainly at first possessed in trust for his daughter as her caretaker and agent. That title to possess must be held to have continued until by some overt act the possession for the daughter was changed into a possession on a title adverse to her."*

In view of the considerations referred to above and in view of the fact that relative probabilities favour a conclusion that the Defendant had initially entered into possession of lots D3 and E, with permission of *Juliet Perera*, it is relevant to consider whether the Defendant, by an overt act, had shed the said character of permissive possession at a subsequent point of time, by which his sister was put on notice that the permissive nature of possession of her brother over the disputed land had turned into a different character of possession, in which her rights over the disputed land are challenged.

Learned Counsel for the Defendant, in support of his plea of prescription, have relied heavily on the uncontroverted fact that it was his client who rented out the house standing on lot D3 and exclusively appropriated its rent for himself. He further contended the fact that

none of his sisters ever came to possess their respective lots nor did they demand their due share of the rent because the Defendant had possessed the two lots adverse to their title. Learned Counsel further submitted that when these factors are considered in the backdrop of the Defendant's solitary act of instituting action to evict a defaulting tenant, in itself would indicate clear denial of any acknowledgement of his sister's title, and also demonstrates to Court that he was clearly in possession of lots D3 and E, adverse to the title of the Plaintiff and of her predecessors. Hence, it was submitted by the learned Counsel for the Defendant that the High Court of Civil Appeal, in allowing his appeals, had correctly arrived at the conclusion that the Defendant is entitled to declaration of his prescriptive title over lots. D3 and E.

This contention indicates the degree of reliance placed by the Defendant on the level of control he claims to have had over the "house" and the income derived from it, in order to strengthen his prescriptive claim over lots D3 and E. Even though the Defendant had failed to convince the trial Courts that he had established a prescriptive claim by advancing the said contention, he was successful with the High Court of Civil Appeal. In view of the submissions made by the learned Counsel for the Plaintiff to convince this Court that the appellate Court had erred in allowing the Defendant's appeals, it is necessary to consider the available evidence that are directly relevant on this point.

What is relevant in the present context is to consider whether there was an overt act. Admittedly the Defendant's father had owned several other properties, in addition to the property under dispute, and his children were either gifted with or inherited their share of same since his death. It is not disputed that none of them lived on their

respective lots of the land in dispute but have settled on their inherited or gifted individual properties, in the vicinity of their ancestral home. It is in this backdrop only the contention of the Defendant on renting out and collecting rent should be evaluated.

The survey plan (P1), that made the disputed land into four subdivided lots, was prepared in 1967. It indicates that before the subdivision, a house and a hut were already stood on lots D and E. After the subdivision of lot D into D1, D2 and D3, house that was initially on lot D, had shifted to the subdivided lot D3, whereas the hut too had shifted to lot D2. Lots D1 and E had no buildings on them and remained as bare plots of land. There were few coconut trees but no clear evidence as to their distribution over the four lots.

It is stated by the Defendant that, at the time of his father's death in 1969, said house was occupied by his father's tenant, but acting on his father's directions, its rent was collected by him. After his father's death, the Defendant had continued to collect rent and, had rented out the house to each succeeding tenant, as and when it became vacant. He asserts that its rent was appropriated all by himself and no share or produce of the land was ever given to any of his two sisters and nor did they demand any. This claim was accepted by the High Court of Civil Appel. The Defendant also states that after the execution of deeds, their father had fenced off the entire property, irrespective of the subdivision, installed a gate and therefore the land, though subdivided into four lots, continued to be possessed as one contiguous land.

In instituting action to evict his defaulting tenant in 1985, the Defendant described in his plaint (P10) that he had rented a "house" to *Simion Perera* and his tenant had fallen into arrears of rent. The reference

to a single house is significant in the context of present appeals. The Defendant also had relied on the said eviction proceedings to establish that he only took any initiative to evict overholding tenant *Simion Perera*, in support of his exclusive and adverse possession.

During his evidence in case No. 6901/L, the Defendant had however stated that he had rented out a "building" (ගොඩනැගිල්ලක්) that stood on lot D3 to *Simion Perera* in 1970. He also asserts that there was a "small house" (පොඩි ගෙයක්) on lot D2 as well at that time. Thus, the Defendant had thereby created an ambiguity as to the "house" he had rented out to *Simion Perera*, since it appears from his own evidence that the Defendant had rented out only a "building" on lot D3, while there is "house" standing on his own lot D2. In case No. 6906/L too the Defendant did not specifically state which of these two houses that he had given out on rent to *Simion Perera*. The trial against *Simion Perera* had proceeded *ex parte* and with the issuance of its decree, the fiscal had placed the Defendant in possession of the property upon execution of the writ of possession. The Defendant then had added that after his tenant was evicted by the fiscal, he had demolished the "building" that stood on that land.

In his plaint, although the Defendant had averred that "a house" had been rented out to *Simion Perera,* he made no refence in the plaint to include or exclude the "hut" that stood on lot D2 with the "house" on lot D3 or to the fact there were two buildings used for residential purposes on the land. It is evident from the Defendant's evidence before the trial Courts, that when he rented out "a building" to *Simion Perera* in 1970, there was another "small house" already in existence on his own land, namely lot D2.

Thus, it is clear that the "hut", that existed in 1967 on Lot D2, had transformed itself into a "small house" by 1970. How did this transformation take place?

The Defendant himself offers a clarification to this transformation. The relevant section of evidence adduced by the Defendant in this regard is as follows:-

" ප්‍ර: පියා 1969 දී ඔප්පුව ලියනකොට තමුන් හිස නවා එකඟවුණා කියලා පැමිල්ලේ නීතීඥ මහතා ප්‍රශ්න කරනකොට කිව්වා?

උ: එහෙමයි.

ප්‍ර: ඔප්පු ලිවීම නිසා තමුන් අර කිව්ව බුක්තියට බාධාවක් වුණාද?

උ: නැහැ කිසිම බාධාවක් වුණේ නැහැ.

ප්‍ර: දැන් බුක්තියේ කිසියම් වෙනසක් වුණාද. ඔප්පු ලිවීමෙන් පසුව?

උ: නැහැ.

ප්‍ර: මොකද තමුන් කළේ?

උ: ඒ කාලේ මගේ ගේ හැදුවා.

ප්‍ර: කවුද ඒ ගේ හැදුවෙ?

උ: තාත්තා. මමත් හැදුවා.

ප්‍ර: වියදම් කළේ කවුද?

උ: තාත්තා වියදම් කළා. මමත් වියදම් කළා."

Thus, the evidence clearly points out that there were two houses standing on the property by 1969. One put up by his father and the other by the Defendant. The distinct reference to "my house" ("මගේ ගේ") in his evidence is important. The Defendant, with that reference makes a distinction of the ownership to the two houses that stood on that land. His evidence indicates that, of these two houses, one was put up by his father and the other put up by him, of course with financial

assistance of his father. However, the Defendant maintained throughout the trials that there was only one house on that land and that is the one built by his father, and belonged to his sister, as he had laid a claim of acquiring prescriptive title to them. Since the Defendant had failed to present a clearer picture through his oral evidence as to from which of the two houses/buildings that he sought to evict *Simion Perera*, this is an important factor, which could only be resolved upon examination of the available documentary evidence, particularly the report of the fiscal (P4) filed in Court, after *Simion Perera's* eviction from the property.

The fiscal who visited the land to execute writ of possession had noted there were in fact two "buildings" ("ගොඩනැගිලි") standing on it and *Simion Perera* operated a fabric printing business, whilst occupying both these buildings. Therefore, the existence of two houses or buildings on that land is a fact confirmed by an independent source, the fiscal report (V4), and that too upon a document tendered by the Defendant himself during the trial. The schedule to the said plaint (P10) indicates that the Defendant had described the land on which the said "house" stood on, with the identical description as given in the partition decree. He had wilfully ignored the subsequent subdivision made in 1967, in describing the residential premises in the plaint. Hence, schedule to the plaint does not provide any assistance to determine this issue. *Simion Perera* was evicted from both these buildings on 02.02.1987 by the fiscal and the Defendant was placed in possession of the entire land, which included lots D1, D2, D3 and E. Since the schedule to the plaint indicated a larger land, the fiscal may have evicted *Simion Perera* from both these buildings that stood on the

land described in the schedule, despite the fact that there was refence only to a single house in the plaint.

The Defendant had thereafter demolished the said buildings before the District Court had restored the tenant *Simion Perera* back in possession of the property on 01.04.1991. This was after the Court had vacated its *ex parte* decree on 17.03.1986, when *Simion Perera* had successfully purged his default before that Court. The 2nd fiscal report restoring *Simion Perera* in possession (V5), indicates that except for a masonry structure that supported an overhead water tank, there were no other buildings that stood on the property at that point of time. The fact of demolishing a building standing on another's land could, in ordinary circumstance, could be an instance of an overt act by a claimant of prescriptive title. However, in relation to the instant appeals, with regard to the Defendant's act of demolition, *Juliet Perera* may have been under the impression that the said act was to prevent *Simion Perera* from re-occupying the land, since it was after the defaulting tenant was successfully evicted on an action instituted with her concurrence. In the absence of any evidence pointing to the contrary, the fact of demolition of the buildings would not support the Defendant's claim of adverse possession.

The Defendant preferred an appeal to the Court of Appeal (CA No. 139/89(F) against the said order of the District Court, by which the original Court had set aside its *ex parte* decree and allowed *Simion Perera* to file answer. At the hearing before the appellate Court, the Defendant, being the appellant, was not present nor was represented. On 31.07.1998, the Court of Appeal, upon consideration of merits of the appeal, held in favour of the Defendant and decided to allow his appeal. *Lesley Perera* who substituted in the said application after his

father's demise, had sought Special Leave to Appeal from this Court in S.C. Spl L.A. No. 170/98, against the said judgment of the Court of Appeal. On 08.12.1998, this Court refused to grant leave and dismissed *Simion Perera's* application now prosecuted by his son. Consequent to this dismissal, the Defendant had executed writ of possession on 14.06.1999, once again to evict said *Lesley Perera,* who continued to occupy the disputed property after passing of his father, *Simion Perera*. The fiscal report (V3) indicates that by this time there existed a "small house" with an asbestos roof on that property, in which *Lesley Perera* was operating a business of a service station for three wheelers. The Defendant was quieted in possession by the Court officer for the second time on 14.06.1999, over lots D1, D3 and E, upon eviction of *Lesly Perera,* who by this time was in possession on behalf of *Gamini Ponweera,* as his lessee and the Plaintiff.

What is important to determine in this context is, that which of these two houses that existed in 1970 on the disputed land, that had in fact been rented out to *Simion Perera,* as averred in the said plaint. Since the Defendant relied heavily on that factor in support of his prescriptive claim, then he must counter the Plaintiff's evidence that *Juliet Perera* had concurred the institution of the said action. The Defendant was silent on this specific assertion throughout his evidence. As already noted, the evidence that the Defendant had presented before the trial Courts reveals that there was only one house standing on the land as indicated in the survey plan P1, and he had given that house on rent to *Simion Perera*. But his evidence on the number of houses is self-contradictory as having asserted that his father had constructed a house after acquiring title to the land in 1954, and he also had built a house on his own on lot D2. The Defendant should have cleared the resultant ambiguity as to

the house that he claims to have given on rent and should also have clearly established that in addition to the "small house" on D2, he also had rented out and collected rent of the house, which stood on lot D3, if that fact was to accrue to his benefit.

When he restricted the scope of the eviction proceedings to a single house, instead of two houses that had in fact been occupied by *Simion Perera* at that particular point of time, it is equally probable that he did so, in relation to the house standing on lot D2, being his own property, instead of the house on lot D3, which belonged to his sister. In instituting action by the Defendant, this omission of the plaint cannot be attributed to a mere oversight, since in his plaint he had described the land on which that particular "house" stood, as a land consisting of only lots D and E, which is in line with the description given in the partition decree. This he did when in fact lot D had been subdivided into D1, D2 and D3 in 1967, as per the schedule to his own deed of gift and that house now stood on lots D3 and E. Referring to this misdescription of the property, the Plaintiff alleged that the Defendant's said deceitful act, had resulted in illegally dispossessing her from lots D3 and E, to which she had valid title.

In the same context, another aspect of the Defendant's case in support of his prescriptive title should be considered. It is correct that the Defendant had rented out the house and collected its rent and he alone instituted action seeking the eviction of his defaulting tenant. However, the Courts have considered and evaluated such claims against the backdrop of social norms and cultural practices and, at times, preferred not to draw the presumption of ouster in favour of a claimant, who raises a plea of prescriptive title on such factors, by adopting a more a pragmatic approach.

De Sampayo J, considering the nature of adverse possession of the plaintiff, in ***Tillekeratne et al. v Bastian et al.*** (1918) 21 NLR 12, had observed (at p. 28), *"While a co-owner may without any inference of acquiescence in an adverse claim allow such natural produce as the fruits of trees to be taken by the other co-owners, the aspect of this will not be the same in the case where valuable minerals are taken for long series of years without any division in kind of money*."

In ***Abdul Majeed v Ummu Zaneera et al***. (supra) *De Silva* J stated (at p.371) "*Our social customs and family ties have some bearing on the possession of immovable property owned in common and should not be lost sight of. Many of our people consider it unworthy to alienate ancestral lands to strangers. Those who are in more affluent circumstances permit their less fortunate relatives to take the income of ancestral property owned in common. But that does not mean that they intend to part with their rights in those lands permanently. Very often if the income derived from such a property is not high the co-owner or co-owners who reside on it are permitted to enjoy the whole of it by the other co-owners who live far away. But such a co-owner should not be penalised for his generous disposition by converting the permissive possession of the recipient of his benevolence to adverse possession".*

In relation to the instant appeal, as referred to earlier on, it is established by the evidence of the Defendant by producing the survey plan that there was a house standing on lot D3 in 1967. Other than the house, there was nothing on lots D1, and E that would yield an income. The land was located in an urban area and is therefore more suited for residential or commercial use rather than utilising same for agricultural purpose. There was no evidence as to the presence of any valuable minerals. Only income said to have been derived from the land is the rent from the two buildings. The Defendant, although claimed to have

utilised the rent form the house, did not offer to mention the amount in his evidence nor did he produce any rent receipts. He did not state that he attorned after his father's death as landlord of *Simion Perera*.

The Defendant's father received title to the land in 1954 after a partition action. The house that stood on lot D3 was admittedly built by his father. However, the Defendant did not claim that he made any improvement to that house nor had maintained it. In the preceding paragraphs, the ambiguity as to the identity of the 'house', the Defendant had given on rent was considered in detail. If the house he had rented out is the one stood on lot D3, his conduct in relation to that house could easily be understood, when considered in the light of the fact that he only had permissible possession of the house and therefore did not possess same *ut dominus*. In the absence of oral evidence by the Defendant as to the specific amount of rent he received from the house; it could well be that the rent was not a significant amount for his sister to demand her share. Hence, the mere fact that she did not demand her share of rent, in itself does not accrue to the benefit of the Defendant, in support of his plea of prescription.

These two factors, i.e., the fact of renting out a house and appropriating its rent, were the primary factors that had been relied upon by the Defendant, in support of his claim of prescription. Despite the rejection of the said claim of acquisition of prescriptive title of the Defendant by the trial Courts, the High Court of Civil Appeal, accepted the Defendant's said claim in stating that the "*Defendant had specifically stated in evidence that he did not give the produce from the land to his sisters. It is in evidence that he had taken the rent paid by Simion Perera entirely to his benefit*". In my view, due to the reasons stated in the preceding paragraphs, in which these factors were considered in detail, they fall

far short of required degree of proof due to their ambiguity. In the absence of any evidence of an ouster, the permissive character of the Defendant's possession over lots D3 and E that had persisted throughout the period 1969 to 1988 had not lost its initial character of acknowledgement of a right existing in *Juliet Perera*. Hence, the Defendant's permissive possession could not be considered as proof of possession by "*a title adverse to or independent of that of the claimant …*" in which an acknowledgement of a right existing in another person would fairly and naturally be inferred. ***Dias Abeysinghe v Dias Abeysinghe and Two Others*** 34 CLW 60 held: "*where the co-owners are members of one family very strong evidence of exclusive possession is necessary to establish prescription*". *Soertz* SPJ, in ***Simpson v Lebbe*** (1947) 48 NLR 112 (at p. 112) in relation to prescription among co-owners insisted that "*… very clear and strong evidence of an ouster and of adverse possession is called for*". In the judgment of ***Gunasekera v Tissera and Others*** (1994) 3 Sri L.R. 245, this requirement was emphasised by *Mark Fernando* J, citing a series of judicial precedents.

There is no evidence that had been presented before the trial Courts, which even tends to suggest that the Defendant did something positive after their father's death to indicate to *Juliet Perera* that he possessed the two lots D3 and E in a manner adverse to her interests, other than the evidence relating to the Defendant's act of renting out the house, collecting and appropriating its rent for himself. The Defendant admits that he never ousted his sister from lot D3 and E, when he said that he merely continued with the arrangement his father had set up even after the latter's demise. In my assessment these items of evidence do not justify a reasonable inference that there was an overt act by which the character of possession held by the Defendant was changed

any time after 1969, which notified to his sister of same. The institution of action to evict the tenant *Simion Perera* too could not accrue to the benefit of the Defendant, in view of the evidence of the Plaintiff that had been referred to above.

I accordingly hold, following the judgment of ***Perera v Perera*** (supra), that the requirement of ouster that had been insisted upon by the superior Courts in relation to co-owned property, is equally applicable even to instances where a claimant of prescriptive title, who was initially allowed into a property, firstly due to familial relationship as in the instant appeals, and secondly because he was allowed to possess the property only upon his acknowledgement of a right, either expressly or impliedly, existing in the other member of family, against whom the prescriptive claim is made.

The other aspect of the Defendant's contention, that whether the possession of the land by the Defendant for well over four decades, in itself is sufficient to a decree in his favour, requires consideration at this stage.

If one were to assume that there was no evidence at all to justify an inference that the Defendant was in permissive possession of his sister *Juliet Perera,* would he still be able to obtain a decree in his favour under section 3 of the Prescription Ordinance, solely on the basis that he had possessed lots D3 and E for over four decades?

When the evidence of the Defendant is considered as a whole, it is evident that his claim of prescription is primarily based on the possession of lots D3 and E for a very long period, which had exceeded a period of over four decades. Understandably, both Counsel for the Defendant had placed heavy reliance of this factor as well before this

Court, in defending the conclusions reached by the High Court of Civil Appeal to allow both his appeals.

As already indicated, the period of four decades commencing from 1954 to 1999, would be considered in this judgment after dividing same into two parts, based on the reasoning of the High Court of Civil Appeal. The first part, which is currently under consideration, covers the period commencing from 1954 to 1988, the year *Juliet Perera* transferred her title to a total outsider for the first time. The other part covers the period from 1988 to 1999, the year in which the Plaintiff was evicted by an order of Court, which shall be considered in detail, in the latter part of this judgment.

It is correct to state that there are judicial precedents that supports the position that, in certain circumstances, the possession of a parcel of land over a very long time might justify the drawing of the presumption of ouster. I shall refer to a few of them, which indicate the underlying rationale for adopting such an approach. In the full bench decision of ***Odiris et al v Mendis et al*** (1910) 13 NLR 309, *Hutchinson* CJ held that "*… the first plaintiff remained in sole possession of B and C for more than thirty years after the expiration of the six years mentioned in the voucher. I think that it is the reasonable conclusion from these facts that he disputed the defendants' title to B and C at the end of the six years, and has disputed it ever since, and it is too late-now for them to assert it. In his plaint he claimed B and C by prescriptive title; and although there was no issue as to prescription, I think that, after such a long period of adverse possession since the term fixed in the voucher, he is not precluded from now disputing the defendants' title.*"

In the judgment of ***Rajapakse and Others v Hendrick Singho and Others*** (1959) 61 NLR 32, *Basnayaka* CJ was of the view that " … *the*

evidence that the defendants since the death of Paulis in 1922, were not only in occupation of the land but also took its produce to the exclusion of the plaintiffs and their predecessors in title, and gave them no share of the produce, paid them no share of the profits, nor any rent, and did not act from which an acknowledgment of a right existing in them would fairly and naturally be inferred, is overwhelming."

Similarly, in the judgment of ***Angela Fernando v Devadeepthi Fernando and Others*** (2006) 2 Sri L.R. 188, *Weerasuriya* J, following the reasoning of ***Tillekeratne v Bastian*** (supra), observed that (at p. 194) "*ouster does not necessarily involve the actual application of force. The presumption of ouster is drawn in certain circumstances when exclusive possession has been so long continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time in the distant past there was in fact a denial of the rights of the other co-owners."* His lordship thereupon had reiterated the principle enunciated in ***Tillekeratne v Bastian*** (1918) 21 NLR 12, by stating that it "… *recognises an exception to the general rule and permits adversity of possession to be presumed in the presence of special circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period*."

In the full bench judgment of ***Tillekeratne v Bastian*** (supra), *Bertram* CJ, in relation to such an instance, posed the question "*if it was not originally adverse, at what point it may be taken to have become so*?" and proceeded to answer same with the statement (at p.23) 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*." In stating thus, his Lordship was alive to the principle of law that had been laid down by *Marshall* CJ in ***Mac Clung v Ross*** (1820) 5 Wheaton 116, that "*a silent possession, accompanied with no act*

which can amount to an ouster or give notice to his co-tenant that his possession is adverse, ought not to be construed into an adverse possession; mere possession, however exclusive or long continued, if silent, cannot give one co-tenant in possession title as against another co-tenant."

In the full bench judgment of ***Alwis v Perera*** (1919) 21 NLR 321, *Bertram* CJ, reiterated the principle of law which was expounded in the case of ***Tillekeratne v. Bastian,*** (supra) 21 NLR 12 that "*where it is shown that people have been in possession of land for a very considerable length of time, that fact, taken in conjunction with the other circumstances of the case, may justify a Court in presuming that the possession which originated in one manner, as, for example, by permission, may have changed its character, and that at some point it became adverse possession.*" The underlying rationale of this principle is explained by *De Silva* J in ***Abdul Majeed v Ummu Zaneera et al*** (supra, and at p. 372) with the statement that "*the presumption of ouster is drawn in certain circumstances, when the exclusive possession has been so-long continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time in the distant past, there was in fact a denial of the rights of other co-owners. The duration of exclusive possession, being so long, it would not be practicable in such a case to lead the evidence of persons who would be in a position to speak from personal knowledge as to how the adverse possession commenced. Most of the persons who had such knowledge may be dead or cannot be traced or are incapable of giving evidence when the matter comes up for trial. In such a situation it would be reasonable, in certain circumstances, to draw the presumption of ouster.*"

The Privy Council, in its judgment of ***Cadija Umma and another v Don Manis Appu and Others*** (1938) 40 NLR392 considered the view expressed by in ***Tillekeratne v Bastian*** (supra) on the parenthetical

clause of section 3 of the Prescription Ordinance. In the said judgment *Bertram* CJ observed 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*". The Privy Council stated that "*their Lordships cannot accept this dictum of the learned Chief Justice*". Their Lordships, however, were not inclined to describe "*under what conditions an agent or co-owner can be heard to say that his possession has been an ouster of his principal or co-sharer"* as it "*is a matter which need not here be examined."*

In ***Abdul Majeed v Ummu Zaneera et al*** (supra), having referred to the phrase "*with the circumstances of the case"* from the judgment of *Bertram* CJ in ***Tillekeratne v Bastian*** (supra), *HNG Fernando* J (as he was then) was of the view that " *read out of their context, these observations may tend to support the view that adversity may be presumed from mere long continued and exclusive possession*" and therefore holds that " *the so-called presumption of ouster is not to be applied arbitrarily, but only if proved circumstances tends to show , firstly the probability of an ouster, and secondly the difficulty or impossibility adducing proof of the 'ouster'. If the circumstances justify the opinion that possession must have become adverse at some time, a judge is not in reality presuming an ouster, he rather gives effect to his opinion despite the absence of proof of ouster which a co-owner would ordinarily be required to adduce."*

Referring to the facts of the appeal before his Lordship, *Fernando* J also stated that " … *the 13th defendant undoubtedly had undisturbed and uninterrupted possession of the property in the sense contemplate by section 3 of the Prescription Ordinance, for (in the language of the parenthesis in section*

3) his possession was " unaccompanied by payment of rent, by performance of any service of duty, or by any other act from which a right existing in any other person would fairly and naturally be inferred". However, his Lordship was of the view that "*… a person is not entitled to a decree under section 3 by virtue of such possession alone; the section requires the proof of a second element, namely that the possession must be "title adverse to or independent of that of the claimant or the plaintiff in such action*".

Senanayake J, in ***Karunawathie and two others v Gunadasa*** (1996) 2 Sri L.R. 246 stated *"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 (a) the income derived from the property (b) the value of the property (c) the relationship of the co-owners and where they reside in relation to the situation of the corpus"*. His Lordship, adopting the same line of reasoning as *Weerasuiya* J did in ***Angela Fernando v Devadeepthi Fernando and Others*** (supra), had thereupon proceeded to hold that "*in the instant case, the income from the Coconut and other trees would have been considerable and income from the Rubber plantation would have been high, this was a valuable piece of property and the 4th Defendant-Appellant was the only person who was residing in the corpus and the corpus was fenced on three sides which establish the exclusive possession. There was not an iota of evidence that the Plaintiffs had plucked even a Coconut or Jak fruit or that he received even a Coconut husk from the 4th Defendant. If the income that the property yields is considerable and the whole of it is appropriated by one co-owner during a long period it is a circumstance which would weigh heavily in favour of adverse possession on the part of the co-owner."*

Thus, it is clear that the fact of being in possession of a particular parcel of land for a substantially a long period of time, in itself would not accrue to the benefit of a claimant, who had set up a claim of acquisition of prescriptive title to such land under section 3 of the Prescription Ordinance. In addition to long possession, such a claimant must also establish "*the presence of special circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period*" in inviting a Court to draw the presumption of ouster.

Since it was for the Defendant to establish the presence of special circumstances additional to the establishment of the fact of undisturbed and uninterrupted possession for the requisite period, it would be relevant at this juncture to consider the judicial precedents that deal with the nature of his burden of proof in this particular perspective. The judicial precedents referred to above does not justify drawing the presumption of ouster upon mere assertion of the Defendant that "I possessed" the land in dispute even for a long period of time.

Moncreiff J, after undertaking a review of the judicial precedents on the nature of possession as required under section 3 of the Prescription Ordinance, had identified following applicable principles and listed them in ***Kirihamy Muhandirama v Dingiri Appu*** (1903) 6 NLR 197, (at p. 200);

> "*It would appear then that, in order that a person may avail himself of section 3 of the Prescription Ordinance, No. 22 of 1871-*

1. *Possession must be shown from which a right in another person cannot be fairly or naturally inferred.*

2. *Possession required by the section must be shown on the part of the party litigating or by those under whom he claims.*

3. *The possession of those under whom the party claims means possession by his predecessors in title.*

4. *Judgment must be for a person who is a party to the action and not for one who sets up the possession of another person, who is neither his predecessor in title nor a party to the action."*

In ***Sirajudeen v Abbas*** (1994) 2 Sri L.R. 365, at p.371, *De Silva* CJ quoted from the text of *Walter Pereira's* Laws of Ceylon, 2nd Ed, where the learned author stated, following the judgment of ***Piyenis v Pedro*** 3 SCC 125, that "*as regards the mode of proof of prescriptive possession, mere general statement 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 the Court. It is also necessary that definite acts of possession by particular individuals or particular portions of land should be proved*."

Similar observations were made by *Basnayaka* CJ, in ***Hassan v Romanishamy*** 66 CLW 112, that "*mere statements of a witness, "I possessed the land" or "we possessed the land" and "I planted plantain bushes and vegetable" are not sufficient to entitle him to a decree under section 3 of the Prescription Ordinance, …*".

The judgment of ***Juliana Hamine v Don Thomas*** (1957) 59 NLR 546, indicate that *L.W. de Silva* AJ was of the view that the plaintiff of that case had failed to establish prescriptive title as his witness had, apart from the use of the word possess, did not describe the manner of his possession. The Court held that "*such evidence is of no value where the Court has to find a title by prescription"* and quoted the Full Bench judgment of ***Alwis v Perera*** (1919) 21 N L R 321, where *Bertram* C J, emphasised that the trial judges should not confine themselves merely to record the words of a witness who states that *"I possessed" or " We possessed" or "We took the produce"*, and should insist those words are explained and exemplified.

The Defendant, during his evidence, repetitively asserted that he had possession of the land since 1954. Having admitted that he is well aware of the nature of possession he ought to have, in order to obtain a decree in his favour under section 3 of the Prescription Ordinance, the Defendant had stated in evidence that even though he was aware that his sister had executed several deeds over the lots D1, D3 and E, he did not take any action as he was content with his "undisturbed" possession over the two lots. This is the position he asserted in the answer as well. He claimed that the Plaintiff nor her predecessors in title ever possessed the two lots in respect of which declarations are sought.

But the body of evidence that had been presented by the parties before trial Courts indicate that the said assertion of an undisturbed possession by the Defendant is not supported at all. on the contrary, they in fact point that possession of the disputed lots by the new owners were *ut dominus.* With *Gamini Ponweera* acquiring title from *Juliet Perera,* being a total outsider to the family, he had possessed at least lot D1 *ut dominus* and thereby interrupting the Defendant's claim of adverse possession of lots D1, D3 and E. The actions of *Gamini Ponweera* and its effects on the possession of the Defendant are considered further down in this judgment whilst reviewing the validity of the findings of the appellate Court that the Defendant had uninterrupted adverse possession for ten years during the 11-year period of 1988 to 1999.

Thus, in view of the principles considered in the said judgments, I hold that the, the Defendant, in asserting that he 'possessed' lots D3 and E since 1954 in support of his prescriptive claim, should have been explained and exemplified as to the exact nature of his possession, for he is expected to eliminate any probable doubts or ambiguities as to the presence of permissive nature of such possession, as contended by the Plaintiff, through her witness. He should have established that his possession of the said two lots satisfies "*the presence of special circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period*". The Defendant had to establish that not only he had undisturbed and uninterrupted possession of the property unaccompanied by payment of rent, by performance of any service or duty, or by any other act from which a right existing in another person would fairly or naturally be inferred. *HNG Fernando* J (as he was then), in ***Abdul Majeed v Ummu Zaneera et al*** (supra) stated (at p.377) that " *… a person is not entitled to a decree under section 3 of the Prescription*

Ordinance by virtue of such possession alone; the section requires the proof of a second element, namely that the possession must be 'by a title adverse to or independent of that of the claimant or the plaintiff in such action'… this is a distinct and separate element emphasised by Bertram CJ in his judgment of ***Tillekeratne v Bastian*** *… ".*

Therefore, it is important for the Defendant to lay the foundation for an objective assessment of his claim by placing sufficient evidence before the trial Courts in support of the four issues he himself had suggested on nature of possession and thereby inviting Court to make a determination in his favour. He had particularly failed in fulfilling this obligation and thus fell short of establishing the second element, as stated in ***Abdul Majeed v Ummu Zaneera et al*** (supra), namely, that the possession must be "*title adverse to or independent of that of the claimant or the plaintiff in such action.*" The Defendant is not entitled to any concession of establishing this element, as it was well within his knowledge as to the nature of possession he claims to have had since 1954. The observations of *Fernando* J in the same judgment to the effect that "*the duration of exclusive possession, being so long, it would not be practicable in such a case to lead the evidence of persons who would be in a position to speak from personal knowledge as to how the adverse possession commenced. Most of the persons who had such knowledge may be dead or cannot be traced or are incapable of giving evidence when the matter comes up for trial. In such a situation it would be reasonable, in certain circumstances, to draw the presumption of ouster*" will have no relevance to the instant appeal owing to the said reason.

Having reached the final part of this judgment, I shall now proceed to consider the 2nd part, as referred to earlier in this judgment,

namely the period commencing from 1988 and ending with 1999. This approach was adopted because the High Court of Civil Appeal, in allowing the Defendant's appeal, indicated its view that the Defendant's adverse possession had commenced from the point of transfer of title of lots D3 and E to *Dinapala de Silva* in 1988, and the Defendant was in adverse possession for an uninterrupted period of ten years therefrom, and thus satisfying the requirement of section 3 of the Prescription Ordinance.

In the impugned judgments, the appellate Court had concluded "*… that the Defendant had possessed the land in dispute from the year 1954 and had specifically commenced prescription at least against Dinapala de Silva in the year 1988, who is a complete outsider, when the Defendant's sister transferred her right to Dinapala de Silva*". As already noted, this finding is common to both judgments pronounced by the High Court of Civil Appeal. The challenge mounted by the Plaintiff on the validity of the of the judgements of the High Court of Civil Appeal was based on the proposition that the Defendant had no contrary to the said finding, there was no evidence of uninterrupted period of adverse possession for ten years. Learned Counsel for the Plaintiff therefore submitted that even if the Defendant had commenced adverse possession from the year 1988, the year in which *Juliet Perera* had transferred her title over lots D3 and E in favour of *Dinapala de Silva,* and continued with such possession from that particular point onwards, clearly he had continuous period of ten years up to the time of eviction of the Plaintiff in 1999, by execution of writ in Case No. 1343/RE.

Before I consider the said contention of the learned Counsel for the Plaintiff, it is relevant to consider the process of reasoning on which the High Court of Civil Appeal had arrived at the said conclusion.

It is indicative from the judgments of the appellate Court that it had reached the said conclusion on the basis that the Defendant "*…had specifically commenced prescription at least against Dinapala de Silva in the year 1988 who is a complete outsider, …*". The wording of the appellate Court is clear to the extent that it had indirectly accepted the period of adverse possession of the Defendant that claimed to have begun in 1954 and continued until 1988, does not qualify to be considered as a period during which the Defendant had held the property adverse to the rights of his sister. Thus, it appears, that the contention advanced by the learned Counsel for the Plaintiff before the High Court of Civil Appeal as well as to this Court that the Defendant had only permissive possession of the disputed parcels of land apparently had an impact on the process of reasoning adopted by the High Court of Civil Appeal.

With that observation, this Court must then examine the remaining part of his contention; whether the Defendant had failed to establish that he had possessed lots D3 and E adverse to the interests of the Plaintiff and her predecessors in title for an uninterrupted period of ten years as the appellate Court had allowed the two appeals only on that basis.

In this context, it is relevant to note here that I have already concluded that the contention of the learned Counsel for the Plaintiff that the nature of the Defendant's possession of lots D3 and E from 1954 to 1988, clearly bears the characteristics of a permissive possession. In the circumstances, it must then be added that, in the absence of an overt act by the Defendant during this period, which would have given *Juliet Perera* notice that the permissive possession of her brother over the said two lots had turned adverse to her rights, there was no adverse

possession established by the former, as required by section 3 of the Prescription Ordinance during the said period of 1954 to 1988.

However, as correctly observed by the appellate Court, that situation ought to have changed when *Juliet Perera* made a transfer of her title over lots D3 and E to *Dinapala de Silva* on 18.01.1988. *Dinapala de Silva*, being a total stranger to the said family arrangement, is not entitled to rely on the continuation of the said permissive possession, where the Defendant was permitted to possess lots D1, D3 and E for and on behalf of his sisters, which had reached its terminal point with the said transfer of title. Whether *Dinapala de Silva* and others who had title to lots D3 and E, have possessed same *ut dominus* since 1988 and whether it was the Defendant who had possessed these lots adverse to the rights of the new owners from the point of acquisition of its title by them in 1988 until they were evicted upon execution of decree in 1999 are questions that should be answered in consideration of the available evidence.

Learned Counsel for the Plaintiff, during his submissions before this Court, had pointed out certain items of evidence as instances that demonstrably indicate that the adverse possession of lots D3 and E, as claimed by the Defendant, had no uninterrupted period of ten years against the Plaintiff and her immediate predecessor in title, in order to qualify him to acquire title under section 3 of the Prescription Ordinance. Having pointed out such instances from the evidence, learned Counsel then relied on a quotation from the text of a book titled ***Law of Adverse Possession*** by *M. Krishnasami* (13th Ed) where it states (at p.191) that "*Possession, which can ripen into title, must be continued without any entry or action by the legal owner of the full statutory period. An entry by the legal owner upon the land, breaks the continuity of an adverse*

possession, when it is made openly with the intention of asserting his claim thereto and is accompanied with acts upon the land, which characterises the assertion of title of ownership", as a statement that describes the nature of possession, the Defendant should have established before Court.

In view of the said contention advanced by the Plaintiff before this Court, namely, that her immediate predecessor in title, *Gamini Ponweera,* had entered into possession of lots D1, D3 and E, during the period 1994 to 1999, when the action against *Simion Perera* was pending before the District Court, it is observed that the High Court of Civil Appeal had in fact considered the question whether the requirement of uninterrupted period of ten years was satisfied by the Defendant. In rejecting the said contention of the Plaintiff, the appellate Court was of the view that, if the inquiry into applications under section 328 of the Civil Procedure Code were proceeded with, the Defendant could have easily established his possession against *Gamini Ponweera*. The appellate Court also noted that the Defendant had successfully resisted all attempts to oust him from the land during this period and hence is entitled to the prescriptive title. Therefore, the appellate Court arrived at a conclusion that the Defendant had proved his adverse possession against the Plaintiff at least from the year 1988 for an uninterrupted period of ten years.

Thus, it appears the appellate Court did consider the fact that *Gamini Ponweera,* upon his eviction from lot D1 on 14.06.1999, had filed an application under section 328 of the Civil Procedure Code. Consequently, the Appellate Court also had accepted that *Gamini Ponweera* was in possession of the disputed land, from 1994, until his eviction in 1999. But unfortunately, the Court had disregarded that fact altogether from its consideration and rejected the contention of the

Plaintiff on the premise that there was no interruption of possession of the Defendant, because, it was of the view that had the inquiry under section 328 proceeded, the Defendant could have easily established his adverse possession against *Gamini Ponweera.*

The contention advanced before this Court by the Plaintiff is line with the case she had presented before the trial Courts seeking its determination. The Plaintiff had raised several issues on this aspect on the Defendant's claim of prescription. In case No. 6906/L, issue Nos. 3b and 3c have dealt with the possession of the plaintiff and *Gamini Ponweera,* whereas in case No. 6901/L, issue Nos. 2, 4 and 5 too were raised over same. The Defendant too, on his part had raised two issues each in both trials, on the nature of possession as referred to above in this judgment. The District Court as well as Additional District Court had answered these issues in favour of the Plaintiff. The District Court had answered the Defendant's two issues on possession as "not proved" while the Additional District Court only answered the issues suggested by the Plaintiff in her favour.

Thus, in view of the Plaintiff's contention on the validity of the appellate Court's conclusion on the question of possession, which is contrary to the findings of the trial Courts on that aspect, it is necessary that this Court considers the evidence upon which such a conclusion was reached by the appellate Court, in adopting a contrary view to the one adopted by the trial Courts. Having perused the available evidence on this point, it is my view that the said affirmative conclusion reached by the High Court of Civil Appeal on the question whether the Defendant had established that he had adverse possession since 1988 over lots D3 and E, is clearly against the weight of the evidence that had

been presented before the trial Courts. I have reached that conclusion upon the reasons that are set out below.

When the High Court of Civil Appeal held with the Defendant's claim that he had acquired prescriptive title after 1988 to lots D3 and E, it is obvious that the required ten-year period of uninterrupted adverse possession should be found within the said period of 1988 to 1999, the year in which the Plaintiff was evicted by an order of Court. It is already noted that the Defendant was engaged in a process of litigation with his tenant *Simion Perera,* which commenced in the year 1985 and continued until the former was finally placed in possession of lots D1, D3 and E by an order of Court in June 1999, after this Court rejected the leave to appeal application filed by the latter. During this period, the title to lots D1, D3 and E had changed hands several times. Then, with the execution of writ, the Defendant was placed in possession of the three lots, along with his own lot D2, by an order of Court. Thereby the applicable period is reduced to a period of eleven years, between 1988 and 1999.

The first outsider to hold title to lots D3 and E from the *Perera* family is *Dinapala de Silva*. He acquired title to these two lots in 1988 from *Juliet Perera* and after his death, the heirs have got together and transferred that title back to *Juliet Perera* in 1993. During this five-year period, there is absolutely no evidence available before the trial Court as to the nature of possession, the said *Dinapala de Silva* may have had over the disputed parcels of land. The Defendant could therefore claim without any challenge to the contrary that he had exclusive adverse possession over the said parcels of land during this five-year period. In

the year 1994, *Juliet Perera* again transferred her rights over lots D1, D3 and E to *Gamini Ponweera* from whom the present Plaintiff had acquired tittle to the two lots. But there is only six-year time gap between 1988 and 1994 (ignoring the short duration when its title was held by *Juliet Perera*) and even if the Defendant had possessed the two lots adverse to the rights of *Dinalapa de Silva* during that time (through his tenant, who was placed back in possession of the entire land by Court on 01.04.1991), that period itself, being of a mere six-year duration, does not satisfy the requirement of ten years of uninterrupted adverse possession.

Thereafter, *Gamini Ponweera* had acquired title to lots D1, D3 and E from *Juliet Perera* on 10.04.1994, who then transferred title of lots D3 and E to the Plaintiff on 10.03.1996. The fiscal, having executed the writ of possession on 14.06.1999, quieted the Defendant in possession of lots D3 and E (owned by the Plaintiff) and lot D1 (owned by *Gamini Ponweera*). The Plaintiff as well as *Gamini Ponweera* have thereupon moved Court under section 328 of the Civil Procedure Code, against the said eviction. The Defendant, on the day of the inquiry of the application by *Gamini Ponweera*, had conceded to the latter's possessory rights over lot D1. The application of the Plaintiff was however dismissed by Court on the day of the inquiry, upon her failure to diligently pursue the said application.

The Plaintiff did not call any of her predecessors in title as witnesses. Her husband, who gave evidence on her behalf, had no direct knowledge of the events that had taken place prior to 1996, the

year she had acquired title to lots D3 and E. It could well be that, in order to compensate for that deficiency in their evidence, the Plaintiff did tender a certified copy of the application by *Gamini Ponweera* before the trial Courts (P7). In that application *Gamini Ponweera* asserts that he had rented out lot D1 to one *Sunanda Perera*, who operated a service station with his employees, whilst occupying the building standing on lot D1, until his eviction by Court and alleged that the Defendant had obtained the said writ of execution by suppression of relevant facts. The fiscal report (V3a) confirms this assertion of *Gamini Ponweera,* as it indicates that when the Court officer had arrived at the property in order to execute the writ, he noted that there was a service station housed in a building with asbestos roofing. There were several workmen employed by one *Sunanada Perera,* who was in occupation of that building, and presented himself as the owner of that service station.

This clearly shows that contrary to the finding of the High Court of Civil Appeal, in fact there was clear evidence before trial Courts that *Gamini Ponweera* had total control over lot D1 and possession *ut dominus* over same. The Defendant, until *Gamini Ponweera* moved Court under section 328, had consistently maintained that he exclusively possessed lots D1, D3 and E, along with his own lot D2, adverse to the interests of its true owners. When that application was taken up for inquiry, the Defendant had entered into a settlement with *Gamini Ponweera* by conceding to the position that the latter is entitled to be quieted into possession of lot D1 from the date of inquiry i.e. 24.05.2000 (P8) after renouncing his alleged prescriptive title over it.

The High Court of Civil Appeal had considered this item of evidence that had been presented in the form of a copy of proceedings under section 328 before the District Court, but in the process had failed to consider this important aspect of an item of evidence it revealed. That aspect of the evidence is in relation to the qualification on which the Defendant had insisted to be clarified, before he enters any settlement with *Gamini Ponweera*. The proceedings before trial Court revealed that the Defendant, having first satisfied himself that there was no "encroachment" by *Gamini Ponweera* into lot D2 by the latter's act of erection of a parapet wall on the common boundary between lots D1 and D2, had thereafter only proceeded with the said settlement in favour of *Gamini Ponweera*, ending the inquiry into the application under section 328.

The learned District Judge, in rejecting the Defendant's assertion that he conceded to *Gamini Ponweera's* rights only because of his close family ties, justifiably questions the acceptability of the said claim by posing the question of, if indeed that was the case, why did the Defendant have to wait from 1999 to concede the rights of his "*family member*", until that member files an application under section 328 and proceeded with its inquiry after his eviction insisted on by the former? But the High Court of Civil Appeal had rejected the Plaintiff's contention on this aspect, solely on a mere hypothetical premise, i.e., if the inquiry was preceded with, the Defendant could have "*easily established*" his claim of prescription. However, the High Court of Civil Appeal did not offer any reasoning as to why it opted to differ with the point raised by the trial judge, by raising that question or the evidence upon which the Court had arrived at that conclusion.

The Defendant, in his evidence, did not clarify as to the time period in which this parapet wall was constructed. But he made no mention either to that construction or to the construction of a house with asbestos roofing on lot D1 by *Gamini Ponweera*. But he had accepted that it was *Gamini Ponweera,* who constructed the parapet wall, at the time of the said settlement. This construction was obviously undertaken by *Gamini Ponweera* after he had acquired title to lot D1 along with D3 and E, in 1994 and before the said settlement was entered in the year 2000. The very acts of constructing a house with asbestos roofing and erecting a parapet wall separating lot D1 from lot D2, within the confines of the larger land claimed by the Defendant, without any resistance or objection from him is a clear indication that *Gamini Ponweera* had possessed at least lot D1 *ut dominus* since acquiring its paper title, despite the claim of exclusive possession by the Defendant during the said four-year period adverse to rights of the actual owner.

During the period 1994 to 1996, lots D3 and E were owned by *Gamini Ponweera* along with lot D1. What must be noted here is *Gamini Ponweera* had erected this parapet wall, when he had title to all three lots, and therefore the interruption to the Defendant's possession is applicable to lots D3 and E as well. The Defendant nonetheless asserts that he possessed lots D1, D3 and E adverse to the rights of its true owners. It is evident that *Gamini Ponweera* had possessed lot D1 from 1994 as his own property and continued in that state until he was evicted by an order of Court in 1999. During this five-year period, the evidence clearly points to the fact that the Defendant never had any possession over lot D1, until he was placed possession of same in 1999

by Court. The series of acts attributed to *Gamini Ponweera,* namely, construction of a parapet wall, construction of a house, renting same out to a third party until his eviction in 1999 and regaining all his rights over lot D1 in 2000, all points to a justifiable finding of fact that *Gamini Ponweera* had possessed lot D1 *ut dominus.*

Similarly, the Plaintiff obtained title to lot D3 and E from *Gamini Ponweera* on 10.03.1996 and instituted the instant actions on 10.07.2007, seeking declaration of title in respect of each of the two lots D3 and E and eviction of the Defendant therefrom. It is clear that during the period of two years from 1994 to 1996, it was *Gamini Ponweera* who had the possession of lots D3 and E along with lot D1. The time period of eight years from 1988 to 1996, even if the Defendant had adverse possession over lots D3 and E during this time, he is not entitled to a decree in his favour as the required ten-year period of such possession was not satisfied.

Similarly, if there is evidence that the Plaintiff too had come into possession of lots D3 and E, after her acquisition of title to same at any point of time before 1999, thereby interrupting the completion of a continuous period of ten years reckoned from 1988, then too the Defendant is not entitled to a decree under section 3 of the Prescription Ordinance. In the circumstances, the question whether there was such evidence placed before the trial Courts must be considered by this Court.

The Plaintiff had placed oral and documentary evidence before trial Courts, which indicated what they did with the land after

acquiring paper title to same in 1996 from *Gamini Ponweera*. It is correct that only the Plaintiff's husband gave evidence on her behalf in both trials. However, the said witness, in addition to his oral evidence, in which he described the nature of possession that the Plaintiff has had over lots D3 and E since becoming its owner, also tendered several documents as evidence, in support of his wife's possession. The assertions made by the witness for the Plaintiff relates to incidents that he himself did witness by participation and thus are termed as direct evidence on those events. As correctly noted by the High Court of Civil Appeal, the witness for the Plaintiff only spoken of the events that had taken place since her acquisition of paper title to lots D3 and E in 1996.

Witness *Charles Amarasekara*, being the husband of the Plaintiff and whilst giving evidence on her behalf, had stated that during the week which followed the execution of the transfer deed in favour of his wife in 1996, they had entered into possession of the land. Having cleared same of vegetation they had demolished a derelict building standing on it along with an overhead tank. They also demolished a part of the boundary wall and taken steps to install a gate in order to gain access to lots D3 and E from the public road. During his evidence *Amarasekara* had also tendered a copy of the application made to the District Court in case No. 1343/RE under section 328, subsequent to her eviction by the fiscal marked as P7.

The High Court of Civil Appeal rejected the Plaintiff's claim on the footing that these were the actions taken by her to establish possession only after acquisition of paper title and the witness called by her is unable to give evidence with regard to the nature of possession of

the land before she made the said purchase and did not call any predecessor in title to challenge the Defendant's claim of adverse possession. This is an erroneous conclusion since the Plaintiff had in fact placed evidence before the trial Courts in the form of documentary evidence, as to the nature of possession her predecessor in title had over the two lots, when she tendered *Gamini Ponweera's* application under section 328 (P7), along with her own application (P6). The judgments of the appellate Court did not indicate whether it had considered the contents of these two items of documentary evidence or not. The appellate Court also failed to indicate its own determination on the learned District Judge's finding that the Defendant had no uninterrupted possession for a period of ten years over lots D3 and E.

In her application under section 328 of the Civil Procedure Code, the Plaintiff had averred that upon acquisition of title to lots D3 and E, she had obtained an assessment number and paid assessment rates to the local authority. This application, although indicating the intention on the part of the Plaintiff to possess the land to which she had acquired title *ut dominus*, does not qualify to be taken as an instance of an interruption to the Defendant's possession over lots D3 and E. However, the acts of demolition of a derelict building and the demolition of a part of the parapet wall in order to put up a gate as claimed by the Plaintiff, in itself would qualify to be taken as instances of asserting her rights over the land and thereby at least interrupting the Defendant's possession. The Defendant had cross-examined the witness at length over this issue and suggested there were no buildings standing on the land at that point of time.

The fiscal report (V5) indicates that the Court officer had observed an overhead tank on that land in 1991. Except for this he had

not noticed any other buildings standing on that land. But the overhead tank was distinctly mentioned in the said report. This was before even the Plaintiff had acquired her title to the land. The witness for the Plaintiff may have exaggerated as to the demolition activity carried out on the land, but the claim that he did demolish the masonry structure of an overhead tank is supported by other independent evidence, namely the fiscal report. The Defendant too, in the case No. 6901/L, admits that the Plaintiff had demolished a building standing on that land. But, despite these acts of interference with his claim of adverse possession, the Defendant did nothing to prevent the Plaintiff from possessing the land or dealing with it the way she pleased. The Defendant at the very least did not register even a nominal verbal protest for her actions on the land. Until he had raised the plea of prescription through his answer to the instant actions instituted by the Plaintiff, she had no occasion or reason even to suspect that the Defendant had commenced adverse possession against her rights.

The claim of demolition by the Plaintiff is a probable one as her building plan for the lots D3 and E was approved by the local authority on 22.08.1997 (after a period of seventeen months since she acquired title) and justifies an inference that she wanted the land to be cleared fully to facilitate the proposed construction of a dwelling house. Importantly, the demolition of a part of the parapet wall that had been put up by *Barlin Perera* and installation of a gate by the Plaintiff to lots D3 and E, was objected to by the Defendant, as indicative by letter V6. The purpose of this demolition and installation of a gate was to have independent access to the public road to lots D3 and E, since the only gate that had served the entire land had been put up by the father of the Defendant and it provided access to the public road only to lot D2 at

that point of time. Thus, the Plaintiff lost no time in installing a gate to her property after acquiring title to same. This obvious interruption to the Defendant's possession was met, not by resorting to a legal remedy on the strength of his prescriptive title, but by merely writing a letter to the local authority requesting the authority to desist from granting permission to the proposed construction activity of the Plaintiff. The reply to the Defendant's complaint by the local authority (V6) indicate that it relates to an unauthorised construction of a parapet wall. In fact, the *Ja-Ela* Pradeshiya Sabha, in response to the Defendant's complaint of an unauthorised construction by the Plaintiff, had directed him twice indicating its position that, unless he obtains a Court order within 14 days, the authority would proceed to approve her building plan. Despite these clear directions, the Defendant opted not to seek any legal remedy against the activities of the Plaintiff over the land and to assert his alleged prescriptive title over the lot D3 and E.

The Plaintiff's husband who participated in the inquiry held by the local authority into the Defendant's petition objecting to granting approval to their building plan, said in evidence that Defendant's basis of objection was based only on the fact that there was ongoing litigation with *Simion Perera.* The Defendant himself admitted in evidence that during the inquiry before the local authority, the officials have advised the Plaintiff's husband not to proceed with the purchase because of the said pending litigation. He also admitted before the trial Courts that witness for the Plaintiff *Amarasekara* had demolished a part of the existing boundary wall and made constructions on lots D3 and E.

What is important to note here is that the Defendant did not claim any prescriptive title to the said property to the Plaintiff even at that point of time. Certainly, this was yet another opportunity for the

Defendant to expressly claim of his acquisition of title to lots D3 and E on the basis of being in possession for a long period of time and to put the Plaintiff on notice of his rights and to resist her possession. But he had apparently kept that claim of prescription as a secret and divulged it only when the Plaintiff sought to evict him by filing the instant actions.

These several instances of activity to which the witness to the Plaintiff had referred to in his evidence are clearly supported by contents of the documentary evidence that had contemporaneously been made and existed even before the instant litigations are instituted. Some of these items of documentary evidence were tendered to Court by the Defendant himself. If the Defendant's adverse possession of lots D1, D3 and E was interrupted during the period commencing from 1988 and 1999, and thereby denying him of fulfilling the requirement of having adverse possession for an uninterrupted period of ten years within that 11-year period, then he is not entitled for a decree in his favour under section 3 of the Prescription Ordinance.

Thus, as indicated earlier on, I am of the view that when the High Court of Civil Appeal rejected the Plaintiff's claim of being in possession of lots D3 and E on the footing that these instances refers only to actions taken by her after acquisition of paper title and therefore her failure to call any of her predecessors in title to rebut the Defendant's claim of adverse possession by leading evidence as to the nature of possession they had over lots D3 and E, the appellate Court had clearly fallen into error in its failure to consider the evidence that had been referred to in the preceding paragraphs. In arriving at the said erroneous conclusion, the High Court of Civil Appeal also failed to consider whether these several acts of the Plaintiff did interrupt the

continuity of the alleged adverse possession relied on by the Defendant. There is a definite finding of fact by the District Court that the adverse possession of the Defendant was interrupted during the period 1988 to 2007, which in turn based on the Defendant's own admission, upon being suggested so by the Plaintiff. The appellate Court had unfortunately ignored all these important items of evidence, that had been presented by the Plaintiff in both oral and documentary forms, in relation to the underlying issue, whether the Defendant had uninterrupted possession of ten years since 1988. The appellate Court offered no reason to justify why it opted to hold contrary to the finding of these relevant facts in issue by the trial Court.

The fact that the Defendant, despite his claim of having been in possession of the same for over four decades, did not resort to legal remedies to prevent the Plaintiff from continuing in her activities over lots D3 and E, on the basis that she has paper title to the property and thereby disturbing his rights acquired by adverse possession over same, justifies drawing an inference that he did not do so because he had acknowledged a right existing in the Plaintiff for her to engage in such activity over the said two lots. The Defendant had full knowledge of the activities of the Plaintiff over the two lots. If that in fact the case is, then the Defendant is clearly disqualified to a decree in his favour, under section 3 of the Prescription Ordinance. Considering the available evidence, it is clear that the possession of the Defendant was repeatedly interrupted by the activities of the Plaintiff and thereby denied the former of an uninterrupted period of ten years of adverse possession.

Therefore, the answer of the District Court to the issue No. 11 of the Defendant, whether the Plaintiff had no possession in whatever form to the lands described the 3rd, 4th and 5th schedules to the plaint

(lots D2. D3 and E respectively) in case No. 6906/L, as "not proved", is a conclusion well supported by the body of evidence presented before it. Thus, the conclusions reached by the High Court of Civil Appeal that "*it is clear that the Defendant had always successfully resisted all attempts to oust him*" and the "Defendant *had been able to establish that he had continued possession of the land until this action was filed by the Plaintiff*", are clearly contrary to the weight of available evidence and, for that reason, are considered as erroneous.

Thus, in conclusion, I am of the view that during the period 1969 to 1988 the Defendant only had permissive possession of *Juliet Perera* and, in the absence of any overt act by which the permissive character of his possession turned into an undisturbed and uninterrupted possession by which a denial of a right existing in the latter could be fairly and reasonably inferred during this period, he is not entitled to a decree under section 3 of the Prescription Ordinance. During the period 1988 to 1999, also he had failed to establish uninterrupted adverse possession of lots D3 and E, for a period of ten years.

Therefore, the question of law on which leave was granted in both the instant appeals, namely, whether the learned Judges of the High Court erred in law in failing to appreciate that the Defendant failed to show an overt act or adverse possession against Plaintiff, namely the Defendant's sister during the period 1969 –1994, is answered in the affirmative and in favour of the Plaintiff.

Hence, the impugned judgments of the High Court of Civil Appeal in appeal Nos. WP/HCCA/NEG/03/2014 (F) and WP/HCCA/NEG /39/2013(F) are hereby set aside. The judgments of the District Court of *Negombo* in case No. 6906/ L and the judgment of

the Additional District Court of *Negombo* in case No. 6901/L, which held in favour of the Plaintiff are restored back and affirmed.

The appeals of the Plaintiff, SC Appeal Nos. 116/20 and 117/20 are accordingly allowed with costs in all three Courts.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal against the judgement of the High Court of Civil Appeals of the Sabaragamuwa Province Holden at Kegalle in Appeal No. 36/2015(F).

SC Appeal 117/2017
SC /HCCA/LA No. 483/16
WP/HCCA/KEG Appeal
No. 36/2015(F)
DC Kegalle Case No. 26656/P

Rajakannagedera Senarath Wijesinghe
Parape, Rambukkana

2nd Defendant-Appellant-Appellant

Vs.

Rajakannagedera Lalith Chandana
Thusitha Kumara,
Parape, Rambukkana

Plaintiff-Respondent-Respondent

1. Manathunga Arachchilage Piyadasa
   Parape, Rambukkana.

1A. Manathunga Arachchilage Ranjith
Thilakasiri Manathunga

1B. Manathunga Arachchilage Sarath
Nandasiri Manathunga.

1C. Lalitha Sriyawathie Manathunga
All of Parape Rambukkana.

3. Rajakannagedera Premawathie
   Parape Rambukkana.

4. Manathunga Dewage Premawathie
   Parape Rambukkana.

5. Edirisinghe Dewage Edirisinghe
   Parape Rambukkana.

Defendants-Respondents-Respondents

Before	:	Jayantha Jayasuriya, PC, CJ Yasantha Kodagoda, PC, J A.H.M.D.Nawaz, J.
Counsel	:	Anuruddha Dharmaratne with Indunil Piyadasa instructed by Indika Jayaweera for 2nd Defendant-Appellant -Appellant. Dr. Sunil Cooray with Sudharshini Cooray for Plaintiff-Respondent-Respondent.
Written submissions Filed by	:	2nd Defendant-Appellant- Appellant on 08.08.2017 and 11.01.2022.
	:	Plaintiff-Respondent-Respondent on 05.02.2018 and 06.01.2022.
Argued on	:	06.08.2021, 07.10.2021 and 26.11.2021
Decided on	:	07.09.2022

Jayantha Jayasuriya, PC, CJ

The plaintiff-respondent-respondent (hereinafter called the "respondent") instituted action in the District Court of Kegalle to partition the land in extent 3 roods and 18 perches, called "Galpeelle Weralugahamulla Hena presently Watta" that was more fully described in the schedule to the plaint. Initially there were four defendants and the 5th defendant was added on the latter's application to intervene.

The respondent having pleaded the pedigree moved that the shares be allocated as set out below:

respondent - 7/216 from the land and ½ share of the two buildings and the copra hut

1st defendant – 129/216

2nd defendant - 52/216

3rd defendant - 21/216

4th defendant – 7/216 from the land and ½ share of the two buildings and the copra hut

The 2nd defendant-appellant-appellant (hereinafter referred to as the "appellant") pleaded that the shares be allocated according to the pedigree set out in his amended statement of claim dated 17 February 2006 and the land and the buildings be partitioned accordingly.

The learned District Judge in his judgment directed the partition of the land *inter alia* as follows:

respondent – ½ of the copra hut and ½ of the two boutique premises and ½ of the land upon which the copra hut and the two boutique premises falls;

appellant – undivided 87/216 shares (excluding the copra hut and the two boutique premises and the land upon which the copra hut and the two boutique premises falls);

½ share of the copra hut, ½ share of the two boutique premises and ½ share of the land upon which the copra hut and the two boutique premises falls, were left un allocated.

The appellant appealed against the said judgment. Appellant's grievance was the manner in which the two boutique premises and the copra hut was allocated by the District Court. The Civil Appellate High Court by its' judgment dated 01.09.2016, dismissed the said appeal.

Being aggrieved by the said judgment of the Civil Appellate High Court, the appellant sought leave to appeal from this Court and this Court granted leave to appeal on the following questions of law.

(i). Have the learned judges of the High Court erred in law in failing to appreciate and consider that the 2nd Defendant is entitled to ½ share of the two boutiques situated near

the Western boundary of the corpus depicted as 'C' in Preliminary Plan No 1906 dated 19.05.1998 prepared by P.M.G. Munasinghe, Licensed Surveyor?

(ii) Have the learned judges of the High Court erred in law in failing to appreciate and consider that the 2nd Defendant is the absolute owner of the copra hut situated near the Western boundary of the corpus depicted as 'D' in Preliminary Plan No 1906 dated 19.05.1998 prepared by P.M.G. Munasinghe, Licensed Surveyor?

(iii) Have the learned judges of the High Court erred in law failing to appreciate and consider that the learned trial judge erred by not granting ½ of the said boutiques and the said copra hut to the 2nd Defendant ?

The learned Counsel for the appellant submitted that the grievance of the appellant against the judgments of both the District Court and the Civil Appellate High Court is the allocation of the two boutique premises and the copra hut.

Therefore, this judgment is confined to the issues relating to the allocation of the two boutique premises and the copra hut and does not deal with the allocation of shares relating to the land excluding the two boutique premises and the copra hut.

In the preliminary plan No 1906 dated 19.05.1998 prepared by P.M.G.Munasinghe licensed surveyor the two boutique premises are depicted as house marked 'C' and the copra hut is depicted as house marked 'D'. Therefore, it is clear that the two boutique premises and the copra hut are two separate entities that are detached and could be identified separately. According to the surveyor's report, the appellant had claimed both these buildings.

The appellant's claim to one of the two boutique premises (1/2 share of the building identified as 'C' – two boutique premises) is on the basis that his parents Ukkuwa and Silindu co-owned the thatched house that existed at the time they gained title as co-owners of the land together with the thatched house situated therein, in the year 1940 and subsequently in the year 1990 his mother Silindu, transferred all her rights to the appellant. However, the learned counsel for the respondent submitted that it was Ukkuwa who improved the thatched house and converted it to the present form, which consists of two boutique premises and therefore said Ukkuwa had sole rights of the two boutique premises. Thereafter Ukkuwa in the year 1990 gifted the aforesaid

two boutique premises to the respondent and another person called Somawathie. Therefore, he contends that the respondent is entitled to ½ share of the two boutique premises and the appellant has no valid claim to the said two boutique premises.

There is no dispute on the fact that the building described as 'two boutique premises' in the preliminary plan 1906, was identified as a 'thatched house' at initial stages which was subsequently improved.

It is pertinent to observe that there is no contest between the parties relating to the devolution of rights and shares unto Ukkuwa and Silindu. There is no contradiction between the pedigrees submitted by both parties, in relation to the same. Admissions 1, 3 and 5 recorded in the District Court also confirm the same. Furthermore, parties admit that the rights of Silindu devolved on the appellant. However, the claim and the counter claim by the appellant and the respondent in relation to the two boutique premises is based on the issue whether Silindu had any right to the two boutique premises at the time she transferred her rights to the appellant, or not.

Competing claims on the copra hut situated on the land also arises due to a series of gifts and cancellation of such gifts and subsequent transfers effected by said Ukkuwa.

It was one P.G.Bandiya who had initially transferred his rights in the relevant land in extent three roods and eighteen perches together with the 'thatched house' situated therein to his daughter Silindu and son-in-law Ukkuwa by the deed bearing No.1020 dated 19 September 1940 and attested by J.P.W.Gunaseka Notary Public – the deed produced marked 2V1. Both parties concede that the 'thatched house' referred to in the said deed was later improved and is presently referred to as 'the two boutique premises'.

Silindu in the year 1987 by deed No. 53937 attested by S.G.Patikiri Arachchi, Notary Public gifted an 'undivided 1/4th share of the land in extent three roods and eighteen perches' which is more-fully described in the schedule of the said deed, to the appellant. The said deed is produced marked 2V2. However, it is pertinent to observe that the aforesaid deed 53937 does not make any reference to deed No. 1020 dated 19th September 1940 (2V1). Furthermore, in deed 53937 (2V2) it is claimed that Silindu's rights were derived from a deed that was not available at the time the deed 53937 was attested. (....දැනට ඉදිරිපිට නැති ඔප්පුවක් පිට අයිතිව නිරවුල්ව භුක්ති විඳින...) It is also important to note that there is no reference to the 'thatched house', in the said

deed. However, three years thereafter, in the year 1990 said Silindu had transferred undivided ½ share of the two boutique premises to the appellant by the deed No. 4758, attested by K.Wijesundara Notary Public on 22 October 1990. The said deed 4758 was produced marked 2V3. This deed describes Silindu's rights as rights derived from the deed No 1020 dated 19th September 1940 (2V1).

An examination of deed 53937 (2V2) reveals that no reference is made to the fact that Silindu co-owned with Ukkuwa the undivided 1/4th share of the land in extent three roods and eighteen perches, in the said deed dated 20th December 1987. Furthermore, the said deed does not make any specific reference to any building situated therein. Specific reference to "undivided ½ share of two boutique premises" is made in the deed attested three years later – deed No. 4758 dated 22 October 1990 (2V3). Silindu by the last mentioned deed 4758 (2V3) attested by K.Wijesundera Notary Public, transferred undivided ½ share of the two boutique premises to the appellant. Appellant's claim to the ½ share of the two boutique premises is based on the last mentioned deed where Silindu transfers her rights to him.

However, it is pertinent to observe that Ukkuwa, initially in the year 1981 had gifted the two boutique premises to the father of the respondent – R.G.Piyasena - by the deed 12174 dated 01 January 1981 attested by S.M.B.Jayaratne, Notary Public (which was produced P7). However, thereafter in the year 1984 Ukkuwa proceeded to cancel the last mentioned deed by the deed 13114 dated 31 October 1984, attested by S.M.B.Jayaratne, Notary Public (which was produced 2V4). Thereafter in the year 1990, one month prior to the execution of the deed 4758 (2V3) by Silindu, Ukkuwa had transferred the two boutique premises to the respondent and another person named Somawathie, by the deed no. 5326 dated 24th September 1990, attested by N.M.Jayatilake Notary Public. The said deed 5326 was produced marked P9. The Respondent's claim in relation to undivided ½ share of the two boutique premises is on the basis that it was Ukkuwa who had the sole rights to the two boutique premises and thereafter the said Ukkuwa transferred his rights to the respondent and another person named Somawathie. It was contended that Ukkuwa derives sole rights to the said two boutique premises as it was he who improved and converted the 'thatched house' into two boutique premises. On this basis it was further contended that Ukkuwa had the right to transfer the entirety of the boutique premises to the respondent and Somawathie leaving ½ share to each of them. It is the respondent's claim, that Silindu's subsequent transfer

of ½ share of the two boutique premises to the appellant by the deed 4758 (2V3) has no force of law and therefore the appellant's claim of ½ share on the boutique premises should fail.

The learned District Judge had accepted the position taken up by the respondent. The learned judge is of the view that the respondent on a balance of probability had established that Ukkuwa having improved the thatched house into two boutique premises thereafter transferred the said two boutique premises to the respondent and Somawathie. The learned trial judge further observed that Silindu had not raised any objections to the transfer of the entirety of the two boutique premises by Ukkuwa but had later on made the transfer of her rights to the appellant. On these grounds the learned trial judge held that ½ share of the boutique premises should be allocated to the respondent and balance ½ share should be left unallocated as Somawathie was not a party to the proceedings.

The learned judges of the Civil Appellate High Court are of the view that the learned trial judge had correctly analysed all material and allocated shares accordingly. Therefore, they dismissed the appeal. However, it is pertinent to observe that the learned judges of the High Court before reaching the conclusion on the allocation of shares by the learned trial judge had observed, that it is only one premises of the two boutique premises that had transferred to the respondent according to the deeds that were produced. This observation is vague and contradictory to the evidence presented at trial. The respondent's position before trial court - the position which was accepted as proved by the trial court, was that Ukkuwa who alone had sole rights to both boutique premises transferred all his such rights to the respondent and said Somawathie.

In examining the transfer of rights by Ukkuwa and Silindu in relation to the two boutique premises, the main issue that is to be considered is whether it was Ukkuwa who had sole rights to the two boutique premises in view of the improvements purported to have been made or whether Ukkuwa and Silindu continued to enjoy equal rights – ½ share each – to the said two boutique premises. In this regard it is pertinent to observe that the two boutique premises did not exist when Bandia initially transferred the land with the thatched house to Ukkuwa and Silindu in the year 1940. Reference to two boutique premises was made for the first time in the deeds 12173 (2V5) and 12174 (P7) made in the year 1981. Both parties concede that it was the 'thatched house' that was later improved and became the 'two boutique premises'. Therefore, it is clear that initially Ukkuwa and Silindu co-owned the land and the thatched house situated thereon

together with the soil underneath and improvements to the co-owned thatched house situated in the co-owned land were made at a later stage.

Under these circumstances, the main issue that has to be examined is whether both Ukkuwa and Silindu who continues to co-own the land has a co-ownership to the boutique premises situated thereon too? The learned trial judge's conclusion that Ukkuwa had sole rights when he transferred the two boutique premises first in 1981 by way of a gift and thereafter in 1990 after cancelling the said gift is on the basis that the plaintiff-respondent succeeded on a balance of probability to prove that it was Ukkuwa who effected improvements to the thatched house and converted to the two boutique premises.

In this regard it is also important to examine whether there is evidence as to who made those improvements and if so does the fact that who made those improvements to the initial thatched house becomes relevant in determining the rights of Ukkuwa and Silindu?

The respondent, an uncle of respondent namely M.D.S.Manathunga, the appellant and the third defendant-respondent-respondent who is a sister of the appellant, had testified at the trial. The respondent is a nephew of the appellant and the appellant is a son of Ukkuwa and Silindu. The respondent who was thirty eight years at the time of his testimony had said that it was his grandfather Ukkuwa who built the two boutique premises. The respondent, would have been born in the year 1973. Therefore by the time the existence of the two boutique premises was recorded in a deed for the first time in 1981, the respondent was a boy of around eight years of age. Witness Manathunga also in his examination in chief had said it was Ukkuwa who built the two boutique premises. However, the third-defendant-respondent-respondent who is a daughter of Ukkuwa and Silindu and who was born when Silindu and Ukkuwa were living in the land in question, in the examination in chief had said that both Ukkuwa and Silindu built the two boutique premises and members of the family, including the appellant and the respondent's father were living there. This witness was born in the year 1949. In the cross examination this witness had said that she '*did not see'* who built the said two boutique premises. However, she had said that it was both Ukkuwa and Silindu who made the improvements. It is also pertinent to observe that both the respondent and the uncle of respondent had not explained whether they had first hand information as to who improved the thatched house or built the two boutique premises. The learned trial judge had not elaborated the basis on which he accepts evidence presented on

behalf of the respondent that Ukkuwa built the two boutique premises, on a balance of probability. In my view the evidence is very scanty in this regard. One other factor that the learned trial judge had taken into account in reaching this conclusion is that Silindu had not raised any objections when Ukkuwa transferred the two boutique premises mentioned above. In this regard also it is pertinent to observe that there is no sufficient evidence to establish that Silindu had prior knowledge of the transfers made by Ukkuwa. Furthermore, it is pertinent to observe that the third-defendant-respondent-respondent in her evidence said that her mother Silindu did not agree with the manner in which Ukkuwa distributed the property as she was of the view that all three children should be benefitted.

It is settled law that when a person builds on a land the title of the building remains with the person who has the title to the land on which it was built.

> *"Accession was a primary mode of acquisition of property recognised by Civil Law. Exceptions were admitted in regard to movable property for cogent reason of policy, but as far as land was concerned, it was an absolute principal that structures and plantations acceded to the soil and enured to the benefit of the owner of soil. The rule whatever is built or cultivated on land becomes part of the land, was received without modification in Roman-Dutch law and applied equally to the case of a person building on his land with materials of another and to that of a person building on another's land with his own materials"* – **"The Law of Property in Sri Lanka" by G.L.Peiris, Vol I, page 29 (Third Re-print -2009).**

In **De Silva v Haramanis *et al***, 3 NLR 160 at 160, it was held that

> *"A house becomes the property of the owners of the soil on which it is built. Between the owners and the builders there may exist equities, such as a right to compensation, &c, but the ownership of a building cannot (in the ordinary case) be in another".*

I need hardly emphasize that the maxim "*omne quod inaedificator solo, solo cedit*" is now trite law. Every thing that is built on land or on another immovable property accedes to that land or immovable property and it becomes the property of the owner of the land as immovable (E. Poste, Gai Institutiones …, 4th ed.., Oxford, (1904) p.73: The Jurisprudence of Holland by Hugo Grotius 2.1.13 - Translated by R.W.Lee (1926) at Chapter X item 6, page 119.)

However, a person who builds on the land of another may have the right to compensation and the right to retention until compensation is paid. These rights depend on many factors including the status of the improver such as a *bona fide* occupier etc;. In **Hassanally v Cassim**, 61 NLR 529 at 532 Viscount Simmonds stated,

> *"the right of the improver to compensation rests on the broad principle that the true owner is not entitled to take advantage, without making compensation, of the improvements effected by one who makes them in good faith believing himself to be entitled to enjoy them whether, for a term or in perpetuity ".*

In relation to the rights of a co-owner who effects improvements with the knowledge that the property is owned in common and that he is entitled, at partition only to a share of the land, proportionate to his interest, it is observed that,

> *"the equitable rights of the improver have to be restricted appropriately, for the purpose of protection of the other co-owners' interests"* - **"The Law of Property in Sri Lanka" by G.L.Peiris, Vol I, page 46 (Third Re-print -2009).**

Further more, in **De Silva v Siyadoris *et. al*.** 14 NLR 268 at 270, it is observed that :

> *"... the co-owner who puts up a building on the common property is in a totally different position from a person who, under agreement with the owner, builds on the land of another. The co-owner in such a case acquires no title in severalty as against the other owners. One co-owner could prevent him from building on the common property without the consent of the other co-owners (Silva v. Silva, 6 NLR 22), but the building once erected accedes to the soil and becomes part of the common property. The right of the builder is limited to a claim for compensation, which he could enforce in a partition action under sections 2 and 5 of Ordinance No. 10 of 1863."*

When the case of the respondent is considered in the context of the above discussed legal principles it is clear that Ukkuwa who co-owned the land and the thatched house with Silindu does not gain the title of the two boutique premises as a sole owner excluding Silindu, even in a situation where Ukkuwa had made improvements to the thatched house. If at all, his rights to the

two boutique premises are the ½ share of the two boutique premises and a right to compensation for the improvements provided that there is evidence to the effect that he was solely responsible for the improvements.

Furthermore, in **Abideen Hadjiar v Aiysha Umma *et al*** , 68 NLR 411 the rights of an improver who made improvements to the benefit of the owner was discussed. In the said case the court held,

> *"The principle of unjust enrichment has no application where the improver effected the improvements for the benefit of the owner. The essence of a claim for compensation is that the improver expected to enjoy the benefit of the improvements for a term or in perpetuity. In this case, apart from any presumption of advancement in favour of the wife, the 2nd defendant has expressly stated that he effected the improvements in the interests of his wife and children, that is, for their benefit. He cannot put forward his claim after the death of his wife when he had no intention at the time he effected the improvements, to make any such claim against his wife.*
>
> *The 2nd defendant's position is no different even if he effected the improvements with the express or implied consent of his wife, the owner, because he did so for her benefit".* (at page 413)

The legal principle set out in **Abideen Hadjiar** (supra) in my view is equally applicable to right to compensation of an improver who is a co-owner.

In this regard, the evidence of the third-defendant-respondent-respondent who is a daughter of Ukkuwa and Silindu is also relevant. According to her, both Ukkuwa and Silindu at one stage had lived in one of the two boutique premises with their children. It is reasonable to infer that even if it was Ukkuwa who was solely responsible for improvements, Ukkuwa had made those improvements for the benefit of the co-owner, his wife Silindu, too. In the absence of any evidence that Ukkuwa made those improvements with the intention of claiming compensation from Silindu – his wife - Ukkuwa cannot have a claim for compensation against her or her successors.

When the facts of the matter under consideration are examined in the context of the legal principles discussed above, Ukkuwa could not have had rights other than for a half share of the two boutique premises when he transferred his rights by the deed 12174 (P7) in 1981 or by deed 5326 (P9) to the respondent and another person in the year 1990. Silindu's entitlement to ½ share of the land and thatched house that had accrued from the deed No 1020 dated 19th September 1940 (2V1) remained intact. The transfer of her rights to the land in 1987 by deed 53937 (2V2) and the subsequent transfer of her rights to the ½ share of the two boutique premises to the appellant by the deed No. 4758 (2V3) in the year 1990 are lawful and valid transfers. Therefore, the appellant is entitled to ½ share of the building identified as 'two boutique premises' and depicted as 'C' in Preliminary Plan No 1906 dated 19.05.1998 prepared by P.M.G. Munasinghe, Licensed Surveyor. The Respondent's entitlement to the said premises is 1/4th share only and the remaining 1/4th share has to be left un-allotted.

Therefore, the learned trial judge as well as the learned judges of the High Court had erred when they held that the appellant has no rights to the two boutique premises and allocated ½ share of the said premises to the respondent.

In view of these findings, I answer the question no. (i), on which leave was granted, in the affirmative.

I will now proceed to examine the issues pertaining to the allocation of shares relating to copra hut. The said copra hut is depicted as the house marked D in the preliminary plan No 1906 dated 19.05.1998, prepared by P.M.G.Munasinghe licensed surveyor.

The appellant's claim to the copra hut is on the premise that Ukkuwa in the year 1981 by deed of gift 12173 dated 01 January 1981 transferred his rights relating to the remaining land and buildings to the appellant, other than the two boutique premises and the land underneath the two boutique premises. The said deed 12173, attested by S.M.B.Jayaratne, Notary Public was produced marked 2V5. The appellant claims that the copra hut did not exist at the time Silindu and Ukkuwa became co-owners of the land and the thatched house in the year 1940, but was later built by Ukkuwa. It is his position that when Ukkuwa transferred buildings situated in the land excluding the two boutique premises by the aforesaid deed 12173 (2V5), the rights of Ukkuwa in relation to the said copra hut also passed on to him and remained with him. It was

further submitted, that the aforementioned claim of the appellant is further strengthened on the basis that Ukkuwa transferred his rights on the two boutique premises to the respondent's father on the same day by deed 12174 which was produced marked P7 and therefore the 'buildings' referred to in deed 12173 (2V5) is in reference to the 'copra hut'.

However, the respondent disputes this claim. The respondent's claim to the copra hut is based on the deed of transfer executed by Ukkuwa on 24 September 1990. The said deed bearing number 5326 attested by N.M.Jayathilake Notary Public was produced marked P9. Ukkuwa by this deed 5326 purported to have transferred his rights to the copra hut to the respondent and one Somawathie. It is the respondent's contention that even if it is admitted that Ukkuwa's rights to the copra hut was transferred to the appellant by a prior deed in 1981 - deed 12173 (2V5), such rights became transferred to the plaintiff respondent due to the execution of the deed of revocation 1587 dated 23 December 1990 attested by S.K.S.Dissanayake, Notary Public, on account of the operation of the doctrine *exceptio rei venditae et traditae*. The aforesaid deed 1587 was produced marked 2V6. It is the contention of the plaintiff-respondent that Ukkuwa's regaining rights to the copra hut immediately passes to the respondent and Somawathie since Ukkuwa had transferred the copra hut to the plaintiff-respondent and Somawathie at a time when he had no title.

It was further contended that the deed of trasfer bearing No 1588, attested by S.K.S.Dissanayake, Notary Public on 23 December 1990, which was produced marked 2V7, fail to pass on the rights relating to the copra hut, even though the said deed 1588 was executed on the same day as the deed of revocation.

It was also contended that all rights relating to the copra hut did immediately pass to the respondent with the execution of the deed of revocation, since the operation of the maxim *exceptio rei venditae et traditae* validated the prior deed 5326 (P9).

It is pertinent to observe that according to the evidence that transpired at the trial the copra hut had been built in the year 1961 and was used in the coconut business carried on by Ukkuwa. As it was discussed hereinbefore, both Ukkuwa and Silindu had lived with their children in one of the boutique premises and Ukkuwa was engaged in his business there. Therefore it is reasonable to infer that Ukkuwa built the copra hut to the benefit of his family. Based on the legal principles

discussed hereinbefore, title to the said copra hut would devolve on both Ukkuwa and Silindu who were the co-owners of the land, even though it was Ukkuwa who built it. It is also pertinent to observe, as it was referred to earlier in this judgment, that there is no dispute that all rights of Silindu had been transferred to the appellant.

Therefore, the appellant is entitled to the rights of Silindu on a ½ share of the copra hut.

The rights of the appellant and the respondent deriving from the rights of Ukkuwa on the balance ½ share of the copra hut needs to be determined on the nature of transactions that had taken place through four deeds referred to herein before. Those four deeds are; deed 12173(2V5), deed 5326(P9), deed 1587 (2V6) and deed 1588 (2V7). The Transfer of rights in relation to the copra hut based on these four deeds can be summarised as follows:

Ukkuwa in the year 1981 initially had transferred his rights on the copra hut to the appellant by a deed of gift and thereafter in September 1990 transferred the same rights to the respondent by a deed of transfer. Three months later Ukkuwa cancels the gift made to appellant and thereafter on the same day conveys same rights back to the appellant by executing a deed of transfer.

Accordingly, when Ukkuwa conveyed his rights to the respondent by the deed of transfer in September 1990, he did not have title to the copra hut as he had already conveyed his rights to the appellant in 1981 by the deed of gift subject to his life interest. However, he regained the title no sooner he revoked the deed of gift in December 1990 but could he have conveyed the same rights to the appellant by the deed of transfer executed the same day? Did not the rights he gained through the revocation of the gift pass on to the respondent, immediately? The deed of transfer through which Ukkuwa transferred his rights to the respondent in September 1990 (deed 5326-P9) had been properly registered in the folio 285 of volume 288, which was produced marked P1(iv). Did the respondent gain title to the copra hut by operation of law – the maxim *exceptio rei venditae et traditae?*

Claims to title based on the legal maxim *exceptio rei venditae et traditae* is recognised under the Roman Dutch law and the jurisprudence developed over the years describe the manner in which it is applicable in Sri Lanka under the common law.

In **Perera v Perera** 62 NLR 5 Privy Council held that under the said doctrine, the title passes to a vendee at the first moment of acquisition of title by vendor who did not have the right to alienate any rights at the time of alienation.

Privy Council, in **Gunatilake v Fernando** 22 NLR 385 at 390 recognising the applicability of the said doctrine further elaborated that,

> *"Under this exception the purchaser who had got possession from a vendor, who at the time had no title, could rely upon a title subsequently acquired by the by the vendor, not only against the vendor, but anyone claiming under the vendor; and though delivery (traditio) was, as the title shows a part of the defence, if the purchaser has acquired possession without force or fraud, he could use the exception, though he had never received actual delivery from the vendor".*

The Privy Council in the same judgement cited with approval the following observations of the Chief Justice in the Supreme Court Decision:

> *"....**Traditio** whether actual or symbolic, is no longer necessary for the consummation of a sale of immovable property, and has been replaced by the delivery of the deed. See Appuhamy v Appuhamy 3 S.C.C. 61, where the whole subject is lucidly explained. The same protection, therefore, which the Roman law gave to a person who had completed his title by possession, our own law will give to a person who had completed his title by securing the delivery of a deed"* (supra at 391).

However, the Supreme Court, in **Siyadoris v Peter Singho** 54 NLR 393 at 394 in deciding the applicability of this maxim held that,

> "*It is self-evident that this exception, which is an equitable plea, cannot be set up by a party who relies on a pretended sale, where there was in reality no consideration and there was no transfer of possession of the property alleged to be sold or delivery of the deed"*

In **Ponnambalam v Balasubramanium** and others [2004] BLR 125 the Supreme Court held that this legal maxim cannot be invoked when there is no delivery or possession and absence of consideration.

I will now proceed to examine the facts of the case under consideration to determine whether the respondent can succeed in invoking the maxim and claim title against the appellant.

The deed 5326 (P9), the deed through which the respondent claims title to the copra hut, was produced in court by the respondent. According to the attestation in the said deed, no consideration had passed at the time of executing the deed. It is also pertinent to note that no other evidence was presented in court that consideration had passed either prior or subsequent to the execution of the deed. Hence an issue arises as to whether the transfer by Ukkuwa to the respondent by deed 5326 (P9) is an *'actual transfer'* or a *'pretended sale'*?

However, no point of contest had been raised before the District Court focusing on this issue. On the strength of the evidence presented in court, following facts can be established. Within three months of the execution of the aforementioned deed, Ukkuwa proceeds to revoke the deed of gift through which he had already transferred his rights to the appellant in 1981, and immediately thereafter, executed a deed of transfer in favour of the appellant again transferring all rights to the land and all buildings excluding the rights to the two shop premises. The respondent in his evidence admits that it is the appellant who is in possession of the copra hut. He does not claim that he had possession at any stage. However, in my view these items of evidence are insufficient to conclude whether or not the respondent could successfully invoke the maxim *exceptio rei venditae et traditae* to his benefit.

When all these matters are taken into account, in my view there is a dearth of evidence for the court to decide whether the legal maxim *exceptio rei venditae et traditae* could be invoked to the benefit of the respondent in these proceedings.

As already observed the issue whether the respondent's claim could be substantiated with the benefit of the legal maxim under consideration has not ben raised at the trial court. If this aspect had been properly raised and a point of contest was framed, all parties would have had the opportunity to present evidence in this regard. If it had been raised it would have crystalised the issue and the required evidence could have been presented. However, neither party took the opportunity when no point of contest was raised. In my view the available evidence is insufficient to reach a finding in favour of the respondent in this regard.

When all these facts are taken together, I am of the view that the respondent cannot successfully invoke the maxim *exceptio rei venditae et traditae* to his benefit. The transfer of rights by Ukkuwa through deed 1588 (2V7) to the appellant prevails. Therefore, all rights of Ukkuwa to the copra hut vests with the appellant. Hence, rights of Silindu – as discussed hereinbefore – as well as rights of Ukkuwa, in relation to the copra hut, had been passed to the appellant and therefore he is entitled to all shares relating to the copra hut.

In view of these findings I answer the question no. (ii), on which leave was granted, in the affirmative.

Accordingly, based on my findings on questions (i) and (ii), I proceed to answer question number (iii), on which leave was granted, also in the affirmative.

Therefore, the appeal is allowed and I set aside the judgement of the learned Civil Appellate High Court dated 01 September 2016. The Judgement of the District Court dated 20th February 2015 is varied to the extent described herein below:

Allocation of Shares to the plaintiff (respondent) and second defendant (appellant):

Plaintiff	– 1/4th share of the two boutique premises and soil underneath
Second Defendant	– Undivided share of 87/216,
	1/2th share of two boutique premises and soil underneath
	All shares of copra hut and soil underneath
Shares unallocated	- 1/4th share of two boutique premises and soil underneath

Points of Contest:

Point of contest no. 7 is answered as follows :

One of the two boutique premises and the soil underneath had been conveyed to the plaintiff and Somawathie.

Point of contest no. 23 is answered as follows:

Ukkuwa's rights other than his rights to the two boutique premises had been transferred to the second defendant.

The Appeal is allowed. The Judgement of the Civil Appellate High Court is set aside and the judgment of the District Court is varied.

Chief Justice

Yasantha Kodagoda, 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 SOCISLIST REPUBLIC OF SRI LANKA

In the matter of an Appeal under and in terms of Article 128 of the Constitution and in terms of Section 5C of High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006, from the Judgment of the Provincial High Court of Civil Appeals of the Western Province holden in Negombo, dated 14th December,2018.

N. Dinesha Marita Amarasekera
No. 736, Negombo Road,
Maththumagala, Ragama.

Plaintiff

S.C.Appeal No.117/2020
SC/HCCA/LA Application No. 48/2019
HCCA Negombo Case No. WP/HCCA/NEG/39/2013(F)
D.C. Negombo Case No. 6901/L

Vs.

M.T. Theobald Perera
"Sriyawasa",
St. Sebastian Mawatha,
Kandana.

Defendant

And

M.T. Theobald Perera (Deceased)
1(a). Hetti Kankanamlage Dona Filamina Jasintha
1(b). Jenita Samanthi Perera

1(c). Anil Susantha Perera
1(d). Amitha Chandima Perera
1(e). Manel Gayani Perera
All of "Sriyawasa",
St. Sebastian Mawatha,
Kandana.
Substituted-Defendant-Appellants

Vs.

N. Dinesha Marita Amarasekera
No. 736, Negombo Road,
Maththumagala, Ragama.
Plaintiff-Respondent

AND NOW BETWEEN

N. Dinesha Marita Amarasekera
No. 736, Negombo Road,
Maththumagala, Ragama.
Plaintiff-Respondent-Appellant

Vs.

M.T. Theobald Perera (Deceased)
1(a). Hetti Kankanamlage Dona
Filamina Jasintha
1(b). Jenita Samanthi Perera
1(c). Anil Susantha Perera
1(d). Amitha Chandima Perera
1(e). Manel Gayani Perera
All of "Sriyawasa",
St. Sebastian Mawatha,
Kandana.
Substituted-Defendant-Appellant-Respondents

BEFORE	:	**L.T.B. DEHIDENIYA, J.** **MURDU N.B. FERNANDO, PC, J.** **ACHALA WENGAPPULI, J.**
COUNSEL	:	M. Adamaly with Aeinsley Silva for the Plaintiff-Respondent-Appellant instructed by Ms. Shanya Wickramarathna. S.A.D.S. Suraweera for Substituted 1(c)\and 1(d)Defendant-Appellant-Respondents
ARGUED ON	:	09th February, 2021
DECIDED ON	**:**	07th October, 2022

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ACHALA WENGAPPULI, J.

The Plaintiff-Respondent-Appellant (hereinafter referred to as "the Plaintiff") instituted two separate actions in the District Court and the Additional District Court of *Negombo,* under case Nos. 6901/L and 6906/L respectively, against the Defendant-Appellant-Respondent, later substituted by 1(a) to (e) Substituted-Defendant-Respondents (hereinafter referred to as "the Defendant") upon his death. With the institution of the said actions, the Plaintiff sought declaration from Court of her title to lots D3 and E, morefully described in the respective schedules to the plaints and as depicted in Plan No. 685 of 11.03.1967, prepared by licenced surveyor *M.D.J.V. Perera*. She also sought eviction of the said Defendant and his agents therefrom along with an award of damages quantified at Rs. 700,000.00. The Defendant, in his answer had, in addition to seeking dismissal of the Plaintiffs actions, also sought a

declaration of his title over the said two lots by claiming that he had acquired prescriptive title of the same.

Parties proceeded to trial in both cases after marking several admissions and settling for 20 trial issues between them in case No. 6906/L and 31 trial issues in case No. 6901/L respectively. Learned District Judge as well as the learned Additional District Judge, with pronouncement of their separate judgments on 07.03.2014 and 01.11.2013, have held with the Plaintiff and rejected the claim of prescription of the Defendant. Being aggrieved by the said judgments, the Defendant had preferred sperate appeals to the High Court of Civil Appeal in *Negombo* under appeal Nos. WP/HCCA/NEG/03/2014 (F) and WP/HCCA/NEG /39/2013(F). The High Court of Civil Appeal had accordingly pronounced two separate judgments in respect of each of the said appeals on 14.12.2018 and allowed them.

The Plaintiff had thereupon sought Leave to Appeal from this Court in SC Application No. SC/HCCA/LA/47/2019 against the judgment of the High Court of Civil Appeal in Appeal No. WP/HCCA/NEG/03/2014(F) while seeking Leave to Appeal in SC Application No. SC/HCCA/LA/48/2019 against the judgment of the High Court of Civil Appeal in WP/HCCA/NEG/39/2013(F). This Court, having considered both these applications of the Plaintiff on 25.06.2020, was inclined to grant leave on the following question of law, in relation to both these applications;

> *Whether the learned Judges of the High Court erred in law in failing to appreciate that the Defendant failed to show an overt act or adverse possession against the*

Plaintiff's predecessors namely, the Defendant's sisters, during the period 1969-1994?

With grating of Leave to Appeal, SC Application No. SC/ HCCA/LA/47/ 2019 was renumbered as SC Appeal No. 116 of 2020, whereas SC Application No. SC/HCCA/LA/48/2019 was renumbered as SC Appeal No. 117 of 2020. Since both these appeals will have to be decided on the identical question of law arising out of the impugned judgments, that had been pronounced against the backdrop of almost identical factual situation as revealed from the body of evidence presented before trial Courts in both cases, on the invitation of the parties at the hearing both appeals were heard together, and thus a common judgment is pronounced in relation to each of the said appeals but under the relevant captions.

Before I proceed to consider the said question of law, in the light of the submissions made by the respective learned Counsel, it is helpful if the respective cases that had presented before the trial Courts by the two parties are referred to at the outset *albeit* briefly, as indicated in their pleadings, issues and in their evidence.

One *Malwana Tudugalage David Barlin Perera,* who was married to *Padukkage Lawarina Perera* had fathered three children, namely *Malwana Tudugalage Theobold Perera, Malwana Tudugalage Juliet Perera and Malwana Tudugalage Lilian Perera*. *Barlin Perera*, became entitled to two allotments of land in total extent of 69.4 Perches, depicted as lots D and E, in Plan No. 436P dated 30.04.1954, that had been carved out of a larger land called *Midellagahawatta* alias *Delgahawatta,* upon a final partition decree in Case No. 1720/P of the District Court of *Gampaha* dated 30.04.1954. In the year 1967, *Barlin Perera*, through plan No. 685 of

11.03.1962 of licenced surveyor *M.D.J.V. Perera* (P1), had subdivided the said lot D of plan 436P into three subdivided parcels of land, depicted in the said subsequent plan as lots D1, D2 and D3, while retaining lot E of the partition plan No. 436P as it is. Thus, in Plan No. 685, the subdivided lots D1, D2, D3 and lot E (as depicted in plan No. 436P) are shown as sperate and distinct allotments of land. Lot D1 is in extent of 20 Perches. Lot D2 is in extent of 24.62 Perches, while lot D3 is in extent of 17.38 Perches. Lot E as per partition plan and plan No. 685, is in extent of 7.4 Perches. Lots D3 and E too shared a common boundary.

Thereupon, *Barlin* Perera and his wife, by execution of three Deeds of Gift, have transferred their title to the said three subdivided lots along with lot E to their three children on 05.06.1967. The Defendant, being the eldest of the three children of *Barlin Perera*, and the only male child, had received title to lot D2, through the Deed of Gift No. 2572 (V2a). Deed of Gift No. 2571 (V3) was executed in favour of *Malwana Tudugalage Juliet Perera,* and she was given title to lot D1 of plan No. 685. The youngest girl of the family, *Malwana Tudugalage Lilian Therese Perera* received lot D3 and E of plan No. 436P, through Deed of Gift No. 2573 (V1).

In the same year, *Lilian Perera* had gifted her title to lots D3 and E to sister *Juliet Perera* by Deed of Gift No. 6983 of 20.12.1980. Thus, *Juliet Perera* became entitled to lot D1, D3 and E. After a period of eight years since the execution of the said deed of gift, *Juliet Perera* had transferred her title over lot D1, D3 and E to *Dinapala de Silva* through Deed of Transfer No. 1188 on 18.01.1988. Said *Dinapala de Silva* had died intestate and his heirs have thereafter transferred title to lots D1, D3 and E back to *Juliet Perera* on 10.12.1993 through Deed of Transfer No. 181, who then made another transfer of the title to lots D1, D3 and E, in

favour of *Don Calistus Gamini Ponweera* by Deed of Transfer No. 208, on 10.04.1994. The Plaintiff had acquired ownership to lots D3 and E, through the Deed of Transfer No. 333 (P3), executed by said *Gamini Ponweera,* who retained title to lot D1 to himself.

In instituting action in case No. 6901 on 10.07.2007, the Plaintiff sought a declaration of Court of her title to lot D3 and in case No. 6906, instituted on 19.07.2007, she sought a declaration of her title to lot E. The Plaintiff also sought ejectment of the Defendant from both these lots. The Plaintiff, by suggesting several issues (Nos. 2, 3 and 10 in case No. 6901/L, Nos. 2B, 3B and 8 in case No. 6906/L), had sought determinations from Court as to the possession of the disputed parcels of land. These trial issues were suggested to the effect, whether she had possessed the disputed land after *Gamini Ponweera* transferred its title by Deed No. 333, whether the Defendant was placed in possession upon execution of the decree of Case No. 1343/RE of District Court of Negombo and whether the Defendant is in illegal possession of the land since 14.06.1994. The Defendant too had suggested trial issues on the question of possession in issue Nos. 11 and 12 in SC Appeal No. 116/20 and 13 and 14 in SC Appeal 117/20.

The Defendant, in his answer as well as in evidence, had admitted the execution of all the title deeds that had been relied upon by the Plaintiff in support of her description of devolution of title, as averred in the plaints. Since these two actions are considered *Rei Vindicatio* actions by the trial Courts, with the said admission of Plaintiff's title to lots D3 and E by the Defendant, both Courts have held that she had established her title over same. Then, it was for the Defendant to establish that he possessed the disputed lots D3 and E on a superior title to that of the Plaintiff. The Defendant's position was that

he had acquired title to these two lots through prescription and suggested issues on that premise. The issues of the Defendant referred to whether the Plaintiff or her predecessors in title never possessed the lands as described in the 3rd, 4th and 5th schedule to his answer (lots D2, D3 and E respectively) and whether the Defendant had adversely and exclusively possessed these parcels of lands against the rights of "others" ("අන් අයගේ") independently for an uninterrupted period of over forty years commencing from the year 1969.

In support of the said claim on prescription, the Defendant had asserted that he had possessed lots D1, D2, D3 and E as one contiguous land ever since his father was conferred with title to same upon a partition decree in 1954. It is his position that despite the subdivision of lot D by Plan No. 685 and execution of Deeds of Gift in 1967, none of his sisters ever came to possess the sub divided lots that are allocated to them. He further asserted it was his father who built a house on that land, and then put up a parapet wall right around the entire property which consisted of four lots and installed a gate. The Defendant however claims that the house standing on the said property was rented out by his father later by him. The Defendant also claimed that he only had appropriated its rent throughout.

In 1977, when the then tenant *Simion Perera* had fallen into arrears of rent, it was the Defendant who had instituted Case No. 1343/RE (P10) on 27.06.1987, and thereby seeking to evict the defaulting tenant. In the schedule to the plaint, the Defendant, for reasons best known to him, had described the boundaries of land on which the rented-out premises stood, by copying the description of boundaries as given in the partition decree. The Defendant made no reference in that

description to the subsequent plan No. 685, which subdivided lot D of partition plan No. 436P into three lots D1, D2 and D3 in the year 1967.

The trial against *Simion Perera* had proceeded *ex parte* and the Court held in the Defendant's favour. The Defendant was thereafter placed in possession by the Fiscal by executing the writ of possession on 02.02.1987. *Simion Perera* at that stage had sought to purge his default and was successful in his endeavour. Therefore, he was restored back in possession by an order of Court on 01.04.1991. The Defendant preferred an appeal against the said order to the Court of Appeal in appeal No. CA 139/89(F). The appellate Court set aside the said order in favour of *Simion Perera.* With the death of *Simion Perera,* his son *Lesley Perera* was substituted to prosecute the Special Leave to Appeal application No.170/98, by which the said judgment of the Court of Appeal was impugned.

On 08.12.1998, this Court had refused granting leave to the said application. Thereupon, the Defendant was placed back in possession on 14.06.1999 by the fiscal, after evicting said *Lesly Perera* from the land, as described in the schedule to the plaint in Case No. 1343/RE. In that process the Plaintiff and *Gamini Ponweera,* who claims to have been in possession of their respective lots up to that point of time, were also evicted. They moved the trial Court under section 328 of the Civil Procedure Code. On the day of inquiry into the application of *Gamini Ponweera,* the Defendant had conceded to the former's possession over lot E and recorded a settlement. The application of the Plaintiff was dismissed by the Court due to her failure to pursue same diligently. In 2007, the Plaintiff instituted the instant actions, seeking eviction of the Defendant from lots D3 and E.

At the conclusion of the two trials instituted by the Plaintiff, the District Court as well as the Additional District Court, in their respective judgments, rejected the claim of the Defendant that he had acquired prescriptive title to lot Nos. D3 and E upon being in possession for a long period of time. However, in allowing appeals of the Defendant, the High Court of Civil Appeal held that the Defendant had possessed the land from the year 1954 and had specifically commenced prescription at least in the year 1988 which continued for well over a period of ten years against a complete outsider *Dinapala de Silva*, who had acquired title to the disputed lots from the sister of the Defendant, *Juliet Perera,* in 1988 and therefore is entitled to a declaration of title in his favour.

In seeking to set aside the impugned judgments of the High Court of Civil Appeal and in addressing the question of law to which this Court granted leave, learned Counsel for the Plaintiff presented his submissions primarily on the following grounds;

a. the Defendant's possession of lots D3 and E were clearly with the consent of his sister *Juliet Perera* and therefore the character of the Defendant's possession not being adverse to the rights of his sibling and, as such, his mere possession of same would not give rights under prescription,

b. the determination of the High Court of Civil Appeal that the Defendant commenced his adverse possession in 1988, in itself is a confirmation of the Plaintiff's contention that the Defendant's possession of lots D3 and E was with the permission of his sister *Juliet Perera,* and,

c. the Defendant failed to establish that there was adverse possession for an uninterrupted period of ten years commencing from the year 1988, as erroneously held by the appellate Court.

In an effort to fortify the said contentions, learned Counsel for the Plaintiff had submitted in relation to his first ground that there was no adverse possession established by the Defendant against his sister because the disputed parcels of land remained a co-owned property since their father's death. In support of that contention, learned Counsel had highlighted certain items of evidence which indicate that the Defendant, being the eldest male in the family, had been in permissive possession of same on behalf of his younger sisters during their father's lifetime. It was also contended that since their father's death in 1969, the same state of affairs had continued without a change of its character until 1988, the year in which *Juliet Perera* made a transfer of her title to *Dinapala de Silva.* Hence, in the absence of an '*overt act*' on the part of the Defendant, any secret intention entertained by him to possess lots D3 and E against the interest of his sibling, will not accrue to his benefit in a claim under section 3 of the Prescription Ordinance. Learned Counsel also relied on the principles referred to in the judgment of *Basnayake* CJ in ***Gunawardene v Samarakoon et al*** (1958) 60 NLR 481, in support of the said contention.

Learned Counsel for the Defendant, in their respective submissions have sought to counter the said contention on the basis that with the subdivision made to lot D in 1967, each of the four subdivided lots had acquired a distinct and an identity of their own, quite independent of the larger land of lot D and also of each other subdivided individual lots and due to this reason, there was no co-

ownership. He further contended that in such circumstances there was no requirement for him to establish an overt act.

Perusal of judgments of both the District Court and the Additional District Court reveal that the original Courts had rejected the Defendant's claim of prescriptive title to lots D3 and E by adverse possession for a period of over ten years. The appeals that had been preferred by the Defendant against the said two judgments were allowed by the High Court of Civil Appeal by setting aside the said judgments of the trial Courts. The appellate Court, in doing so, was of the view that the evidence indicated that the Defendant did not give any produce from the land to his sisters and had taken the rent entirely for his benefit, and therefore his claim of prescription had been established to the required degree of proof, by satisfying the requirements, as stipulated by section 3 of the Prescription Ordinance. However, it also appears that the High Court of Civil Appeal was not convinced fully with the Defendant's position that he had commenced his adverse possession in 1957. Nonetheless, the appellate Court decided to allow the Defendant's appeals on the basis that he had established a period of ten years of undisturbed and uninterrupted possession, which the said Court found to have commenced in 1988, after his sister *Juliet Perera* transferred her title over lots D3 and E to *Dinapala de Silva,* a total outsider to their family. The appellate Court had stated in the impugned judgment *"… that the Defendant had possessed the land in dispute from the year 1954 and had specifically commenced prescription at least against Dinapala de Silva in the year 1988, who is a complete outsider, when the Defendant's sister transferred her right to Dinapala de Silva".* This statement is common to both the judgments

pronounced by the High Court of Civil Appeal, in allowing the two appeals that had been preferred by the Defendant.

The Defendant's claim of acquisition of prescriptive title to lots D3 and E is therefore founded essentially upon two pillars. The first is the Defendant's assertion that after the execution of the deeds of gift, none of his sisters ever came to possess their respective lots and he was in exclusive possession thereof, which had commenced even before his father's decision to subdivide same and gift to his three children. The other is, the Defendant's claim of possession of the three lots as one contiguous land through his tenant for over a long period of time, as indicative from the fact of institution of legal proceedings, by which he successfully ejected the defaulting tenant.

There was no evidence to indicate that after 1969, none of his sisters ever had possession over the lots D1, D3 and E. Thus, the Defendant had either occupied or possessed lots D3 and E after his father's death in 1969. But whether the Defendant had possessed same in the context of the principles of law that are applicable to acquisition of prescriptive title, as laid down in section 3 of the Prescription Ordinance, is an important consideration demanding attention of this Court.

In view of the factual basis on which the High Court of Civil Appeal has held in Defendant's favour, I find it convenient to consider his claim of being in adverse possession of lots D3 and E for over a period of four decades, by dividing that period of over forty years into two parts. The period commencing from 1954, the year in which his father was conferred with title to 1988, the year in which *Juliet Perera* had transferred her title to totally an outsider, shall be considered in the

first part. The balance part of the said four-decade long period, which commenced from the year 1988 and ended with 1994, the year in which the Plaintiff was evicted upon execution of decree in case No. 1343/RE, shall be considered thereafter.

Since the Defendant had admitted the devolution of title of the Plaintiff in the instant actions by which she sought declarations of her title to lots D3 and E and laid out a prescriptive title to same, it was his burden to establish that he had acquired prescriptive title by satisfying all the requirements as envisaged by the provisions of section 3 of the Prescription Ordinance.

In support of discharging his burden in relation to the claim of prescription, it was incumbent upon the Defendant to establish a starting point, on which he had commenced his adverse and uninterrupted possession of lots D3 and E for a period of ten years. This requirement was insisted upon by *Gratiaen* J in ***Chelliah v Wijenathan et al.*** (1951) 54 NLR 337 with the statement (at p. 342) that "*where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights*". This principle of law was reiterated by *G.P.S. De Silva* CJ in ***Sirajudeen and two others v Abbas*** (1994) 2 Sri L.R. 365.

It appears from the transcript of the proceedings before the trial Courts that the Defendant was clearly inconsistent with his stance taken in relation to the starting point of his adverse possession, when compared with the one taken in his answers and the one in giving evidence. In setting up his claim of prescriptive title in his answers, the

Defendant had averred that he possessed lots D1, D3 and E since 1969 for an uninterrupted period of over forty years, adverse to the title of his sisters. He had raised issues in both trials to the effect whether he was in adverse and uninterrupted possession for over forty years since 1969 (issue No. 14 in case No. 6901/L and issue No. 12 in case No. 6906/L respectively) in line with his assertions in the answers.

During his examination-in-chief the Defendant had asserted that, after his father subdivided the land in 1967 and gifted same to each of his three children, none of his sisters ever came to possess their respective lots nor did they separate their respective lots with fences after the said execution of deeds. He further asserts that irrespective of the said subdivision and execution of deeds of gift in favour of his sisters, he had exclusively possessed the entire land as one contiguous land from the year 1967 onwards and thereby advanced the point of commencement by two years. However, during cross-examination the Defendant had once again advanced the starting point from 1967 to the year 1954 aligning with the time of his father's, conferment of title upon the partition decree, contradicting the position indicated in his pleadings and issues.

The claim that he commenced adverse possession from the year 1954 was challenged by the Plaintiff. It was suggested to him during cross-examination by the Plaintiff that in spite of him being a minor of 16 years of age at that point of time and still dependent on his father for sustenance, the said claim that he alone possessed the land in its entirety since the acquisition of title to the lots D and E through the said partition decree in 1954 is an improbable one. He then added that his father, since acquisition of its title in 1954, never possessed the land until his death in 1969. Thus, it was the position of the Defendant that

he had exclusive possession of the entirety of land, inclusive of lots D1, D3 and E, for well over four decades and is therefore entitled to a decree in his favour.

The Defendant's assertion that ever since his father had acquired title to the disputed land in 1954 on a partition decree, he had possessed same adverse to the interests of his own father, whilst being in his father's care, is obviously a fanciful claim and had been rejected by the trial Courts on account of its inherent improbability. In addition to the said reason, there is yet another compelling reason to reject that claim. That is because the Defendant had conceded of accepting his father's decision to subdivide the land and gift same to the latter's three children, with his head "*bowed down*" in deference, despite his continued possession of the property from 1954 against rights of his father. Having admitted the fact that he was aware as to the nature of possession he ought to have in proof of his prescriptive title during cross examination by the Plaintiff, the Defendant nonetheless admitted occupying the land under his father's ownership throughout this period and thereby wiping out the character of adverse possession from his occupation of the property.

Thus, it was clear from the evidence that the Defendant himself had nullified his own claim of adverse possession that commenced from 1954, by admitting that he had chosen to surrender his "exclusive possession over the property" to the will of his father without a whimper of protest when their father decided to gift the subdivided lots of the said land in 1967 to his three children and thus conceding to the rights of his father over the land in dispute.

The trial Courts have rejected the Defendant's claim of prescriptive title altogether but the High Court of Civil Appeal, despite the trial issue framed by him on the basis that he commenced adverse possession in 1969 and his oral assertion of being in possession of the land since 1954, had taken the year 1988, as the starting point of his adverse possession. In my view, the Defendant's assertion relating to the starting point of his adverse possession of lots D3 and E, is not a credible and reliable claim, owing to its aforesaid inherent limitations, and was rightly rejected by the trial Courts. The remaining aspect of the Defendant's contention that whether the fact of his long possession of the land for over four decades, in itself justifies drawing the presumption of ouster against the Plaintiff and her predecessors in title shall be considered in the next segment of this judgment. But first, I shall proceed to consider the nature of possession the Defendant claims to have had over lots D3 and E during the period commencing from the year 1954 and ending with the year 1999.

The Plaintiff, in seeking to counter the claim of the Defendant that none of his sisters have ever possessed the sub divided lots since execution of deeds of gift in 1967 and he only controlled and derived income from same, had advanced a contention on the basis that the possession he claims to have had over lots D3 and E is of permissive one in nature. By advancing this contention, the Plaintiff may have sought to explain the obvious inaction of her predecessor in title, namely *Juliet Perera,* in not asserting her rights over lots D3 and E, with the execution of the deed of gift or at least from the point of her father's death in 1969. Thus, it appears from the said contention that the fact only the Defendant was in possession of the disputed property during the period 1954 to 1988, is admitted.

It is relevant to note that the said contention of permissive possession had been specifically advanced by the Plaintiff before the High Court of Civil Appeal as well. The impugned judgments of that Court indicate that it made reference to the said submissions of the Plaintiff but had proceeded to reject same on the basis that "the *Defendant had specifically stated in evidence that he did not give the produce from the land to his sisters*".

In the circumstances, the contention of the Plaintiff, that the Defendant, being the eldest brother of *Juliet Perera,* had only permissive possession over lots D3 and E, ought to be considered and determined in the backdrop of the evidence presented before the trial Courts, upon the principles that are enunciated in judicial precedents, which dealt with similar factual situations.

In this context, it must be noted that the said contention of permissive possession was presented before the High Court of Civil Appeal as well as this Court is based on the issues suggested by the Plaintiff as well as the Defendant before the trial Courts. The Defendant, in particular had suggested two trial issues in each case that are in relation to the very nature of possession the Plaintiff had over the lots D3 and E, on which he sought determinations by Court.

These issues (namely issue Nos. 11 and 12 in SC Appeal No. 116/20 and 13 and 14 in SC Appeal 117/20) dealt with the disputed factual positions of the parties, namely, whether the Plaintiff or her predecessors in title have never possessed in whatever form ("කිසිදු ආකාරයක බුක්තියක්") to the lands as described in the 3rd, 4th and 5th schedule to his answer (lots D2, D3 and E respectively) and whether the Defendant had adversely and exclusively possessed these parcels of

lands against the rights of "others" ("අන් අයගේ") independently and for an uninterrupted period of over forty years, commencing from the year 1969.

It is evident that the Defendant, in suggesting the said trial issues, had raised them on the basis that neither the Plaintiff nor her predecessors in title ever had any form of possession over the disputed lots D3 and E. He also sought a determination of Court on his claim of acquisition of title to these two lots by adverse possession for a long period of time which over four decades by suggesting the other issues. Thereby the Defendant had invited the District Court as well as the Additional District Court to determine one of the primary facts in dispute, namely whether the Plaintiff and her predecessors in title, never possessed the disputed parcels of land, in whatever form of possession known to law. Thus, the contention of the Plaintiff, based on permissive possession of a sibling, must be considered in the light of the reasoning adopted by the Courts below and the evidence presented before the trial Courts along with inferences that could reasonably be drawn from such evidence.

Before I proceed to consider the evidence on this aspect, it is helpful to take note of an approach, which the Superior Courts have consistently applied, when dealing with situations such as the one that had been presented before this Court in the instant appeals.

When one relies on adverse possession in setting up a claim of prescriptive title against another under provisions of section 3 of Prescription Ordinance, it appears that the Superior Courts have applied a slightly different criterion in assessing validity of such a claim, depending on the fact whether there is a familial relationship in

existence between the contesting parties, *vis a vis* the criterion they had adopted in the assessment of such a claim that had been laid against a total stranger.

The judgment of ***Maduwanwela v Ekneligoda*** (1898) 3 NLR 213, relates to an instance where a sister of one *Tikiri Banda,* who was allowed to live in the latter's house with charitable intentions of the former and to take fruit and produce as she pleased from the land when she had no means of support. She had subsequently executed a lease on that property. Upon her death, her children claimed that their mother had acquired prescriptive title to the property and relied on the act of execution of a lease, in support of that claim. *Bonser* CJ, agreed with the finding of the trial Court that the sister of *Tikiri Banda* is merely an occupier and "*she had no possession of this property, but had merely occupation under licence of her brother."* Similarly, the judgment of ***Abdul Majeed v Ummu Zaneera et al***. (1959) 61 NLR 361 is in relation to an instance where a co-owner had set up a prescriptive claim against the other members of his family. In the course of the said judgment *De Silva* J, stated (at p.371) that "*Our social customs and family ties have some bearing on the possession of immovable property owned in common and should not be lost sight of. Many of our people consider it unworthy to alienate ancestral lands to strangers. Those who are in more affluent circumstances permit their less fortunate relatives to take the income of ancestral property owned in common. But that does not mean that they intend to part with their rights in those lands permanently. Very often if the income derived from such a property is not high the co-owner or co-owners who reside on it are permitted to enjoy the whole of it by the other co-owners who live far away. But such a co-owner should not be penalised for his generous disposition by converting the permissive possession of the recipient of his benevolence to adverse possession".*

His Lordship, in dealing with the 13th defendant's position that his mother *Muttu Natchia* had '*put him in complete possession*' of the property and by being in sole and exclusive possession of it he had acquired a prescriptive title to the entire property, had rejected that claim by stating (at p.370) *"It would not be strange if the 13th defendant collected the rent and looked after the building and before him his father did so. Of the three children of Muttu Natchia, the 13th defendant's father was the only male. That being so it is quite natural, these parties being Muslims, that the 13th defendant's father, the only male in the family, was in charge of the premises and collected the rent. On the death of the father the son may well have taken over those duties without any objection from the other co-owners."* An appeal from the judgment of ***Abdul Majeed v Ummu Zaneera et al*** (supra) had been preferred to Privy Council by the appellants. In determining the said appeal the Privy Council, in its judgment of ***Hussaima v Ummu Zaneera*** (1961) 65 NLR 125, had affirmed the rejection of the said claim of prescription, and noted the point made by *De Silva* J, that the 13th defendant was the only son of the original grantor's wife.

The judgment of ***De Silva v Commissioner General of Inland Revenue*** (1973) 80 NLR 292 dealt with a situation where a son had claimed acquisition of prescriptive title against his mother over a land in extent of over 200 acres called *Dewatawatta* on the basis that he had possession of same in its entirety from 1951 to 1965, appropriated its income, paid acreage taxes, paid wealth and land taxes on that land. In delivering the judgment, *Sharvananda J* (as he was then) had laid down the principles of law that are applicable in relation to consideration of such a claim of prescription. It is necessary to quote extensively from his Lordship's pronouncement of the applicable principles of law, in

order to retain its context and clarity. His Lordship stated thus (at p. 295);

> *"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. It will not enable the possession to acquire title by adverse possession. Where possession commenced with permission, it will be presumed to so continue until and unless something adverse occurred about it. The onus is on the licensee to show when and how the possession became adverse. Continued appropriation of the income and payment of taxes will not be sufficient to convert permissive possession into adverse possession, unless such conduct unequivocally manifests denial of the perimeter's title. In order to discharge such onus, there must be clear and affirmative evidence of the change in the character of possession. The evidence must point to the time of commencement of adverse possession. Where the parties were not at arms-length, strong evidence of a positive character is necessary to establish the change of character."

In a more recent pronouncement of this Court in ***Jayasinghe Pathman v Somapala*** (SC Appeal No. 6/14 - decided on 19.11.2021), *Dehideniya* J too had adopted a similar approach in holding that "*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 averse to him/her.*"

Returning to the said contention of the Plaintiff, that the Defendant only had permissive possession of lots D3 and E, it must be observed that the Plaintiff did not call any witness who could speak that the Defendant was merely permitted to occupy the land by his sister. Except for the reference to that the action to evict *Simion Perera* was instituted by the Defendant was for and on behalf of his sister as

well, there was no other evidence to support such an inference. But it is the Defendant who had set up a prescriptive claim and he should satisfy Court that he had possessed the property in the manner as set out in section 3 of the Prescription Ordinance and establish his claim of possession, as per issue Nos. 11, 12, 13 and 14 respectively. The Defendant, however asserted that he only possessed the land in addition to advancing the position that none of his sisters ever had any possession. This claim of inaction by his sisters *Lilian* and *Juliet* to assume his exclusive possession over lots D3 and E could be due to various reasons, including the one asserted by the Defendant. It could be that the Defendant may have had possessed the property adverse to the rights of his sister.

But it is also equally possible that *Juliet Perera* was under the impression that her brother's continued possession of the property after the demise of their father is merely a continuation of his act of managing the property under her permissive possession as her father did, when he was alive. There is also the probability that she may have acquiesced the conduct of the Defendant in possessing the property and collecting the rent or that she may have even abandoned her rights over that property in favour of the Defendant. Therefore, the evidence must justify exclusion of the other probable reasons which explain the said conduct attributed particularly to *Juliet Perera,* except the one that the Defendant had relied on, in support of his claim of adverse possession.

In this context, if the said contention of the Plaintiff is to be accepted as the more probable reason to explain *Juliet Perera's* conduct of inaction, there must be evidence to suggest that Juliet *Perera* had abandoned her rights over the disputed property or that she had acquiesced the continued possession and enjoyment of her property by

the Defendant. When one considers the relative probabilities of *Juliet Perera* abandoning her rights simply due to the reason of her conduct of not taking any positive action to possess the two lots upon their father's death, it must be noted that the evidence however points in favour of a contrary situation. After *Lilian Perera* was gifted with title to lots D3 and E in 1967 by her father *Barlin Perera*, she had gifted same to her sister *Juliet Perera* in 1980 by Deed of Gift 6983. *Juliet Perera*, after retaining title over lots D1, D3 and E for over two decades, transferred same to *Dinapala de Silva* in 1988, for valuable consideration. *Dinapala de Silva* had no familial relationship to *Juliet Perera.* When heirs of *Dinapala de Silva,* have re-transferred the title over these lots after a period of five years back to her, *Juliet Perera* had thereupon executed a transfer of her title to all three lots, D1, D3 and E, in favour of another stranger *Gamini Ponweera* in 1994, once again for valuable consideration.

This series of transactions indicate that *Juliet Perera* and *Lilian Perera* were alive to their rights over the designated lots that were gifted to them and had regularly exercised one of the attributes of ownership, i.e., their right to alienate property. These positive actions of the two sisters indicate that they had not abandoned their rights over the lots D1, D3 and E, at any point of time during 1967 to 1988.

The other probable reason for *Juliet Perera's* said conduct, whether she had acquiesced to the Defendant's possession and enjoyment of the income, is necessarily interwoven with the Plaintiff's contention of permissive possession and her knowledge that the permissive possession of the Defendant over lots D3 and E had transformed into adverse possession, which is in denial of her title to the property. Hence, the question whether it is probable that she had acquiesced the Defendant's adverse possession should be considered along with the

question whether *Juliet Perera* granted permissive possession to the Defendant.

In view of the contention of permissive possession, that had been advanced by the learned Counsel for the Plaintiff, it is necessary to refer to the nature of evidence upon which the said contention was founded.

The Plaintiff did not call any of the Defendant's sisters to give evidence on her behalf, particularly in support of permissive possession. They are undoubtedly the best witnesses to confirm or deny granting such permission. The witness for the Plaintiff, who testified on her behalf, could only speak to the events which followed the acquisition of title to these two lots by his wife. Thus, the only evidence relating to the exact nature of possession and the circumstances under which the land in its entirety was possessed during the period commencing from 1967 to 1988, the year *Juliet Perera* transferred her rights to *Dinapala de Silva*, had been tendered by the Defendant.

Thus, the assessment of the relative probabilities of the Plaintiff's contention of allowing the Defendant to be in possession of lots D3 and E by his sister to manage same on her behalf or she had acquiesced his possession with the knowledge that he holds the property against her rights, will have to be assessed from the evidence of the latter for only he had knowledge of relevant facts and circumstances and therefore could give direct evidence on those aspects.

Seeking to counter the Defendant's assertion that he only instituted action to evict the overholding tenant, in support of his claim that he had possessed the lots D3 and E adverse to the interests of *Juliet Perera,* the witness for the Plaintiff stated in his evidence that although the action for eviction of *Simion Perera* was instituted by the Defendant

but it was on behalf of his sister as well. He then explained the reason as to why such a course of action was followed. The witness for the Plaintiff said in evidence that " **අපි දන්න පරිදි තියොබෝල්ඩ් පෙරේරා නඩුව දාලා තියෙන්නේ. එයා එක්ක ඉඳලා තියෙනවා නංගිලා දෙන්නෙක්. එකම සහෝදරයා නිසා මුළු ඉඩමටම මෙයා තමා නඩු දාලා තියෙන්නෙ**". However, it must be noted that the said reference to an institution of a joint action by the witness for the Plaintiff was apparently based on what he may have learnt from his predecessors in title, for he had no direct knowledge of the same and therefore could be termed as hearsay evidence.

The significance of this item of evidence is that it is consistent with the contention that had been advanced by the Plaintiff seeking to justify an inference of permissive possession and as such, the action for eviction of tenant could well have been instituted by the Defendant in 1985 with the blessings of *Juliet Perera,* who acted on the belief that her eldest brother in her permissive possession of lots D3 and E, and is continuing in that capacity even after sixteen years since their father's death, taken action to evict an overholding tenant. Not only the Defendant had failed to specifically negate this aspect of the Plaintiff's case in his evidence, but had tacitly admitted that position, in admitting that he merely continued to manage the property in the same manner even after his father's death.

There is no dispute that *Barlin Perera*, after being quieted in possession following the execution of partition decree in 1954, had possessed the entirety of the said land *ut dominus*. He constructed a house on that land and also constructed a parapet wall around the property and had thereafter rented it out. When the deeds of gift were executed, the said tenant of *Barlin Perera* was already in possession of one of the buildings, despite the fact that after the subdivision in 1967,

the house the tenant occupied now stood on lots D3 and E while the 'hut' shifted to lot D2. During the two-year period between 1967 and 1969, *Barlin Perera* had continued to be in possession of the entire land through his tenant and had continued to collect rent from the tenant through his son, the Defendant.

There is no evidence that the Defendant had assumed the status of landlord although he collected rent on his father's behalf, during latter's lifetime. There was no assertion by the Defendant that, before the execution of deeds of gift, he was considered to be the landlord of the tenant who occupied the house standing on lots D3 and E, either by his father or by the tenant, despite him collecting rent. In effect their father was managing the property, through the Defendant, for and on behalf of all three of his children, even though he had no title over the property remaining in him by then, except for the life interest. None of his children had objected to their father's said conduct nor did any of them demanded a share from the rent. They have silently accepted their father's dominance over the affairs in relation to the property and its income. In other words, having gifted each of his three children with the title of sub divided lots, their father had thereupon continued to be in possession of the land in its entirety along with the buildings standing thereon, and managed the same for and on behalf of his three children. This particular state of affairs indicate that the three children had tacitly permitted their father to possess their respective lots for and on their behalf. Thus, it is evident that the nature of the 'possession' the Defendant's father had over lots D1, D2 D3 and E, during the period of 1967 and 1969 is clearly a one of permissive possession.

A relevant question that arises in these circumstances is whether the said status of permissive possession had changed with the death of *Barlin Perera* in 1969?

In fact, the Defendant himself concedes that it did not. During his cross examination in case No. 6901/L he admitted that after the death of his father, he had merely continued to manage the property in the same manner as he did during his father's lifetime. In order to assess the context in which the said admission was made, it is helpful if that segment of evidence is reproduced below in its entirety.

"ප්‍ර: තමුන් උසාවියට කියා සිටියා නඩුවකින් පසුව 1954 තාත්තාගෙන් තමුන්ට බුක්තිය ලැබුනා කියලා. මොකක්ද ඒ නඩුව?

උ: බෙදුම් නඩුවක්.

ප්‍ර: ඒ බෙදුම් නඩුවෙන් මේ ඉඩම සම්පූර්ණ ඉඩමද තාත්තාට ලැබුණේ?

උ: එහෙමයි.

ප්‍ර: තාත්තා තමුන්ට බුක්තිය භාරදුන්නා කියන එකෙන් අදහස් කරන්නේ මොකක්ද?

උ: මට ඒක බලාගන්න කියලා තමා දුන්නේ.

ප්‍ර: තමාගේ අනිත් සහෝදර සහෝදරියෝ දන්නවාද?

උ: මමයි පිරිමියා. තාත්තා මටයි දුන්නේ බලා ගන්න.

ප්‍ර: තමුන්ගෙන් ප්‍රශ්න කළා 1969 ද මොකද කලේ?

උ: 1969 දී තාත්තා මළා.

ප්‍ර: ඒ ඉඩම ගැන මොකද කළේ තමුන්?

උ: ඒ ඉඩම කුලියට දීපුවා ඒ විදියටම කරගෙන ගියා. එක ඉඩමක් හැටියට තිබුණේ. වටේට තාප්පයක් බැඳලා. ගේට්ටුවක් දාලා තිබුනා."

As indicative from the segment of evidence that had been reproduced above, it is reasonable to assume that after the execution of deeds in favour of the two younger sisters, the permissive possession of

the Defendant had over the lots D1, D3 and E, was continued without a change, keeping with the said family arrangement, even after the death of their father. Thus, with the death of their father, it is more probable that the Defendant had substituted himself to the shoes of his father who had permissive possession over the lots D1, D3 and E, for and on behalf of the two younger females.

The segment of evidence reproduced above also indicates that the Defendant had conceded to the position that, being the eldest and the only male child in the family, he was asked by his father only to 'look after' the property. The Defendant asserted that his father gave the property to "**බලාගන්න**". None of his sisters were married at that time. Hence, it is evident that his father's intention would have been to entrust the property in its entirety to the Defendant, with the expectation that his son would protect the interests of his sisters over same, whilst looking after his own lot D2. The very word used by his father in asking the Defendant to look after ("**බලාගන්න**") the property is significant in this context. It indicates that the Defendant was merely entrusted with the task of looking after the lots D1, D3 and E, for and on behalf of his two sisters. Instead of using the words "**අරගන්න**" or "**තියාගන්න**", which indicate a clearer intention of renouncing whatever the interest he might have had over the property at that point of time, *Barlin Perera* had used the word "**බලාගන්න**", in entrusting the Defendant with the responsibility of looking after the property. The said intention of *Barlin Perera* attributed to his act of asking the Defendant to "**බලාගන්න**" is clearly manifests from his act of gifting each of the subdivided lots to all of his three children, instead of gifting same as one contiguous land to one of them or particularly to the Defendant, who was already managing it under his permission.

This consideration is therefore more in line with intention of *Barlin Perera* of making the subdivision of the land and gifting his children with same. It is also relevant to note that having owned several other properties to make an equitable distribution of wealth among all his three children, there is no other probable reason other than the one referred to above in order to explain the conduct of *Barlin Perera,* in relation to this particular property. Similarly, there is no justifiable reason that can be attributed to the act of *Barlin Perera* as to why he had undertaken an extra effort to subdivide the land through a surveyor at a significant cost and thereafter gift those individual subdivided lots to all of his children, when he had the more convenient option of gifting the land in its entirety to one of them, as it existed at that particular point of time.

Obviously, the two sisters of the Defendant would have been made aware of this arrangement their father had put in place to manage their share of property through the Defendant even before its subdivision was made. Hence, mere entrustment of the property to the Defendant does not indicate that he was given exclusive rights over that property to the detriment of his other sibling's rights. The Defendant's contention of the failure of his two sisters to possess their respective lots no sooner they were gifted with same, is based on the proposition that immediately after the deeds of gift were executed, his two sisters should have commenced possessing same, at least by fencing off the boundaries they shared with lot D2, owned by the Defendant.

When one considers certain cultural traditions and practices of our society, it is not unusual for the two young females, who still are under their father's guardianship, for showing some hesitation and reluctance in asserting their newly conferred rights over the respective

lots, no sooner they were gifted with title to same. It was noted earlier on in this judgment that our Courts have considered claims of prescription by one member of a family against the others with some circumspection and accepted such claims only after considering their validity against the backdrop of the nature of their relationship, whilst being alive to the prevailing social and cultural practices in the society. At times, the Courts have preferred not to draw the presumption of ouster, after evaluating the nature of the relationship of such a claimant, taking cognisance of such social norms and realities.

In applying that assessment criterion to the instant appeal, it is observed that not only the two daughters of *Barlin Perera,* the Defendant also, in accordance with the prevailing cultural norms and family values, had accepted his father's possession of the land with his head bowed down, despite harbouring an undisclosed intention in his mind to possess the property in its entirety all by himself, even before the deeds of gift were executed. Thus, when considered in the light of such social and cultural norms, it is highly probable that *Barlin Perera* had permissive possession of all four subdivided lots after 1967 on behalf of his three children until his death in 1969. The evidence of the Defendant also indicate that said permissive possession had continued even after *Barlin Perera's* death in 1969.

There is no evidence that the relationship between the three siblings was strained or of any hostility that had erupted between them at any point of time, forcing them to part their ways upon strained family ties. Thus, in the mind of *Juliet Perera,* the Defendant had merely succeeded to the responsibility of managing the land on her behalf, in place of her late father. Under these circumstances, the culturally expected a role of the eldest male child of a family in relation to his

younger unmarried sister, especially after their father's death, would undoubtedly have contributed to the brotherly trust that had been placed in the Defendant by his sister. In these circumstances, it is reasonable to infer that *Juliet Perera* would have assumed that the Defendant, being her eldest brother, would not act in any manner whatsoever against her interests and continue to possess and manage lots D3 and E on her behalf as he did when their father was alive.

It is observed that the Defendant, although claimed that he had possession ("බුක්තිය") of lots D3 and E since 1954 but opted to keep his intention to possess same, against the ownership of *Juliet Perera,* to himself without disclosing it. He did not at least once indicate his intention to hold possession of the same against the interests of his sister. Eventually, he was compelled to make his secret intention declared in public, when the Plaintiff instituted the instant actions, seeking declarations of her title to those two lots. The continuation of permissive possession over the said two lots after the death of their father by the Defendant could easily be inferred in the absence of any significant change in the circumstances relating to nature of his possession. The Defendant admits that he is aware *Juliet Perera* had made several transfers through several notarially executed instruments over the said two lots, but he was content with merely to continue to be in "බුක්තිය" regardless of such transfers. Hence, it is clear that at no point *Juliet Perera* was made aware that the permissive possession of the Defendant had turned adverse to her interests.

This factor, namely the knowledge on the part of *Juliet Perera* of her brother's change of character in relation to possession, being an integral component of the requirement of the starting point of an adverse possession, thus remained an obscure factor. The knowledge of

Juliet Perera that her brother is holding the property against her rights is a must for the prescriptive claim laid out by the Defendant to succeed by satisfying the component of her acquiescence. This is evident from the judgment of ***Appu Naide v Heen Menika et al*** (1948) 51 NLR 63, which was pronounced in relation to an instance where a *Kandyan*, who had permitted his sisters who have contracted *Deega* marriages but nonetheless to possess their share of the land for a long period of time. The Court held that he cannot be permitted to deny their rights due to his acquiescence. In delivering the said judgment *Basnayaka* J (as he was then), had quoted the following statement of *Thesiger* L.J., from the judgment of ***De Bussche v. Alt*** *(1878) L. R. 8 Ch. D. 286* (at p. 314), in defining the doctrine of acquiescence. It is stated by *Thesiger* L.J in the said judgment that;

> *"If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act…".*

In my view, due to the factors that are enumerated above, the last of the probabilities referred to earlier on this segment, namely the probability of *Juliet Perera's* acquiescence to the Defendant's possession adverse to her interests after the death of their father is therefore reduced to a mere probability, especially in the absence of any knowledge on the part of *Juliet Perera* about the Defendant's intention to hold the property in adverse possession against her rights and her belief that he held the property in permissive possession.

The judgment of ***Perera v Perera*** (1897) 2 NLR 370, deals with almost an identical factual situation that arose in the instant appeal. This judgment refers to an instance where a father had donated a parcel of land to his daughter immediately before her marriage. Having accepted the gift, she had handed it back to her father for safe keeping. She never entered into possession of the land donated, but her father continued to possess same and let it to tenants who paid him rent and repaired the buildings on it during the donee's lifetime, who continued to be on the best of terms with her father. When she died, her father claimed that he had acquired prescriptive title to the said land. *Lawrie* ACJ was of the view (at p. 371) that although the father was given the deed and continued to possess the land *"… he certainly at first possessed in trust for his daughter as her caretaker and agent. That title to possess must be held to have continued until by some overt act the possession for the daughter was changed into a possession on a title adverse to her."* The only important factor that is dissimilar to the factual position in the instant appeals to that of ***Perera v Perera*** (supra) is the fact that donee had expressly entrusted the land along with the deed of gift back to her father, whereas in this instance, it had to be inferred from the conduct of the parties upon the evidence presented before the trial Courts. Since the probabilities factor weigh in favour of the Plaintiff in support of her contention that the Defendant only had permissive possession of lots D3 and E from *Juliet Perera,* said deficiency in her case as to the nature of possession of the Defendant had over the land, could be supplemented with a reasonable inference drawn in favour of permissive possession, particularly in the absence of any evidence adduced by the Defendant to indicate a contrary position, except for his repetitive assertion that he was in "බුක්තිය ".

In view of the items of evidence referred to above, I hold that the Defendant is deemed to be a licensee of *Juliet Perera,* who entered into occupation and possession of lots D3 and E, upon permissive possession. The said conclusion was reached by applying the test, which formulated by Lord *Denning* and applied in ***Errington v Errington and Woods*** (1952) 1 KB 290, in order to determine whether a party is a tenant or a licensee. This is the test adopted by *Gratiaen* J, in the judgment of ***Swami Sivgnananda v The Bishop of Kandy*** (1953) 55 NLR 130, in relation to an instance where a person was permitted to occupy a premises on an agreement to sell but failed to complete the purchase as agreed, refused to vacate when the owners have sold the premises to the plaintiff and taken up the position that he is a tenant and is entitled to protection of the provisions of the Rent Restriction Act. *Gratiaen* J adopted Lord Denning's test to determine the said dispute (at p. 132) and reproduced same as follows; "*… if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only*".

In the above context, I think the time is ripe to consider another facet of the contention advanced by the learned Counsel for the Plaintiff. During the course of his submissions, learned Counsel made an attempt to present the status of the Defendant and his sisters by referring to them as co-owners. With his attempt to term the litigating parties to the instant appeal as co-owners, learned Counsel sought to apply an important principle of law applicable to such co-owners, namely when one or more of them opted to lay out a claim of acquisition of prescriptive title over the co-owned property or a part of

it, against the rights of the others, such claim must precede with an overt act.

In ***Maduwanwela v Ekneligoda*** (supra), having rejected the contentions that if a person allows another out of charity to occupy his house, the Courts are bound to presume that occupation is possession and that the license to occupy means license to possess *ut dominus, Bonser* CJ had laid down the principle that a person(at p. 215), who is let into occupation of property as a tenant or a licensee, must be deemed to continue to occupy that property on the same capacity in which he was initially admitted, until by some overt act he manifests his intention to occupy it in another capacity and no secret act will avail to change the nature of his occupation. This principle of law was acted upon by Lord *Mac Naghten* in the Privy Council judgment of ***Nauda Marikkar v Mohammadu*** (1903) 7 NLR 91, in rejecting a claim of prescription of the added defendant, who had "*never got rid of character of agent*". His Lordship, in delivering the Privy Council judgment of ***Corea v Iseris Appuhamy*** (1911) 15 NLR 65, had reiterated the same principle once more by stating that (at p.78), it is not possible for a co-owner "*… to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result*." This principle of law was pronounced and acted upon in relation to instances where a claim of prescription is laid out against a co-owned property by one of the co-owners. The judgment of *Basnayaka* CJ, in ***Gunawardene v Samarakoon et al*** (supra), is an authority relied on by the learned Counsel for the Plaintiff, in support of his contention of overt act is needed to change the character of possession. This judgment too had followed the principle of law that the possession of one co-owner is the possession of the other co-owners and such a possession

cannot be ended by any secret intention, entertained in the mind of the possessing co-owner.

In a recent judgment of this Court (***Chaminda Abeykoon v Anthony Fernando and Others*** SC Appeal No. 54A/2008 – decided on 02.10.2018), after undertaking an analysis of the judicial precedents that were pronounced on the presumption of ouster, especially in relation to a claim of prescription by a licensee, *Prasanna Jayawardena* J had stated that " *… the requirement that the possession of one co-owner is the possession of the other co-owners and that an overt act in the nature of ouster must occur to demonstrate a change of the character of that possession and start running of prescription in favour of one co-owner, applies with equal force to instances where a licensee or an agent possesses a property in a subordinate character. In such instances, an overt act must occur to demonstrate change in the character of that possession and start the running of prescription in favour of the erstwhile licensee or agent*", after rejecting the submission of the licensee that, "*the requirement of an overt act applies only in the case of claims of prescription between co-owners*."

This is because, his Lordship added, "*it is well-established principle of law that, as long as a person possesses a property as the licensee or agent of the owner, that person cannot acquire prescriptive title to that property. Instead, the running of prescription can commence only upon the licensee or agent committing some "overt act" which demonstrates that he has cast aside his subordinate character and is now possessing the property adverse to or independent of the owner of the property and without acknowledging any right of the owner of the property. The overt act is required to give [or deem to give] notice to the owner that his erstwhile licensee or agent is, from that time onwards, claiming to possess the property adverse to or independent of the owner."*

Thus, the said judgement treats a licensee, who claims acquisition of prescriptive title to a land, in the same status of a co-owner who had laid out a prescriptive claim to the co-owned land and as such he too must establish the change of his former character of a licensee to a that of one who possess adversely by establishing an overt act. Whilst in respectful agreement with the said pronouncement of *Jayawardena* J and, in view of the considerations referred to above, I am of the opinion that it is appropriate to apply the said principle in relation to the instant appeals as well, since the Defendant too had entered into possession of lots D3 and E with permission of his sister as a licensee. I am fortified in this view as *Lawrie* ACJ in ***Perera v Perera*** (supra) stated (at p. 371) that *"… he certainly at first possessed in trust for his daughter as her caretaker and agent. That title to possess must be held to have continued until by some overt act the possession for the daughter was changed into a possession on a title adverse to her."*

In view of the considerations referred to above and in view of the fact that relative probabilities favour a conclusion that the Defendant had initially entered into possession of lots D3 and E, with permission of *Juliet Perera*, it is relevant to consider whether the Defendant, by an overt act, had shed the said character of permissive possession at a subsequent point of time, by which his sister was put on notice that the permissive nature of possession of her brother over the disputed land had turned into a different character of possession, in which her rights over the disputed land are challenged.

Learned Counsel for the Defendant, in support of his plea of prescription, have relied heavily on the uncontroverted fact that it was his client who rented out the house standing on lot D3 and exclusively appropriated its rent for himself. He further contended the fact that

none of his sisters ever came to possess their respective lots nor did they demand their due share of the rent because the Defendant had possessed the two lots adverse to their title. Learned Counsel further submitted that when these factors are considered in the backdrop of the Defendant's solitary act of instituting action to evict a defaulting tenant, in itself would indicate clear denial of any acknowledgement of his sister's title, and also demonstrates to Court that he was clearly in possession of lots D3 and E, adverse to the title of the Plaintiff and of her predecessors. Hence, it was submitted by the learned Counsel for the Defendant that the High Court of Civil Appeal, in allowing his appeals, had correctly arrived at the conclusion that the Defendant is entitled to declaration of his prescriptive title over lots. D3 and E.

This contention indicates the degree of reliance placed by the Defendant on the level of control he claims to have had over the "house" and the income derived from it, in order to strengthen his prescriptive claim over lots D3 and E. Even though the Defendant had failed to convince the trial Courts that he had established a prescriptive claim by advancing the said contention, he was successful with the High Court of Civil Appeal. In view of the submissions made by the learned Counsel for the Plaintiff to convince this Court that the appellate Court had erred in allowing the Defendant's appeals, it is necessary to consider the available evidence that are directly relevant on this point.

What is relevant in the present context is to consider whether there was an overt act. Admittedly the Defendant's father had owned several other properties, in addition to the property under dispute, and his children were either gifted with or inherited their share of same since his death. It is not disputed that none of them lived on their

respective lots of the land in dispute but have settled on their inherited or gifted individual properties, in the vicinity of their ancestral home. It is in this backdrop only the contention of the Defendant on renting out and collecting rent should be evaluated.

The survey plan (P1), that made the disputed land into four subdivided lots, was prepared in 1967. It indicates that before the subdivision, a house and a hut were already stood on lots D and E. After the subdivision of lot D into D1, D2 and D3, house that was initially on lot D, had shifted to the subdivided lot D3, whereas the hut too had shifted to lot D2. Lots D1 and E had no buildings on them and remained as bare plots of land. There were few coconut trees but no clear evidence as to their distribution over the four lots.

It is stated by the Defendant that, at the time of his father's death in 1969, said house was occupied by his father's tenant, but acting on his father's directions, its rent was collected by him. After his father's death, the Defendant had continued to collect rent and, had rented out the house to each succeeding tenant, as and when it became vacant. He asserts that its rent was appropriated all by himself and no share or produce of the land was ever given to any of his two sisters nor did they demand any. This claim was accepted by the High Court of Civil Appel. The Defendant also states that after the execution of deeds, their father had fenced off the entire property, irrespective of the subdivision, installed a gate and therefore the land, though subdivided into four lots, continued to be possessed as one contiguous land.

In instituting action to evict his defaulting tenant in 1985, the Defendant described in his plaint (P10) that he had rented a "house" to *Simion Perera* and his tenant had fallen into arrears of rent. The reference

to a single house is significant in the context of present appeals. The Defendant also had relied on the said eviction proceedings to establish that he only took any initiative to evict overholding tenant *Simion Perera*, in support of his exclusive and adverse possession.

During his evidence in case No. 6901/L, the Defendant had however stated that he had rented out a "building" (ගොඩනැගිල්ලක්) that stood on lot D3 to *Simion Perera* in 1970. He also asserts that there was a "small house" (පොඩි ගෙයක්) on lot D2 as well at that time. Thus, the Defendant had thereby created an ambiguity as to the "house" he had rented out to *Simion Perera*, since it appears from his own evidence that the Defendant had rented out only a "building" on lot D3, while there is "house" standing on his own lot D2. In case No. 6906/L too the Defendant did not specifically state which of these two houses that he had given out on rent to *Simion Perera*. The trial against *Simion Perera* had proceeded *ex parte* and with the issuance of its decree, the fiscal had placed the Defendant in possession of the property upon execution of the writ of possession. The Defendant then had added that after his tenant was evicted by the fiscal, he had demolished the "building" that stood on that land.

In his plaint, although the Defendant had averred that "a house" had been rented out to *Simion Perera,* he made no refence in the plaint to include or exclude the "hut" that stood on lot D2 with the "house" on lot D3 or to the fact there were two buildings used for residential purposes on the land. It is evident from the Defendant's evidence before the trial Courts, that when he rented out "a building" to *Simion Perera* in 1970, there was another "small house" already in existence on his own land, namely lot D2.

Thus, it is clear that the "hut", that existed in 1967 on Lot D2, had transformed itself into a "small house" by 1970. How did this transformation take place?

The Defendant himself offers a clarification to this transformation. The relevant section of evidence adduced by the Defendant in this regard is as follows:-

" ප්‍ර: පියා 1969 දී ඔප්පුව ලියනකොට තමුන් හිස නවා එකඟවුණා කියලා පැමිල්ලේ නීතීඥ මහතා ප්‍රශ්න කරනකොට කිව්වා?

උ: එහෙමයි.

ප්‍ර: ඔප්පු ලිවීම නිසා තමුන් අර කිව්ව බුක්තියට බාධාවක් වුණාද?

උ: නැහැ කිසිම බාධාවක් වුණේ නැහැ.

ප්‍ර: දැන් බුක්තියේ කිසියම් වෙනසක් වුණාද. ඔප්පු ලිවීමෙන් පසුව?

උ: නැහැ.

ප්‍ර: මොකද තමුන් කළේ?

උ: ඒ කාලේ මගේ ගේ හැදුවා.

ප්‍ර: කවුද ඒ ගේ හැදුවෙ?

උ: තාත්තා. මමත් හැදුවා.

ප්‍ර: වියදම් කළේ කවුද?

උ: තාත්තා වියදම් කළා. මමත් වියදම් කළා."

Thus, the evidence clearly points out that there were two houses standing on the property by 1969. One put up by his father and the other by the Defendant. The distinct reference to "my house" ("මගේ ගේ") in his evidence is important. The Defendant, with that reference makes a distinction of the ownership to the two houses that stood on that land. His evidence indicates that, of these two houses, one was put up by his father and the other put up by him, of course with financial

assistance of his father. However, the Defendant maintained throughout the trials that there was only one house on that land and that is the one built by his father, and belonged to his sister, as he had laid a claim of acquiring prescriptive title to them. Since the Defendant had failed to present a clearer picture through his oral evidence as to from which of the two houses/buildings that he sought to evict *Simion Perera*, this is an important factor, which could only be resolved upon examination of the available documentary evidence, particularly the report of the fiscal (P4) filed in Court, after *Simion Perera's* eviction from the property.

The fiscal who visited the land to execute writ of possession had noted there were in fact two "buildings" ("ගොඩනැගිලි") standing on it and *Simion Perera* operated a fabric printing business, whilst occupying both these buildings. Therefore, the existence of two houses or buildings on that land is a fact confirmed by an independent source, the fiscal report (V4), and that too upon a document tendered by the Defendant himself during the trial. The schedule to the said plaint (P10) indicates that the Defendant had described the land on which the said "house" stood on, with the identical description as given in the partition decree. He had wilfully ignored the subsequent subdivision made in 1967, in describing the residential premises in the plaint. Hence, schedule to the plaint does not provide any assistance to determine this issue. *Simion Perera* was evicted from both these buildings on 02.02.1987 by the fiscal and the Defendant was placed in possession of the entire land, which included lots D1, D2, D3 and E. Since the schedule to the plaint indicated a larger land, the fiscal may have evicted *Simion Perera* from both these buildings that stood on the

land described in the schedule, despite the fact that there was refence only to a single house in the plaint.

The Defendant had thereafter demolished the said buildings before the District Court had restored the tenant *Simion Perera* back in possession of the property on 01.04.1991. This was after the Court had vacated its *ex parte* decree on 17.03.1986, when *Simion Perera* had successfully purged his default before that Court. The 2nd fiscal report restoring *Simion Perera* in possession (V5), indicates that except for a masonry structure that supported an overhead water tank, there were no other buildings that stood on the property at that point of time. The fact of demolishing a building standing on another's land could, in ordinary circumstance, could be an instance of an overt act by a claimant of prescriptive title. However, in relation to the instant appeals, with regard to the Defendant's act of demolition, *Juliet Perera* may have been under the impression that the said act was to prevent *Simion Perera* from re-occupying the land, since it was after the defaulting tenant was successfully evicted on an action instituted with her concurrence. In the absence of any evidence pointing to the contrary, the fact of demolition of the buildings would not support the Defendant's claim of adverse possession.

The Defendant preferred an appeal to the Court of Appeal (CA No. 139/89(F) against the said order of the District Court, by which the original Court had set aside its *ex parte* decree and allowed *Simion Perera* to file answer. At the hearing before the appellate Court, the Defendant, being the appellant, was not present nor was represented. On 31.07.1998, the Court of Appeal, upon consideration of merits of the appeal, held in favour of the Defendant and decided to allow his appeal. *Lesley Perera* who substituted in the said application after his

father's demise, had sought Special Leave to Appeal from this Court in S.C. Spl L.A. No. 170/98, against the said judgment of the Court of Appeal. On 08.12.1998, this Court refused to grant leave and dismissed *Simion Perera's* application now prosecuted by his son. Consequent to this dismissal, the Defendant had executed writ of possession on 14.06.1999, once again to evict said *Lesley Perera,* who continued to occupy the disputed property after passing of his father, *Simion Perera*. The fiscal report (V3) indicates that by this time there existed a "small house" with an asbestos roof on that property, in which *Lesley Perera* was operating a business of a service station for three wheelers. The Defendant was quieted in possession by the Court officer for the second time on 14.06.1999, over lots D1, D3 and E, upon eviction of *Lesly Perera,* who by this time was in possession on behalf of *Gamini Ponweera,* as his lessee and the Plaintiff.

What is important to determine in this context is, that which of these two houses that existed in 1970 on the disputed land, that had in fact been rented out to *Simion Perera,* as averred in the said plaint. Since the Defendant relied heavily on that factor in support of his prescriptive claim, then he must counter the Plaintiff's evidence that *Juliet Perera* had concurred the institution of the said action. The Defendant was silent on this specific assertion throughout his evidence. As already noted, the evidence that the Defendant had presented before the trial Courts reveals that there was only one house standing on the land as indicated in the survey plan P1, and he had given that house on rent to *Simion Perera*. But his evidence on the number of houses is self-contradictory as having asserted that his father had constructed a house after acquiring title to the land in 1954, and he also had built a house on his own on lot D2. The Defendant should have cleared the resultant ambiguity as to

the house that he claims to have given on rent and should also have clearly established that in addition to the "small house" on D2, he also had rented out and collected rent of the house, which stood on lot D3, if that fact was to accrue to his benefit.

When he restricted the scope of the eviction proceedings to a single house, instead of two houses that had in fact been occupied by *Simion Perera* at that particular point of time, it is equally probable that he did so, in relation to the house standing on lot D2, being his own property, instead of the house on lot D3, which belonged to his sister. In instituting action by the Defendant, this omission of the plaint cannot be attributed to a mere oversight, since in his plaint he had described the land on which that particular "house" stood, as a land consisting of only lots D and E, which is in line with the description given in the partition decree. This he did when in fact lot D had been subdivided into D1, D2 and D3 in 1967, as per the schedule to his own deed of gift and that house now stood on lots D3 and E. Referring to this misdescription of the property, the Plaintiff alleged that the Defendant's said deceitful act, had resulted in illegally dispossessing her from lots D3 and E, to which she had valid title.

In the same context, another aspect of the Defendant's case in support of his prescriptive title should be considered. It is correct that the Defendant had rented out the house and collected its rent and he alone instituted action seeking the eviction of his defaulting tenant. However, the Courts have considered and evaluated such claims against the backdrop of social norms and cultural practices and, at times, preferred not to draw the presumption of ouster in favour of a claimant, who raises a plea of prescriptive title on such factors, by adopting a more a pragmatic approach.

De Sampayo J, considering the nature of adverse possession of the plaintiff, in ***Tillekeratne et al. v Bastian et al.*** (1918) 21 NLR 12, had observed (at p. 28), *"While a co-owner may without any inference of acquiescence in an adverse claim allow such natural produce as the fruits of trees to be taken by the other co-owners, the aspect of this will not be the same in the case where valuable minerals are taken for long series of years without any division in kind of money*."

In ***Abdul Majeed v Ummu Zaneera et al***. (supra) *De Silva* J stated (at p.371) "*Our social customs and family ties have some bearing on the possession of immovable property owned in common and should not be lost sight of. Many of our people consider it unworthy to alienate ancestral lands to strangers. Those who are in more affluent circumstances permit their less fortunate relatives to take the income of ancestral property owned in common. But that does not mean that they intend to part with their rights in those lands permanently. Very often if the income derived from such a property is not high the co-owner or co-owners who reside on it are permitted to enjoy the whole of it by the other co-owners who live far away. But such a co-owner should not be penalised for his generous disposition by converting the permissive possession of the recipient of his benevolence to adverse possession".*

In relation to the instant appeal, as referred to earlier on, it is established by the evidence of the Defendant by producing the survey plan that there was a house standing on lot D3 in 1967. Other than the house, there was nothing on lots D1, and E that would yield an income. The land was located in an urban area and is therefore more suited for residential or commercial use rather than utilising same for agricultural purpose. There was no evidence as to the presence of any valuable minerals. Only income said to have been derived from the land is the rent from the two buildings. The Defendant, although claimed to have

utilised the rent form the house, did not offer to mention the amount in his evidence nor did he produce any rent receipts. He did not state that he attorned after his father's death as landlord of *Simion Perera*.

The Defendant's father received title to the land in 1954 after a partition action. The house that stood on lot D3 was admittedly built by his father. However, the Defendant did not claim that he made any improvement to that house nor had maintained it. In the preceding paragraphs, the ambiguity as to the identity of the 'house', the Defendant had given on rent was considered in detail. If the house he had rented out is the one stood on lot D3, his conduct in relation to that house could easily be understood, when considered in the light of the fact that he only had permissible possession of the house and therefore did not possess same *ut dominus*. In the absence of oral evidence by the Defendant as to the specific amount of rent he received from the house; it could well be that the rent was not a significant amount for his sister to demand her share. Hence, the mere fact that she did not demand her share of rent, in itself does not accrue to the benefit of the Defendant, in support of his plea of prescription.

These two factors, i.e., the fact of renting out a house and appropriating its rent, were the primary factors that had been relied upon by the Defendant, in support of his claim of prescription. Despite the rejection of the said claim of acquisition of prescriptive title of the Defendant by the trial Courts, the High Court of Civil Appeal, accepted the Defendant's said claim in stating that the "*Defendant had specifically stated in evidence that he did not give the produce from the land to his sisters. It is in evidence that he had taken the rent paid by Simion Perera entirely to his benefit*". In my view, due to the reasons stated in the preceding paragraphs, in which these factors were considered in detail, they fall

far short of required degree of proof due to their ambiguity. In the absence of any evidence of an ouster, the permissive character of the Defendant's possession over lots D3 and E that had persisted throughout the period 1969 to 1988 had not lost its initial character of acknowledgement of a right existing in *Juliet Perera*. Hence, the Defendant's permissive possession could not be considered as proof of possession by "*a title adverse to or independent of that of the claimant …*" in which an acknowledgement of a right existing in another person would fairly and naturally be inferred. ***Dias Abeysinghe v Dias Abeysinghe and Two Others*** 34 CLW 60 held: "*where the co-owners are members of one family very strong evidence of exclusive possession is necessary to establish prescription*". *Soertz* SPJ, in ***Simpson v Lebbe*** (1947) 48 NLR 112 (at p. 112) in relation to prescription among co-owners insisted that "*… very clear and strong evidence of an ouster and of adverse possession is called for*". In the judgment of ***Gunasekera v Tissera and Others*** (1994) 3 Sri L.R. 245, this requirement was emphasised by *Mark Fernando* J, citing a series of judicial precedents.

There is no evidence that had been presented before the trial Courts, which even tends to suggest that the Defendant did something positive after their father's death to indicate to *Juliet Perera* that he possessed the two lots D3 and E in a manner adverse to her interests, other than the evidence relating to the Defendant's act of renting out the house, collecting and appropriating its rent for himself. The Defendant admits that he never ousted his sister from lot D3 and E, when he said that he merely continued with the arrangement his father had set up even after the latter's demise. In my assessment these items of evidence do not justify a reasonable inference that there was an overt act by which the character of possession held by the Defendant was changed

any time after 1969, which notified to his sister of same. The institution of action to evict the tenant *Simion Perera* too could not accrue to the benefit of the Defendant, in view of the evidence of the Plaintiff that had been referred to above.

I accordingly hold, following the judgment of ***Perera v Perera*** (supra), that the requirement of ouster that had been insisted upon by the superior Courts in relation to co-owned property, is equally applicable even to instances where a claimant of prescriptive title, who was initially allowed into a property, firstly due to familial relationship as in the instant appeals, and secondly because he was allowed to possess the property only upon his acknowledgement of a right, either expressly or impliedly, existing in the other member of family, against whom the prescriptive claim is made.

The other aspect of the Defendant's contention, that whether the possession of the land by the Defendant for well over four decades, in itself is sufficient to a decree in his favour, requires consideration at this stage.

If one were to assume that there was no evidence at all to justify an inference that the Defendant was in permissive possession of his sister *Juliet Perera,* would he still be able to obtain a decree in his favour under section 3 of the Prescription Ordinance, solely on the basis that he had possessed lots D3 and E for over four decades?

When the evidence of the Defendant is considered as a whole, it is evident that his claim of prescription is primarily based on the possession of lots D3 and E for a very long period, which had exceeded a period of over four decades. Understandably, both Counsel for the Defendant had placed heavy reliance of this factor as well before this

Court, in defending the conclusions reached by the High Court of Civil Appeal to allow both his appeals.

As already indicated, the period of four decades commencing from 1954 to 1999, would be considered in this judgment after dividing same into two parts, based on the reasoning of the High Court of Civil Appeal. The first part, which is currently under consideration, covers the period commencing from 1954 to 1988, the year *Juliet Perera* transferred her title to a total outsider for the first time. The other part covers the period from 1988 to 1999, the year in which the Plaintiff was evicted by an order of Court, which shall be considered in detail, in the latter part of this judgment.

It is correct to state that there are judicial precedents that supports the position that, in certain circumstances, the possession of a parcel of land over a very long time might justify drawing of the presumption of ouster. I shall refer to a few of them, which indicate the underlying rationale for adopting such an approach. The full bench decision of ***Odiris et al v Mendis et al*** (1910) 13 NLR 309, *Hutchinson* CJ held that "*… the first plaintiff remained in sole possession of B and C for more than thirty years after the expiration of the six years mentioned in the voucher. I think that it is the reasonable conclusion from these facts that he disputed the defendants' title to B and C at the end of the six years, and has disputed it ever since, and it is too late-now for them to assert it. In his plaint he claimed B and C by prescriptive title; and although there was no issue as to prescription, I think that, after such a long period of adverse possession since the term fixed in the voucher, he is not precluded from now disputing the defendants' title.*"

In the judgment of ***Rajapakse and Others v Hendrick Singho and Others*** (1959) 61 NLR 32, *Basnayaka* CJ was of the view that " … *the*

evidence that the defendants since the death of Paulis in 1922, were not only in occupation of the land but also took its produce to the exclusion of the plaintiffs and their predecessors in title, and gave them no share of the produce, paid them no share of the profits, nor any rent, and did not act from which an acknowledgment of a right existing in them would fairly and naturally be inferred, is overwhelming."

Similarly, in the judgment of ***Angela Fernando v Devadeepthi Fernando and Others*** (2006) 2 Sri L.R. 188, *Weerasuriya* J, following the reasoning of ***Tillekeratne v Bastian*** (supra), observed that (at p. 194) "*ouster does not necessarily involve the actual application of force. The presumption of ouster is drawn in certain circumstances when exclusive possession has been so long continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time in the distant past there was in fact a denial of the rights of the other co-owners."* His lordship thereupon had reiterated the principle enunciated in ***Tillekeratne v Bastian*** (1918) 21 NLR 12, by stating that it "… *recognises an exception to the general rule and permits adversity of possession to be presumed in the presence of special circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period*."

In the full bench judgment of ***Tillekeratne v Bastian*** (supra), *Bertram* CJ, in relation to such an instance, posed the question "*if it was not originally adverse, at what point it may be taken to have become so*?" and proceeded to answer same with the statement (at p.23) 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*." In stating thus, his Lordship was alive to the principle of law that had been laid down by *Marshall* CJ in ***Mac Clung v Ross*** (1820) 5 Wheaton 116, that "*a silent possession, accompanied with no act*

which can amount to an ouster or give notice to his co-tenant that his possession is adverse, ought not to be construed into an adverse possession; mere possession, however exclusive or long continued, if silent, cannot give one co-tenant in possession title as against another co-tenant."

In the full bench judgment of ***Alwis v Perera*** (1919) 21 NLR 321, *Bertram* CJ, reiterated the principle of law which was expounded in the case of ***Tillekeratne v. Bastian,*** (supra) 21 NLR 12 that "*where it is shown that people have been in possession of land for a very considerable length of time, that fact, taken in conjunction with the other circumstances of the case, may justify a Court in presuming that the possession which originated in one manner, as, for example, by permission, may have changed its character, and that at some point it became adverse possession.*" The underlying rationale of this principle is explained by *De Silva* J in ***Abdul Majeed v Ummu Zaneera et al*** (supra, and at p. 372) with the statement that "*the presumption of ouster is drawn in certain circumstances, when the exclusive possession has been so-long continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time in the distant past, there was in fact a denial of the rights of other co-owners. The duration of exclusive possession, being so long, it would not be practicable in such a case to lead the evidence of persons who would be in a position to speak from personal knowledge as to how the adverse possession commenced. Most of the persons who had such knowledge may be dead or cannot be traced or are incapable of giving evidence when the matter comes up for trial. In such a situation it would be reasonable, in certain circumstances, to draw the presumption of ouster.*"

The Privy Council, in its judgment of ***Cadija Umma and another v Don Manis Appu and Others*** (1938) 40 NLR392 considered the view expressed by in ***Tillekeratne v Bastian*** (supra) on the parenthetical

clause of section 3 of the Prescription Ordinance. In the said judgment *Bertram* CJ observed 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*". The Privy Council stated that "*their Lordships cannot accept this dictum of the learned Chief Justice*". Their Lordships, however, were not inclined to describe "*under what conditions an agent or co-owner can be heard to say that his possession has been an ouster of his principal or co-sharer*" as it "*is a matter which need not here be examined.*"

In ***Abdul Majeed v Ummu Zaneera et al*** (supra), having referred to the phrase "*with the circumstances of the case*" from the judgment of *Bertram* CJ in ***Tillekeratne v Bastian*** (supra), *HNG Fernando* J (as he was then) was of the view that " *read out of their context, these observations may tend to support the view that adversity may be presumed from mere long continued and exclusive possession*" and therefore holds that " *the so-called presumption of ouster is not to be applied arbitrarily, but only if proved circumstances tends to show , firstly the probability of an ouster, and secondly the difficulty or impossibility adducing proof of the 'ouster'. If the circumstances justify the opinion that possession must have become adverse at some time, a judge is not in reality presuming an ouster, he rather gives effect to his opinion despite the absence of proof of ouster which a co-owner would ordinarily be required to adduce.*"

Referring to the facts of the appeal before his Lordship, *Fernando* J also stated that " … *the 13th defendant undoubtedly had undisturbed and uninterrupted possession of the property in the sense contemplate by section 3 of the Prescription Ordinance, for (in the language of the parenthesis in section*

3) his possession was " unaccompanied by payment of rent, by performance of any service of duty, or by any other act from which a right existing in any other person would fairly and naturally be inferred". However, his Lordship was of the view that "*… a person is not entitled to a decree under section 3 by virtue of such possession alone; the section requires the proof of a second element, namely that the possession must be "title adverse to or independent of that of the claimant or the plaintiff in such action*".

Senanayake J, in ***Karunawathie and two others v Gunadasa*** (1996) 2 Sri L.R. 246 stated *"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 (a) the income derived from the property (b) the value of the property (c) the relationship of the co-owners and where they reside in relation to the situation of the corpus"*. His Lordship, adopting the same line of reasoning as *Weerasuiya* J did in ***Angela Fernando v Devadeepthi Fernando and Others*** (supra), had thereupon proceeded to hold that "*in the instant case, the income from the Coconut and other trees would have been considerable and income from the Rubber plantation would have been high, this was a valuable piece of property and the 4th Defendant-Appellant was the only person who was residing in the corpus and the corpus was fenced on three sides which establish the exclusive possession. There was not an iota of evidence that the Plaintiffs had plucked even a Coconut or Jak fruit or that he received even a Coconut husk from the 4th Defendant. If the income that the property yields is considerable and the whole of it is appropriated by one co-owner during a long period it is a circumstance which would weigh heavily in favour of adverse possession on the part of the co-owner."*

Thus, it is clear that the fact of being in possession of a particular parcel of land for a substantially a long period of time, in itself would not accrue to the benefit of a claimant, who had set up a claim of acquisition of prescriptive title to such land under section 3 of the Prescription Ordinance. In addition to long possession, such a claimant must also establish "*the presence of special circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period*" in inviting a Court to draw the presumption of ouster.

Since it was for the Defendant to establish the presence of special circumstances additional to the establishment of the fact of undisturbed and uninterrupted possession for the requisite period, it would be relevant at this juncture to consider the judicial precedents that deal with the nature of his burden of proof in this particular perspective. The judicial precedents referred to above does not justify drawing the presumption of ouster upon mere assertion of the Defendant that "I possessed" the land in dispute even for a long period of time.

Moncreiff J, after undertaking a review of the judicial precedents on the nature of possession as required under section 3 of the Prescription Ordinance, had identified following applicable principles and listed them in ***Kirihamy Muhandirama v Dingiri Appu*** (1903) 6 NLR 197, (at p. 200);

> "*It would appear then that, in order that a person may avail himself of section 3 of the Prescription Ordinance, No. 22 of 1871-*

1. *Possession must be shown from which a right in another person cannot be fairly or naturally inferred.*

2. *Possession required by the section must be shown on the part of the party litigating or by those under whom he claims.*

3. *The possession of those under whom the party claims means possession by his predecessors in title.*

4. *Judgment must be for a person who is a party to the action and not for one who sets up the possession of another person, who is neither his predecessor in title nor a party to the action."*

In ***Sirajudeen v Abbas*** (1994) 2 Sri L.R. 365, at p.371, *De Silva* CJ quoted from the text of *Walter Pereira's* Laws of Ceylon, 2nd Ed, where the learned author stated, following the judgment of ***Piyenis v Pedro*** 3 SCC 125, that "*as regards the mode of proof of prescriptive possession, mere general statement 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 the Court. It is also necessary that definite acts of possession by particular individuals or particular portions of land should be proved*."

Similar observations were made by *Basnayaka* CJ, in ***Hassan v Romanishamy*** 66 CLW 112, that "*mere statements of a witness, "I possessed the land" or "we possessed the land" and "I planted plantain bushes and vegetable" are not sufficient to entitle him to a decree under section 3 of the Prescription Ordinance, …*".

The judgment of ***Juliana Hamine v Don Thomas*** (1957) 59 NLR 546, indicate that *L.W. de Silva* AJ was of the view that the plaintiff of that case had failed to establish prescriptive title as his witness had, apart from the use of the word possess, did not describe the manner of his possession. The Court held that "*such evidence is of no value where the Court has to find a title by prescription"* and quoted the Full Bench judgment of ***Alwis v Perera*** (1919) 21 N L R 321, where *Bertram* C J, emphasised that the trial judges should not confine themselves merely to record the words of a witness who states that *"I possessed" or " We possessed" or "We took the produce"*, and should insist those words are explained and exemplified.

The Defendant, during his evidence, repetitively asserted that he had possession of the land since 1954. Having admitted that he is well aware of the nature of possession he ought to have, in order to obtain a decree in his favour under section 3 of the Prescription Ordinance, the Defendant had stated in evidence that even though he was aware that his sister had executed several deeds over the lots D1, D3 and E, he did not take any action as he was content with his "undisturbed" possession over the two lots. This is the position he asserted in the answer as well. He claimed that the Plaintiff nor her predecessors in title ever possessed the two lots in respect of which declarations are sought.

But the body of evidence that had been presented by the parties before trial Courts indicate that the said assertion of an undisturbed possession by the Defendant is not supported at all. on the contrary, they in fact point that possession of the disputed lots by the new owners were *ut dominus.* With *Gamini Ponweera* acquiring title from *Juliet Perera,* being a total outsider to the family, he had possessed at least lot D1 *ut dominus* and thereby interrupting the Defendant's claim of adverse possession of lots D1, D3 and E. The actions of *Gamini Ponweera* and its effects on the possession of the Defendant are considered further down in this judgment whilst reviewing the validity of the findings of the appellate Court that the Defendant had uninterrupted adverse possession for ten years during the 11-year period of 1988 to 1999.

Thus, in view of the principles considered in the said judgments, I hold that the, the Defendant, in asserting that he 'possessed' lots D3 and E since 1954 in support of his prescriptive claim, should have been explained and exemplified as to the exact nature of his possession, for he is expected to eliminate any probable doubts or ambiguities as to the presence of permissive nature of such possession, as contended by the Plaintiff, through her witness. He should have established that his possession of the said two lots satisfies "*the presence of special circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period*". The Defendant had to establish that not only he had undisturbed and uninterrupted possession of the property unaccompanied by payment of rent, by performance of any service or duty, or by any other act from which a right existing in another person would fairly or naturally be inferred. *HNG Fernando* J (as he was then), in ***Abdul Majeed v Ummu Zaneera et al*** (supra) stated (at p.377) that " *… a person is not entitled to a decree under section 3 of the Prescription*

Ordinance by virtue of such possession alone; the section requires the proof of a second element, namely that the possession must be 'by a title adverse to or independent of that of the claimant or the plaintiff in such action'… this is a distinct and separate element emphasised by Bertram CJ in his judgment of ***Tillekeratne v Bastian*** *… ".*

Therefore, it is important for the Defendant to lay the foundation for an objective assessment of his claim by placing sufficient evidence before the trial Courts in support of the four issues he himself had suggested on nature of possession and thereby inviting Court to make a determination in his favour. He had particularly failed in fulfilling this obligation and thus fell short of establishing the second element, as stated in ***Abdul Majeed v Ummu Zaneera et al*** (supra), namely, that the possession must be "*title adverse to or independent of that of the claimant or the plaintiff in such action.*" The Defendant is not entitled to any concession of establishing this element, as it was well within his knowledge as to the nature of possession he claims to have had since 1954. The observations of *Fernando* J in the same judgment to the effect that "*the duration of exclusive possession, being so long, it would not be practicable in such a case to lead the evidence of persons who would be in a position to speak from personal knowledge as to how the adverse possession commenced. Most of the persons who had such knowledge may be dead or cannot be traced or are incapable of giving evidence when the matter comes up for trial. In such a situation it would be reasonable, in certain circumstances, to draw the presumption of ouster*" will have no relevance to the instant appeal owing to the said reason.

Having reached the final part of this judgment, I shall now proceed to consider the 2nd part, as referred to earlier in this judgment,

namely the period commencing from 1988 and ending with 1999. This approach was adopted because the High Court of Civil Appeal, in allowing the Defendant's appeal, indicated its view that the Defendant's adverse possession had commenced from the point of transfer of title of lots D3 and E to *Dinapala de Silva* in 1988, and the Defendant was in adverse possession for an uninterrupted period of ten years therefrom, and thus satisfying the requirement of section 3 of the Prescription Ordinance.

In the impugned judgments, the appellate Court had concluded "*… that the Defendant had possessed the land in dispute from the year 1954 and had specifically commenced prescription at least against Dinapala de Silva in the year 1988, who is a complete outsider, when the Defendant's sister transferred her right to Dinapala de Silva*". As already noted, this finding is common to both judgments pronounced by the High Court of Civil Appeal. The challenge mounted by the Plaintiff on the validity of the of the judgements of the High Court of Civil Appeal was based on the proposition that the Defendant had no contrary to the said finding, there was no evidence of uninterrupted period of adverse possession for ten years. Learned Counsel for the Plaintiff therefore submitted that even if the Defendant had commenced adverse possession from the year 1988, the year in which *Juliet Perera* had transferred her title over lots D3 and E in favour of *Dinapala de Silva,* and continued with such possession from that particular point onwards, clearly he had continuous period of ten years up to the time of eviction of the Plaintiff in 1999, by execution of writ in Case No. 1343/RE.

Before I consider the said contention of the learned Counsel for the Plaintiff, it is relevant to consider the process of reasoning on which the High Court of Civil Appeal had arrived at the said conclusion.

It is indicative from the judgments of the appellate Court that it had reached the said conclusion on the basis that the Defendant "*…had specifically commenced prescription at least against Dinapala de Silva in the year 1988 who is a complete outsider, …*". The wording of the appellate Court is clear to the extent that it had indirectly accepted the period of adverse possession of the Defendant that claimed to have begun in 1954 and continued until 1988, does not qualify to be considered as a period during which the Defendant had held the property adverse to the rights of his sister. Thus, it appears, that the contention advanced by the learned Counsel for the Plaintiff before the High Court of Civil Appeal as well as to this Court that the Defendant had only permissive possession of the disputed parcels of land apparently had an impact on the process of reasoning adopted by the High Court of Civil Appeal.

With that observation, this Court must then examine the remaining part of his contention; whether the Defendant had failed to establish that he had possessed lots D3 and E adverse to the interests of the Plaintiff and her predecessors in title for an uninterrupted period of ten years as the appellate Court had allowed the two appeals only on that basis.

In this context, it is relevant to note here that, I have already concluded that the contention of the learned Counsel for the Plaintiff that the nature of the Defendant's possession of lots D3 and E from 1954 to 1988, clearly beares the characteristics of a permissive possession. In the circumstances, it must then be added that, in the absence of an overt act by the Defendant during this period, which would have given *Juliet Perera* of notice that the permissive possession of her brother over the said two lots had turned adverse to her rights, there was no adverse

possession established by the former, as required by section 3 of the Prescription Ordinance during the said period of 1954 to 1988.

However, as correctly observed by the appellate Court, that situation ought to have changed when *Juliet Perera* made a transfer of her title over lots D3 and E to *Dinapala de Silva* on 18.01.1988. *Dinapala de Silva*, being a total stranger to the said family arrangement, is not entitled to rely on the continuation of the said permissive possession, where the Defendant was permitted to possess lots D1, D3 and E for and on behalf of his sisters, which had reached its terminal point with the said transfer of title. Whether *Dinapala de Silva* and others who had title to lots D3 and E, have possessed same *ut dominus* since 1988 and whether it was the Defendant who had possessed these lots adverse to the rights of the new owners from the point of acquisition of its title by them in 1988 until they were evicted upon execution of decree in 1999 are questions that should be answered in consideration of the available evidence.

Learned Counsel for the Plaintiff, during his submissions before this Court, had pointed out certain items of evidence as instances that demonstrably indicate that the adverse possession of lots D3 and E, as claimed by the Defendant, had no uninterrupted period of ten years against the Plaintiff and her immediate predecessor in title, in order to qualify him to acquire title under section 3 of the Prescription Ordinance. Having pointed out such instances from the evidence, learned Counsel then relied on a quotation from the text of a book titled ***Law of Adverse Possession*** by *M. Krishnasami* (13th Ed) where it states (at p.191) that "*Possession, which can ripen into title, must be continued without any entry or action by the legal owner of the full statutory period. An entry by the legal owner upon the land, breaks the continuity of an adverse*

possession, when it is made openly with the intention of asserting his claim thereto and is accompanied with acts upon the land, which characterises the assertion of title of ownership", as a statement that describes the nature of possession, the Defendant should have established before Court.

In view of the said contention advanced by the Plaintiff before this Court, namely, that her immediate predecessor in title, *Gamini Ponweera,* had entered into possession of lots D1, D3 and E, during the period 1994 to 1999, when the action against *Simion Perera* was pending before the District Court, it is observed that the High Court of Civil Appeal had in fact considered the question whether the requirement of uninterrupted period of ten years was satisfied by the Defendant. In rejecting the said contention of the Plaintiff, the appellate Court was of the view that, if the inquiry into applications under section 328 of the Civil Procedure Code were proceeded with, the Defendant could have easily established his possession against *Gamini Ponweera*. The appellate Court also noted that the Defendant had successfully resisted all attempts to oust him from the land during this period and hence is entitled to the prescriptive title. Therefore, the appellate Court arrived at a conclusion that the Defendant had proved his adverse possession against the Plaintiff at least from the year 1988 for an uninterrupted period of ten years.

Thus, it appears the appellate Court did consider the fact that *Gamini Ponweera,* upon his eviction from lot D1 on 14.06.1999, had filed an application under section 328 of the Civil Procedure Code. Consequently, the Appellate Court also had accepted that *Gamini Ponweera* was in possession of the disputed land, from 1994, until his eviction in 1999. But unfortunately, the Court had disregarded that fact altogether from its consideration and rejected the contention of the

Plaintiff on the premise that there was no interruption of possession of the Defendant, because, it was of the view that had the inquiry under section 328 proceeded, the Defendant could have easily established his adverse possession against *Gamini Ponweera.*

The contention advanced before this Court by the Plaintiff is line with the case she had presented before the trial Courts seeking its determination. The Plaintiff had raised several issues on this aspect on the Defendant's claim of prescription. In case No. 6906/L, issue Nos. 3b and 3c have dealt with the possession of the plaintiff and *Gamini Ponweera,* whereas in case No. 6901/L, issue Nos. 2, 4 and 5 too were raised over same. The Defendant too, on his part had raised two issues each in both trials, on the nature of possession as referred to above in this judgment. The District Court as well as Additional District Court had answered these issues in favour of the Plaintiff. The District Court had answered the Defendant's two issues on possession as "not proved" while the Additional District Court only answered the issues suggested by the Plaintiff in her favour.

Thus, in view of the Plaintiff's contention on the validity of the appellate Court's conclusion on the question of possession, which is contrary to the findings of the trial Courts on that aspect, it is necessary that this Court considers the evidence upon which such a conclusion was reached by the appellate Court, in adopting a contrary view to the one adopted by the trial Courts. Having perused the available evidence on this point, it is my view that the said affirmative conclusion reached by the High Court of Civil Appeal on the question whether the Defendant had established that he had adverse possession since 1988 over lots D3 and E, is clearly against the weight of the evidence that had

been presented before the trial Courts. I have reached that conclusion upon the reasons that are set out below.

When the High Court of Civil Appeal held with the Defendant's claim that he had acquired prescriptive title after 1988 to lots D3 and E, it is obvious that the required ten-year period of uninterrupted adverse possession should be found within the said period of 1988 to 1999, the year in which the Plaintiff was evicted by an order of Court. It is already noted that the Defendant was engaged in a process of litigation with his tenant *Simion Perera,* which commenced in the year 1985 and continued until the former was finally placed in possession of lots D1, D3 and E by an order of Court in June 1999, after this Court rejected the leave to appeal application filed by the latter. During this period, the title to lots D1, D3 and E had changed hands several times. Then, with the execution of writ, the Defendant was placed in possession of the three lots, along with his own lot D2, by an order of Court. Thereby the applicable period is reduced to a period of eleven years, between 1988 and 1999.

The first outsider to hold title to lots D3 and E from the *Perera* family is *Dinapala de Silva*. He acquired title to these two lots in 1988 from *Juliet Perera* and after his death, the heirs have got together and transferred that title back to *Juliet Perera* in 1993. During this five-year period, there is absolutely no evidence available before the trial Court as to the nature of possession, the said *Dinapala de Silva* may have had over the disputed parcels of land. The Defendant could therefore claim without any challenge to the contrary that he had exclusive adverse possession over the said parcels of land during this five-year period. In

the year 1994, *Juliet Perera* again transferred her rights over lots D1, D3 and E to *Gamini Ponweera* from whom the present Plaintiff had acquired tittle to the two lots. But there is only six-year time gap between 1988 and 1994 (ignoring the short duration when its title was held by *Juliet Perera*) and even if the Defendant had possessed the two lots adverse to the rights of *Dinalapa de Silva* during that time (through his tenant, who was placed back in possession of the entire land by Court on 01.04.1991), that period itself, being of a mere six-year duration, does not satisfy the requirement of ten years of uninterrupted adverse possession.

Thereafter, *Gamini Ponweera* had acquired title to lots D1, D3 and E from *Juliet Perera* on 10.04.1994, who then transferred title of lots D3 and E to the Plaintiff on 10.03.1996. The fiscal, having executed the writ of possession on 14.06.1999, quieted the Defendant in possession of lots D3 and E (owned by the Plaintiff) and lot D1 (owned by *Gamini Ponweera*). The Plaintiff as well as *Gamini Ponweera* have thereupon moved Court under section 328 of the Civil Procedure Code, against the said eviction. The Defendant, on the day of the inquiry of the application by *Gamini Ponweera*, had conceded to the latter's possessory rights over lot D1. The application of the Plaintiff was however dismissed by Court on the day of the inquiry, upon her failure to diligently pursue the said application.

The Plaintiff did not call any of her predecessors in title as witnesses. Her husband, who gave evidence on her behalf, had no direct knowledge of the events that had taken place prior to 1996, the

year she had acquired title to lots D3 and E. It could well be that, in order to compensate for that deficiency in their evidence, the Plaintiff did tender a certified copy of the application by *Gamini Ponweera* before the trial Courts (P7). In that application *Gamini Ponweera* asserts that he had rented out lot D1 to one *Sunanda Perera*, who operated a service station with his employees, whilst occupying the building standing on lot D1, until his eviction by Court and alleged that the Defendant had obtained the said writ of execution by suppression of relevant facts. The fiscal report (V3a) confirms this assertion of *Gamini Ponweera,* as it indicates that when the Court officer had arrived at the property in order to execute the writ, he noted that there was a service station housed in a building with asbestos roofing. There were several workmen employed by one *Sunanada Perera,* who was in occupation of that building, and presented himself as the owner of that service station.

This clearly shows that contrary to the finding of the High Court of Civil Appeal, in fact there was clear evidence before trial Courts that *Gamini Ponweera* had total control over lot D1 and possession *ut dominus* over same. The Defendant, until *Gamini Ponweera* moved Court under section 328, had consistently maintained that he exclusively possessed lots D1, D3 and E, along with his own lot D2, adverse to the interests of its true owners. When that application was taken up for inquiry, the Defendant had entered into a settlement with *Gamini Ponweera* by conceding to the position that the latter is entitled to be quieted into possession of lot D1 from the date of inquiry i.e. 24.05.2000 (P8) after renouncing his alleged prescriptive title over it.

The High Court of Civil Appeal had considered this item of evidence that had been presented in the form of a copy of proceedings under section 328 before the District Court, but in the process had failed to consider this important aspect of an item of evidence it revealed. That aspect of the evidence is in relation to the qualification on which the Defendant had insisted to be clarified, before he enters any settlement with *Gamini Ponweera*. The proceedings before trial Court revealed that the Defendant, having first satisfied himself that there was no "encroachment" by *Gamini Ponweera* into lot D2 by the latter's act of erection of a parapet wall on the common boundary between lots D1 and D2, had thereafter only proceeded with the said settlement in favour of *Gamini Ponweera*, ending the inquiry into the application under section 328.

The learned District Judge, in rejecting the Defendant's assertion that he conceded to *Gamini Ponweera's* rights only because of his close family ties, justifiably questions the acceptability of the said claim by posing the question of, if indeed that was the case is, why did the Defendant had to wait from 1999 to concede the rights of his "*family member*", until that member files an application under section 328 and proceeded with its inquiry after his eviction insisted on by the former? But the High Court of Civil Appeal had rejected the Plaintiff's contention on this aspect, solely on a mere hypothetical premise, i.e., if the inquiry was preceded with, the Defendant could have "*easily established*" his claim of prescription. However, the High Court of Civil Appeal did not offer any reasoning as to why it opted to differ with the point raised by the trial judge, by raising that question or the evidence upon which the Court had arrived at that conclusion.

The Defendant, in his evidence, did not clarify as to the time period in which this parapet wall was constructed. But he made no mention either to that construction or to the construction of a house with asbestos roofing on lot D1 by *Gamini Ponweera*. But he had accepted that it was *Gamini Ponweera,* who constructed the parapet wall, at the time of the said settlement. This construction was obviously undertaken by *Gamini Ponweera* after he had acquired title to lot D1 along with D3 and E, in 1994 and before the said settlement was entered in the year 2000. The very acts of constructing a house with asbestos roofing and erecting a parapet wall separating lot D1 from lot D2, within the confines of the larger land claimed by the Defendant, without any resistance or objection from him is a clear indication that *Gamini Ponweera* had possessed at least lot D1 *ut dominus* since acquiring its paper title, despite the claim of exclusive possession by the Defendant during the said four-year period adverse to rights of the actual owner.

During the period 1994 to 1996, lots D3 and E were owned by *Gamini Ponweera* along with lot D1. What must be noted here is *Gamini Ponweera* had erected this parapet wall, when he had title to all three lots, and therefore the interruption to the Defendant's possession is applicable to lots D3 and E as well. The Defendant nonetheless asserts that he possessed lots D1, D3 and E adverse to the rights of its true owners. It is evident that *Gamini Ponweera* had possessed lot D1 from 1994 as his own property and continued in that state until he was evicted by an order of Court in 1999. During this five-year period, the evidence clearly points to the fact that the Defendant never had any possession over lot D1, until he was placed possession of same in 1999

by Court. The series of acts attributed to *Gamini Ponweera,* namely, construction of a parapet wall, construction of a house, renting same out to a third party until his eviction in 1999 and regaining all his rights over lot D1 in 2000, all points to a justifiable finding of fact that *Gamini Ponweera* had possessed lot D1 *ut dominus.*

Similarly, the Plaintiff obtained title to lot D3 and E from *Gamini Ponweera* on 10.03.1996 and instituted the instant actions on 10.07.2007, seeking declaration of title in respect of each of the two lots D3 and E and eviction of the Defendant therefrom. It is clear that during the period of two years from 1994 to 1996, it was *Gamini Ponweera* who had the possession of lots D3 and E along with lot D1. The time period of eight years from 1988 to 1996, even if the Defendant had adverse possession over lots D3 and E during this time, he is not entitled to a decree in his favour as the required ten-year period of such possession was not satisfied.

Similarly, if there is evidence that the Plaintiff too had come into possession of lots D3 and E, after her acquisition of title to same at any point of time before 1999, thereby interrupting the completion of a continuous period of ten years reckoned from 1988, then too the Defendant is not entitled to a decree under section 3 of the Prescription Ordinance. In the circumstances, the question whether there was such evidence placed before the trial Courts must be considered by this Court.

The Plaintiff had placed oral and documentary evidence before trial Courts, which indicated what they did with the land after

acquiring paper title to same in 1996 from *Gamini Ponweera*. It is correct that only the Plaintiff's husband gave evidence on her behalf in both trials. However, the said witness, in addition to his oral evidence, in which he described the nature of possession that the Plaintiff has had over lots D3 and E since becoming its owner, also tendered several documents as evidence, in support of his wife's possession. The assertions made by the witness for the Plaintiff relates to incidents that he himself did witness by participation and thus are termed as direct evidence on those events. As correctly noted by the High Court of Civil Appeal, the witness for the Plaintiff only spoken of the events that had taken place since her acquisition of paper title to lots D3 and E in 1996.

Witness *Charles Amarasekara*, being the husband of the Plaintiff and whilst giving evidence on her behalf, had stated that during the week which followed the execution of the transfer deed in favour of his wife in 1996, they had entered into possession of the land. Having cleared same of vegetation they had demolished a derelict building standing on it along with an overhead tank. They also demolished a part of the boundary wall and taken steps to install a gate in order to gain access to lots D3 and E from the public road. During his evidence *Amarasekara* had also tendered a copy of the application made to the District Court in case No. 1343/RE under section 328, subsequent to her eviction by the fiscal marked as P7.

The High Court of Civil Appeal rejected the Plaintiff's claim on the footing that these were the actions taken by her to establish possession only after acquisition of paper title and the witness called by her is unable to give evidence with regard to the nature of possession of

the land before she made the said purchase and did not call any predecessor in title to challenge the Defendant's claim of adverse possession. This is an erroneous conclusion since the Plaintiff had in fact placed evidence before the trial Courts in the form of documentary evidence, as to the nature of possession her predecessor in title had over the two lots, when she tendered *Gamini Ponweera's* application under section 328 (P7), along with her own application (P6). The judgments of the appellate Court did not indicate whether it had considered the contents of these two items of documentary evidence or not. The appellate Court also failed to indicate its own determination on the learned District Judge's finding that the Defendant had no uninterrupted possession for a period of ten years over lots D3 and E.

In her application under section 328 of the Civil Procedure Code, the Plaintiff had averred that upon acquisition of title to lots D3 and E, she had obtained an assessment number and paid assessment rates to the local authority. This application, although indicating the intention on the part of the Plaintiff to possess the land to which she had acquired title *ut dominus*, does not qualify to be taken as an instance of an interruption to the Defendant's possession over lots D3 and E. However, the acts of demolition of a derelict building and demolition of a part of the parapet wall in order to put up a gate as claimed by the Plaintiff, in itself would qualify to be taken as instances of asserting her rights over the land and thereby at least interrupting the Defendant's possession. The Defendant had cross-examined the witness at length over this issue and suggested there were no buildings standing on the land at that point of time.

The fiscal report (V5) indicates that the Court officer had observed an overhead tank on that land in 1991. Except for this he had

not noticed any other buildings standing on that land. But the overhead tank was distinctly mentioned in the said report. This was before even the Plaintiff had acquired her title to the land. The witness for the Plaintiff may have exaggerated as to the demolition activity carried out on the land, but the claim that he did demolish the masonry structure of an overhead tank is supported by other independent evidence, namely the fiscal report. The Defendant too, in the case No. 6901/L, too admits that the Plaintiff had demolished a building standing on that land. But, despite these acts of interference with his claim of adverse possession, the Defendant did nothing to prevent the Plaintiff from possessing the land or dealing with it the way she pleased. The Defendant at the very least least did not register a nominal verbal protest for her actions on the land. Until he had raised the plea of prescription through his answer to the instant actions instituted by the Plaintiff, she had no occasion or reason even to suspect that the Defendant had commenced adverse possession against her rights.

The claim of demolition by the Plaintiff is a probable one as her building plan for the lots D3 and E was approved by the local authority on 22.08.1997 (after a period of seventeen months since she acquired title) and justifies an inference that she wanted the land to be cleared fully to facilitate the proposed construction of a dwelling house. Importantly, the demolition of a part of the parapet wall that had been put up by *Barlin Perera* and installation of a gate by the Plaintiff to lots D3 and E, was objected to by the Defendant, as indicative by letter V6. The purpose of this demolition and installation of a gate was to have independent access to the public road to lots D3 and E, since the only gate that had served the entire land had been put up by the father of the Defendant and it provided access to the public road only to lot D2 at

that point of time. Thus, the Plaintiff lost no time in installing a gate to her property after acquiring title to same. This obvious interruption to the Defendant's possession was met, not by resorting to a legal remedy on the strength of his prescriptive title, but by merely writing a letter to the local authority requesting the authority to desist from granting permission to the proposed construction activity of the Plaintiff. The reply to the Defendant's complaint by the local authority (V6) indicate that it relates to an unauthorised construction of a parapet wall. In fact, the *Ja-Ela* Pradeshiya Sabha, in response to the Defendant's complaint of an unauthorised construction by the Plaintiff, had directed him twice indicating its position that, unless he obtains a Court order within 14 days, the authority would proceed to approve her building plan. Despite these clear directions, the Defendant opted not to seek any legal remedy against the activities of the Plaintiff over the land and to assert his alleged prescriptive title over the lot D3 and E.

The Plaintiff's husband who participated in the inquiry held by the local authority into the Defendant's petition objecting to granting approval to their building plan, said in evidence that Defendant's basis of objection was based only on the fact that there was ongoing litigation with *Simion Perera.* The Defendant himself admitted in evidence that during the inquiry before the local authority, the officials have advised the Plaintiff's husband not to proceed with the purchase because of the said pending litigation. He also admitted before the trial Courts that witness for the Plaintiff *Amarasekara* had demolished a part of the existing boundary wall and made constructions on lots D3 and E.

What is important to note here is that the Defendant did not claim any prescriptive title to the said property to the Plaintiff even at that point of time. Certainly, this was yet another opportunity for the

Defendant to expressly claim of his acquisition of title to lots D3 and E on the basis of being in possession for a long period of time and to put the Plaintiff on notice of his rights and to resist her possession. But he had apparently kept that claim of prescription as a secret and divulged it only when the Plaintiff sought to evict him by filing the instant actions.

These several instances of activity to which the witness to the Plaintiff had referred to in his evidence are clearly supported by contents of the documentary evidence that had contemporaneously been made and existed even before the instant litigations are instituted. Some of these items of documentary evidence were tendered to Court by the Defendant himself. If the Defendant's adverse possession of lots D1, D3 and E was interrupted during the period commencing from 1988 and 1999, and thereby denying him of fulfilling the requirement of having adverse possession for an uninterrupted period of ten years within that 11-year period, then he is not entitled for a decree in his favour under section 3 of the Prescription Ordinance.

Thus, as indicated earlier on, I am of the view that when the High Court of Civil Appeal rejected the Plaintiff's claim of being in possession of lots D3 and E on the footing that these instances refers only to actions taken by her after acquisition of paper title and therefore her failure to call any of her predecessors in title to rebut the Defendant's claim of adverse possession by leading evidence as to the nature of possession they had over lots D3 and E, the appellate Court had clearly fallen into error in its failure to consider the evidence that had been referred to in the preceding paragraphs. In arriving at the said erroneous conclusion, the High Court of Civil Appeal also failed to consider whether these several acts of the Plaintiff did interrupt the

continuity of the alleged adverse possession relied on by the Defendant. There is a definite finding of fact by the District Court that the adverse possession of the Defendant was interrupted during the period 1988 to 2007, which in turn based on the Defendant's own admission, upon being suggested so by the Plaintiff. The appellate Court had unfortunately ignored all these important items of evidence, that had been presented by the Plaintiff in both oral and documentary forms, in relation to the underlying issue, whether the Defendant had uninterrupted possession of ten years since 1988. The appellate Court offered no reason to justify why it opted to hold contrary to the finding of these relevant facts in issue by the trial Court.

The fact that the Defendant, despite his claim of having been in possession of the same for over four decades, did not resort to legal remedies to prevent the Plaintiff from continuing in her activities over lots D3 and E, on the basis that she has paper title to the property and thereby disturbing his rights acquired by adverse possession over same, justifies drawing an inference that he did not do so because he had acknowledged a right existing in the Plaintiff for her to engage in such activity over the said two lots. The Defendant had full knowledge of the activities of the Plaintiff over the two lots. If that in fact the case is, then the Defendant is clearly disqualified to a decree in his favour, under section 3 of the Prescription Ordinance. Considering the available evidence, it is clear that the possession of the Defendant was repeatedly interrupted by the activities of the Plaintiff and thereby denied the former of an uninterrupted period of ten years of adverse possession.

Therefore, the answer of the District Court to the issue No. 11 of the Defendant, whether the Plaintiff had no possession in whatever form to the lands described the 3rd, 4th and 5th schedules to the plaint

(lots D2. D3 and E respectively) in case No. 6906/L, as "not proved", is a conclusion well supported by the body of evidence presented before it. Thus, the conclusions reached by the High Court of Civil Appeal that "*it is clear that the Defendant had always successfully resisted all attempts to oust him*" and the "Defendant *had been able to establish that he had continued possession of the land until this action was filed by the Plaintiff*", are clearly contrary to the weight of available evidence and, for that reason, are considered as erroneous.

Thus, in conclusion, I am of the view that during the period 1969 to 1988 the Defendant only had permissive possession of *Juliet Perera* and, in the absence of any overt act by which the permissive character of his possession turned into an undisturbed and uninterrupted possession by which a denial of a right existing in the latter could be fairly and reasonably inferred during this period, he is not entitled to a decree under section 3 of the Prescription Ordinance. During the period 1988 to 1999, also he had failed to establish uninterrupted adverse possession of lots D3 and E, for a period of ten years.

Therefore, the question of law on which leave was granted in both the instant appeals, namely, whether the learned Judges of the High Court erred in law in failing to appreciate that the Defendant failed to show an overt act or adverse possession against Plaintiff, namely the Defendant's sister during the period 1969 –1994, is answered in the affirmative and in favour of the Plaintiff.

Hence, the impugned judgments of the High Court of Civil Appeal in appeal Nos. WP/HCCA/NEG/03/2014 (F) and WP/HCCA/NEG /39/2013(F) are hereby set aside. The judgments of the District Court of *Negombo* in case No. 6906/ L and the judgment of

the Additional District Court of *Negombo* in case No. 6901/L, which held in favour of the Plaintiff are restored back and affirmed.

The appeals of the Plaintiff, SC Appeal Nos. 116/20 and 117/20 are accordingly allowed with costs in all three Courts.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of Section 37 (2) of the Arbitration Act No. 11 of 1995.

S C Appeal No. 119/2017

(with S C Appeal No. 120/2017)

SC/HC/LA No: 87/2016

HC No: HC/ARB/57/2013

ARB No: SLNAC/166/12/2006

1. Sathsindu Forwarding & Security (Pvt) Limited,
   No. 80,
   Navam Mawatha,
   Colombo 02.

2. Bagnold Associates Limited,
   No. 85,
   Grace Church Street,
   London, EC3 0AA,
   United Kingdom.

CLAIMANTS

Vs.

Sri Lanka Ports Authority,
No. 19,
P.O Box No. 595,
Church Street,
Colombo 01.

RESPONDENT

AND BETWEEN

1. Sathsindu Forwarding & Security (Pvt) Limited,

No. 80,
Navam Mawatha,
Colombo 02.

2. Bagnold Associates Limited,
No. 85,
Grace Church Street,
London,
EC3 0AA,
United Kingdom.

CLAIMANT-PETITIONERS

Vs.

Sri Lanka Ports Authority,
No. 19,
P.O Box No. 595,
Church Street,
Colombo 01.

RESPONDENT-RESPONDENT

AND NOW BETWEEN

Sri Lanka Ports Authority,
No. 19,
P.O Box No. 595,
Church Street,
Colombo 01.

RESPONDENT-RESPONDENT-APPELLANT

Vs.

1. Sathsindu Forwarding & Security (Pvt) Limited,
No. 80,
Navam Mawatha,
Colombo 02.
2. Bagnold Associates Limited,
No. 85,

Grace Church Street,
London, EC3 0AA,
United Kingdom.

CLAIMANT-PETITIONER-RESPONDENTS

Before: **JAYANTHA JAYASURIYA PC CJ**

P. PADMAN SURASENA J

E. A. G. R. AMARASEKARA J

Counsel: Vikum De Abrew SDSG with Chaya Sri Nammuni SSC for the Respondent-Respondent-Appellant

Nihal Jayawardena PC with Shyamalie Goonewardena & Radhya Herath for the Claimant-Petitioner-Respondents

Argued on: 12 - 01 - 2021 and 29 - 03 - 2021

Decided on: 22 - 03 - 2022

P Padman Surasena J

The Respondent-Respondent-Appellant, Sri Lanka Ports Authority (hereinafter referred to as the SLPA), entered in to the agreement dated 22-01-2004 (produced marked **P 4**), with the 1st Claimant-Petitioner-Respondent, a company incorporated in Sri Lanka, which acted in association with the 2nd Claimant-Petitioner-Respondent, Bagnold Associates Limited, a company incorporated in the United Kingdom, to conduct Port Security Consultancy Service according to the International Code for the Security of Ships and Port Facilities (ISPS) required by the Diplomatic Conference on Maritime Security held in London in December 2002 which had called for development of new measures relating to the security of ships and port facilities. For convenience, the 1st Claimant-Petitioner-Respondent and the 2nd Claimant-Petitioner-Respondent will hereinafter be jointly referred to in this judgment, as the Claimants.

Schedule A of the afore-stated agreement (hereinafter referred to as the Agreement), specified the services entrusted to the Claimants by the SLPA, while Schedule B of the Agreement specified the rates of payment for the provision of the said services. The Claimants had agreed to complete the said services within the time scale specified at the end of Schedule

B of the Agreement. For easy reference I would reproduce below, the two of the above-mentioned schedules to the Agreement.

Schedule A which sets out the services entrusted to the Claimants is as follows.

Schedule A

SCOPE OF WORK

Phase 1

Port Facility Security Assessment (PFSA)

A risk analysis of a port facility's operation in order to determine its risk to be the subject of any attack and its vulnerabilities in relation to such attack known as "Port Facility Security Assessment" (PFSA) of the Seaports of Sri Lanka and would address following.

a. *Identification and evaluation of important assets and infrastructure it is important to protect.*
b. *Identification of the possible threats to the assets and infrastructure and likelihood of their occurrence, in order to establish and prioritize security measure.*
c. *Identification, selection and prioritization of countermeasures and procedural changes and their level of effectiveness in reducing vulnerability.*
d. *Identification of vulnerabilities*
e. *Recommendations*

\- ***4 Weeks***

On getting approval of the Port Facility Security Assessment report by your Designate Authority, the Port Facility Security Plan (PFSP) would be prepared.

Phase 2

Port Facility Security Plans (PFSP)

A plan developed to ensure the Application of measures designed to protect the port facility and ships, persons and Cargo, Cargo transport units and Ship's stores within Port facility from the risks of a Security incident known as ***Port Facility Security Plans (PFSP)*** *of the Sea Ports of Sri Lanka and would address following.*

a. *Detail the security organisation of Port Facility.*

b. *Detail of Port Facility's link with other relevant authorities and the necessary commutation system to allow the effective continuous operation of the organization and its links with others, including ships in port;*
c. *Detail the basic security level 1 measures, both operational and physical, that will be in place;*
d. *Detail the additional security measures that will allow the port facility to progress without delay to security level 2 and, when necessary, to security level 3;*
e. *Provide for regular review, or audit, of the PFSP and for its amendments in response to experience or changing circumstances; and*
f. *Detail reporting procedures to government of Sri Lanka's contact points.*

- 4 Weeks

Phase 3

Training of Port Facility Security Officers

SATHSINDU/BAGNOLD *undertakes to design a training program and conducted aid program for up to ten persons.*

- *Understanding the reasons for the ISPS code*
- *ISPS Code content and requirements.*
- *Understanding the ISPS Code.*
- *Carrying out port critically assessments.*
- *Carrying out port vulnerability assessments.*
- *Ship & port interface.*
- *Understanding port security searches and search technology.*
- *ISPS documentation*
- *Developing an ISPS security manual.*

- ***3 Days to 01 Week***

In return, the SLPA had agreed to pay for the above-mentioned services, as per the payment scheme provided in Schedule B which is as follows.

Schedule B

ISPS PAYMENT SCHEDULE

	An advance payment of 50% of the total cost upon signing the Agreement	*US $ 60,000.00*
	25% to be paid at the time of submitting the security manuals	*US $ 30,000.00*
	25% to be paid at the time Government accepts security manuals	*US $ 30,000.00*
	Total	***US $ 120,000.00***

TIME SCALE

Phase	***Local***	***Foreign***
01		*4 Weeks*
02	*4 Weeks*	
03		*1 Week*

By virtue of the aforementioned payment schedule, the SLPA, upon signing the Agreement, was required to make an advance payment of 50% of the total cost which the SLPA had duly paid to the Claimants.

After the lapse of one year and six days to be exact, the Claimants, by the Notice of Arbitration dated 28th January 2005, had informed the SLPA that a dispute had arisen as the SLPA was in breach of their obligations under the Agreement as it had refused to pay the balance part of the total payment. The Claimants stated in the said notice that they are entitled to the balance payment since they had performed the services under the Agreement.

As the parties had agreed to refer for arbitration, any dispute arising between them regarding the performance of the contract as per clause 15 of the Agreement, the Claimants had referred the aforesaid dispute for arbitration by way of the afore-mentioned Notice of Arbitration.

The dispute in respect of which the Claimants had given Notice of Arbitration to SLPA, could be gathered by the following averments in the said Notice of Arbitration, produced marked **P 3** in this proceeding.[1]

[1] The said Notice of Arbitration was annexed marked X 8 to the Statement of Claim filed in the arbitral tribunal.

"In terms of Clause 2 of the above-mentioned agreement, Sri Lanka Ports Authority established by Act No. 51 of 1979, appointed our clients Sathsindu Forwarding & Security (Pvt) limited (SFSL) and/or in association with Bagnold Associates Limited as the Recognized Security Organization (RSO) and to perform the services listed in Schedule A annexed thereto upon the payment of rates mentioned in Schedule B to the said agreement for and on behalf of the Sri Lanka Ports Authority.

Our clients Sathsindu Forwarding & Security (Pvt) limited (SFSL) in association with Bagnold Associates Limited have performed their obligations and/or carried out the said services for which Sri Lanka Ports Authority has paid and settled a sum of US $ 60,000/- being 50% of the total payment that should be paid under the agreement mentioned above.

However, as the Sri Lanka Ports Authority in breach of its obligation under the above Agreement failed and neglected to pay the balance sum of US$ 60,000/. Therefore our clients Sathsindu Forwarding & Security (Pvt) limited (SFSL) in association with Bagnold Associates Limited are entitled to claim the said balance sum of US$ 60,000/- together with the interest at the rate of 12% per annum on the said sum from 23rd March 2004. Further, our clients the said Sathsindu Forwarding & Security (Pvt) limited (SFSL) in association with Bagnold Associates Limited have incurred a sum of Rs. 126,823.60 as expenses incurred to them and thus in terms of Clause 4.1.3 of the said Agreement entitled to claim the same together with the interest at the rate of 12% per annum from 23rd of March 2004.

However, as the Sri Lanka Ports Authority repeatedly failed and neglected to pay the above mentioned sums to our clients as per the said Agreement, through their Attorneys-at-law, sent a letter of demand dated 27th November 2004 demanding the above mentioned sums from Sri Lanka Ports Authority."

Thus, the dispute, the Claimants had referred for arbitration before the relevant arbitral tribunal as per the Notice of Arbitration, is the non-payment by the SLPA, the balance sum of US Dollars 60,000/=, in breach of its obligation under the Agreement despite the completion of the performance by the Claimants, their obligations under the Agreement. It is because the Claimants had carried out the services entrusted to them by the Sri Lanka Ports Authority that the former had claimed the balance sum of US Dollars 60,000/=.

Accordingly, having taken necessary steps to have the arbitrators appointed, the Claimants had filed in the arbitral tribunal, their Statement of Claim dated 05th January 2007 in which

they have described in detail, the dispute that had arisen between the Claimants and the SLPA.

The dispute in respect of which the Claimants have filed the said Statement of Claim, could be gathered by the averments contained in the 14th and 15th paragraphs in that Statement of Claim produced marked **P 5** in this proceeding. The said paragraphs are reproduced below for easy reference.

> *"14. An agreement to that effect was entered into between Sathsindu Forwarding & Security (Pvt) Limited (SFSL), the first named claimant, in association with Bagnold Associates Limited, the second named claimant and the Sri Lanka Ports Authority the(sic) for conducting of port security consultant services for international code for the security of ships and port facilities (ISPS) and to perform the services listed in Schedule A annexed thereto upon the payment of rates mentioned in Schedule B to the said agreement for and on behalf of the Sri Lanka Ports Authority.*
>
> *A true copy of the said Agreement is annexed hereto marked as "**X2**" and pleads the same as part and parcel hereof.*
>
> *15. The claimants above named have performed their obligations to the full satisfaction of the SLPA and/or carried out the said services for which Sri Lanka Ports Authority has paid and settled a sum of US$ 60,000/- being 50% of the total payment that should be paid under the agreement mentioned above.*
>
> *In proof of the said contention, the claimants annexe herewith marked as "**X3 (a)**", "**X3 (b)** and "**X3 (c)**" respectively, true copies of the said invoice, letter dated 26th January 2004 and receipt issued by the 1st Claimant."*

Moreover, in the said Statement of Claim, the Claimants have also stated the following.

i. *The Claimants have submitted the Port Facility Security Assessment (PFSA) and the invoice for payment for work carried out for SLPA in terms of the agreement for part payment.*
ii. *The Claimants have prepared the Port Facility Security Plans (PFSP).*
iii. *In the meantime, in April 2004 the Parliamentary election was held after which a different political party formed the Government.*
iv. *Thereafter the Government has appointed Sri Lanka Navy as the designated authority and the Recognized Security Organization (RSO) for ports security.*

v. *The LTTE almost carried out a major attack on the port of Colombo on 16-06-2006 which would have caused heavy damaged to the port of Colombo and to the city of Colombo. The attack failed purely due to bad weather.*

vi. *The 1st Claimant sent a letter dated 24-03-2004 to the Respondent with an attached invoice for an immediate payment of US Dollars 30,000 /=.*

vii. *The Claimants are therefore entitled to claim the balance sum of US Dollars 60,000 together with the interest at the rate of 12 percent per annum on the said sum from the date of 23rd March 2004 from the SLPA.*

viii. *The Claimants have incurred a sum of RS. 126,823.60 as expenses incurred to them and thus in terms of clause 4.1.3 of the agreement are entitled to claim that amount also together with the interest.*

ix. *The Claimants have sent a letter of demand dated 27-11-2004 to the SLPA.*

The Claimants, in keeping with the dispute they had referred for arbitration, had only prayed in their Statement of Claim, the following relief:

a. *an award in a sum of US $ 60,000/- or its equivalent sum in Sri Lanka rupees, together with the interest at the rate of 12% per annum on the said sum from 23rd March 2004 from the Respondent,*
b. *further award in a sum of Rs. 126,823.60 as expenses incurred to them together with the interest at the rate of 12% per annum from 23rd of March 2004, and*
c. *Costs of the arbitration.*

The SLPA filing its Statement of Defence, had taken up inter alia, the following positions.

(i) *Following the tragic events of 11.09.2001, IMO adopted new provisions to the SOLAS convention in December 2002 in order to enhance maritime security.*

(ii) *IMO by resolution amended the SOLAS convention under which the said ISPS security arrangements became mandatory from 01.07.2004.*

(iii) *The SLPA entered into the agreement in order to comply with the mandatory requirements under ISPS Code.*

(iv) *The SLPA paid a sum of US $ 60,000/= as an advance payment in terms of the agreement.*

(v) *The Claimants have failed to fulfill their obligations in terms of the agreement.*

(vi) *The Claimants are not entitled for any payment under the agreement as the Claimants have failed to carry out their obligations under the agreement.*

(vii) Sri Lanka Navy has fulfilled the requirements under the ISPS Code before the deadline given for the implementation of the same.

At the commencement of the inquiry before the arbitral tribunal, both parties framed issues to be decided by the arbitral tribunal. This was also done in keeping with the dispute that was referred for arbitration. It is relating to that particular dispute, that the parties had submitted their respective pleadings before the arbitral tribunal. The issues (as per the award as well as the written submissions filed by the parties in the arbitral tribunal) raised respectively by the Claimants and the SLPA, would help identify the nature of the said particular dispute, the arbitral tribunal was dealing with, in the instant case.

Issues raised by the Claimants:

i) Did the Claimants enter into the agreement marked X 2[2] to perform the services described in the said agreement?
ii) Did the Claimants perform the obligations contracted in terms of X 2?
iii) Did the Claimants make a demand by X 6[3]?
iv) Did the [SLPA] refuse to make payment in terms of X 7[4]?
v) Are the Claimants entitled to the sums referred to in paragraphs 44 of the Statement of Claim?
vi) If one or more issues are answered in favour of the Claimant, are the Claimants entitled to the reliefs prayed for in the claim?

Issues raised by the SLPA:

i) Was there a valid contract between the Claimant and the [SLPA]?
ii) Was there a valid Arbitration Agreement to refer the purported dispute for arbitration due to one or more aforesaid reasons?
iii) Was there a valid reference for arbitration?
iv) Has the tribunal jurisdiction to hear this arbitration and grant relief prayed for by the Claimant?
v) If any one or more issues above are answered in favour of the [SLPA], should the Statement of Claim be dismissed in limine by the tribunal?
vi) Without prejudice to the above issues, did IMO adopt new provisions to the SOLAS convention in December 2002 in order to enhance maritime security?

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[2] The Agreement produced (in the Supreme Court) marked **P 4** in this appeal.
[3] The letter of demand dated 27-11-2004 annexed to the Statement of Claim.
[4] The letter dated 24-12-2004 by which the SLPA had replied the above letter of demand.

vii) Did IMO resolution amend the SOLAS convention under which the said ISPS security arrangements became mandatory from 01-07-2004?

viii) Did the [SLPA] enter into the agreement marked X 2 in order to comply with the mandatory requirements under the ISPS Code?

ix) Did the [SLPA] pay a sum of US $ 60,0000/- as an advance payment in terms of the agreement marked X 2?

x) Did the Claimant fail to fulfill its obligations in terms of the agreement?

xi) Did the [SLPA] appoint the Claimants as a Recognised Security Organization (RSO)?

xii) Are the Claimants entitled for payment under the agreement?

xiii) Has the Sri Lanka Navy fulfilled the requirements under the ISPS Code before the deadline given for implementation of the same?

xiv) If any one or more of the issues above are answered in favour of the [SLPA], should the Statement of Claim be dismissed in limine by the tribunal?

xv) Are the Claimants entitled for the relief prayed for, in the Statement of Claim?

xvi) Are the Claimants estopped from claiming any money in terms of the agreement due to their conduct?

xvii) Is the amount claimed by the Claimant excessive?

xviii) If any one or more of the issues above are answered in favour of the [SLPA], should the Statement of Claim be dismissed in limine by the tribunal?

xix) Had the Claimants failed to discharge its obligation for the advance payment made even after the time period stipulated in the agreement?

xx) Had the Claimant failed to fulfill its obligations for the advance payment made in terms of the agreement marked X 2?

xxi) Did the Claimants fail to fulfill its obligations for the advance payment made even after the time period stipulated in the agreement?

xxii) *Has a cause of action accrued to the [SLPA] against the Claimant to recover the aforesaid sum of US $ 60,000/- with the interest at the rate of 12% per annum on the said sum from 23-04-2004 up to the date of award and legal interest on the aggregate amount mentioned in the award till payment in full?*

The above issues clearly show that all three stakeholders in this arbitration, namely the two rival parties and the arbitral tribunal, had focussed on the dispute of non-payment by the SLPA, the balance sum of US Dollars 60,000/=, in breach of its obligation under the Agreement, despite the completion of the performance by the Claimants, their obligations

under the Agreement. This is because it was the said dispute that the Claimants had referred for arbitration before the arbitral tribunal.

However, after the completion of the inquiry, the arbitral tribunal had unanimously awarded the Claimants a sum of US$ 48,000/- being the balance of 90% of the total cost (US$ 120,000/-) after deducting the advance of US $ 60,000/- already paid to the Claimants by the SLPA. In the award, the arbitral tribunal had held that the Claimants are entitled to the said 90% of the total sum in terms of clause 10.3 of the Agreement on the basis that the SLPA had prevented the Claimants from carrying out the services entrusted to them.

Being aggrieved by the award of the arbitral tribunal, the SLPA filed in the High Court, the petition and affidavit dated 28-03-2013 in the case bearing No. HC ARB/ 57/ 2013 in terms of section 32(1) of the Arbitration Act No. 11 of 1995 (hereinafter sometimes referred to as the Arbitration Act), seeking to set aside the aforesaid arbitral award. Thereafter, the Claimants filed an application dated 28-05-2013 bearing case No. HC ARB/ 112/ 2013, seeking to enforce the said arbitral award under section 31 of the Arbitration Act. The learned High Court Judge having consolidated those two applications in terms of section 35 of the Arbitration Act, pronounced the judgment which is impugned in this appeal. The learned High Court Judge by that judgment had dismissed the application of the SLPA refusing to set aside the arbitral award and made order in the same judgment recognizing and enforcing the arbitral award.

Being aggrieved by the judgment of the learned High Court Judge, the SLPA has filed the instant appeal to challenge the order refusing to set aside the arbitral award. This Court, when the Leave to Appeal application pertaining to the instant appeal was supported before it, having heard the submissions of the learned Counsel for both parties, by its order dated 12-06-2017, has granted Leave to Appeal in respect of the questions of law set out in sub-paragraphs (a), (b) and (c) of paragraph 18 of the Petition dated 15-01-2016 filed by the SLPA. The said questions of law read as follows.

a) *Is the judgement of the High Court contrary to the provisions in sections 4, 15, 18, 24 and 25 of the Arbitration Act?*
b) *Has the Judge of the High Court failed to set aside the Arbitral Award in terms of the provisions of Section 32 (1)(a)(iii) of the Arbitration Act?*
c) *Has the Judge of the High Court failed to set aside the Arbitral Award in terms of the provisions of Section 32 (1)(b)(ii) of the Arbitration Act?*

Since there is a reference to sections 4, 15, 18, 24 and 25 of the Arbitration Act in the afore-stated question of law set out in paragraph 18 (a) of the petition, reproducing those sections first, would be convenient.

Section 4 of the Arbitration Act describes the arbitrability of the dispute as follows:

> *"Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the matter in respect of which the arbitration agreement is entered into is contrary to public policy or, is not capable of determination by arbitration."*

Section 15 of the Arbitration Act specifies the duties of the arbitral tribunal as follows:

> *15. (1) An arbitral tribunal shall deal with any dispute submitted to it for arbitration in an Impartial, practical and expeditious manner.*
>
> *(2) An arbitral tribunal shall afford all the parties an opportunity, of presenting their respective cases in writing or orally and to examine all documents and other material furnished to it by the other parties or any other person. The arbitral tribunal may, at the request of a party, have an oral hearing before determining any question before it.*
>
> *(3) An arbitral tribunal may, notwithstanding the failure of a party without reasonable cause, to appear before it, or to comply with any order made by it, continue the arbitral proceedings and determine the dispute on the material available to it.*
>
> *(4) Parties may, introduce new prayers for relief provided that such prayers for relief fall within the scope of the arbitration agreement and it is not inappropriate to accept them having regard to the point of time at which they are introduced and to other circumstances. During the course of such proceedings, either party may, on like conditions, amend or supplement prayers for relief introduced earlier and rely on new circumstances in support of their respective cases.*

Section 18 of the Arbitration Act describes the commencement of arbitral proceedings as follows:

> *18. An arbitration shall be deemed to have been commenced if -*
>
> *a) a dispute to which the relevant arbitration agreement applies has arisen; and*
> *b) a party to the agreement -*

(i) has received from another party to the agreement a notice requiring that party to refer, or to concur in the reference of, the dispute to arbitration; or

(ii) has received from another party to the agreement a notice requiring that party to appoint an arbitral tribunal or to join or concur in or approve the appointment of, an arbitral tribunal in relation to the dispute.

Section 24 of the Arbitration Act describes the law applicable to the substance of dispute as follows:

24. (1) An arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties to any arbitration agreement, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The provision of subsections (1) and (2) shall apply only to the extent agreed to by the parties.

(4) The arbitral tribunal shall decide according to considerations of general justice and fairness or trade usages only if the parties have expressly authorised it to do so.

Section 25 of the Arbitration Act describes the form and content of the arbitral award as follows:

25. (1) The award shall be made in writing and shall be signed by the arbitrators constituting the arbitral tribunal. In arbitral proceedings with more than one arbitrator, the signatures of the majority of the members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 14.

(3) The award shall state its date and place of arbitration as determined in accordance with section 16. The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators constituting the arbitral tribunal in accordance with subsection (1) of this section shall be delivered to each party.

Having reproduced the above sections, let me first consider the questions of law set out in paragraphs 18 (a) and 18 (b) of the petition since the main thrust of the arguments advanced by the learned Senior Deputy Solicitor General who appeared for the SLPA was directed towards the issues set out in those questions.

At the outset, it must be remembered that arbitration is a process dependant solely on the agreement of the parties. The party autonomy is fundamental to such process. When one traverses through the provisions of the Arbitration Act, it becomes clear that the Act has recognised the party autonomy to a great extent. For example, the parties are free to determine the number of arbitrators of an arbitral tribunal;[5] the parties are free to agree on a procedure for appointing the arbitrators;[6] the parties are free to agree on any appropriate procedure including mediation and conciliation to encourage settlement at any time during the arbitral proceedings;[7] the parties are free to agree on the place of arbitration;[8] the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.[9] It is also open for the parties to agree: on the manner in which evidence before arbitral tribunal shall be given,[10] on the mode in which they could be represented before arbitral tribunal.[11] Moreover, the parties also can agree to an exclusion agreement as per section 38 of the Act. Thus, the principle of party autonomy could be seen permeating the entire Act as the guiding principle through those and also the other provisions of the Act. It is the said guiding principle which the Courts also adopt and give effect to, when deciding cases involving arbitrations. This is perhaps why arbitration is sometimes referred to as a private method of dispute resolution. In the arbitration process, the Government is not involved; the court system is not involved (except as provided for in the Act); the parties do not have to rely on any Government institution for resolution of their dispute. Process of conducting the arbitration, venue, time, mode of adducing evidence are all decided by agreement of parties. Although it is the agreement of the parties which first establishes the arbitral tribunal, it would thereafter be the arbitral tribunal which would eventually take over the whole affairs of

[5] Section 6.
[6] Section 7 (subject to the provisions of the Act).
[7] Section 14.
[8] Section 16.
[9] Section 17.
[10] Section 22.
[11] Section 23.

conducting the arbitration to its conclusion. However, one must not forget that it is basically the agreement of the parties which initially founds the arbitral tribunal and it is the parties and parties alone which confer it with jurisdiction by referring a dispute to it, for adjudication.

Although it is a private method of dispute resolution, once the arbitral tribunal makes an award, the law of the country (Arbitration Act) steps in to recognize and enforce that award. However, this is not without any limitation. The law (Arbitration Act) has put in place, certain legal framework within which the arbitral tribunal must operate. Courts will recognise and enforce an award made by an arbitral tribunal only if it had conducted its affairs (leading to the relevant award) within the framework specified by law. The afore-stated limitations are reflected in section 32 of the Act. Thus, it would be opportune at this juncture to reproduce that section. This is more so as the questions of law set out in Paragraphs 18 (b) and 18 (c) are also centred around some of the provisions in the said section.

Section 32 of the Arbitration Act.

(1) An arbitral award made in an arbitration held in Sri Lanka may be set aside by the High Court, on application made therefor, within sixty days of the receipt of the award –

(a) where the party making the application furnishes proof that -

(i) a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of Sri Lanka ; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case ; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on maters beyond the scope of the submission to arbitration:
Provided however that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act : or

(b) where the High Court finds that -

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka: or

(ii) the arbitral award is in conflict with the public policy of Sri Lanka.

(2) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application."

In the instant case, in clause 15 of the Agreement, the parties had agreed that any arbitration must be determined and resolved according to the rules and procedures as per the laws of Sri Lanka. Indeed, in the Notice of Arbitration dated 28-01-2005 itself, the Claimants also have relied on the provisions of the Arbitration Act No.11 of 1995. There is also no dispute that the provisions of the Arbitration Act must apply in this instance.

The main contention of the SLPA is that the arbitral tribunal had unlawfully made an award in relation to a new matter, raised for the first time by the Claimants in their written submissions, filed after the conclusion of the inquiry. It is because of that, the SLPA argues that the award of the arbitral tribunal must be set aside under section 32(1)(a)(iii) of the Arbitration Act. It is that argument I would now consider.

The Claimants commenced the inquiry proper, led evidence of witnesses and marked documents. They attempted to prove that they had fulfilled their obligations under the Agreement, as claimed in their Statement of Claim. However, the SLPA by way of cross examination, leading evidence of witnesses and by producing documents showed the arbitral tribunal, that the Claimants in fact had not fulfilled their obligations as per the Agreement. Perusal of the arbitral award shows clearly that the arbitral tribunal had accepted the position that the Claimants had not completed fulfilling their obligations as per the Agreement.

After the conclusion of the inquiry, both the Claimants and the SLPA had filed their respective written submissions. Some of the averments in the written submissions filed by the Claimants after the inquiry,[12] clearly show that the Claimants too do not assert positively that they had completely fulfilled their obligations as per schedule A of the Agreement. This is evident as the Claimants had more specifically used the phrase *'having almost completed'* in paragraph 84 of the written submissions dated 10.05.2012. It is in the said written submissions that the

[12] Page 949 & 969 of the appeal brief.

Claimants, for the first time, had claimed 90% of the total cost as per clause 10.3 of the Agreement.

Perusal of the proceedings of the arbitral tribunal shows that the arbitral tribunal had concluded recording of evidence on 03-09-2009, on which date, a date for correction of proceedings was fixed. Thereafter the arbitral tribunal had proceeded to make corrections of the proceedings on several dates i.e., 18-11-2009, 27-11-2009 and 16-02-2010.

The Claimants had thereafter filed their final written submission dated 10-05-2012. Proceedings dated 20-06-2012 shows that the learned Counsel for the Claimants Mr. Nihal Jayawardena had made an oral submission before the arbitral tribunal on that date (i.e., 20-06-2012) and thereafter continued his submission on 11-07-2012 also. Thereafter, on the same day (i.e., 11-07-2012), the learned Deputy Solicitor General Mr. De Abrew had started replying the aforesaid submissions made on behalf of the Claimant. (Same Counsel had continued to represent their respective parties in the High Court as well as in this Court.)

The sequence of the above events would clearly show that the arbitral tribunal had proceeded to hear the oral submissions of the learned Counsel for both parties, after both parties had filed their respective written submissions; the Claimants on 10-05-2012 and the SLPA on 22-05-2012 (as per the date stamp placed on the written submissions of the SLPA). Perusal of the aforesaid oral submissions made by the parties (recorded in the proceedings before the arbitral tribunal), also clearly shows that the Claimants had not advanced a case based on clause 10.3 of the Agreement up until that moment. The submissions made by the learned Deputy Solicitor General shows that the claim under clause 10.3 of the Agreement, put forward by the Claimants for the first time in their written submission filed after conclusion of recording of evidence, had taken the SLPA by surprise. The said submission also reveals that the learned Deputy Solicitor General had sufficiently appraised the arbitral tribunal of the above position well before it pronounced the award dated 30-01-2013.

However, despite the above position being brought to its attention, the arbitral tribunal had just brushed aside the said position and proceeded to make an award on the new claim put forward by the claimant in their final written submission. This has clearly deprived the SLPA any opportunity of defending such a claim before the arbitral tribunal. This clearly is tantamount to the arbitral tribunal breaching the provisions in section 15 (2) of the Arbitration Act which has stipulated that an arbitral tribunal shall afford all parties an opportunity, of presenting their respective cases. When the SLPA did not know that the Claimants would finally rest their case on clause 10.3 of the Agreement how could the SLPA have presented its case to defend such a claim? This is primarily due to the fact that the Claimants had not

referred any such dispute arising out of clause 10.3 of the Agreement for adjudication before the arbitral tribunal. The operative part of the said award dated 30-01-2013, (produced marked **P 2** in this proceeding) which is reproduced below would shed further light on the above issue.

> *"… Therefore, in view of the failure by the Respondent to perform its obligations in relation to the PFSAs the Claimants could not have completed performance in respect of PFSPS and in view of the foregoing statement of law set out by C G Weeramantry, the Respondent cannot seek to avoid liability on the basis that Claimants have not performed their obligations in relation to the PFSPs as per the agreement C9.* ***The Claimants in paragraph 22 of their written submission dated 10/05/2012 submit that they are entitled to 90% of the total sum in terms of Clause 10.3 of the agreement C9****.[13] For the foregoing reasons I am in agreement with this submission* ***on the ground that the Respondent's employees prevented Claimant 1 from carrying out the services as contemplated in Clause 10.3****. [14] Accordingly, 90% of US$ 120,000/- amounts to US $ 108,000. The advance of US $ 60,000 already [paid] to Claimant 1 by the Respondent would have to be deducted from this sum. Therefore, the balance sum payable by the Respondent to Claimant 1 will be US $ 48,000/- …"*

The phrases emphasized by me in the above quotation which was extracted from the award clearly show that, the entitlement to 90% of the total sum in terms of clause 10.3 of the Agreement was put forward by the Claimants for the first time in their written submissions dated 10-05-2012, filed after the conclusion of the inquiry; and the arbitral tribunal had made the award in relation to that claim so made in the said written submission, on the ground that the SLPA had prevented the Claimants from carrying out the services, as contemplated in clause 10.3.

The Claimants did not refer for arbitration, any dispute arising out of a situation where the SLPA had terminated the services of the Claimants or the SLPA or its employees had prevented the Claimants from carrying out the services entrusted to them. It would only be to such an istance, the aforestated clause 10.3 of the Agreement would apply. Further, as per the said clause, it would only be under such circumstances that the SLPA is required to pay the Claimants, 90% of the total sum payable, in terms of Schedule B of the Agreement, irrespective of the amount of work completed. The said clause 10.3 is reproduced below.

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[13] Emphasis is mine.
[14] Emphasis is mine.

"10.3. If the SFSL services are terminated or SLPA its employees prevented the SFSL to carry out the Services due to any reason SLPA shall pay 90% of the total sum payable in terms of schedule B irrespective of the extent of work carried out."

The dispute, the Claimants had referred for arbitration, is the failure on the part of the SLPA to pay and settle a sum of US$ 60,000/- (being 50% of the total payment that should be paid under the Agreement) after the Claimants had performed their obligations to the full satisfaction of the SLPA. It is that claim that the Claimants had demanded from the SLPA through the letter of demand dated 27-11-2004 annexed marked **X - 6** to the Statement of Claim and produced in the inquiry before the arbitral tribunal marked **C -34**. The paragraph extracted from the said letter of demand which is reproduced below would clearly confirm that it was indeed the dispute.

"Our clients state that they carried out the said services as per the Agreement but the Sri Lanka Authority having paid a sum of US $ 60,000/- failed and neglected to pay the balance sum of US $ 60,000 and together with the interest at the rate of 12% per annum on the said sum from 23rd March 2004 and the expenses incurred in terms of Clause 4.1.3 of the said Agreement of Rs. 126,823.60 together with interest at the rate of 12% per annum from 23rd March 2004. "

According to the said letter of demand, it is for the recovery of the said claim (in case the SLPA fails to pay) that the Claimants had instructed their Attorneys at Law to institute legal proceedings against the SLPA.

The Claimants neither divulged nor invited the arbitral tribunal to adjudicate, any dispute revolving around the question whether the SLPA had terminated the services of the Claimants or whether the SLPA or its employees had prevented the Claimants from carrying out the entrusted services which would have called for application of clause 10.3 of the Agreement.

It is only in the written submissions filed after the conclusion of the inquiry,[15] that the Claimants had admitted (as I have already adverted to), the fact that they had not completely fulfilled their obligations as per Schedule A of the Agreement. (The arbitral tribunal too upheld this position).

The SLPA did not file its Statement of Defence to defend any dispute arising out of any incident where SLPA had either terminated the services of the Claimants or had prevented the

[15] Page 949 of the appeal brief.

Claimants from carrying out the services entrusted to them. That would be a situation falling under clause 10.3 of the Agreement which would have in all probability required the SLPA to adopt a different 'strategy' in its defence. The SLPA in their pleadings, had only focused on the particular dispute that was referred for arbitration. i.e., its alleged failure to pay a sum of US $ 60,000.00/= being 50% of the total payment that should be paid under the Agreement upon the Claimants completing the performance of their obligations to the full satisfaction of the SLPA. That was the case the SLPA had defended in the course of the inquiry before the arbitral tribunal.

Thus, it is clear from the above facts that the parties had not mandated the arbitral tribunal to resolve any dispute arising out of any situation to which clause 10.3 of the Agreement applies. This was simply because there was no such dispute arisen between the parties. Indeed, it is clear that the SLPA had become aware of such a claim (under clause 10.3 of the Agreement) only after the Claimants had filed their written submission dated 10-05-2012 which is a date after the completion of the inquiry. Therefore, the arbitral tribunal could not have focused its mind on such a dispute during the inquiry as the parties had not invited the arbitral tribunal to consider and resolve that kind of dispute. The Claimants chose to raise it for the first time in their written submissions filed after the conclusion of the inquiry.

As per the provisions of the Arbitration Act, once the arbitral tribunal makes an award, there can be no review of its merits subject however to the aforesaid grounds of challenge set out in section 32 of the Act. This is the law and it is the parties who on their own volition agree to be bound by that law. However, this does not mean that an arbitral tribunal, once formed by the agreement of the parties, can go on voyages of discovery of disputes between the parties which formed it, irrespective of the fact that the parties before that tribunal had not referred such disputes for adjudication by the tribunal. The arbitral tribunal therefore has a legal duty to stay within its limits. These limits must be basically gathered cumulatively from the Notice of Arbitration, pleadings such as Statement of Claim and Statement of Defence, and issues. That is the wish of the parties; that is what the parties had agreed; that is the only power conferred on it by the parties; and that is the power conferred on the arbitral tribunal by law. Thus, an arbitral tribunal must take all possible steps to ensure that it remains within its terms of reference. It must guard its boundaries so that neither the tribunal nor any party before it could cross them. This is further illustrated by the following citations.

In their work, 'Law and Practice of International Commercial Arbitration',[16] the authors underscore the need for an arbitral tribunal to remain within its mandate in the following way:

> *"An arbitral tribunal may only validly determine those disputes that the parties have agreed that it should determine. This rule is an inevitable and proper consequence of the voluntary nature of arbitration.[17] In consensual arbitration, the authority or competence of the arbitral tribunal comes from the agreement of the parties; indeed, there is no other source from which it can come. It is the parties who give to a private tribunal the authority to decide disputes between them; and the arbitral tribunal must take care to stay within the terms of its mandate. The rule to this effect is expressed in several different ways. Sometimes it is said that an arbitral tribunal must conform to the mission entrusted to it; [18] or that it must not exceed its mandate; or that it must stay within its terms of reference,[19] competence or authority. Another way of expressing the rule (which is followed in this book) is to state that an arbitral tribunal must not exceed its jurisdiction (this term being used in the sense of mandate, competence or authority)."*

In the case of Oberoi Hotels (Pvt) Limited Vs. Asian Hotels Corporation Ltd,[20] the appellant (Oberoi) being the owner of the premises of Oberoi Hotel, entered into a Technical Assistance and Operating Agreement (TAOA) dated 08-03-1970 with the respondent Company (Asian Hotels), which provided for the promotion of the hotel named, "Lanka Oberoi" and the services to be performed by the appellant (Oberoi) in managing the hotel. After some years of operation under the said agreement, the appellant (Oberoi) sent Notice of Arbitration dated 19-03-1997 to the respondent (Asian Hotels). The dispute referred for arbitration was in relation to certain failures and interferences by the respondent (Asian Hotels) as reflected in the following two paragraphs of the said Notice of Arbitration.

> *"1. You have failed-*

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[16] Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides; (2004), 4th Edition, London: Sweet & Maxwell, at page 248 (paragraph 5-30).

[17] *In some states, such as Chile, some matters must be referred to arbitration (see Jorquiera & Helmlinger, "Chile" in International Arbitration in Latin America (Blackaby, Lindsey & Spinillo eds), p.95. It is questionable whether such compulsory arbitration is in fact arbitration in the true sense of the word since it lacks the necessary element of consent. Such "arbitrations" are outside the scope of this book.*

[18] *See, e.g., French Code of Civil Procedure 1981, Art.1502.3.*

[19] *Under the ICC Arbitration Rules, Art. 18, an arbitral tribunal must draw up its own "Terms of Reference" for signature by the parties and the tribunal and for approval by the ICC's Court, before proceeding with the arbitration.*

[20] SC/LA No. 28/2000, decided on 25-11-2002. [Reported in 2002 BALR 23 and also in Cabral's ALR (Vol I)].

(a) to complete the refurbishment works;

(b) to provide a hotel which can be operated as a modern fully-equipped hotel, catering to International Tourist and Business Trade.

2. You have interfered with, obstructed and prevented the exercise of the

absolute control and discretion in the operation of the Hotel vested".

The respondent (Asian Hotels) replying by letter dated 16-05-1997 denied the allegations and counter claimed damages on the basis of certain lapses on the part of the appellant (Oberoi). The respondent (Asian Hotels) also by this letter appointed its arbitrator. As per the letter dated 22-07-1997, the nominated arbitrators had notified that a chairman has been appointed to the arbitral tribunal. Thereafter, the respondent (Asian Hotels) by the letter dated 19-09-1997 sent to the appellant (Oberoi), had informed that in the circumstances set out in that letter, 'the Management Contract has terminated by operation of the circumstances of law/ has ceased to subsist in law' and the respondent (Asian Hotels) would have the right to formally terminate the agreement. The arbitral tribunal in that case, having considered the contents of that letter, in paragraphs 1, 2 and 3 of the award held that the agreements continued to exist and to be binding up to the date of close of the hearing in Colombo i.e., 16-10-1998 stating in the award as follows:

"Accordingly, we hold that although notice of 19-9-97 was given in good faith on legal advice, it was not effective to bring the contract to an end, either through a unilateral right of termination or on the ground of a repudiation by the Oberoi".

It was on the above finding that the tribunal in that case had considered remedies contained in paragraphs 1, 2 and 3 of the award and held that the agreements continued to exist and to be binding up to the date of close of the hearing in Colombo i.e., 16-10-1998. The respondent (Asian Hotels) then made an application to the High Court seeking to set aside the award, in terms section 32(1)(a)(iii) of the Arbitration Act on the basis that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration. The High Court set aside this part of the award holding that the letter dated 19-09-1997 did not come within the scope of the submission to arbitration, since it was sent six months after the commencement of arbitral proceedings. His Lordship Sarath N Silva Chief Justice seeing no error in the judgment of the High Court, examined in that judgment the applicable law namely, sections 15, 18, 24, 25 and 50 of the Arbitration Act. The following two paragraphs extracted from that judgment would be relevant for the instant case too.

"….The words "any dispute submitted to it for arbitration" [in section 15 of the Arbitration Act][21] *should be understood consistent with the provisions of Section 18 as meaning, any dispute that had arisen relevant to the arbitration agreement and submitted by way of a reference to arbitration by the parties. Similarly, Section 24 which deals with the law that will be applicable on the basis of which the arbitral tribunal will make its decision, is to be understood as requiring the arbitral tribunal to decide the dispute which has arisen and submitted to arbitration by way of a reference by the parties, "in accordance with such rules of law as are chosen by the parties ...". The same construction should be carried through to the making of an award as provided in Section 25 of the Act. The term "award" is defined in Section 50(1) to mean, "a decision of the arbitral tribunal on the substance of the dispute". In this provision too the phrase "substance of the dispute" should be construed to mean, the substance of the dispute that had arisen and submitted to arbitration by way of a reference by the parties. …"*

"…. It is seen that the touchstone in all situations is "the submission to arbitration". Therefore the question as to the validity of the award or any decision contained therein has to be decided primarily on the basis of the dispute that has arisen and submitted to arbitration by way of a reference by the parties. The leeway that is provided in paragraph (iii) is that the High Court should not look at only the strict letter of the submission to arbitration, but look at the entirety of the submission and ascertain whether the award deals with a dispute as envisaged by the parties or whether decisions contained in the award come with the terms of the scope of the submission to arbitration. In brief, the test is to ascertain whether the award contains matters which the parties could reasonably be said to have intended, to be decided by the arbitral tribunal, when they submitted the dispute, that had arisen, to arbitration. This is in keeping with the basic principle that an arbitral tribunal derives jurisdiction solely from the submission to arbitration by the parties. …"

Hatton National Bank Limited Vs. Casimir Kiran Atapattu and another,[22] is another case in which this Court had to consider whether the High Court had erred in law in holding that the arbitral award relevant to that case did not violate Section 32(1) (a) (iii). I would albeit briefly, advert to the facts of that case only to the extent relevant to the afore-stated section.

[21] The addition of the phrase within brackets is mine.
[22] SC Appeal 38/2006, SC Appeal 39/2006 decided on 25-06-2013, [Cabral's ALR (Vol I) 547].

Hatton National Bank Limited (HNB), granted certain financial accommodation to the respondents (Casimir Kiran Atapattu and another), who were carrying on business in partnership under the name, style and firm of Soul Entertainments (SOUL), to enable the latter to meet the initial expenses of importing into Sri Lanka, one set of Apogee Speakers from the United States of America. As security for the said financial accommodation, SOUL entered into a lease agreement, which provided for the lease of the said Apogee Speakers to SOUL for a period of 36 months. The said lease agreement meant that the HNB remained and continued to be the owner of the said Apogee Speakers. SOUL had initially complied with the lease agreement and duly paid the lease rentals for more than half the period of the lease. HNB by its letter dated 02.06.1998, sought to terminate the said agreement on the basis that SOUL had defaulted the payment of rentals. More than a month after the said termination of the said lease agreement, SOUL claimed that the said Apogee Speakers were destroyed in a fire. According to the Statement of Claim the HNB claimed a sum of money being the amounts due to it as arrears of rental on the lease agreement, and a further sum of money being the value of the Apogee Speaker system that was leased out to SOUL. According to the Statement of Defence, SOUL claimed that it had paid the lease rentals for 28 months and the letter of termination was wrongful and was of no force or avail in law. SOUL also contended that in any event the subject matter of the lease agreement, namely the Apogee Speaker system was destroyed by fire and therefore the lease agreement had become frustrated. The tribunal in that case, in its unanimous award had partly rejected the claim made by HNB, and directed HNB to pay SOUL, on the basis of latter's counter-claim, a sum of money found to be the amount of loss suffered by SOUL due to HNB's failure to insure the Apogee Speaker system, and a further sum of Rs. 1,462,832/- being the lease rentals SOUL had neglected to pay HNB in terms of the lease agreement, and interest thereon.

HNB sought to have the award set aside before the High Court primarily on the basis that it dealt with "a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration" under section 32(1)(a)(iii) of the Arbitration Act. The High Court, rejected that contention on the ground that no objection to the jurisdiction of the arbitral tribunal was raised by HNB at any stage before the said tribunal. In that case, one of the questions of law this Court granted Leave to Appeal against the aforesaid judgment of the High Court was aimed to ascertain whether the High Court had erred in law in determining and/or holding that the said arbitral award did not violate section 32(1) (a) (iii). The paragraphs which immediately follow the instant, would show that this Court had held that the award in that case fell within section 32(1)(a)(iii) of the Arbitration Act as the arbitral tribunal in that case had strayed

beyond its limits to consider some issues not taken up in the Statement of Defence and were altogether inconsistent with SOUL's conduct and pleadings.

In the said case, certain admissions were recorded which included, an unqualified admission that that HNB entered into a lease agreement with SOUL. The Counsel for SOUL had sought to formulate issues No. 9 and 10, but were strongly objected to, by the counsel for HNB on the basis that those issues were not covered by the pleadings and in fact inconsistent with the position taken up by SOUL in its correspondence with HNB as well as its Statement of Defence. The said issues Nos. 9 and 10 were to the following effect:

9. Did the HNB have a right to enter into the said lease agreement?

10. Was the HNB the "owner" of the Apogee Speaker system*?*

The arbitral tribunal, without giving any reason, allowed issues Nos. 9 and 10 to stand. Subsequently, in the award, the tribunal inaccurately stated that "the following issues were agreed upon by the parties at the commencement of the inquiry", and proceeded to set out the 31 issues on which it based its award. That included issues No. 9 and 10 which Counsel for HNB had strongly resisted. It was in that backdrop that His Lordship Justice Saleem Marsoof PC, holding that the purpose of rejecting the claim of HNB for the return of the Apogee Speaker system or the payment of its agreed value, was created by the tribunal's failure to reject issues Nos. 9 and 10 based on the objection taken to them by the Counsel for HNB, despite the fact that they did not arise from the pleadings, and were altogether inconsistent with them, answered the afore-stated question of law (in respect of which this Court had granted Leave to Appeal in that case) in the affirmative and in favour of HNB, and stated as follows:

> *"In conclusion, it needs to be emphasised that the manner in which the arbitral tribunal arrived at its astonishing award is most revealing, and demonstrates not only that the arbitral tribunal was, to say the least, altogether confused in regard to what exactly was legitimately in issue in the case, but also that it had wittingly or unwittingly strayed outside its mandate. It is trite law that the mandate of an arbitral tribunal to decide any dispute is based on party autonomy and is confined to the limits of the power conferred to it by the parties in express terms or by necessary implication. An arbitration tribunal does not have the freedom that Italian poet Robert Browning yearned for in his famous Andrea del Sartio, I. 97, or as those lesser mortals who are not that poetically inclined would put it, the freedom of the wild ass; it is obliged to act within, and not exceed, its mandate. …"*

Let me continue further with the discourse relevant to the issues at hand. In the instant case, the Claimants have neither prayed for any relief under clause 10.3 of the Agreement nor framed any issue in relation to such a claim. It is despite the absence of such a claim that the arbitral tribunal had awarded the Claimants a sum of US $ 48,000/= together with simple interest at the rate of 12% per annum from the period beginning 27-11-2004 until the payment is paid in full, together with costs in the sum of Rs. 250,000/- against the SLPA. Section 15(1) of the Arbitration Act mandates an arbitral tribunal to deal with any dispute submitted to it for arbitration in an impartial, practical and expeditious manner. As has been held in the case of Oberoi Hotels,[23] section 15 of the Arbitration Act does not confer on an arbitral tribunal to deal with any dispute between parties to an arbitration agreement. An arbitral tribunal can validly exercise its jurisdiction to conduct an arbitration only in respect of any dispute that had arisen relevant to the arbitration agreement and submitted by way of a reference to arbitration by the parties for its adjudication.

Similarly, section 4 of the Arbitration Act also must be interpreted in the same way. Thus, section 4 of the Arbitration Act too does not empower an arbitral tribunal to deal with any dispute between parties to an arbitration agreement but only disputes that had arisen relevant to the arbitration agreement and submitted to it by way of a reference to arbitration by the parties for adjudication.

It is the same interpretation that should be provided to section 24 of the Arbitration Act which has stipulated the law which an arbitral tribunal must apply to decide a dispute. The phrase "in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute" must therefore mean as held in Oberoi Hotels[24]case, as empowering the arbitral tribunal to decide the dispute which has arisen and submitted to arbitration by way of a reference by the parties, in accordance with such rules of law as are chosen by the parties.

In the instant case, although there is an arbitration agreement between the Claimants and the SLPA, neither party had submitted any dispute arising out of any situation falling under clause 10.3 of the Agreement for arbitration by the arbitral tribunal. Thus, the arbitral tribunal in the instant case, has made an award on a matter not submitted before it by any party, for arbitration.

As per section 15(2) of the Arbitration Act, it is mandatory for an arbitral tribunal to afford all parties an opportunity, of presenting their respective cases. In the instant case, the arbitral

[23] Supra.
[24] Supra.

tribunal has failed to comply with that requirement as well. (I have already commented on this above).

Section 15(4) of the Arbitration Act has not granted an unrestricted freedom for any Party to introduce new prayers for relief. Such new prayers can only be permitted having regard to the point of time at which they are introduced and the other relevant circumstances. It is only in their written submissions, that the Claimants for the first time change the character of the scope of the arbitration by introducing a new matter under clause 10.3 of the Agreement. The Claimants did not make any application for insertion of a new prayer invoking the provisions in section 15 (4). Thus, the relief granted to the Claimants by the arbitral tribunal is not something even the Claimants had prayed for, as a relief.

An arbitration must have commenced before it could be concluded, for nothing that has not commenced can be concluded. Section 18 of the Arbitration Act requires fulfilment of two requirements before one could assert the fact that a particular arbitration has commenced. These two requirements are set out in limbs (a) and (b) of that section. First requirement is that a dispute to which the relevant arbitration agreement applies must have arisen between parties. Second requirement can be fulfilled in one of the two ways set out in section 18 (b) and that is when *a party to the agreement* -

i. has received from another party to the agreement a notice requiring that party to refer, or to concur in the reference of, the dispute to arbitration; or

ii. has received from another party to the agreement a notice requiring that party to appoint an arbitral tribunal or to join or concur in or approve the appointment of, an arbitral tribunal in relation to the dispute.

As has been mentioned above, in the instant case, the pleadings, issues, documents produced and evidence recorded, show that no dispute arising out of any situation falling under clause 10.3 of the Agreement had arisen between the Claimants and the SLPA. Thus, the above mentioned first requirement under section 18 (a) does not exist.

The dispute, the Claimants had referred for arbitration before the relevant arbitral tribunal as per the Notice of Arbitration, is the non-payment by the SLPA, the balance sum of US Dollars 60,000/=, in breach of its obligation under the Agreement despite the completion of the performance by the Claimants, their obligations under the Agreement. The Claimants had not referred to any dispute arising out of any situation falling under clause 10.3 of the Agreement in the Notice Arbitration **P 3**. Thus, the notice the SLPA has received (**P 3**) is not a notice falling under section 18 (b) of the Arbitration Act as far as any dispute arising out of any

situation falling under clause 10.3 of the Agreement is concerned. Therefore, the second requirement under section 18 (b) also does not exist in the instant case. This means that no arbitration with regard to any dispute arising out of any situation falling under clause 10.3 of the Agreement has ever commenced.

'Award' has been defined in section 50 (1) of the Arbitration Act as follows.

"award" means a decision of the arbitral tribunal on the substance of the dispute.

As has been held in the case of Oberoi Hotels,[25] the phrase "substance of the dispute" in section 50 (1) must be interpreted to mean, the substance of the dispute that had arisen and submitted to arbitration by way of a reference by the parties. The fact that no arbitration in relation to any dispute arising out of any situation falling under clause 10.3 of the Agreement has ever occurred, establishes conclusively that no award in terms of section 50 (1) in relation to that kind of dispute can exist in law.

Thus, the term "award" in section 50(1) must mean, a decision of the arbitral tribunal on the substance of the dispute which has arisen and submitted to arbitration by way of a reference by the parties. Similarly, the award referred to in section 25 of the Arbitration Act must only mean an award which qualifies to fall under the above interpretation.

Perusal of the judgment of the learned Judge of the High Court shows that in view of the issue: '*Did the Claimants fail to fulfill its obligations in terms of the agreement?'*, the learned High Court Judge had concluded that the arbitrators were obliged to consider the question whether the Claimants have failed to fulfill the obligations of the agreement fully or partially and if partially, why the Claimants were unable to fulfill the obligations fully. The learned Judge of the High Court had also taken into account, the presence of the issue: *'Are the Claimants entitled for payment under the agreement?'.* It is on that basis that the learned Judge of the High Court had taken the view that the claim under clause 10.3 of the agreement is not a new claim taken up for the first time by the Claimants in the written submissions. The learned Judge of the High Court has also taken the view that the Claimants have only brought the contractual term to the attention of the tribunal with regard to the manner in which compensation should be awarded in the event of such breach of the agreement by the respondent when the services by the claimant was prevented by the respondent. Moreover, the judgment of the High Court also reveals that the learned Judge of the High Court in view of the issue: *'Has a cause of action accrued to the [SLPA] against the Claimant to recover the aforesaid sum of US $ 60,000/- with the interest at the rate of 12% per annum on the said*

[25] Supra.

sum from 23-04-2004 up to the date of award and legal interest on the aggregate amount mentioned in the award till payment in full?', has taken the view that the arbitrators were also required to refer to any other term of the agreement and consider whether the claimants are entitled to payments under any of the clauses in the agreement.

It must be observed that paragraph 15 of the Statement of Claim (**P 5**) reads "The claimants above named have performed their obligations to the full satisfaction of the SLPA and /or carried out the said services for which Sri Lanka Ports Authority has paid and settled a sum of USD 60,000/- being 50 % of the total payment that should be paid under the agreement mentioned above". The Claimants maintain the same position in the Notice of Arbitration (**P 3**). However, the SLPA in paragraph 16(iv) of its Statement of Defence (**P 6**) had disputed this claim and had pleaded that it paid the said sum of USD 60,000/- which was 50 % of the total payment **as an advance payment** as it was required to do so in terms of the agreement. The fact that the said sum of USD 60,000/- was required to pay as an advance, is clearly borne out from the *'ISPS PAYMENT SCHEDULE'* in Schedule B of the Agreement.

Clause 4.1.1 of the Agreement (**P 4**) reads: "In consideration of the services to be rendered by the SFSL under this agreement SLPA shall pay to SFSL the amounts at terms as per agreed Schedule B and such additional sums (if any) as shall from time to time agreed by the parties in writing". Further, item 1 of schedule B of the Agreement requires the SLPA to make an advance payment of 50% of the total cost **upon signing the agreement**. Therefore, the above payment is NOT made in recognition of any work carried out by the Claimant as claimed in the Notice of Arbitration but paid as an advance just after signing the agreement. Therefore, there cannot be any ambiguity on that issue.

According to schedule B of the Agreement, the total sum of USD 120,000/= was to be paid at three stages:

- Advance payment of 50% (USD 60,000/=) upon signing the agreement
- 25% (USD 30,000/=) to be paid at the time of submitting the security manuals
- 25% (USD 30,000/=) at the time when Government accepts security manuals

Therefore, after the receipt of USD 60,000/- as the advance payment, the Claimants' entitlement to the balance 50% of the total sum arises at two stages in equal sums namely, USD 30,000/- at the time of submitting security manuals and the final payment of USD 30,000/- at the time the Government accepts security manuals. It is therefore pertinent to observe that the Claimants' entitlement to receive the full payment (USD 120,000/-) arises only at the point the SLPA accepts the security manual. Therefore, to receive the 100% of the

sum the Claimants must have completed all their undertakings to the satisfaction of the SLPA too. It is also pertinent to observe, according to **clause 4.1.2** 'SFSL shall be entitled to a ratable proportion of the sum or sums payable under this clause for any broken portion of any work during which its engagement under this agreement subsists'.

The above facts in my view, are important to comprehend the nature of the dispute that was placed for arbitration by the Claimants.

As has already been stated above, the Claimants in the Notice of Arbitration (**P 3**) claim, that they 'have performed their obligations and /or carried out the services for which SLPA has paid and settled a sum of USD 60,000/- being 50% of the total payment that should be paid under the Agreement. The Claimants also allege in **P 3** that the SLPA had breached its obligation under the Agreement and failed and neglected to pay the balance sum of USD 60,000/-. It was on that basis that the Claimants had stated in **P 3** that they are entitled to claim the balance sum of USD 60,000/= together with the interest at the rate of 12% per annum on the said sum from 23rd March 2004. Further, the Claimants had stated in **P 3** that they are entitled in terms of Clause 4.1.3 of the Agreement, to claim a sum of Rs 126,823.60 as expenses incurred by them together with the interest at the rate of 12% per annum from 23rd March 2004".

As per paragraph 15 of the Statement of Claim (**P 5**), the Claimants have stated that they have performed their obligations to the full satisfaction of the SLPA and / or carried out the said services for which Sri Lanka Ports Authority has paid and settled a sum of USD 60,000/= being 50% of the total payment that should be paid under the Agreement.

In paragraph 29 of **P 5** the Claimants have stated that they are therefore entitled to claim the said balance of USD 60,000/= together with the interest at the rate of 12% per annum on the said sum from 23rd March 2004 from the SLPA. Further the Claimants in paragraph 29 have also stated that in terms of clause 4.1.3 of the Agreement, they are entitled to claim a sum of Rs 126,823.60 as expenses incurred to them together with the interest at the rate of 12% per annum from 23rd of March 2004.

It was on the above basis that the Claimants stated in paragraph 44 of **P 5** that they are entitled to receive a total sum of USD 60,000/= or its equivalent sum in Sri Lanka Rupees, together with the interest at the rate of 12% per annum on the said sum from 23rd March 2004 from the SLPA. Further the Claimants in that paragraph have claimed a sum of Rs 126,823.60 as expenses incurred to them in terms of clause 4.1.3 of the Agreement together with the interest at the rate of 12% per annum from 23rd March 2004.

It was in those circumstances that the Claimants as per paragraph 45 have prayed for;

a. an award in a sum of USD 60,000/= or its equivalent sum in Sri Lanka Rupees, together with the interest at the rate of 12% per annum on the said sum from 23rd March 2004 from the respondent,
b. an award in a sum of Rs 126,823.60 as expenses incurred to them together with the interest at the rate of 12% per annum from 23rd of March 2004, and
c. costs of the arbitration.

The matter initiated by the Claimants for arbitration through the Notice of Arbitration had been further crystalized through the Statement of Claim and the issues raised by the Claimants. Among the six issues raised by the Claimants, issues (ii) and (v) read as:

- Did the Claimants perform the obligations contracted in terms of X2?
- Are the Claimants entitled to the sums referred to in paragraph 44 of the Statement of Claim?

In the light of the above positions, the general reference to a dispute in relation to the performance of the Agreement as referred to in paragraph 33 of the Statement of Claim namely, "Under the above circumstances a dispute and / or [deference] has arisen between the Claimants ..... touching and / or concerning and / or with respect to the performance of the said Agreement marked 'X2' mentioned above" should be taken in conjunction with the specific pleadings in the Notice of Arbitration, Statement of Claim and the issues raised by the Claimants in comprehending the Claimants' case presented for arbitration. When all these matters are taken together, in my view, the Claimants have proceeded for arbitration on the basis that they have performed their obligations fully and are entitled to receive the full amount in the agreement (USD 120,000/=). They had claimed the balance 60,000/= leaving aside the advance received upon the signing of the Agreement.

Issues No. (x), (xi), (xiv) and (xv) raised by the SLPA, in my view, cannot expand the case of the Claimants. Even though the issue on excessiveness in the amount claimed, does not refer to any specific legal provisions or a specific clause in the agreement, the inquiry by the Arbitrators cannot expand to examine clause 10.3 as the said clause is applicable only to a specific factual positions i.e.:

- "that the SFSL services are terminated" and / or
- "SLPA its employees prevented the SFSL to carry out the services.."

The claimants had not pleaded either of these two eventualities in the Notice of Arbitration, Statement of Claim or in the issues. To the contrary, the Claimants had claimed that they had performed their obligations under the Agreement fully while the SLPA had pleaded that the Claimants had failed to fulfill their obligations. Therefore, in the backdrop of the two rival positions taken up by the parties, the excessiveness of the amount claimed by the Claimants has to be considered and evaluated in terms of a general provision in the Agreement namely clause 4.1.2 (i.e., "SFSL shall be entitled to a ratable proportion of the sum or sums payable under this clause for any broken portion of any work during which its engagement under this agreement subsists") without resorting to clause 10.3 which expands the parameters of the dispute referred for arbitration. This is important when considering the scheme of payment in Schedule B (ISPS Payment Schedule) of the Agreement. Therefore, the right for a tribunal to grant a lesser relief that falls within the main relief needs to be interpreted subject to the limitation that granting of such relief should not either expand or change the parameters of the dispute that had been presented for adjudication.

Even when the principle of law that "a failure of one party to perform an entire contract is due to the act of the other party, it is not open to the latter to seek to avoid liability on the ground of non-performance" is invoked to determine the legal obligation of a party, the calculation of payments due, should not have been made based on a clause that expands / changes the parameters of the matter presented. Such calculation should have been based on the clause, which permits the tribunal to consider the proportion of work and the scheme of payment agreed by the parties, in determining the entitlement and responsibilities of the parties.

In view of the foregoing, in my view, the Claimants' submission that 'they did not refer any fresh issue with regard to the non- performance of the Petitioner as per clause 10.3 of the Agreement, but merely brought a contractual term of the Agreement to the attention of the tribunal with regard to the manner in which the quantum of the payment due to the Claimants could be calculated in accordance with the Agreement' is devoid of any merit.

I have already discussed above as to how an arbitral tribunal could assume jurisdiction to decide a dispute. In my view, the High Court in the instant case, has failed to appreciate the fact that the arbitral tribunal had no jurisdiction to adjudicate a dispute which the parties had not referred to it for arbitration. It also had not endeavoured to ascertain correctly, the dispute which the parties had referred to it for arbitration. Moreover, the learned Judge of the High Court has failed to purposively interpret the above issues with a view of keeping the arbitral tribunal within the four corners of its jurisdiction. Further, the arbitral tribunal also has failed to uphold the effect of the provisions in sections 4, 15, 18, 24 and 25 of the Arbitration Act in

their correct spirit. This is a fundamental error directly affecting the jurisdiction of the arbitral tribunal which vitiates the judgment of the High Court.

Thus, I hold that the arbitral tribunal after hearing all the evidence and after receiving the written submissions, had not proceeded to make an award in relation to the dispute that was referred to it, for arbitration.

On the other hand, the arbitral tribunal had made an award relating to a matter which is outside the scope of the dispute submitted by the Claimant for arbitration before it. The dispute that the arbitral tribunal resolved was unknown to the parties. It is not possible for the arbitral tribunal to assume jurisdiction on its own to resolve a dispute which is unknown to the parties. The Arbitration Act does not permit exercise of such arbitrary power by arbitral tribunals.

Although the above comments would sufficiently dispose this appeal, the following few paragraphs also would further demonstrate that the award made by the tribunal in the instant case has dealt with a dispute not contemplated by, and not falling within the terms of the submission to arbitration and contains decisions on maters beyond the scope of the submission to arbitration. As per the agreement (**P4**) the following facts could be gathered. It was after the tragic events occurred on 11th September 2001 that the International Maritime Organization (IMO) had unanimously agreed in November 2001 to develop new measures relating to the security of ships and port facilities for adoption at a conference of contracting governments to the International Convention for the Safety of Life at Sea 1974 (known as the Diplomatic Conference on Maritime Security). In December 2002, the development of the said new measures to be submitted to the said Diplomatic Conference, was entrusted to the Maritime Safety Committee of the IMO. Accordingly, in December 2002, the Maritime Safety Committee had agreed on the final version of the proposed texts, to be submitted to the Diplomatic Conference. The Diplomatic Conference held from 9th - 13th December 2002, had adopted the proposed amendments to the existing provisions of the International Convention for the Safety of Life at Sea, 1974 (SOLAS). Thereafter, the IMO by a resolution had amended Chapter V and XI of SOLAS by which compliance with the Code had become mandatory with effect from 1st July 2004. It is in that background that the SLPA on behalf of the Government of Sri Lanka, had taken steps to enter into the relevant agreement with the Claimants in order to ensure the timely compliance with the aforesaid mandatory requirements specified by IMO.

In clause 1 of the Agreement itself, the parties had agreed the commencement date of the Agreement to be 22nd January 2004. The parties also had agreed in the same clause that the Agreement would be for a period of 03 months from the commencement date. As per clause

4.1.4, SLPA shall make the payments agreed, within seven (07) days of the receipt of the invoice. As per the time scale specified in Schedule B to the Agreement, the Claimants were supposed to complete all three phases within a very short time specified therein. Thus, it can be seen, from the above clauses that the work entrusted to the Claimants were to be carried out on urgent basis. Indeed, the time scale itself reflects this fact.

The Claimants in their Statement of Claim (Paragraph 16) had stated that in fact their foreign consultants visited Colombo, Trincomalee, Galle and Point Pedro sea ports to carry out Port Facility Security Assesment (PFSA) on several dates from February to April 2004. Thus, even during the last stages of the Agreement's validity/operational period, (the Agreement was to end on 22-04-2004) the Claimants had no obstruction to carry out the tasks entrusted to them. On the other hand, the Claimants neither complain that the SLPA had terminated their services nor complain of any obstruction by the SLPA or its employees at any stage which would have prevented them from completely carrying out their obligations. Their clear position was that they had performed their obligations to the full satisfaction of the SLPA. Their complain/dispute that was referred for arbitration was the failure on the part of the SLPA to pay a sum of US $ 60,000.00/= being 50% of the total payment that should be paid under the Agreement despite the completion of the services by them to the satisfaction of SLPA. This means that the Claimants had claimed that they had completed their work, for it is only then that they can claim for the balance US $ 60,000.00/=. That is the payment which the Claimants allege that the SLPA had defaulted. Within that dispute, any obstruction by the SLPA to complete the tasks undertaken by the Claimants cannot exist for such an obstruction should have preceded the completion of the Claimants' obligations.

The above facts also show that the Claimants have had free access to those sea ports; and there had been no dispute over an incident in which the SLPA had prevented the Claimants from carrying out their entrusted services during the time the agreement was in force. It was in April 2004, that the Claimants state that a General Election was held and a new political party formed the Government. It was only thereafter that the Claimants had found out from the media about the Sri Lanka Navy being appointed by Government as the Designated Authority & the Recognised Security Organization (RSO) for ports security. The validity period of the Agreement would have ended on 22-04-2004 since it was only for 03 months commencing from 22-01-2004. The fact that the Claimants had prayed for the balance sum of US $ 60,000/- together with the interest at the rate of 12% per annum on the said sum from 23rd March 2004 from the SLPA, too indicates that it is their position that they had finished their task by that time. Thus, when the Claimants had advanced that kind of case,

one cannot expect the SLPA to predict in advance, that the Claimants, at the stage of the final written submissions, would bring in a claim under clause 10.3 of the Agreement.

For the foregoing reasons, I answer the questions of law in respect of which this Court has granted Leave to Appeal in the following manner.

Answer to the question of law set out in paragraph 18(a) of the petition:

The High Court has failed to uphold the effect of the provisions in sections 4, 15, 18, 24 and 25 of the Arbitration Act in their correct spirit and hence the judgment of the High Court is contrary to those sections.

Answer to the question of law set out in paragraph 18(b) of the petition:

The learned Judge of the High Court should have set aside the arbitral award in terms of the provisions of Section 32 (1)(a)(iii) of the Arbitration Act as the award has dealt with a dispute not contemplated by and not falling within the terms of the submission to arbitration, and contains decisions on maters beyond the scope of the submission to arbitration.

In view of the above conclusion, it would not be necessary to consider the question of law set out in paragraph 18(c) of the petition.

In these circumstances, the judgment of the High Court cannot be allowed to stand. I set aside the judgment of the High Court dated 04.11.2016.

I have held that the award made by the arbitral tribunal deals with a dispute not contemplated by and not falling within the terms of the submission to arbitration, and contains decisions on maters beyond the scope of the submission to arbitration. In the said award there is no decision on the dispute submitted to it for arbitration. The sole decision in the award, is a decision on a matter not submitted to arbitration.

Moreover, the Claimants have failed to present their case on the basis that they are entitled to receive payment for the specific work that they have performed (on a ratable proportion under clause 4.1.2). The case they had presented was on the basis that they have fully performed their duties under the contract. Furthermore, the Arbitrators did not use such criteria when they determined the Claimants' entitlement, but based the award on clause 10.3 which mandates payment of 90% of the total sum, irrespective of the volume of work completed by the Claimants. Therefore, in my view the High Court was not in a position to invoke the proviso to section 32(1)(a)(iii) of the Arbitration Act in making its determination.

Thus, the separation in terms of the proviso to section 32 (1) (a) (iii) does not arise.

For the foregoing reasons, I also set aside the arbitral award dated 30-01-2013.

The learned High Court Judge after consolidating both applications filed respectively by the SLPA and the Claimants in the High Court, had pronounced one judgment applicable to both of them. Thus, it would suffice for this Court also to pronounce one judgment in respect of both the appeals namely SC Appeal No. 119/2017 and SC Appeal No. 120/2017 as the said appeals correspond to the aforesaid two applications in the High Court. Therefore, this judgment will apply to both cases bearing Nos. SC Appeal 119/2017 (HC ARB/ 57/ 2013) and SC Appeal 120/2017 (HC ARB/ 112/ 2013).

JUDGE OF THE SUPREME COURT

JAYANTHA JAYASURIYA PC CJ

I agree,

CHIEF JUSTICE

E. A. G. R. AMARASEKARA J

I had the opportunity of reading the draft judgement written by his lordship justice P. Surasena. With all due respect to the views expressed by his lordship Justice P. Surasena, I prefer to express a dissenting view with regard to the matter before us.

1. This application before us was originally a leave to appeal application against the Judgment dated 04.11.2016 made by the High Court of Colombo in case No. HC/ARB/57/2013 which confirmed the award made in arbitration No SLNAC/166/12/2006.

2. This Court granted leave on 3 questions of law, namely;
   - Is the judgment of the High Court contrary to the provisions in sections 4,15, 18, 24, and 25 of the Arbitration Act?
   - Has the Judge of the High Court failed to set aside the Arbitral Award in terms of the provisions of Section 32(1)(a)(iii) of the Arbitration Act?
   - Has the Judge of the High Court failed to set aside the Arbitral Award in terms of the provisions of Section 32(1)(b)(ii) of the Arbitration Act?

3. In the Judgment written by his lordship Justice Surasena, it appears that the conclusion is that, due to a reference to clause 10.3 of the agreement in the written submissions of the Claimant – Respondents (hereinafter sometimes referred to as the claimants), the Arbitration Tribunal had exceeded the jurisdiction they were bestowed with by the party autonomy or in other words by the reference for arbitration by the parties.

4. I am not in disagreement with what has been said by his lordship in his judgment in general with regard to the party autonomy in relation to arbitration proceedings and also with regard to the jurisdiction of the Arbitral Tribunal that it shall not go on a voyage of discovery and exceeds the mandate given to it by the reference of the dispute by the parties. I do not intend to express contrary views to the views expressed by the authorities cited by my brother judge. However, it is my view that in an application made in terms of section 32 of the Arbitration Act, the applicant must produce before the High Court proof to establish his application and the scope of the court to set aside the award is limited to the grounds highlighted by the section itself. Thus, the High Court has no jurisdiction to decide on the facts relating to the dispute, other than what is necessary to decide the existence of any ground / grounds for setting aside the award mentioned in the section itself. Thus, in my view, this court sitting in appeal over the decision of the High Court is also circumscribed

in deciding on facts other than what is necessary to decide the existence of any ground/ grounds for setting aside the award mentioned in the said section itself. Further, with all due respect to the view expressed by his lordship justice Surasena, I hold a different opinion with regard to what had been referred for arbitration by the parties in the matter at hand; In other words, a different opinion as to the dispute presented for the arbitration by the Parties.

5. By giving notice P2 in terms of Section 18, the Claimants put in motion the arbitration proceedings. It is true that in the said notice, the Claimants have referred to the dispute in the manner they saw it or wanted to present it, but Claimants are only a party to the dispute. In the process, opposite party also has presented the dispute in the manner it saw the dispute or wanted to present it. After giving notice, the Claimants have filed a statement of claim and the Respondent before the arbitration tribunal, namely the Appellant in this matter has filed a statement of defense and however, thereafter parties have framed issues before the Arbitral Tribunal. Once issues are framed, the dispute becomes crystalized in issues because parties expect the answers for issues from the tribunal in the form of its decision. None of the issues have been objected on grounds such as that they were not in conformity with the notice, or pleadings tendered or that they were not within the scope of the agreement for arbitration or they were too wide in scope etc. Thus, the arbitrators were invited to answer the issues raised by the parties as it finalized the nature of the dispute placed before it by both the parties. If the issues raised before an Arbitral tribunal are within the ambit of the arbitration agreement, I think arbitral tribunal is bound to answer them; when those issues exceed the scope of the arbitration agreement, arbitrators have to answer accordingly, stating that they are not arbitrable since they fall outside the arbitration agreement.

6. Following paragraphs from the said notice have been quoted by his lordship Justice Surasena in his draft Judgment.

> *"In terms of Clause 2 of the above-mentioned agreement, Sri Lanka Ports Authority established by Act No. 51 of 1979, appointed our clients Sathsindu Forwarding & Security (Pvt) limited (SFCL) and/or in association with Bagnold Associates Limited as the Recognized Security Organization (RSO) and to perform the services listed in Schedule A annexed thereto upon the payment of rates mentioned in Schedule B to the said agreement for and on behalf of the Sri Lanka Ports Authority.*

Our clients Sathsindu Forwarding & Security (Pvt) limited (SFCL) in association with Bagnold Associates Limited have performed their obligations and /or carried out the said services for which Sri Lanka Ports Authority has paid and settled a sum of US $ 60,000/- being 50% of the total payment that should be paid under the agreement mentioned above.

However, as the Sri Lanka Ports Authority in breach of its obligation under the above Agreement failed and neglected to pay the balance sum of US$ 60,000/-. Therefore, our clients Sathsindu Forwarding & Security (Pvt) limited (SFSL) in association with Bagnold Associates Limited are entitled to claim the same together with the interest at the rate of 12% per annum from 23rd of March 2004.

However, as the Sri Lanka Ports Authority repeatedly failed and neglected to pay the above mentioned sums to our clients as per the said agreement, through their Attorneys-at law, sent a letter of demand dated 27th November 2004 demanding the above mentioned sums from Sri Lanka Ports Authority."

Those paragraphs contain the claim, and state that the Claimants performed their obligations and/or carried out the services for which the Claimants were paid USD 60,000 being 50% of the total payment that should be paid under the agreement. It further states that Sri Lankan Ports Authority (Respondent – Appellant, hereinafter sometimes referred to as the appellants) is in breach of its obligations. The Claimants in those paragraphs state their entitlement to the balance payment and to the expenses together with interest, and further states that due to the failure of the SLPA, the Claimants through their lawyers had sent a letter of demand. However, the three paragraphs following the quoted paragraphs are also necessary to grasp the dispute contained in the notice. First of those 3 paragraphs that follows the aforesaid quoted paragraphs indicates how the Respondent – Appellant, Sri Lanka Ports Authority, disputed the claim of the claimants by stating that the Claimants were never appointed as RSO (Recognized Security Organization).The 2nd of those 3 paragraphs which is quoted below states the dispute that the Claimants wanted to refer for arbitration.

"Under the above circumstances a dispute and/or difference has arisen between the Claimants…… and the Sri Lankan Ports Authority, …….. and/or concerning and/or with respect to the performance of the said agreement mentioned above."

Thus, the Claimants described the dispute in the backdrop of their claim and the stand taken up by the Appellant as one arisen with regard to the performance of the relevant

agreement. By the 3rd of the 3 paragraphs following the above quoted paragraphs the claimants refer the said dispute for arbitration. Thus, what was referred to the arbitration by the notice was a dispute with regard to the performance of the agreement in the backdrop of the two stances as described in the notice. Full performance of the obligations as stated by the Claimants belongs to the stance they have taken. In my view it is within the authority of the tribunal to accept fully or partly or reject such stances. Further, it appears the Claimant has referred to the US $60,000/- advance as a payment made for the obligations performed /services carried out. An advance is generally paid for with a purpose. Maybe it is necessary for the preparatory/initial works. In my view, there is nothing wrong in referring to it as a payment for obligations done or services performed after such initial/preparatory work is done. On the other hand, as a finding on facts, the tribunal had answered issue no. 24 and 25 negatively indicating that the claimants did not fail in fulfilling their obligations for the advance payment.

7. As I said before, this notice only expresses the dispute as indicated by one party, namely the claimants, and the dispute for arbitration get crystalized only when the issues are framed. Now I would like to bring the attention to some of the issues raised on behalf of the Appellant at the inquiry, namely, issues number 15, 17, 20, 21, and 22 of the Appellant Respondents which are quoted below.

"*15. Did the Claimant fail to fulfill its obligations in terms of the agreement?*

17. Are the Claimants entitled for payment under the agreement?

20. Are the claimants entitled for the relief prayed for in the statement of claim?

21. Are the Claimants estopped from claiming any money in terms of the agreement Due to their conduct?

22. Is the amount claimed by the Claimant excessive?"

Thus, it was the Appellant itself which wanted answers to the above issues. It is true that these issues were raised without prejudice to the issues raised by the appellant with regard to the jurisdiction of the arbitration tribunal entertaining the statement of claim, namely issues no.06 to 10, but those issues have been answered in favour of the Claimants by giving sufficient reasons by the tribunal. In my view, since the issues raised regarding the jurisdiction were answered in favour of the claimants, the dispute referred for arbitration by the parties is also comprised of the issues quoted above. When the Appellant asks

whether the claimants are entitled for payment under the agreement or whether they are estopped from claiming any money in terms of the agreement, and whether the amount claimed by the Claimant is excessive, they do not refer to any legal provisions or limit the question of excessiveness or entitlement to any identified clause in the agreement, but these issues cannot be understood out of context. Those questions including the excessiveness of the claim or entitlement to the claim have been raised in contemplation of the contractual relationship between the parties; thus, the questioning goes to the extent of asking whether the claim is excessive and whether the claimants are entitled to payments under the agreement. Hence it was none other than the Appellant who wanted the tribunal to inquire as to the questions whether the amount claimed by the Claimant is excessive as per the contract between them or whether claimants are entitled to payments in terms of the agreement. In such a situation, irrespective of the reference to clause 10.3 of the agreement in written submissions of the Claimants, the Tribunal is bound to peruse such clauses if they apply to the factual situation revealed by the evidence led before it. My view is that when the entitlement for a payment is questioned in terms of an agreement without referring to any specific term in the agreement it contemplates the whole agreement. It is for the relevant party to frame issues in such a manner to express what is intended by them. However, if an issue is too wide or devoid of clarity, the opposite party can object to the issue when it is raised if it is prejudicial to it. In the case at hand, the appellant has raised the afore quoted issues without any objections. I do not think that this court being a court exercising appellate jurisdiction should devolve on an exercise that limit the scope of the issues as the inquiry based on facts is not within the task of this court.

8. On the other hand, written submissions cannot be considered as an instrument that refer a dispute for arbitration. It is there to present an analysis of the evidence led and to show applicable law. The Claimant has not raised or proposed any new issues through it. What the paragraph 22 of the written submissions of the Claimant says is that in any event they are entitled to 90% of the balance. The use of the words "in any event" indicate that the Claimant did not abdicate his claim for the balance but it brings to the notice of the tribunal that when and if the tribunal comes to the conclusion that the Claimant could not fulfill their obligations due to the fault of the Appellants, they are entitled to that amount as per the agreement. One must not forget that whether the claim was excessive was put in issue by the Appellant itself. Further, the tribunal came to its conclusions on the facts revealed by evidence led prior to the filing of written submissions and if such evidence were not

within the framework contemplated by issues, it could have been objected by the relevant party at the time they were placed before the tribunal.

9. In my view, a Court can always grant a lesser relief by giving reasons if it falls within the main relief prayed for (***Allis Vs Senevirathne (1989) 2 SLR 335***, ***Attanayake V Ramyawathie (2003) 1 S L R 401 at 409)***. However, it cannot exceed what has prayed for in giving relief. I do think that it should be the same in arbitration proceedings. On the other hand, the Arbitral Tribunal had the plenary jurisdiction with regard to the disputes arising from the agreement if they are referred to it. It is the Appellant who invited to see whether the claim is excessive or whether the claimants are entitled to payment in terms of the agreement. The Appellant should not be allowed to challenge the award before a forum which exercises supervisory jurisdiction when the tribunal found that a certain amount has to be reduced or the full payment of balance is not due owing to a clause in the agreement when it granted relief when the Appellant itself raised issues whether the claim was excessive or whether the claimants are entitled in terms of the agreement. Further, a dispute exists only when there is a difference between the stances taken by the parties. Basically, granting relief is within the domain of the court or tribunal. However, there can be disputes as to the relief when parties take different stances as to the nature, quantum or scope of the relief that can be given. In the case at hand, as per the issues raised, the Claimants' position was that they performed the obligations as per the agreement marked X2 and made a demand by X6 and the Appellant refused to make payment and they are therefore entitled to the sums referred to in paragraph 44 of the statement of claim. It appears that the main stance of the Appellant was that there was no valid contract and valid arbitration agreement between parties and therefore the tribunal has no jurisdiction to hear and grant relief. However, on analysis of facts relating to the contractual relationship between parties, the tribunal has decided by giving adequate reasons that there was an agreement between parties which also contained an arbitration agreement and the tribunal has jurisdiction to hear and grant relief. However, without prejudice to the aforesaid main stance, the Appellant among other things had taken up the position that;

   - the Claimants failed in fulfilling their obligations and also that the Claimants were not appointed as RSO (Recognized Security Organization),
   - the Claimants are not entitled to payment under the agreement as well as to the reliefs prayed for in the statement of claim and Claimants are estopped from claiming

money in terms of the agreement and further that the amount claimed by the claimant is excessive.

Thus, in my view, the Appellant had brought forward a dispute to be resolved by the arbitral tribunal with regard to the fulfilment of obligations by the claimants and the entitlement of the claimants for payment in terms of the agreement as well as to the excessiveness of the claim made by the claimant, in case its main stance with regard to the jurisdiction was to be rejected. Hence, in my view, the award made by the Tribunal was within the parameters of the reference for arbitration. One may argue that a party cannot take a different stance during the proceedings. Generally, this type of argument is based on the provisions in the Civil Procedure Code, namely section 150 and its explanation 2. The said section and explanation applies to courts of law and in fact, it appears the Claimants had relied on a similar argument against the Appellant with regard to taking up a different stance but the Tribunal had refused the said argument in favour of the Appellants stating that applies only to courts of law- vide page 8 paragraph 3 of the Award. Even if it applies it is a limitation on the relevant party and the tribunal is not restricted by it in answering the issues raised by the opposite party.

10. On the other hand, even if consideration of clause 10.3 of the agreement by the tribunal is considered wrong, the High Court or this Court just cannot totally refuse the claim of the Claimant if the effect of it can be separated – vide Section 32(iii) proviso of the Arbitration Act. In this regard it is important to see the findings of the Arbitral Tribunal with regard to the dispute prior to applying the clause 10.3 of the agreement. In this regard, I would quote the following part from the arbitral award.

"Therefore, it is evident that the cause for the none completion of the obligations is because the employees of the Respondents took up a position contrary to the express provisions in the agreement C9 to the effect that (a) the Claimants were not RSO; and (b) the Respondents could not review and approve the PFSA and thus the conduct of the employees of the Respondent prevented the Claimants from carrying out its services in terms of the agreement C9. It is relevant to mention that "where a failure of one party to perform an entire contract is due to the act of the other party, it is not open to the latter to seek to avoid liability on the ground of none performance"; vide C G Weeramantry in Law of Contracts (page 605). Therefore, in view of the failure by the Respondent to perform its obligations in relation to the PFSAs the Claimants could not have completed performance in respect of PFSPS and in view of the foregoing statement of law set out by C G Weeramantry, the Respondent cannot seek to avoid liability on the basis that Claimants

have not performed their obligations in relation to the PFSPs as per the agreement C9" (in this quoted part the Appellants are referred to as Respondents)

The above shows that if the application of clause 10.3 is taken away, the finding of the tribunal was that the Appellant cannot avoid liability on the ground of non-performance of the claimants, since the Appellant was the one who prevented the Claimants from performing their obligations. In other words, it says that wrongdoer cannot benefit from its wrong. Thus, it appears that the Arbitral Tribunal has applied clause 10.3 of the agreement in favour of the Appellant since there was such a clause, if such application is removed from the arbitral award its finding is that the Appellant cannot avoid liability on the basis of non-performance as it has happened due to the fault of the Appellant. In other words, finding was that the Appellant is liable in the same manner the contract was duly performed by the Claimants. The attempt of the Appellant now is to use the application of clause 10.3 in reducing the claim of the claimant by the tribunal in their favour irrespective of their fault, to quash the relief granted to the Claimants.

If application of clause 10.3 is separated and removed, the finding of the tribunal indicates that the Appellant should be liable since it cannot take up the defense of non performance. That was a finding by the tribunal based on facts placed as evidence before the Tribunal.

11. The Appellant attempts to argue if the claimants put in issue the application of clause 10.3, it could have presented its case to meet that. Firstly, it is the appellant itself which raised the issue of excessiveness of the claim as per the agreement as well as Claimants' entitlement to payment in terms of the agreement. Now it cannot blame the claimants. On the other hand, this argument cannot hold water as the finding of the tribunal indicates that if it was not for this clause, as per the law, Appellant cannot take up the non-performance in its defense indicating that the Appellant is liable in the same way when the obligations are duly performed by the claimants.

The tribunal on the material placed before it has decided that there was a valid agreement between the parties and there was an agreement to refer disputes for arbitration and therefore, the tribunal had jurisdiction to proceed with the reference for arbitration. The tribunal has given adequate reasons for its conclusions. There was no substantial material to show that any party to the arbitration agreement was under any incapacity.

For the reasons given above in this judgment by me, it is my view that the award was within the parameters of the reference for arbitration by the parties. It was the Appellant who wanted arbitrators to go into the questions of the claimant's entitlement as per the agreement and the excessiveness of the claim. The finding of the tribunal was that the Appellant cannot take up the position that the Claimants did not fulfil the obligation in terms of the contract since it was the fault of the Appellant that hindered the performance of the obligations by the Claimants. The Appellant had the notice of Arbitration, took part in the arbitration proceedings and had the opportunity to lead evidence on the issues framed. I cannot find that the composition of the tribunal or the procedure followed was not in accordance with the agreement or in conflict with the Arbitration Act. I do not see any ground to hold that the subject matter of the dispute is not capable of settlement by arbitration under the laws of this country. Since there was an agreement between the parties with regard to certain services to be performed by the Claimants and an arbitration agreement to refer dispute for arbitration, where no illegality, unlawfulness or immorality is involved I do not think that the award is in conflict with the public policy of this country. Learned High Court Judge has discussed in detail why the Award should not be considered as one against public policy. I cannot find fault with reasons given by the learned High Court Judge in that regard. Therefore, the questions of laws allowed by this court have to be answered in the negative. Thus, I affirm the judgment delivered by the learned High Court judge. This appeal has to be dismissed.

JUDGE OF THE SUPREME COURT

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

H.M. Chandrakanthi,
Kohombagahawatta,
Badulla golla,
Medegama.
Applicant

SC APPEAL NO: SC/APPEAL/127/2019
SC LA NO: SC/SPL/LA/75/2018
HC NO: UP/HC/02/2017 APPEAL
BIBILE MC NO: 26361

Vs.

K.M. Gamini Kumara,
Lununeligahawatta,
Helearawa,
Pitadeniya,
Medegama.
Respondent

AND BETWEEN

K.M. Gamini Kumara,
Lununeligahawatta,
Helearawa,
Pitadeniya,
Medegama.
Respondent-Appellant

Vs.

H.M. Chandrakanthi,
Kohombagahawatta,
Badulla golla,
Medegama.
Applicant-Respondent

AND NOW BETWEEN

H.M. Chandrakanthi,
Kohombagahawatta,
Badulla golla,
Medegama.
Applicant-Respondent-Appellant

Vs.

K.M. Gamini Kumara,
Lununeligahawatta,
Helearawa,
Pitadeniya,
Medegama.
Respondent-Appellant-Respondent

Before: P. Padman Surasena, J.
A.H.M.D. Nawaz, J.
Mahinda Samayawardhena, J.

Counsel: Nuwan Bopage with Chathura Weththasinghe for the Petitioner-Respondent-Appellant.

Niroshan Mihindukulasuriya with Roshini Fernando for the Respondent-Appellant-Respondent.

Argued on: 31.03.2021

Decided on: 20.05.2022

Mahinda Samayawardhena, J.

The Applicant wife instituted these proceedings by application dated 25.08.2014 in the Magistrate's Court of Bibile seeking maintenance from the Respondent husband under section 2(1) of the Maintenance Act, No. 37 of 1999, on the basis that the Respondent expelled her from the matrimonial home around 9.00 p.m. on 30.07.2014 and refused to maintain her thereafter. The Applicant did not state the reason for this incident in her application. However, at the inquiry before the Magistrate's Court, it was revealed that the said incident took place due to adultery committed by her in the matrimonial home with a person named Guneris. The Respondent had found both of them together on that specific day. As seen from the inquiry notes V6 of the female Sub Inspector of the Medegama police station (which was not marked subject to proof), the Applicant and Guneris admitted at the inquiry that they had been continuing with an adulterous relationship for about four months leading up to the aforesaid incident. This is admissible evidence. *(Punchi Banda v. Seelawathie [1986] 2 Sri LR 414)*

After the inquiry into the Applicant's maintenance application, the learned Magistrate held that the allegation of adultery had not been proved to a high degree of proof. Hence, the Respondent was ordered to pay maintenance to the Applicant at a rate of Rs. 7,000 per month.

On appeal, the High Court set aside the order of the Magistrate's Court on the basis that the Applicant was living in adultery at the time of filing the maintenance application and was therefore disentitled to maintenance in terms of the proviso to section 2(1) of the Maintenance Act.

Section 2(1) of the Maintenance Act with the proviso reads as follows:

> *2(1) Where any person having sufficient means, neglects or unreasonably refuses to maintain such person's spouse who is unable to maintain himself or herself, the Magistrate may, upon an application being made for maintenance, and upon proof of such neglect or unreasonable refusal order such person to make a monthly allowance for the maintenance of such spouse at such monthly rate as the Magistrate thinks fit having regard to the income of such person and the means and circumstances of such spouse:*
>
> *Provided however, that no such order shall be made if the Applicant spouse is living in adultery or both the spouses are living separately by mutual consent.*

Being dissatisfied with the Judgment of the High Court, the Applicant has now come before this Court on the basis that the

High Court misdirected itself in its interpretation of "living in adultery" contained in the proviso to section 2(1) of the Maintenance Act. This is the question of law upon which leave to appeal was granted by this Court.

Learned counsel for the Applicant does not canvass the finding of the High Court that the Applicant committed adultery with Guneris on 30.07.2014 and for approximately four months before the said date (as admitted at the police inquiry). His argument is that, even assuming this is correct, the Applicant is not disqualified from claiming maintenance from the Respondent as there is no evidence that she was "living in adultery" (as opposed to "committing adultery") at the time of filing the application, as contemplated in the proviso to section 2(1) of the Maintenance Act.

Black's Law Dictionary (11th Edition) at page 64 defines adultery as "voluntary sexual intercourse between a married person and someone other than the person's spouse." The proof of "living in adultery" does not mean proving the act of sexual intercourse by direct evidence.

I am sensitive to the fact that the proviso to section 2(1) states: "no such order shall be made if the Applicant spouse is living in adultery". It does not state: "no such order shall be made if the Applicant spouse committed adultery". It states "is living in adultery", not "was living in adultery" or "had been living in adultery". It means the Applicant at the time of making the application was cohabiting with a person other than his or her spouse or "living a life of promiscuous immorality" as a

continuing act, as distinguished from one or two lapses of virtue. *Vide Wijeysinghe v. Josi Nona (1936) 38 NLR 375, Pushpawathy v. Santhirasegarampillai (1971) 75 NLR 353.*

However, in order to prove "living in adultery", the Respondent spouse need not prove that the Applicant was living in adultery on the date of filing the application. The words "living in adultery" means the Applicant shall be living in adultery at or about the time of filing the application. No rule of thumb can be laid down in deciding what constitutes "at or about the time". It shall be decided on the unique facts and circumstances of each individual case.

In the instant case, the Applicant was found with Guneris at about 8.00 p.m. on 30.07.2014 in the matrimonial home. At the police inquiry held on the following day, it was admitted that they had been continuing with the adulterous relationship for about four months before this incident. Thereafter, the Applicant filed the application seeking maintenance on 25.08.2014 – less than one month after the incident. In my view, the Applicant was living in adultery at or about the time of filing the application for maintenance.

The facts in *Weerasinghe v. Renuka [2016] 1 Sri LR 57* – the Judgment heavily relied on by learned counsel for the Applicant – are distinguishable. In the said case, the Applicant wife filed a maintenance case against the Respondent husband after the latter left the matrimonial home. The Respondent refused to pay maintenance on the basis that there had been previous incidents of adultery committed by the Applicant with her

brother-in-law. The Magistrate's Court held with the Respondent but the High Court set aside the order. On appeal, this Court held that the said incidents of adulterous conduct on the part of the Applicant with her brother-in-law had taken place "long before the separation of the parties", and the parties had been living together after the said incidents until they later separated over a "minor incident" unrelated to adultery, and therefore the Applicant was not living in adultery "at or about the time the application [was] made". The facts in the instant case are different.

The Court shall be able to depart from the plain meaning of statutory text when its literal application would lead to absurdity. If "living in adultery" is strictly interpreted to mean that the Applicant shall be living in adultery on the date of or at the time of filing the application, an astute Applicant living in adultery can temporarily cease such adulterous cohabitation in order to bring his or her application within the ambit of section 2 of the Maintenance Act. This could never have been the intention of the legislature. Proximity in time between living in adultery and filing a maintenance application is a question of fact. Each case shall be treated independently.

In the instant case, the High Court has not misdirected itself in its interpretation of "living in adultery" in the proviso to section 2(1) of the Maintenance Act. Hence I answer the question of law on which leave to appeal was granted against the Applicant.

I affirm the Judgment of the High Court and dismiss the appeal but without costs.

Judge of the Supreme Court

P. Padman Surasena, 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

Rambandi Deveyalage Gamini
Pushpalatha of Kandegedara,
Devalegama.
Plaintiff

SC APPEAL NO: SC/APPEAL/131/2016
SC LA NO: SC/HCCA/LA/102/15
PHC KEGALLE NO: SP/HCCA/KAG/24/2013 (F)
DC KEGALLE NO: 7706/L

Vs.

1. Wickrema Arachchilage Suneetha,
   'Jeewana' Devalegama.
2. Kapuwella Gamlath Ralalage
   Abeywickrema of
   Kandegedara, Devalegama.

Defendants

AND BETWEEN

Rambandi Deveyalage Gamini
Pushpalatha of Kandegedara,
Devalegama.
Plaintiff-Appellant

Vs.

1. Wickrema Arachchilage Suneetha,
   'Jeewana' Devalegama.
2. Kapuwella Gamlath Ralalage
   Abeywickrema of Kandegedara,
   Devalegama.
   Defendant-Respondents

AND NOW BETWEEN

Rambandi Deveyalage Gamini
Pushpalatha of Kandegedara,
Devalegama.
Plaintiff-Appellant-Appellant

Vs.

1. Wickrema Arachchilage Suneetha,
   'Jeewana' Devalegama.
2. Kapuwella Gamlath Ralalage
   Abeywickrema of Kandegedara,
   Devalegama.
   Defendant-Respondent-
   Respondents

Before: P. Padman Surasena, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Sunil Abeyaratna with Buddhika Alagiyawanna for the Plaintiff-Appellant-Appellant.

Chatura Galhena with Dhanani Weerasinghe for the 1st Defendant-Respondent-Respondent.

Vidura Gunaratne for the 2nd Defendant-Respondent-Respondent.

Argued on: 26.11.2021

Written submissions:

by the Plaintiff-Appellant-Appellant on 29.07.2019.

by the 1st Defendant-Respondent-Respondent on 28.11.2016.

by the 2nd Defendant-Respondent-Respondent on 03.06.2019.

Decided on: 20.01.2022

Mahinda Samayawardhena, J.

The plaintiff filed this action against the two defendants in the District Court seeking a decree in her favour on the basis that the defendants are holding the property in suit in trust for the plaintiff. In the alternative, the plaintiff claimed the property on unjust enrichment. The defendants sought dismissal of the action. After trial, the District Judge dismissed the plaintiff's case. On appeal, the High Court affirmed the judgment of the District Court. This appeal is against the judgment of the High Court.

The position taken up by the plaintiff in the plaint was that she borrowed a sum of Rs. 25,000 from the 1st defendant and as

security for the said loan transferred the land in suit in the name of the 1st defendant. She also stated that at the time of the execution of the deed the 1st defendant signed another informal agreement (which she tendered with the plaint marked P2) to say that once the consideration stated in the deed is paid with interest, the 1st defendant agrees to retransfer the property to the plaintiff. According to the plaint, notwithstanding the repayment of Rs. 25,000, the 1st defendant did not retransfer the property but instead had transferred the property to the 2nd defendant by deed No. 2164.

The 1st defendant in the answer stated that deed No. 4057 is an out and out transfer of the land in consideration of the payment by the 1st defendant to the plaintiff of a sum of Rs. 15,000 and that it is not subject to a constructive trust. The 1st defendant denied any informal agreement between the parties.

At the trial, the evidence of the plaintiff was unclear and confusing. As the learned District Judge had correctly observed, the plaintiff was inconsistent in the positions taken. Contrary to what she stated in the plaint, her evidence at the trial was that she never executed a deed, and deed No. 4057 is a fraudulent deed in that her signature was obtained on some blank half sheet papers that have later been converted to a deed of transfer. In evidence, she neither marked deed No. 4057 nor the contemporaneous informal agreement through which the 1st defendant allegedly promised to retransfer the property to the plaintiff once the money was paid with interest, even though those documents were tendered with the plaint.

Her evidence that she was unaware of the value of the property rendered it impossible for the District Court to grant relief even on the alternative claim of unjust enrichment.

It is unfortunate that no proper evidence was given by the plaintiff at the trial. Her evidence was completely unsatisfactory and unreliable. No other witness was called by her. It is likely that the defendants did not give evidence because the plaintiff did not prove her case.

The District Judge who saw and heard the evidence of the plaintiff found it difficult to accept her evidence, and rightly so. The High Court cannot be found fault with when it decided not to interfere with the judgment of the District Court.

This court granted leave to appeal on two questions of law. One is whether the High Court failed to consider that deed No. 4057 "*is necessarily subject to an undertaking or condition of retransfer, which in effect creating a constructive trust.*" This question shall be answered in the negative. Deed No. 4057 which the plaintiff did not produce in evidence is not a conditional transfer; it is an outright transfer. The plaintiff never gave clear evidence on retransfer. The informal document with the purported condition of retransfer was never produced in evidence. On top of that, the position taken up by her in evidence was not that deed No. 4057 is subject to the condition of retransfer but that the deed is a forgery. In view of this finding, there is no necessity to express my views on the latter part of the question.

The other question of law is unspecific and couched in broader terms. It is whether the High Court failed to consider that the District Court erred in law and fact in deciding the case. In my

view, the District Court did not err in law and fact when it decided to dismiss the plaintiff's case on the basis that the plaintiff failed to prove her case. As such, this question shall also be answered in the negative.

I 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

Film Locations (Private Limited)
No. 282/6, Kotte Road,
Nugegoda.
Plaintiff

SC APPEAL NO: SC/APPEAL/133/2015
SCLA NO: SC/HCCA/LA/491/2014
HC COLOMBO NO: WP/HCCA/COL/157/2012/LA
DC COLOMBO NO: 7461/SPL

Vs.

1. Sri Lanka Mahaweli Authority,
   No. 500, T.B. Jayah Mawatha,
   Colombo 10.
2. M. Sirisena,
   Resident Project Manager,
   Victoria Office,
   Digana.
3. Taprobane Studio Ranch
   (Private) Limited,
   No 282/6,
   Kotte Road,
   Nugegoda.

Defendants

AND BETWEEN

Sri Lanka Mahaweli Authority,
No. 500, T.B. Jayah Mawatha,
Colombo 10.
1st Defendant-Petitioner

Vs.

Film Locations (Private Limited)
No. 282/6, Kotte Road,
Nugegoda.
Plaintiff-Respondent
M. Sirisena,
Resident Project Manager,
Victoria Office,
Digana.
2nd Defendant-Respondent
Taprobane Studio Ranch
(Private) Limited,
No 282/6, Kotte Road,
Nugegoda.
3rd Defendant-Respondent

AND NOW BETWEEN

Film Locations (Private Limited)
No. 282/6, Kotte Road,
Nugegoda.
Plaintiff-Respondent-Petitioner

Vs.

Sri Lanka Mahaweli Authority,
No. 500, T.B. Jayah Mawatha,
Colombo 10.
1st Defendant-Petitioner-Respondent

M. Sirisena,
Resident Project Manager,
Victoria Office,
Digana.
2nd Defendant-Respondent-Respondent

Taprobane Studio Ranch
(Private) Limited,
No 282/6, Kotte Road,
Nugegoda.
3rd Defendant-Respondent-Respondent

Before: P. Padman Surasena, J.
Kumudini Wickramasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Thisath Wijayagunawardane, P.C., with Gihan Liyanage and Sharan Reeves for the Plaintiff-Respondent-Petitioner.
Pulasthi Rupasinghe and Lakna Kularatne for the 1st Defendant-Petitioner-Respondent and 2nd Defendant-Respondent-Respondent.

Argued on: 01.11.2021

Written submissions:
By the 1st Defendant-Petitioner-Respondent on 22.11.2021
By the Plaintiff-Respondent-Petitioner on 22.11.2021

Decided on: 21.11.2022

Mahinda Samayawardhena, J.

The plaintiff instituted this action against the three defendants in the District Court of Colombo seeking the following reliefs in the prayer to the plaint.

(a) To enter a Judgment and a decree that the 1st Respondent is bound by law to act in terms of expressed and/or implied terms of the Agreement marked "A" with the Plaint and/or that the 1st Respondent is not entitled in law to breach the conditions in the said Agreement.

(b) A declaration that the 3rd Respondent is entitled to uninterrupted possession of the lands described in the 1st and 2nd Schedules to the Plaint.

(c) To enter a Judgment and a decree that the 1st and 2nd Defendants are not entitled to obstruct and/or interfere with the uninterrupted possession of the 3rd Defendant of the lands morefully described in the 1st and 2nd schedules to the Plaint.

(d) A permanent injunction preventing the 1st and 2nd Defendants from obstructing and/or interfering with the uninterrupted possession of the 3rd Defendant of the lands morefully described in the 1st and 2nd schedules to the Plaint.

(e) An interim injunction preventing the 1st and 2nd Respondents from obstructing and/or interfering with the uninterrupted possession of the 3rd Respondent of the lands morefully described in the 1st and 2nd Schedule to the Plaint.

The 1st and 2nd defendants filed answer seeking dismissal of the action. By paragraphs 1 and 2 of the answer, they took up a preliminary objection to the maintainability of the action on the basis that: the plaintiff had not disclosed a cause of action against the 1st and 2nd defendants; if at all a cause of action had been disclosed, it had accrued

to the 3rd defendant and not to the plaintiff, and since the 3rd defendant being an incorporated company is a separate legal entity that can sue and be sued in the eyes of the law, the plaintiff cannot file this action on behalf of the 3rd defendant; therefore the plaint is defective on misjoinder of parties.

The 3rd defendant did not file answer. When the case was called for settlement of issues as part of the trial, the 3rd defendant was discharged on the application of learned counsel for the plaintiff. The reference in the issues to the 3rd defendant was changed to the name of the 3rd defendant – Taprobane Studios Ranch (Private) Ltd.

Thereafter, learned counsel for the 1st and 2nd defendants had taken up a preliminary objection to the maintainability of the action as presently constituted on the basis that no cause of action survives for the plaintiff to continue with the action upon discharging the 3rd defendant from the case. The District Court overruled this objection and, on appeal, the High Court of Civil Appeal upheld the objection and dismissed the action. The plaintiff is before this Court against the judgment of the High Court. This Court has granted leave to appeal against the judgment of the High Court on the following questions of law as formulated by the plaintiff.

I. *Did the Learned High Court Judges err in law holding that no cause of action survives for the Petitioner to proceed with the said case after the 3rd Respondent was discharged from the proceedings?*
II. *Did Learned High Court Judges err in law in holding that the Petitioner has not sought reliefs for itself, and all reliefs prayed for in the Plaint are in favour of the 3rd Respondent and hence the Petitioner cannot maintain the said action?*
III. *Was the Petitioner entitled to have and maintain the said action against the 1st Respondent without the 3rd Respondent being a party as the Petitioner had filed the said action to exercise its rights under*

the said Memorandum of Understanding and to enforce the said legal obligation of the 1st Respondent to keep peaceful possession of the said property with the 3rd Respondent?

IV. In view of the provisions of sections 17, 18 and 22 of the Civil Procedure Code, did the Learned High Court Judges err in law in upholding the said objection and allowing the said appeal?

As seen from the proceedings of the District Court dated 09.07.2009, the plaintiff has raised 7 issues. Those seven issues are as follows:

1) පැමිණිල්ල සමඟ A ලෙස ලකුණු කර ඇති ගිවිසුම මගින් සහ පැමිණිල්ල සමඟ ඩී1 වශයෙන් ලකුණු කර ඇති අංක 410 සහ ඩී2 වශයෙන් ඇති අංක 411 දරණ පිඹුරුවල දක්වා ඇති සම්පූර්ණ දේපල 3 විත්තිකාර සමාගමට සින්නක්කරයේ පවරා දීමටත්, එහි නිරවුල් සන්තකය සහ ඛුක්තිය 3 විත්තිකාර සමාගමට ලබාදීමටත් 1 වන විත්තිකාර අධිකාරිය එකඟවී සහ හෝ ගිවිසගෙන ඇත්ද?

2) (a) 1 වන විත්තිකරු පැමිණිල්ලේ සඳහන් පරිදි එකී ගිවිසුමට අනුව කටයුතු කරමින් එකී 410 සහ 411 දරණ පිඹුරුවල දක්වා ඇති අක්කර 10 විශාල භූමියෙහි හිස් සහ නිරවුල් සන්තකය එම ගිවිසුම අත්සන් කල වහාම තැප්‍රෝබේන් ස්ටුඩියෝ ලෑන්ඩ් ප්‍රයිවෙට් ලිමිටඩ් සමාගම විසින් අවුරුදු 12කට අධික කාලයක් නිරවුල් ලෙස එම දේපල භුක්ති විඳින්නේද?

2) (b) ඒ අනුව එම ගිවිසුම මගින් පැමිණිල්ලේ උපලේඛනයේ සඳහන් අක්කර 10ක් විශාල බිම් ප්‍රමාණය තැප්‍රෝබේන් ස්ටුඩියෝ ලෑන්ඩ් ප්‍රයිවෙට් ලිමිටඩ් සමාගමට පවරා දීමටද එහි හිස් සහ නිරවුල් සන්තකය බාරදීමටද 1 විත්තිකාර සමාගම එකඟ නොවූ බව ප්‍රකාශ කර සිටීමෙන් 1 විත්තිකාර සමාගම නීතියෙන් ප්‍රතිබන්ධනයවී ඇත්ද?

3) පැමිණිලිකරු සහ 1 විත්තිකරු අතර ඇති කරගත් එකී විරෝධතා ගිවිසුමට තැප්‍රෝබේන් ස්ටුඩියෝ ලෑන්ඩ් ප්‍රයිවෙට් ලිමිටඩ් යන සමාගමේ කටයුතු මේ වනතෙක් ක්‍රියාත්මකව සහ හෝ වලංගුව පවතින්නේද?

4) එසේ නිබියදී 1 විත්තිකරු සහ හෝ 1 විත්තිකරුගේ සේවකයෙකු සහ හෝ නියෝජිතයෙකු වන 2 විත්තිකරු එක්ව සහ වංක සහයෝගයෙන් සහ හෝ අසත්භාවයෙන් කටයුතු කරමින් ද්වේශ සහගත ලෙසත්, සහ හෝ

නීතිවිරෝධී ලෙසත් සහ හෝ එකී ගිවිසුමේ ප්‍රකාශිතව සහ හෝ ව්‍යංග කොන්දේසිවලට පටහැනි ලෙසත්, පැමිණිල්ලේ උපලේඛනයේ සඳහන් එකී අංක 410 සහ 411 දරණ පිඹුරුවල දැක්වෙන දේපලෙහි 3 විත්තිකරුගේ එකී තැප්‍රෝබේන් ස්ටුඩියෝ ලෑන්ඩ් ප්‍රයිවෙට් ලිමිටඩ් යන සමාගමේ නිත්‍යානුකූල භුක්තිය සහ හෝ සන්තකයට බාධා සහ හෝ අවහිර කිරීමට පටන් ගත්තේද?

5) එකී ගිවිසුමේ ප්‍රකාශන සහ ව්‍යාජ කොන්දේසි ප්‍රකාරව තැප්‍රෝබේන් ස්ටුඩියෝ ලෑන්ඩ් ප්‍රයිවෙට් ලිමිටඩ් යන සමාගම 410 සහ 411 දරණ පිඹුරුවල දක්වා ඇති සම්පූර්ණ දේපලෙහි නිරවුල් බුක්තිය සහ හෝ සන්තකය දැරීමට නිත්‍යානුකූල හිමිකම් සතුද සහ හෝ එකී සමාගමට එම දේපලේ නිරවුල් බුක්තිය සහ හෝ සන්තකය දැරීමට ඉඩදීමට 1 විත්තිකරු නීතියෙන් බැඳී ඇත්ද සහ හෝ එම සමාගමේ එම දේපලෙහි නිරවුල් බුක්තියට බාධා සහ හෝ අවහිර සිදු කිරීමට සහ හෝ 2 විත්තිකරුවන්ට නීතිමය හිමිකම් නොමැතිද?

6) එම දේපලෙහි එකී තැප්‍රෝබේන් ස්ටුඩියෝ ලෑන්ඩ් ප්‍රයිවෙට් ලිමිටඩ් යන සමාගමේ නිරවුල් බුක්තිය සහ හෝ සන්තකයට බාධා සහ හෝ අවහිර සිදුකිරීම වළක්වාලීමට සහ හෝ එසේ 1 විත්තිකරු විසින් එම ගිවිසුමේ කොන්දේසි උල්ලංඝනය කිරීම වළක්වාලීමට එම සමාගමේ කළමනාකරණ අධ්‍යක්ෂ සහ එකී සමාගමේ ප්‍රධාන කොටස් හිමියා වන මෙම පැමිණිලිකාර සමාගම නීතියෙන් හිමිකම් ඇත්ද?

7) ඉහත විසඳිය යුතු ප්‍රශ්න එකක් හෝ වැඩි ගණනකට හෝ සියල්ලම පැමිණිලිකරුගේ වාසියට පිළිතුරු ලැබෙන්නේ නම් පැමිණිල්ලේ ඉල්ලා ඇති සහන ලබා ගැනීමට පැමිණිලිකරුට හිමිකම් ඇත්ද?

It is clear that issue Nos. 1-6 are issues raised by the plaintiff on behalf of the 3rd defendant. In other words, the answers to these issues – whether in the affirmative or in the negative – will affect the 3rd defendant, not the plaintiff.

What right does the plaintiff have to sue on behalf of the 3rd respondent company? This is not a derivative action. The plaintiff does not file this action as a shareholder of the 3rd defendant company. Suffice it to say that this is against the fundamentals of Company Law. The plaintiff in

paragraph 24 of the amended plaint states "1 වන විත්තිකරු 3 වන විත්තිකාර සමාගමේ ප්‍රධාන කොටස් හිමියකු වන බැවින් පැමිණිලිකරුවකු ලෙස එකතු කිරීම සඳහා 3 වන විත්තිකරුගේ කැමැත්ත ලබා ගැනීම ප්‍රායෝගිකව අපහසු කරුණක් බවත්, ඒ අනුව 3 වන විත්තිකරු මෙම නඩුවේ අත්‍යාවශ්‍ය පාර්ශවකරුවකු වශයෙන් විත්තිකරුවකු කර ඇති බවත්, එයට එරෙහිව කිසිදු සහනයක් මෙම නඩුවෙහි ඉල්ලා නොසිටින බවත් පැමිණිලිකරු ප්‍රකාශ කර සිටී." The third paragraph of section 17 of the Civil Procedure Code states "*If the consent of anyone who ought to be joined as a plaintiff cannot be obtained, he may be made a defendant, the reasons therefor being stated in the plaint.*" By the aforesaid paragraph 24 in the plaint, the plaintiff accepts *inter alia* that (a) the 1st defendant is a majority shareholder of the 3rd defendant company; (b) the consent of the 1st defendant was not obtained to sue on behalf of the 3rd defendant; and (c) the 3rd defendant is an essential party to the action (the word used is "අත්‍යාවශ්‍ය", not "අවශ්‍ය"). If the plaintiff himself says the 3rd defendant is an essential party to maintain this action, can he later move the Court to release the 3rd defendant without affording any reason? The answer is in the negative.

I have no hesitation in concluding that the plaintiff has no legal right to file action on behalf of the 3rd defendant company. On the other hand, without the 3rd defendant named as a party to the action, the Court cannot decide the rights of the 3rd defendant (by answering the aforesaid issues). The plaintiff contends that the affirmative answers to these issues benefit the 3rd defendant and they are not in derogation of the rights of the 3rd defendant. I am unable to accept this position. How does the Court know, for instance, whether the 3rd defendant wants to take over possession or continue to retain possession of the lands described in the schedule to the plaint, because such commitment also involves the discharge of corresponding obligations or responsibilities arising out of such commitment. On the other hand, if the Court answers these issues against the 3rd defendant, is the 3rd defendant bound by such order? The

answer is in the negative because the 3rd defendant is no longer a party to the action. Is this not a futile exercise? According to the proceedings dated 09.07.2009, the 3rd defendant has been discharged without any representation on its behalf. In my view, after the 3rd defendant was discharged from the proceedings, the Court cannot allow issue Nos. 1-6 to remain since those issues are directly relevant to the rights of the 3rd defendant.

Then the only remaining issue is issue No. 7 which refers to the reliefs as prayed for in the prayer to the plaint. This is a standard issue raised by any plaintiff as a matter of routine after having raised specific issues. Except paragraph (a) of the prayer to the plaint, all other prayers are related to the 3rd defendant which I have already dealt with. I carefully read the averments in the body of the plaint to learn that the plaintiff has filed this action to secure possession of the lands described in the schedule to the plaint on behalf of the 3rd defendant. Paragraph (a) of the prayer to the plaint should be understood in that context, not in isolation. This is easily discernible by reading paragraph 25 of the amended plaint where the plaintiff says that he intends to file a separate action for the enforcement of the agreement and claim compensation, which he has admittedly done subsequently.

Learned President's Counsel for the plaintiff, drawing the attention of Court to section 17 of the Civil Procedure Code, contends that an action cannot be dismissed on non-joinder of parties. Section 17 of the Civil Procedure Code reads as follows:

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

This section states that without dismissing the action on non-joinder or misjoinder of parties, the Court may decide the rights of the parties who are actually before the Court. But in this case, as explained above, there are no rights to be safeguarded except for those of the 3rd defendant which, as I have already stated, cannot be done by reason of the fact that (a) the plaintiff cannot sue on behalf of the 3rd defendant, and (b) the Court cannot adjudicate the rights of the 3rd defendant without the 3rd defendant being a party to the case. Hence the plaintiff cannot shelter behind this section.

Learned President's Counsel for the plaintiff, also drawing the attention of the Court to section 18(1) of the Civil Procedure Code, says that if the Court thinks the 3rd defendant is a necessary party, the Court ought to add the 3rd defendant as a party to the action. Section 18(1) of the Civil Procedure Code 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.*

There is no duty cast upon the Court to add parties and the Court may *ex mero motu* do so in a fit case. Upon the application of the plaintiff, the Court discharged the 3rd defendant. Does the plaintiff expect the Court to add the 3rd defendant soon thereafter? The plaintiff shall also

understand that the system of justice practiced in our country is adversarial not inquisitorial, and the Court shall adjudicate upon the dispute as it is presented before Court by the respective parties and not in the way the Court wants it to be presented.

I must also add that after the amendment to section 93(2) of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act No. 9 of 1991, the addition of parties after the day the case is first fixed for trial, which necessitates the amendment of pleadings, is extremely restricted. Section 18 shall be read together with section 93(2), not in isolation.

Learned President's Counsel also draws the attention of this Court to section 22 of the Civil Procedure Code to contend that the 1st and 2nd defendants cannot take up this objection of non-joinder of parties after the settlement of issues. Section 22 of the Civil Procedure Code reads as follows:

> *All objections for want of parties, or for joinder of parties who have no interest in the action, or for misjoinder as co-plaintiffs or co-defendants, shall be taken at the earliest possible opportunity, and in all cases before the hearing. And any such objection not so taken shall be deemed to have been waived by the defendant.*

The 1st and 2nd defendants took up the objection of misjoinder of the 3rd defendant in the answer, in the teeth of the plaintiff's averment in the plaint that the 3rd defendant is an essential party to the action. Thereafter when the plaintiff moved to discharge the 3rd defendant, the plaintiff submitted that without the 3rd defendant the reliefs sought by the plaintiff in the plaint could not be granted. Although this looks like the 1st and 2nd defendants are taking up a contradictory position, in the facts and circumstances of this case, the 1st and 2nd defendants were

constrained to do so and, in my view, they did the right thing. I hold that the plaintiff's action from the outset is misconceived in law.

I answer the questions of law in the negative and dismiss the appeal with costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Kumudini 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 for Leave to Appeal, under and in terms of Section 5(2) and 6 of the High Court of the Provinces (Special provision) Act No. 10 of 1996 to be read together with the provisions in the Civil Procedure Code.

Case no.: SC/APPEAL/149/2016

Leave to Appeal No: SC/HCCA/LA/ 53/2013
HCCA (-): CIV/HCV/LA/02/2008
D.C (Vavuniya): TR/1097/05

1. P. Shanthakumar of Kugan Motors,
   52, Second Cross Street,
   Vavuniya.
2. M. H. D. Mailvaganam
   65, Mill Road,
   Vavuniya.
3. M. Murugathas,
   Island Lodge,
   97, Bazaar Street,
   Vavuniya.
4. T. Thirunavukkarasu,
   Pillaiyar Stores,
   69, Mill Road,
   Vavuniya.

5. K. Nithiyananthan,
   Mala Distributors,
   No.113, Mill Road,
   Vavuniya.
6. S. Shanmugaratnam,
   No. 171, Kandasamy Kovil Road,
   Vavuniya.
7. B. Annalingam,
   Kugan's Honda House,
   No.110, Bazaar Street,
   Vavuniya.
8. A.Sabanathan,
   City Trade Corporation, Sathiya Building,
   12, 15, First Cross Street,
   Vavuniya.
9. S. Theiventhiran,
   New Mala Battery Trading Centre,
   87, Mill Road,
   Vavuniya.
10. S. N. Nathan,
    Second Cross Street,
    Vavuniya.
11. N. Suntharampillai,
    M. Kasipillai & Sons,
    Mill Road,

Vavuniya.

12. K.A. Senthilnathan,
    J.P, First Cross Street,
    Vavuniya.

PLAINTIFFS

Vs

1. Rasa Vijendranathan
   No.127,
   Kandasamy Kovil Road,
   Vavuniya.
2. Joy Mahil Mahadeva
   No.2, Foundation House Lane,
   Colombo 10.
   Presently at 79, Kandasamy Kovil Road, Vavuniya.
3. Senthini Dharmaseelan,
   Chinthamani, Lowton Road,
   Manipay.
4. Jeyaratnam Ravikumar,
   "Crown Villa" Navaly South,
   Manipay
5. Sri Durga Jeyaratnam
   "Crown Villa" Navaly South,
   Manipay
6. Jeyaratnam Gokhale.
7. Jayaratnam Veerasingam and

8. Jeyaratnam Ragavan
   All of "Crown Villa" Navaly South,
   Manipay

DEFENDANTS

AND BETWEEN

In the matter of Leave to Appeal to set aside the order dated 15/05/2008 in D.C. Vavuniya Case No. TR/1097/05.

Rasa Vijendranathan
No.127, Kandasamy Kovil Road,
Vavuniya

1ST DEFENDANT - PETITIONER

Vs

1. P. Shanthakumar of Kugan Motors,
   52, Second Cross Street,
   Vavuniya.

2. M. H. D. Mailvaganam
   65, Mill Road,
   Vavuniya.

3. M. Murugathas,
   Island Lodge,
   97, Bazaar Street,
   Vavuniya.

4. T. Thirunavukkarasu,
   Pillaiyar Stores,
   69, Mill Road,
   Vavuniya.
5. K. Nithiyananthan,
   Mala Distributors,
   No.113, Mill Road, Vavuniya.
6. S. Shanmugaratnam,
   No. 171, Kandasamy Kovil Road,
   Vavuniya.
7. B. Annalingam,
   Kugan's Honda House,
   No.110, Bazaar Street,
   Vavuniya.
8. A.Sabanathan,
   City Trade Corporation,
   Sathiya Building,
   12, 15, First Cross Street,
   Vavuniya.
9. S. Theiventhiran,
   New Mala Battery Trading Centre,
   87, Mill Road,
   Vavuniya.
10. S. N. Nathan,
    Second Cross Street,

Vavuniya.

11. N. Suntharampillai,
    M. Kasipillai & Sons,
    Mill Road,
    Vavuniya.
12. K.A. Senthilnathan, J.P.,
    First Cross Street,
    Vavuniya.

PLAINTIFFS- RESPONDENTS

1. Joy Mahil Mahadeva
   No.2 Foundation House Lane,
   Colombo 10.
   Presently at 79, Kandasamy Kovil Road,
   Vavuniya.
2. Senthini Dharmaseelan,
   Chinthamani, Lowton Road,
   Manipay.
3. Jeyaratnam Ravikumar,
   "Crown Villa" Navaly South,
   Manipay.
4. Sri Durga Jeyaratnam
   "Crown Villa" Navaly South,
   Manipay.
5. Jeyaratnam Gokhale.
6. Jayaratnam Veerasingam and
7. Jeyaratnam Ragavan

All of "Crown Villa" Navaly South,
Manipay.

DEFENDANTS- RESPONDENTS

AND NOW BETWEEN

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 Provinces) (Amendment) Act No. 54 of 2006 read together with Article 128 of the Constitution.

Rasa Vijendranathan
No.127, Kandasamy Kovil Road,
Vavuniya

1ST DEFENDANT – APPELLANT- APPELLANT

Vs

1. P. Shanthakumar of Kugan Motors,
   52, Second Cross Street,
   Vavuniya.
2. M. H. D. Mailvaganam
   65, Mill Road,
   Vavuniya.
3. M. Murugathas,
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    Vavuniya.
12. K.A. Senthilnathan, J.P.,
    First Cross Street,
    Vavuniya.

PLAINTIFFS- RESPONDENTS- RESPONDENTS

1. Joy Mahil Mahadeva
   No.2 Foundation House Lane,
   Colombo 10.
   Presently at 79, Kandasamy Kovil Road,
   Vavuniya.
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   Manipay.
4. Sri Durga Jeyaratnam
   "Crown Villa" Navaly South,
   Manipay.

5. Jeyaratnam Gokhale.
6. Jayaratnam Veerasingam and
7. Jeyaratnam Ragavan
   All of "Crown Villa" Navaly South, Manipay.

DEFENDANTS- RESPONDENTS- RESPONDENT

BEFORE : **L.T.B. DEHIDENIYA, J.,**
S. THURAIRAJA, PC, J. and
A.H.M.D. NAWAZ, J.

COUNSEL : Vivekanathan Puvitharan, PC with Anuja Rasanayakhan for 1st Defendant-Appellant-Appellant
N.R Sivendran with Anusha Ratnam for Plaintiffs-Respondents-Respondents

WRITTEN SUBMISSIONS : Plaintiffs- Respondents- Respondents on 6th January 2021 and Synopsis of Written Submissions on 5th November 2021

1st Defendant-Appellant-Appellant on 5th October 2016

ARGUED ON : 29th October 2021

DECIDED ON : 18th March 2022

S. THURAIRAJA, PC, J.

The Facts

This is an appeal filed by the 1st Defendant- Appellant-Appellant (namely one Rasa Vijendranathan, hereinafter referred to as the "Appellant") against the Judgement delivered in the High Court of Civil Appeal dated 20th December 2012.

This action is regarding the Puliyady Pillaiyar Temple and its temporalities situated at Mill Road, Soosaipillaiyarkulam Road Junction. The Plaintiffs- Respondents-Respondents (hereinafter sometimes called and referred to as the 'Plaintiffs-Respondents') state that they are worshippers and members of the congregation of the said temple and have been in the habit of attending the performance of the worship and or services held at the said temple. The land on which the said temple is situated was originally owned by Annapillai Visvalingam by the Deed no.2171 dated 21.03.1927, attested by P.K. Pedurupillai Notary Public of Mullativu District. The second to the fifth Defendants are the descendants of the said Annapillai Visvalingam. A granite statue of Pillaiyar was installed in this land and worshipped by persons of Hindu religion and the temple was built with the consent of Muthurajah Jeyaratnam descendant of Annapillai Visvalingam in the said land by the worshippers as shrine.

In or about 1996, the people of Vavuniya were displaced due to the civil war and the temple was abandoned. After the people returned to their respective homes the worshippers including the Plaintiffs-Respondents started repairing the said temple at their expenses with the consent of late Muthurajah Jeyaratnam the descendant of Annapillai Visvalingam, the father of the 2nd-8th Defendant - Respondents-Respondents (hereinafter sometimes called and referred to as the '2nd-8th Defendants-Respondents') and poojas and services were held at the Temple.

The Plaintiff-Respondents state that the Appellant unlawfully ousted the worshippers and the 2nd-8th Defendants-Respondents and their father, late Muthurajah Jeyaratnam, from the management control and administration of the temple and their

powers and took control of the said temple and administers the said temple contrary to the interests of the 2nd – 8th Defendants and the worshippers. The Plaintiffs alleged that the Appellant wrongfully collects money from the worshippers and misappropriates the collection and the Appellant had never shown any account and he does not manage the temple properly. The Plaintiffs state there is a general dissatisfaction among the congregation with the way the Appellant manages the temple hence the Appellant is not a fit and proper person to be in charge of the Charitable trust and should be removed from office.

The Plaintiffs-Respondents instituted action at the District Court of Vavuniya against the Appellant and 2nd to 8th Defendants-Respondents-Respondents (hereinafter referred to as the "Defendants-Respondents") stating inter-alia that the Plaintiffs-Respondents are worshippers and members of the congregation of the Puliyady Pillaiyar Temple and are interested in the said Temple and its temporalities within the meaning of Section 102 of the Trusts Ordinance No. 9 of 1917 (as amended). They further stated that the said Temple is a place of Hindu Religious worship and is a charitable trust within the meaning of Section 102 of the Trusts Ordinance, while also stating that the Appellant has unlawfully ousted the worshipers and the Defendants-Respondents, took control of the said Temple.

The Plaintiffs further stated that it had become necessary for the Plaintiffs to apply for an order declaring that the temple and its temporalities a charitable trust, setting up a new scheme of management and removing the Appellant from the Board of trustees.

The Plaintiffs further stated in their Plaint that they have presented a Petition to the Government Agent through the Divisional Secretary, Vavuniya for the appointment of a Commissioner to inquire into the subject matter of the Petition under Section 102 of the Trusts Ordinance and that the Commissioner has issued a letter to the effect that an inquiry has been held regarding the matters mentioned in the Petition filed, that it was not possible to reach an amicable settlement due to the objections of the

Respondents. The letter advises the parties to refer the matter to court if they wish to take further action regarding the same.

The Appellant purports that the above matters pertaining to the response by the Divisional Secretary to be incorrect and misleading and alleges that the purported letter issued by the Government Agent dated 06.06.2005, marked P-01 does not on the face of it conveys any such matters as referred to by the Plaintiffs-Respondents.

The Appellant filed his answer and raised preliminary objections to the effect that the said action was filed without compliance with the condition precedent to filing of the action, that no certificate under and in terms of the Trusts Ordinance had been obtained from the Government Agent, that the letter dated 06/06/2005 was not issued upon an inquiry held in terms of the requirements of the Trusts Ordinance, more specifically in compliance with Section 102 of the same, and that therefore the Respondents do not have locus standi to have and maintain this action.

The Appellant substantiates his interest in the temple and the Land owing to the fact that his Grandfather's Uncle had consecrated a Pillaiyar Statute under a Tamarind tree (referred to as "Pulia Maram" in Tamil) and had worshipped in the 19th Century, thus leading to the Temple eventually being name "Puliyady Pillaiyar" (this can be interpreted to mean "Pillaiyar under a Tamarind tree"). The Appellant claims that thereafter his grandfather, subsequently his son and presently himself managed, maintained, expanded and developed the temple. The Appellant claims that the Respondents are not worshipers of the temple and have filed this action at the instigation of the 2nd Defendant- Respondent.

Nevertheless, subsequent to the letter dated 06/06/2005 by the Divisional Secretary, the Plaintiffs-Respondents filed Plaint dated 10/06/2005 at the District Court of Vavuniya where the Appellant raised the issues regarding compliance with Section 102 as preliminary objections. The Learned District Court Judge had held the following by Order date 15/05/2008:

a) The Action is said to have been filed under and in terms of Section 102 of the Trusts ordinance. But the Objection taken the 1st Defendant that the said action has not been instituted under Section 102 of the Trusts Ordinance becomes a question of law
b) The fact that the document dated 06/06/2005 marked P-01 filed by the Plaintiffs along with the Plaint has complied with the Trusts Ordinance can only be decided at the end of the trial in as much as the Plaintiffs' Attorney-at-law replied to the objection raised by the Appellant. Therefore, the said document can be accepted or not can be decided only after the leading of evidence
c) Similarly, 17,18,19 and 20th Issues are also issues of law and thus they also can be decided only upon leading evidence.
d) The Court has decided to record the full evidence before deciding the said issues.

Being aggrieved by the said Order the Appellant filed application for Leave to Appeal to the High Court of Vavuniya, whereupon the High Court delivered Order dated 20/12/2012 dismissing the Appeal with costs.

The Appellant has filed Petition dated 31st January 2013 before this Court, and was granted leave on the following question of law as found in Paragraph 25(b) of the Petition as follows:

> *"25 b) Have the District Court Judge and the Judges of the High Court erred in law that there was a valid action when the Plaint has not disclosed the condition precedent to entertain an action by Court under and in terms of Section 102(3) of the Trusts Ordinance?"*

In answering this question of law, I find it pertinent to lay out the facts of the case followed by an examination of the relevant provisions of law, namely Section 102 of the Trusts Ordinance.

Compliance with Section 102(3) of the Trusts Ordinance.

The facts in contention of the instant case are surrounding two specific documents, namely the Petition filed at the Divisional Secretary and the document marked P-01 which was issued by the Divisional Secretary advising the parties to take this matter to court.

The Appellant avers that these documents are not in compliance with the requirements of Section 102(3) of the Trusts Ordinance.

Section 102 (3) states as follows:

> *"(3) No action shall be entertained under this section unless the plaintiffs **shall have previously presented a petition** to the *Divisional Secretary of the Divisional Secretary's Division in which such place or establishment is situate praying for the appointment of a commissioner or commissioners to inquire into the **subject-matter** of the plaint, and unless the *Divisional Secretary of the Divisional Secretary's Division shall have certified that an **inquiry has been held** in pursuance of the said petition, and that the commissioner or commissioners (or a majority of them) has reported –*
>
> *(a) that the subject-matter of the plaint is one that **calls for the consideration of the court**; and*
>
> *(b) either that it has not proved possible to bring about an **amicable settlement** of the questions involved, or that the assistance of the court is required for the purpose of giving effect to any amicable settlement that has been arrived at.*
>
> *(*See section 4 of the Transfer of Powers (Divisional Secretaries) Act, No. 58 of 1992.) "*
>
> (Emphasis Added)

The above provision makes it apparent that the Legislators intended for parties to seek resolution of dispute through amicable means prior to seeking redress at courts. For this purpose, Section 102 (3) mandates that persons with concerns pertaining to religious trusts present their concern to the Divisional Secretary whereupon the Divisional Secretary will adequately inquire into said matter and communicating the results of such inquiry to the parties. The Divisional Secretary may find that the parties are amenable to come to an amicable solution or may find that there is a scheme discussed regarding which the parties may seek the advice of courts or may certify that such amicable solution is not achievable and thus advise parties to seek redress at the relevant District Court.

Religious Trusts and disputes arising thereof are extremely sensitive in nature given the nature of communities and their bonds, individual and ancestral, with the community in itself and the place of worship. As such, the Trusts Ordinance referred to a Government Agent as they were meant to be in a position to be inquire into and be more sensitive to the intricacies of religious and social communities concerned with the place of worship, more so than the court system. The Divisional Secretary is in a position to resolve such dispute through inquiry and amicable settlement in order to ensure minimal displeasure and resentment within such community. This allows minor disputes to be settled expeditiously without referring to courts.

As such the above mechanism requires, in essence, that prior to calling upon the advice of the Courts, the concerned parties communicate the raised concerns in a written form to the Divisional Secretary, the conducting of an inquiry by the Divisional Secretary, and finally the communication of results of such inquiry via written form by the Divisional Secretary. The purpose of the Petition and certification by the Divisional Secretary is in order for these goals to be met. However, the Trusts Ordinance does not specify a format for either document.

In interpreting the format required of documents under the above provision, the Appellant states that the learned District Court Judge and High Court Judge have

failed to apply the *stare decisis* held in the cases of **Sivaguru v Alagaratnam 48 NLR 369, Siththiravelu v Ramalingam and Others 61 CLW 31, Velautham v Velauther 61 NLR 230** and **Ramesh and another v Chettiar (2004) 1 SLR 355.**

The case of **Sivaguru v Alagaratnam** (*Supra)* concerned five persons interested in a temple, who brought an action under section 102 of the Trusts Ordinance praying that the defendants, who were the trustees, be held unfit to hold office. The certificate of the Government Agent was filed with their plaint and the only question in issue was whether the certificate sufficiently complied with Section 102 (3) (a) and (b) of the Trusts Ordinance. In this case, the contents of the certificate are said to have stated as follows:

> " *I certify that Mr. A. Alagaratnam and others presented a petition on January 24, 1945, praying for the appointment of a Commission to inquire into the accounts and the management of the Mamangapillaiyar Temple. The Commissioners duly appointed by me have reported that an inquiry has been held into these matters which form the subject-matter of the plaint and that the assistance of the Court may be obtained to Implement the scheme adopted by the members of the congregation* ".

The Learned Judge Hon. Keuneman A.C.J noted that the above did not amount to a certificate fulfilling the criteria prerequisite of Section 102 (3) given that,

> *" under section 102 (3), the Government Agent's certificate must contain the statement " that an inquiry has been held in pursuance of the said petition and that the Commissioner or Commissioners or a majority of them has reported (a) that the subject-matter of the plaint is one that calls for the consideration of the Court and (b)* ***either that it has not proved possible to bring about an amicable settlement of the questions involved or that the assistance of the Court is required for the purpose of giving effect to any amicable settlement which has been***

arrived at. *The document P 1 certainly does not show that Commissioners have held categorically that " the subject-matter of the plaint is one that calls for the consideration of the Court". I think it is advisable that all Commissioners should make specific reference to that fact as required by section 102 (3) (a). But even if we can assume for the purposes of the argument that such an allegation is to foe implied in P 1, it is not possible for us to hold that there has been a compliance with section 102 (3) (b) for the simple reason that* ***it is impossible for us to say from P 1 whether there has or has not been an amicable settlement of the questions involved. There should have been a statement that there either was or was not an amicable settlement.*** *The words in, P 1 " the assistance of the Court may be obtained to implement the scheme adopted by the members of the congregation " do not necessarily convey the idea that there was an amicable settlement between the plaintiffs in this case and other parties possibly interested in the temple or with the trustees in the case* ***we do not know what the scheme adopted was, whether it related to the subject-matter of the plaint or not and we do not know who were the members of the congregation*** ".

(Emphasis Added)

In examining the above, I find that the concern of the learned Judge was a lack of clarity in the said certificate in regard to the success or failure of reaching an amicable settlement. As such, the Divisional Secretary is expected to indicate the outcome of the inquiry, especially given the vague terms referring to a "scheme adopted by the members of the congregation". I believe that the facts of the instant case are not akin to the facts of the above case as there is no reference to a vague scheme to be adopted nor is there a lack of clarity in terms of the outcome of the inquiry in the instant case.

Secondly, In the case of **Velautham v Velauther 61 NLR 230,** The certificate by the Division Secretary stated as follows:

"I do hereby certify under sub-section (3) of Section 102 of the Trusts Ordinance (Cap. 72) that in pursuance of a petition presented to me by Mr. S. Velautham and nine others of Analaitivu regarding the management of the Sangaramoorthy Murugamoorthy Temple, Analaitivu, in the Divisional Revenue Officer's division of Islands, I appointed .... by an act of appointment dated 3rd January, 1955 commission to enquire into the subject matter of the said petition and

2. That the enquiry had been held in pursuance of the said petition and that the said commissioners have reported:

(a) That the subject- matter of the said petition is one that calls for consideration of the Court;

(b) That it has not been proved possible to bring about an amicable settlement of the questions involved. "

Whereupon objection was taken up to the effect that there was no plaint presented along with the petition to the Government Agent. Hon. Basnayake, C. J. agreed with the District Court and stated that the decision was taken in accordance with the case of **Sivaguru v. Alagaratnam** (*Supra)*, In that:

"as section 102 (3) declares that no action shall be entertained unless the Government Agent shall have certified that the commissioners have reported that the subject matter of the plaint is one that calls for the consideration of the Court. Clearly the commissioners cannot make such a report unless the plaint is annexed to the petition presented to the Government Agent and he cannot certify that they have so reported unless the commissioners have done so. "

Thereafter, in the case of **Siththiravelu v Ramalingam and Others 61 CLW 31**, Basnayake C.J states as follows"

" It has been held by this Court in the case of Velautham and others v Velauther and Another, that the certificate should be in terms of the sub-section (3) and that to enable the Government Agent to issue the prescribed certificate the petitioners should submit the plaint they propose to file in the Court upon receiving the certificate. Unless that is done the Commissioner cannot report that the subject matter of the plaint is one that calls for the consideration of the Court and the Government Agent cannot certify that they have so reported. In the instant case it would appear that the plaint which was filed was not submitted to the Government Agent…."

Finally in the case of **Ramesh and another v Chettiar (2004) 1 SLR 355,** the cases mentioned above have been re-examined by the Court of Appeal.

However, in terms of the interpretations afforded by the above cases, I am inclined to only agree with the case of **Sivaguru v Alagaratnam** as the purpose was in regard to the clarity of the certificate. The Court in that instance decided that the certificate did not conform to Section 102 since there was an ambiguity pertaining to the "Scheme adopted by the members of the congregation" and did not refer to a requirement of a plaint being submitted to the Government Agent.

In the instant case, the letter by the Government Agent of Vavuniya is reproduced hereof easy reference:

அரசாங்க அதிபர் பணிமனை, வவுனியா

எனது இல உமது இல Date: 06.06.2005

திரு. சி சண்முகரத்தினம்
171, கந்தசாமி கோவில் ரோட்,

வவுனியா

அன்புள்ள ஐயா

வவுனியா புளியடி சித்திவிநாயகர் ஆலயம் தொடர்பான பிணக்கு

மேற்படி விடயம் தொடர்பாக தங்களாலும் இன்னும் பலராலும் ஒப்பமிடப்பட்டு 2005.05.26 ஆந் திகதி எனக்கு அனுப்பிவைக்கப்பட்ட கடிதம் தொடர்பானது.

தாங்கள் உட்பட இன்னும் பலரால் ஒப்பமிடப்பட்டு 2003 ஜூலை மாதம் (திகதி இடப்படாமல்) எனக்கும் வவுனியா பிரதேச செயலாளருக்கும் அனுப்பி வைக்கப்பட்ட மேற்படி ஆலயப் பிணக்கு சம்பந்தப்பட்ட முறைப்பாடு தொடர்பாக எனது அறிவுறுத்தலின் படி வவுனியா பிரதேச செயலாளர் இப்பிணக்கைச் சுமூகமாகத் தீர்த்து வைப்பதற்கான முயற்சிகளை எடுத்திருந்தும், கூட்டங்களை நடாத்தியிருந்தும் எதிராளி தரப்பாருடைய எதிர்ப்புகள் காரணமாக இப்பிணக்கை சுமூகமாகத் தீர்த்து வைக்க முடியாமல் உள்ளது என்பதை அறியத்தருகின்றேன்.

எனவே, இவ்விடயம் தொடர்பாக மேற்கொண்டு நடவடிக்கை எடுக்கத் தாங்கள் விரும்பினால் நீதிமன்றத்தின் மூலமே இப்பிணக்குக்கான தீர்வைக்காணலாம் எனவும் ஆலோசனை கூறுகின்றேன்.

தங்கள் சேவையிலுள்ள
(சி. சண்முகம்)
அரச அதிபர்
வவுனியா மாவட்டம்

பிரதி : பிரதேச செயலாளர் வவுனியா -தகவலுக்காக

The English translation of the above is also reproduced as follows:

KACHCHERI, VAVUNIYA

My No: GA/ADM/CO/T Your No:…… Date: 06.06.2005

Mr.S.Shanmugarathnam,
171, Kanthasamy Kovil Road,
Vavuniya.

Dear Sir,

Dispute regarding the Siththivinayagar Temple, Puliyady, Vavuniya

This is with regarding to the letter signed by you and by several others and sent to me on 26.05.2005 regarding the above matter.

I inform you that even though measures were taken and meetings held by the Divisional Secretary of Vavuniya on my instruction to settle amicably the above dispute regarding the temple according to the complaint signed by you and by several others on July 2003 (without dated) and sent to me and the Divisional Secretary of Vavuniya, the dispute couldn't be settled amicably due to the protests of the Defendants.

Therefore, if you wish to take further action regarding this, I recommended you to refer this matter to the court and the dispute could be settled.

In your service,
Sgd illegibly
(S.Shanmugam)
Government Agent
Vavuniya District

CC: Divisional Secretary, Vavuniya:- for information

The above is signed by one S. Shanmugan, Government Agent of Vavuniya District and copied to the Divisional Secretary of Vavuniya.

As such, the above clearly indicated that this letter has been written in reference to the dispute directed to the Divisional Secretary by the parties, that an inquiry has been conducted regarding the same, that the dispute cannot be settled amicable, and recommends that the parties refer this dispute to the court if they wish to take further action. Given that no set template or requirements beyond those enumerated within the provision itself dictates the format of the certification by the Government Agent, I find this letter to be sufficient for the purposes of Section 102(3).

In applying the requirements of Section 102(3) of the Trusts Ordinance to the instant case, I find that as required, the Plaintiffs have previously presented a Petition to the Government Agent, this document is in the required form as it does not leave any ambiguity to the effect that it is a Petition by stating "The Petition of the Petitioners abovementioned appearing by their Attorney-at-Law…" and thereafter clearly stating the claims. As such I find no discrepancies in the document found in page 270 of the brief for the purposes of Section 102(3).

Section 102(3) requires that the Commissioner appointed inquire into the "subject matter of the plaint" as opposed to a plaint in itself. The plaint stands as a document to be submitted and assessed before the court and not before the Government Agent. The subject matter of the Plaint is extremely similar to the Petition in the instant case. Paragraph 15 of the Petition and the Prayer in the Plaint both pray for the declaration of the said temple and its temporalities as a charitable trust, settlement of a scheme of management for the proper administration of the said temple and its temporalities, removing the Appellant from the Management of the temple, appointment of a Board of Trustees and ordering of any other costs and reliefs the court may deem suitable. Therefore, by reference to the Petition submitted by the Plaintiffs, the Divisional Secretary has inquired into the prayers of the same and thus adequately addressed the subject matter of the plaint prior to arriving at the conclusion that the solution. This is sufficient as Section 102 (3) does not require the Plaint itself to be forwarded but that the subject matter of the plaint be inquired. As such, the reference of plaintiff and plaint is not for the Purpose of the Divisional Secretary but the District Court in the context of this provision.

Stare Decisis in Sri Lanka

Keeping the above facts and interpretation in mind I find that the cases subsequent to **Sivaguru v. Alagaratnam** are not correct according to the law as a requirement of submitting the plaint, which is to be submitted before the court, to the Government Agent is not found within Section 102(3) itself and has been read into the

same through the cases as enumerated above. I find that in order for the Plaintiffs to be in compliance with Section 102(3), it is sufficient for the Petition and the certification to fulfil certain criteria in its content as no strict prescribed format has been provided by the Trusts Ordinance for the same. As such, I find that the interpretations in the cases **Siththiravelu v Ramalingam and Others 61 CLW 31, Velautham v Velauther 61 NLR 230** and **Ramesh and another v Chettiar (2004) 1 SLR 355** are based upon a misconception of the relevant provisions. As these judgements have been followed by the Court of Appeal in the case of **Ramesh and another v Chettiar (2004) 1 SLR 355.** The views in this decision are not correct according to law and are not accepted by the Supreme Court based on the aforementioned reasoning.

At this juncture I find it pertinent to discuss the concept of *Stare Decisis* as followed in Sri Lanka in order to ascertain whether the abovementioned dicta have any binding force upon the present Court. In order to do so, one must identify the particulars of the above cases. The case of **Sivaguru v. Alagaratnam** was decided by the Supreme Court in the year 1947 by Hon. Keuneman, A.C.J. and Hon. Jayetileke, J. The case **Velautham v Velauther** was decided by the Supreme Court in the year 1957 by Hon. Basnayake, C.J., and Hon. Sinnetamby, J. The case **Siththiravelu v Ramalingam and Others** was decided by the Supreme Court in the year 1961 by Hon. Basnayake, C.J. and Hon. H. N. G Fernando, J. Finally, the case of **Ramesh and another v Chettiar** was decided by the Court of Appeal in the year 2004 by Hon. Amaratunga, J. and Hon. Wimalachandra, J.

As has long been accepted and as was discussed by Hon. Basnayake C.J himself in **Bandahamy v. Senanayake 62 NLR 313,** the principle or doctrine of stare decisis has been received and adopted in this country, with modifications, during the colonial period. As stated in this decision:

> *"The decision of an ultimate or appellate court has a dual aspect. The decision of the dispute between the parties and the principles of law which the court lays down in deciding that dispute. The actual decision of the*

dispute binds the parties. About that there is no question. The principles of law guide the court in deciding similar disputes and most courts of appeal and of ultimate jurisdiction regard themselves as bound by the principles enunciated by them in their decisions. The first aspect concerns the parties, the second the public, the profession and the subordinate courts and tribunals bound or influenced by those decisions. "

It was further recognized that the doctrine limited this precedent to the *ratio decidendi* of a case and does not include the *obiter dicta* as found in a judgement. It was recognized that:

"The principle of law which guides a court of ultimate or appellate Jurisdiction in arriving at its decision in the case before it, is for convenience called the ratio decidendi of the case (the reason of or for decision). The expression may be taken as meaning " the reason for the order that the court makes" or " the reason or ground on which a judgment is rested" ".

In the above cases of **Siththiravelu v Ramalingam and Others** and **Ramesh and another v Chettiar,** the ratio decidendi of **Velautham v Velauther** was followed in arriving at both decisions, as was apt at the time, while the latter case interpreted the ratio decidendi in the case of **Sivaguru v. Alagaratnam**.

However, it must be noted that the Sri Lankan Courts have recognized the necessity and value of a flexible approach to the doctrine of *Stare Decisis* as in the case of **Unique Gemstones LTD. v. W. Karunadasa and Others (1995) 2 SLR 357**, which quoted **Bandahamy v. Senanayake** to the effect that:

"The very strength of judgment law lies in his flexibility and capability of development by judicial exposition by generation of Judges. A Rigid Adherence to 'Stare Decisis' would rob our system of its virtues and hamper its development. We should strive to strike a mean between the one

extreme of too frequent changes in the law without sound and compelling reasons for them and the other extreme of slavish adherence to precedent merely because it has been decided before."

In deciding the binding effect of the *ratio decidendi* in the above cases, I find it pertinent to establish three key elements.

Firstly, it is pertinent to examine the established law regarding the binding effect of judgements based on the number of judges constituting a bench. In the case of **Bandahamy v. Senanayake**, the binding effect of decisions based on the number of number of judges constituting the bench was rather extensively discussed along with the cursus curiae established by Basnayake C.J. with importance to the instant scenario, the *cursus curiae* as outline stated that a bench of two judges sitting together regard themselves bound by a decision of three or more judges. The same is accepted by English courts as mentioned by Lord Goddard in **Edwards v. Jones [1947] 1 All E. R. 830, 833** by stating that;

"I should have no hesitation, if necessary, in differing from the decision in that case, not merely because we are sitting now as a court of three, and that was a court of two, but also because the case was not argued for the defendants, who did not appear, and when a case has been argued only on one side, it has not the authority of a case which has been fully argued".

In the above benches, as enumerated above, all judgements have been delivered by a bench constituting of only two Judges. As such, the decisions in the above referred cases do not have absolute binding effect upon the present bench,

Secondly, as discussed in length in the case of **Bandahamy v. Senanayake** it must be noted that between 1833 to 1971 the Privy Council was the highest Court or the Court of last resort followed by the Supreme Court as established by the Charter of 1833 and continued thereafter. In 1971 with the abolition of the right of appeal to the Privy Council and the establishment of the Court of Appeal, this latter Court as

then constituted became the highest Court in the land which was in turn abolished in 1974 by the Administration of Justice Law and a new System of Courts was established by this law. The new Supreme Court as established under the Administration of Justice Law became the highest Court in the country. This position continued till 1978 when the new Constitution of the Democratic Socialist Republic of Sri Lanka abolished the Supreme Court established under the Administration of Justice Law and much of its jurisdiction was conferred on the Court of Appeal which was made a Court of subordinate jurisdiction by the creation of the present Supreme Court with supreme power in all matters of law at the apex of the Judicial system in the country.

Due to this development of law the question arises as to whether the Supreme Court as established following the abolition of the right to appeal to the Privy Council is bound by decisions made by a Supreme Court which was not of the last resort prior to such development.

In the case of **Costa v. Jayatilleke SC 265/74-D.C. Mt. Lavinia 47641 /A**, Hon. Vythialingam J held that the Supreme Court under the Administration of Justice Law being the highest Court under that system was not bound by a decision of the Supreme Court which preceded it as the latter was a Court subordinate to the Privy Council. This was cited by Hon. Thamotheram, J in **Walker Sons & Co. (U.K.) Ltd. V. Gunatilake and Others (1979) 1 SLR 231** to the effect that:

> *"The relevant question is which is the court vested with final authority in any system. The ratio decidendi of cases decided by the Court becomes a rule for the future binding all courts which are not the courts of last resort whether it be under the same system or under a different system. It is always open to the legislature to alter the rule as declared."*

As such, it is apparent that only decisions by a court of last resort are binding upon subsequent court within the same or a different system. Given this clear approach opted for within the Sri Lankan judicial system, it suffices to say that the present

Supreme Court is not bound by the decisions given in **Sivaguru v. Alagaratnam**, **Siththiravelu v Ramalingam and Others,** and **Velautham v Velauther** as they were decided during the period when the Supreme Court was not the Court of last instance.

Considering all the above facts and circumstances and upon examining Section 102 of the Trust Ordinance and cited cases, I find that the Plaintiffs are in compliance with Section 102 and that the requirements later imposed by the aforementioned cases are not required by the Trust Ordinance. As such, I hold that this application is dismissed as there is no merit in this application. The Plaintiffs are entitled to costs for proceeding at this Court and the Civil Appellate High Court of Vavuniya.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, 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

Stella Gwendelline Hycinth Wijesinghe,
No. 05, Railway Avenue,
Nugegoda.
Plaintiff

SC APPEAL NO: SC/APPEAL/154/2017
SC LA NO: SC/HCCA/LA/59/2017
HCCA BADULLA NO: WP/HCCA/MT/42/2013(F)
DC NUGEGODA NO: 179/2008/L

Vs.

Lalith Wickramarathne,
No. 51/1,
Stanley Thilakaratne Mawatha,
Nugegoda.
Defendant

AND BETWEEN

Lalith Wickramarathne,
No. 51/1,
Stanley Thilakaratne Mawatha,
Nugegoda.
Defendant-Appellant

Vs.

Stella Gwendelline Hycinth Wijesinghe,
No. 05, Railway Avenue,

Nugegoda.
Plaintiff-Respondent

AND NOW BETWEEN

Stella Gwendelline Hycinth Wijesinghe,
No. 05, Railway Avenue,
Nugegoda.
Plaintiff-Respondent-Appellant

Vs.

Lalith Wickramarathne,
No. 51/1, Stanley Thilakaratne Mawatha,
Nugegoda.
Defendant-Appellant-Respondent

Before: P. Padman Surasena, J.
A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: J.P. Gamage with Nisansala Pathirana for the Plaintiff-Respondent-Appellant.
Hemasiri Withanachchi with Shantha Karunadhara for the Defendant-Appellant-Respondent.

Argued on: 12.01.2022

Written submissions:
by the Plaintiff-Respondent-Appellant on 20.10.2017 and 23.02.2022
by the Defendant-Appellant-Respondent on 21.10.2020 and 08.02.2022

Decided on: 21.11.2022

Mahinda Samayawardhena, J.

The plaintiff instituted this action against the defendant in the District Court of Nugegoda, seeking a declaration that lot 4 in the final decree entered in partition case No. 5399/P belongs to the parties to that action, and the defendant has no right of way over lot 4. The defendant filed amended answer seeking dismissal of the plaintiff's action. He also made a cross-claim in the answer stating that he has acquired prescriptive title to lot 4 (not right of way by prescription) and/or he is entitled to use lot 4 as a way of necessity.

At the trial it was recorded as an admission (admission No. 3) that the said lot 4 had been given as a road to the parties to that partition action by the final decree. It is common ground that the defendant was not a party to that partition action.

The plaintiff raised the following issues at the trial:

1. 5399 බෙදුම් නඩුවේ අවසාන නීන්දු ප්‍රකාශය පරිදි පැමිණිල්ලේ උපලේඛණගත ලේඛණයේ අයිතිවාසිකම් ලැබූ පාර්ශවකරුවන් පමණක් එකී දේපල මාර්ගයක් වශයෙන් භාවිතා කරන ලද්දේ ද?
2. විත්තිකරුවන් 2008.08.13 වන දින හෝ ඊට ආසන්න දිනක එකී මාර්ගයේ පැමිණිලිකාරියගේ බුක්තියට නීති විරෝධී ලෙස ආරවුල් කරන ලද්දේ ද?
3. ඉහත සඳහන් විසඳනාවන්ට ලැබෙන පිළිතුරු ඔව් නම් පැමිණිලිකාරියට පැමිණිල්ලේ අයාචනයේ සහන ලබා ගත හැකිද?

The defendant raised the following issues:

4. පැමිණිල්ල සිවිල් නඩු විධාන සංග්‍රහයේ 18 වගන්තියේ ප්‍රතිපාදන වලට පටහැනිව ඉදිරිපත් කර ඇද්ද?

5. පැමිණිල්ල සිවිල් නඩු විධාන සංග්‍රහයේ 35 වගන්තියේ ප්‍රතිපාදන වලට පටහැනිව ඉදිරිපත් කර ඇද්ද?
6. ඉහත කී 7 සහ 8 විසඳනාවන්ට එසේ යයි පිළිතුරු ලැබේ නම් පැමිණිලිකාරිය එම නඩුව පවරා හැකි ආකාරයෙන් පවත්වා ගෙන යා නොහැකිද?
7. අංක 5399/ටී දරණ නඩුවේ අවසාන නීන්දු ප්‍රකාශය මගින් මීට වසර 60 කට පෙර එම නඩුවේ පාර්ශවකරුවන්ට පමණක් මාර්ග අයිතියක් ලබා දී තිබුනද කාලයාගේ ඇවෑමෙන් මෙම නඩුවේ විෂයගත මාර්ගය පැමිණිලිකාරියද යාබද ඉඩම් හිමියන්ද, නුගේගොඩ නගර වාසීන්ද පොදු පාරක් ලෙස බාවිතා කර ඇද්ද?
8. අදාල මාර්ගය පුරා වසර 30 කට අධික කාලයක් කෝට්ටේ මහ නගර සභාව විසින් නඩත්තු කර ඇත්ද?
9. සංශෝධිත උත්තරයේ 17 වන ඡේදයේ කියා ඇති පරිදි විත්තිකරුවන් විසින් පුරා වසර 10කට අධික කාලයක් පොදු පාරක් ලෙස අදාල මාර්ගය පරිහරණය කර ඇද්ද?
10. පුරා වසර ගණනාවක් තිස්සේ නගර සභාවෙන් නඩුවට අදාල මාර්ගයට තාර දමා විදුලි ආලෝකය ලබා දී මහජන මුදලින් වැඩිදියුණු කිරීම සමගම මේ පාර පොදු මහජන මුදලින් නඩත්තු වන මාර්ගයක් බවට පත් වී ඇද්ද?
11. ඉහත කී විසඳිය යුතු ප්‍රශ්න එකකට හෝ වැඩිගණනකට විත්තියේ වාසියට නීන්දු වූයේ නම් උත්තරයේ අයාචනයේ අයැද ඇති සහන විත්තිකරුට හිමිකම් ඇත්ද?

Although the defendant in the prayer to the answer claimed lot 4 on prescription and/or use of lot 4 as a way of necessity as the substantive relief, he changed the character of his case by way of the issues. By way of the issues, he took up the position that lot 4 is now a public road and therefore the plaintiff's action shall fail. He confined his case only to that

issue. His last issue (issue No. 11) is, if one or all of the said issues are answered in the affirmative, whether the defendant is entitled to the reliefs as prayed for in the prayer to the answer. In other words, if the defendant fails to prove that lot 4 is a public road, the defendant's case fails.

After trial, the District Court entered judgment for the plaintiff. The defendant preferred an appeal to the Hight Court of Civil Appeal of Mt. Lavinia. On appeal he again changed his case. He abandoned all his defences taken in the answer and issues and took up an entirely new position, that is: what the plaintiff filed in the District Court was an action known as *actio negatoria*; only an owner having soil rights can file such an action; since the plaintiff does not have soil rights to lot 4, the plaintiff's action must fail. The High Court accepted this new position taken for the first time on appeal and set aside the judgment of the District Court and directed the District Court to enter judgment for the defendant granting all the reliefs as prayed for in the answer. It may be recalled that the defendant's first cross-claim is that he is the owner of lot 4 by prescription.

The plaintiff is before this Court against the judgment of the High Court. This Court granted leave to appeal on the following questions of law as formulated by learned counsel for the plaintiff.

a. *Did the Learned Provincial High Court Judges err in law in deciding that an issue on the nature of a case is a question of Law?*
b. *Did the Learned Provincial High Court Judges err in law in allowing a new issue in Appeal which affects the nature of the case?*
c. *Did the Learned Provincial High Court Judges err in law in deciding that the Plaintiff-Petitioner's case is in the nature of actio negatoria?*
d. *Did the Learned Provincial High Court Judges err in law in not considering that neither the Plaintiff-Petitioner nor the Defendant-*

Respondent has raised any issue on the basis of actio negatoria at the trial?

e. *Did the Provincial High Court Judges err in law in deciding that the Plaintiff-Petitioner has no soil rights to the subject matter to the case (lot No. 4, corpus morefully described in the schedule to the plaint)?*
f. *Did the Learned Provincial High Court Judges err in law in not considering that the concept of actio negatoria in Roman Dutch Law cannot be applied on the subject matter which was partitioned in terms of the provisions of the Partition Law?*
g. *Did the Learned Provincial High Court Judges err in law in not considering the admission by the parties which is marked as "P14" in allowing the Appeal of the Defendant-Respondent?*

A party to an action cannot change his position as he pleases to suit the occasion. Firstly, a party cannot present by way of issues a different case from what he has pleaded in his pleadings. However, if the opposing party does not object, the Court can accept the issues since once issues are raised pleadings recede to the background. Secondly, once issues are raised and accepted by Court, a party cannot present a new case when leading evidence at the trial from what he has raised by way of issues. Thirdly, once the judgment is delivered by the trial Court, a party cannot present a new case before the appellate Court from what was presented before the trial Court, unless any new ground is on a pure question of law and not on a question of fact or on a mixed question of fact and law.

Two questions arise in this context: (a) is the new issue raised for the first time on appeal a pure question of law; and (b) if the answer to the aforesaid is in the affirmative, is the answer given to that question by the High Court correct.

According to the third admission recorded, the defendant admitted at the trial that lot 4 was allotted to the parties to the partition action as a road

by the final decree. it is common ground that the plaintiff's mother was the plaintiff in that partition action, and she transferred a defined portion from her lot to the plaintiff by a deed.

In my view, the Courts below should not have allowed the defendant to change positions to suit the occasion. The purported new position taken up by the defendant on appeal is not a pure question of law but a mixed question of fact and law. It is by analysing the averments in the plaint and the evidence led at the trial that learned counsel for the defendant says that what the plaintiff filed was an action known as *actio negatoria*. That is how he classifies the plaintiff's case. Since this matter was not put in issue before the trial Court, the plaintiff did not lead any evidence to meet that argument. The plaintiff rejects the position of the defendant that she filed an action in the nature of *actio negatoria*. I am not inclined to take the view that it is a pure question of law. If the new matter raised for the first time on appeal is not a pure question of law, the matter shall end there and the judgment of the High Court shall be set aside and the judgment of the District Court shall be restored.

But let us assume for the sake of argument that what the plaintiff filed was an action in the nature of *actio negatoria* and that the plaintiff ought to have soil rights to file such an action. The High Court held that the parties to the partition action obtained soil rights only to the specific allotments of land allotted to them in lieu of their undivided shares and that they are not entitled to soil rights to lot 4 which was left to be used by the allottees in common as a road. Then who has soil rights to lot 4 – the neighbours? In the final decree of partition marked P1 at the trial, lot 4 has been referred to mainly in two places. In the first place it says "*The lot No. 4 being reservation for a road twenty feet wide morefully described in the schedule hereto declared to be in common between the parties*." In the other place it says *"The Lot No. 4 reservation for a road twenty feet*

wide is declared a private road or a right of way which is in common to the parties and which said lot No. 4 is according to the said plan No. 942 bounded on the North east by Railway Avenue on the south east by properties now of Albert Perera and Malwattage Simon Peiris on the south west by lot No. 3 on the North west by Lots Nos 1 and 2 containing in extent twenty point eight seven perches (A0-R0-P.20.87)." There is no scintilla of doubt that according to the final decree of partition, lot 4 has been left to the allottees who got separate allotments of the land, to be used as a "private road". That portion has been separated as a common road only for the benefit of the said allottees, not for outsiders. The portion of land subject to lot 4 is the land of the allottees. It is preposterous to even think the allottees of the specific lots lost their soil rights to lot 4 after the final decree of partition was entered. All the allottees have soil rights to lot 4 in common.

I answer the questions of law in the affirmative. I set aside the judgment of the High Court and restore the judgment of the District Court and allow the appeal with costs in all three Courts, which I fix at rupees two hundred and fifty thousand.

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 a Leave to Appeal application filed in terms of the section 5(2) of the Provincial High Court (Special Provisions) Act No. 10 of 1996.

Avenra Gardens (Private) Limited,
No. 22/5, Muhahunaupitiya,
Negambo.

S.C. Appeal No. 157/2019 **Plaintiff**
SC/HC/LA No. 63/2019
HC/Civil No. 253/17 MR

Vs.

1. Global Project Funding AG
   Samstagernstrasse,
   CH- 8832,
   Wollerau,
   Switzerland.

2. My Star Spain S L
   C/Padre Thomas Montana,
   36-2-46023,
   Valencia,
   Spain.

3. CAIXA Bank SA,
   Main Brach,
   Barcelona ES,
   Spain.

4. Seylan Bank PLC,
   Head Office,
   Seylan Tower,
   No. 90, Galle Road,
   Colombo 03.

Defendants

AND NOW BETWEEN

4. Seylan Bank PLC,
   Head Office,
   Seylan Tower,
   No. 90, Galle Road,
   Colombo 03.

Defendant-Petitioner

Vs.

1. Global Project Funding AG
   Samstagernstrasse,
   CH- 8832, Wollerau,
   Switzerland.

2. My Star Spain S L
   C/Padre Thomas Montana,
   36-2-46023, Valencia,
   Spain.

3. CAIXA Bank SA,
   Main Brach, Barcelona ES,
   Spain.

Defendant-Respondents

Avenra Gardens (Private) Limited,
No. 22/5, Muhahunaupitiya,
Negambo.

Plaintiff-Respondent

Before: L.T.B. Dehideniya, J.

A.L. Shiran Gooneratne, J.

Janak De Silva, J.

Counsel:

Kuvera De Zoysa, P.C. with Senaka De Seram for the 4th Defendant-Appellant

Ruwantha Cooray for the Plaintiff-Respondent

Written Submissions tendered on:

4th Defendant-Appellant on 14.11.2019

Plaintiff-Respondent on 22.07.2020

Argued on: 01.03.2021

Decided on: 23.02.2022

Janak De Silva, J.

This is an appeal against the order of the learned judge of the Commercial High Court dated August 26, 2019.

Leave to appeal was granted in respect of the following questions of law:

(1) The learned Commercial High Court Judge failed to consider the order of dated 31st October 2017 entering the terms of settlement was only between the Plaintiff and the 1st and 2nd Defendants and not between the other Defendants

(2) The learned Commercial High Court Judge failed to consider that in terms of the order entered by the learned Commercial High Court Judge on the 31st October 2017 with regard to the entering of the decree, there was no decree entered by as per said settlement against the Petitioner

The issues to be determined are related to the terms of the settlement entered on October 31, 2017. Therefore, I will not make any reference to the factual matrix of the action except to the extent that it may impinge on the terms of the settlement.

The Court called for the original record of the Commercial High Court and, after examining the case record, the proceedings of October 31, 2017 read as follows:

1 වන විත්තිකරු පෙරකලාසි ගොනු කර සිටී.

පැමිණිලිකාර ආයතනයේ නියෝජිත සිටි.

පැමිණිලිකරු වෙනුවෙන් නීතිඥ ලංකා ධර්මසිරි මහත්මියගේ උපදෙස් මත නීතිඥ චමිත් ෆර්නෑන්ඩු මහතා සහ නීතිඥ රුවන්ත කුරේ යන මහත්වරුන් සමග ජනාධිපති නීතිඥ අලි සබ්රි මහතා පෙනි සිටි.

1,2 විත්තිකරුවන් වෙනුවෙන් 1 වන විත්තිකරුගේ නියෝජිත සහ 2 වන විත්තිකරුගේ ඇටෝනි බලකරු ගරු අධිකරණයේ සිටි.

1 වන විත්තිකරුවන් වෙනුවෙන් ජී. ඩබ්. ආර්. ධම්මික මහතාගේ උපදෙස් මත නීතිඥ ශිහාන් විජේගුණවර්ධන මහතා පෙනී සිටි.

2 වන විත්තිකරු වෙනුවෙන් සාලගලගේ කුමාර ප්‍රසාද් සිල්වා මහතා පෙනී සිටි.

4 වන විත්තිකාර වෙනුවෙන් වයෝමා පරණගම මහත්මියගේ උපදෙස් මත නීතිඥ උදයන්ති මදනායක මහත්මිය පෙනී සිටි.

.....

මෙම නඩුව සම්බන්ධයෙන් දෙපාර්ශවය වෙනුවෙන් පෙනී සිටින නීතිඥවරුන් ප්‍රකාශ කර සිටින්නේ මෙම නඩුවට අදාල විෂය වස්තුව වනුයේ පැමිණිල්ලට ඒ8 වශයෙන් අමුණා ඉදිරිපත් කර ඇති ණයවර ලිපිය ප්‍රකාරව 1,2 විත්තිකරුවන්ට අදාල ණයවර ලිපියේ සඳහන් මුදල අය කර ගත හැකිද, නොඑසේ නම් එම මුදල යලි පැමිණිලිකරු වෙත මුදා හැරිය යුතුද යන්නය.

එකී ණයවර ලිපිය ආරම්භ කොට ඇත්තේ 2 වන විත්තිකරු විසින් 1 වන විත්තිකරුගේ නියෝජිතයා ලෙස පැමිණිලිකරුට එකී ණයවර ලිපියට අදාල භාණ්ඩ ලංකාවට ආනයනය කිරීම සම්බන්ධයෙන් ගෙවිය යුතු ඇමරිකානු ඩොලර් 1,368,750/- ක මුදලක් ගෙවීම සම්බන්ධයෙන් වූ අවලංගු කළ නොහැකි ණයවර බිල් පත්‍රයක් සම්බන්ධයෙනි.

කෙසේ වෙතත් අදාල ණයවර ලිපිය ප්‍රකාරව 2 වන විත්තිකරු විසින් පැමිණිලිකරු වෙත එවිය යුතු වූ භාණ්ඩ එවීම ප්‍රතික්ෂේප කිරීම හේතුකොට ගෙන සහ/හෝ එවැනි භාණ්ඩයක් ඇත්ත වශයෙන්ම නැව් ගත කොට නොතිබීම හේතුකොට ගෙන එකී ණයවර ලිපිය මත 1,2 විත්තිකරුවන්ට මුදල් ලබා ගැනීමට නොහැකි යන පදනම මත පැමිණිලිකරු ගරු අධිකරණයෙට පැමිණ සිටිනවා ස්වාමීනි.

ඒ පිළිබඳව සැහිමකට පත් වීමෙන් පසුව මුල් අවස්ථාවේදී අධිකරණය විසින් එකී ණයවර ලිපිය අනුව මුදල් නිශ්කාෂනය කිරීම වළක්වාලමින් 4 වන විත්තිකාර බැංකුවට විරුද්ධව වාරණ නියෝගයක් නිකුත් කල අතර ඊට විරෝධතා ඉදිරිපත් නොකිරීම මත දැනට අතුරු ඉන්ජන්ෂන් තහනම් ආඥාවක් නිකුත් කොට ඇත.

ඉන් පසුව මැතිතුමනි 1,2 වන විත්තිකරුවන්ට විරුද්ධවද වාරණ නියෝගයන් ඇති අතර එය තවදුරටත් ක්‍රියාත්මක වෙමින් පවතී. නමුත් මෙම නඩුවේ සමථයක් ඇති කර ගැනීම සඳහා පාර්ශවකරුවන් එකඟ වී ඇති අතර ඒ අනුව පහත සමථ කොන්දේසි වලට අනුව මෙම නඩුව සමථයට පත් කරවා ගැනීමට දෙපාර්ශවය එකඟ වේ.

01. ඒ8 දරන ණයවර ගිවිසුමට ප්‍රකාරව එම ණයවර ගිවිසුමට අදාල වූ භාණ්ඩ 1,2 වන විත්තිකරුවන් විසින් පැමිණිලිකරුට නැව්ගත කොට නොමැති බවට 1,2 විත්තිකරුවන් පිළිගනී.

02. ඒ අනුව එකී ණයවර ලිපියට අදාල මුදල පැමිණිලිකරු වෙත යලි මුදා හැරීමට 1,2 විත්තිකරුවන් එකඟ වේ.

03. ඒ අනුව එකී ණයවර ලිපියට අදාල ඇමරිකානු ඩොලර් 1,368,750/- යන ප්‍රමාණය අද දින සිට සති 2 ක කාලයක් තුල එනම්, 2017.11.14 වන දින හෝ ඊට පෙර බැංකු අණකරයක් මගින් හෝ පැමිණිලිකරුගේ වාසියට 4 වන විත්තිකාර තීරු ගිණුමක පැමිණිලිකරුගේ වාසියට තැන්පත් කිරීමට 1,2 විත්තිකරුවන් එකඟ වේ.

04. ඒ අනුව එලෙස 2017.11.14 වන දින හෝ ඊට පෙර එකී ඇමරිකානු ඩොලර් 1,368,750/- ක මුදල පැමිණිලිකරුට බැංකු අණකරයකින් ගෙවනු ලැබුවහොත් සහ/හෝ තීරු ගිණුමක පැමිණිලිකරුගේ වාසියට 4 වන විත්තිකාර බැංකුවෙහි තැන්පත් කොට එකී බැංකුව එකී මුදල් ලැබුණු බවට සහතික කරනු ලැබුවහොත් ඒ8 ණයවර ලිපිය මත 1,2 විත්තිකරුවන්ට

ලැබිය යුතු මුදල 4 වන විත්තිකාර බැංකුව විසින් මුදා හැරිය යුතු බවට දෙපාර්ශවය එකඟ වේ.

05. එලෙස 2017.11.14 වන දින හෝ ඊට පෙර එකී මුදල පැමිණිලිකරුට ගෙවීමට හෝ පැමිණිලිකරුගේ වාසියට 4 වන විත්තිකාර බැංකුවෙහි තීරු ගිණුමක තැන්පත් කිරීමට 1,2 විත්තිකරුවන්ට පැහැර හැරියහොත් හෝ ප්‍රතික්ෂේප කරනු ලැබුවහොත් පැමිණිල්ලේ ආයචනයේ ''අ, ආ, ඇ, ඈ සහ ඔ'' ඡේදයේ ඉල්ලා ඇති සහන අයකර ගැනීම සඳහා පැමිණිලිකරුට අයිතිවාසිකම් ඇති බවට 1,2 විත්තිකරුවන් එකඟ වේ.

ඒ අනුව එකී එකඟතාවය මත එදිනෙන් පසුව 4 වන විත්තිකාර බැංකුවෙහි ඒ8 ණයවර ලිපිය ප්‍රකාරව අදාල ණයවර ලිපිය නිකුත් කිරීම සඳහා තැන්පත් කර ඇති පැමිණිලිකරුගේ මුදල් අදාල ණයවර ලිපිය අවලංගු කොට එදින සිට සතියක් ඇතුලත යලි පැමිණිලිකරු වෙත මුදා හැරීමට 4 වන විත්තිකාර බැංකුව එකඟ වේ. ඒ අනුව එකී කොන්දේසි මත පැමිණිලිකරු සහ 1,2 සහ 4 විත්තිකරුවන්ට අතර සමථ නඩු තීන්දුවක් ඇතුලත් කරන ලෙන සියලු පාර්ශවයන් ඉල්ලා සිටි. 3 වන විත්තිකරුට විරුද්ධව පියවර ගැනීම සම්බන්ධයෙන් මෙම සමථය අනුව කටයුතු කොට තීරණයක් ඉදිරිපත් කිරීම සඳහා ඊළඟ දිනට කැදවන මෙන් ඉල්ලා සිටි.

<u>අධිකරණයෙන්;</u>

එකඟ වී ඇති කොන්දේසි වලට අනුව පැමිණිලිකරුට සහ 1,2 විත්තිකරුවන් අතර තීන්දු ප්‍රකාශයක් ඇතුලත් කරන්න. පැමිණිල්ලේ නියෝජිත සහ 1,2 විත්තිකරුවන්ගේ නියෝජිත නඩු පොත් අත්සන් කිරීමට නියම කරමි.

The basic question to be decided is whether the 4th Defendant-Appellant (hereinafter referred to as "Appellant") is a party to the terms of the settlement entered on October 31, 2017.

Section 408 of the Code of Civil Procedure provides for the adjustment of actions and reads as follows:

> *"If an action be adjusted wholly or part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the action, such agreement, compromise, or satisfaction shall be notified to the court* ***<u>by motion made in presence of, or on notice to, all the parties concerned</u>, and the court shall <u>pass a decree in accordance therewith</u>****, so far as it relates to the action, and such decree shall be final, so far as relates to so much of*

the subject-matter of the action as is dealt with by the agreement, compromise, or satisfaction." (Emphasis added)

The foundation of a consent decree is the *consensus ad idem* of the parties. For this reason, section 408 of the Civil Procedure Code directs that the Court should pass a decree in accordance with the terms of the settlement. Case law emphasizes the need to comply with this and other relevant provisions to ensure that any settlement entered is based on the mutual consent of the parties.

Any settlement or compromise must conform strictly to the provisions of sections 91 and 408 of the Civil Procedure Code. If the compromise was lacking in precision and did not strictly conform to sections 91 and 408 of the Civil Procedure Code and it leads to confusion and uncertainty, any decree entered on it could be attacked on the ground of want of mutuality [*Faleel v. Argeen and Others* (2004) 1 Sri.L.R. 48]. Thus, in *Dassanaike v. Dassanaike* (30 N.L.R. 385 at 387), Fisher, C. J. observed:

> *"It is fundamentally necessary before section 408 can be applied that it should be clearly established that what is put forward as an agreement or compromise of an action by the parties was intended by them to be such."*

No doubt settlement of an action between the parties is welcome. In fact, settlement between parties should be encouraged by the Court to the extent possible in law provided that applications to pursue a settlement are not made with a view to delay the proceedings or to merely obtain a date. However, before any such settlement is entered and decree entered accordingly, the procedural steps mandated by law must scrupulously be observed to ensure that the terms of the settlement are based on the consent of all the parties whose rights are affected by it.

That appears to be the reason for section 408 of the Civil Procedure Code to require any settlement to be notified to the Court by way of motion made in the presence of, or on notice to, all the parties concerned. It directs that "*such agreement, compromise, or satisfaction shall be notified to the court by motion…"*. In my view, these words require the terms of the settlement to be incorporated into a motion signed by the registered attorney for all parties to the settlement. There can be no room for any dispute once terms are recorded in a motion and the parties concerned have indicated their consent

by the registered attorney-at-law signing the motion containing the terms of the settlement.

This Court has added safeguards to be followed in concluding settlement arrangements to ensure that they reflect the intention of the parties. Thus Soertsz, J. observed in *Punchibanda v. Punchibanda et al* (42 N.L.R. 382):

> "*This Court has often pointed out that when settlements, adjustments, admissions, &c., are reached or made, their nature should be explained clearly to the parties, and their signatures of thumb impressions should be obtained. The consequence of this obvious precaution not being taken is that this Court has its work unduly increased by wasteful appeals and by applications being made to it for revision or restitutio in integrum. One almost receives the impression that once a settlement is adumbrated, those concerned, in their eagerness to accomplish it, refrain from probing the matter thoroughly lest the settlement fall through."*

Regrettably, I note that the terms of settlement in this case have not been incorporated into a motion as required by law. Instead, the terms were recorded in open court on October 31, 2017. After the terms of settlement were entered, the learned judge of the Commercial High Court, directed that the decree be entered between the Plaintiff and the 1st and 2nd Defendants only. This order was made despite an application to enter a consent decree between the Plaintiff and the 1st , 2nd and Appellant.

Moreover, journal entry no. 17 pertaining to this date, part of which appears to have been written in English by the learned judge of the Commercial High Court, reads:

> "…Terms of Settlement were recorded between the Plaintiff and the 1st and 2nd Defendants….Enter Decree accordingly…Representatives of the parties are directed to sign the record."

The record reflects that only the representatives of the Plaintiff and the 1st and 2nd Defendants have signed the record. There is no signature of any representative of the Appellant.

To my mind, the learned judge of the Commercial High Court did not have any doubt when the settlement was recorded on 31st October, 2017 that only the Plaintiff and the 1st and 2nd Defendants were parties to the terms of the settlement. That appears to be the reason for the journal entry written by the learned judge to state that the terms of settlement were entered into between the Plaintiff and the 1st and 2nd Defendants. This is complimented by the order he made on that date, directing that the decree be entered between the Plaintiff and 1st and 2nd Defendants according to the terms of the settlement. The matter is put beyond doubt by the fact that only the representatives of the Plaintiff and the 1st and 2nd Defendants have signed the record.

However, the learned counsel for the Plaintiff-Respondent drew the attention of the Court to the proceedings of October 31, 2017 and submitted that the Appellant was represented by Ms. Udayani Madanayake, Attorney-at-Law and as such the terms of settlement are binding on the Appellant. Indeed, her name appears in the proxy filed on behalf of the Appellant in the Commercial High Court.

It is trite law that the Attorney-at-Law on record has the authority to enter into a settlement on behalf of a party [*Fernando v. Sinnoris Appu* (20 N.L.R. 460), *Punchibanda v. Punchibanda et al* (42 N.L.R. 382), *Sinna Veloo v. Messrs. Lipton Limited* (66 N.L.R. 214)]. Nevertheless, it must be clear from the record that registered attorney on record accepted the terms of the settlement on behalf of the party he represents. Such an agreement will be clearly reflected if the provisions of section 408 of the Civil Procedure Code are scrupulously followed by submitting a consent motion to the court. Regrettably it has not been done in this case.

It is customary for appearances by all parties to be recorded on each date when there is a public hearing. In my view, the mere fact that the appearance of Ms. Udayani Madanayake, Attorney-at-Law is recorded on October 31, 2017 for the Appellant does not amount to any consent on the part of the Appellant to the terms of the settlement.

This Court observes that in this case five (5) terms are recorded as part of the settlement. The tenor in the five terms refers to admission by two parties (දෙපාර්ශවය) or by 1st and 2nd Defendants (1,2 විත්තිකරුවන්). This negates any claim that the Appellant agreed to the terms of the settlement. However, the learned counsel for the Plaintiff-Respondent drew

the Court's attention to the paragraph immediately below subsection (5) and argued that it was indicative of the appellant's agreement.

Nonetheless the learned judge directed that a decree be entered only between the Plaintiff and 1st and 2nd Defendants. In my view, this indicates that the Commercial High Court was of the opinion that the parties to the settlement arrangements were the Plaintiff and the 1st and 2nd Defendants.

I hold that the facts and circumstances of this case do not unequivocally establish the Appellant's consent to the terms of the settlement.

This conclusion is supported by consideration of the proceedings of December 14, 2017. On this day the learned counsel appearing on behalf of the Appellant had informed the Commercial High Court of its inability to revoke the letter of credit issued at the request of the Plaintiff in view of the applicable rules. After hearing the parties, the learned judge of the Commercial High Court declined to change the terms of the regulation.

His order reads:

> "On 31st October 2017, settlement was recorded between the Plaintiff and the 1st and 2nd Defendants. The 4th Defendant who was present has also agreed to release the money deposited against the letter of credit and signed the case record. Accordingly, the court has already entered the decree. Accordingly, the court holds that the terms of the settlement already entered in the case cannot be altered at this stage."

It is significant that the learned judge asserts that the agreement was recorded between the Plaintiff and the 1st and 2nd Defendants. This is consistent with the journal entry and order he made on October 31, 2017.

It appears he has taken the view that although not a party to the terms of the settlement, the Appellant had agreed to release the money deposited against the letter of credit by signing the case record. He was clearly mistaken because no representative of the Appellant had signed the case record.

The learned counsel for the Plaintiff-Respondent further submitted that the order made by the learned judge was not challenged by the Appellant and as such it cannot be done in the present appeal.

However, it is the clear right of every litigant to invite the Appellate Court to consider on a final appeal any interlocutory order even if he did not directly challenge it at the time when it was made [*Abubakker v. Ismall Lebbe* (11 N.L.R. 309 at 313), *Perera v. Battaglia* (58 N.L.R. 447 at 449), *Cornel & Company Limited v. Mitsui & Company Limited and Others* (2000) 1 Sri.L.R. 57 at 76].

The Plaintiff-Respondent sought to execute the decree entered in this case against the Appellant by motion dated 21st February 2018 which was supported in open court on 5th April 2018. The Appellant objected to this application. Following an inquiry, the learned judge of the Commercial High Court, by order of August 26, 2019, allowed the application for execution of the writ against the Appellant. The Appellant preferred this application against the said order as he is entitled in law.

The learned judge of the Commercial High Court concluded that the Appellant did not have the right to object to the execution of the writ inter alia, as no appeal was preferred against the order made on 14th December 2017. However, I find that the Appellant has the right to challenge the request to enforce the writ against it, taking into account the above authorities.

The learned judge of the Commercial High Court also rejected the objections of the Appellant to the execution of the decree on the basis that the settlement was entered into between the Plaintiff, 1st and 2nd Defendants and Appellant. He was clearly mistaken as the Appellant was not a party to the terms of the settlement as explained above.

For all the foregoing reasons, I answer the two questions of law in the affirmative and set aside the order of the learned judge of the Commercial High Court dated August 26, 2019. In terms of section 408 of the Civil Procedure Code, the decree must be passed in accordance with *such agreement, compromise, or satisfaction as notified* to court. In this case the decree sought to be executed against the Appellant has been entered contrary to the terms of the settlement and the order made by the learned judge of the Commercial High Court on October 31, 2017.

Accordingly, I dismiss the application of the Respondent dated 21st February 2018 and filed on 6th March 2018 in the Commercial High Court marked as P11 to execute a writ against the Appellant.

For the avoidance of doubt, I hold that the Appellant is not a party to the terms of the settlement entered on 31st October, 2017.

The Appeal is allowed.

I make no order as to costs.

The Registrar is directed to take further action accordingly.

JUDGE OF THE SUPREME COURT

L.T.B. Dehideniya, 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 DEMOCRACTIC SOCIALIST REPUBLIC OF SRI LANKA

1. Jayawardene Liyanage Gunadasa,
   No. 449,
   Elvitigala Mawatha,
   Colombo 05.
   Plaintiff

SC APPEAL NO: SC/APPEAL/159/2016
SC SPL LA NO: SC/SPL/LA/39/2016
CA CASE NO: CA/494/99(F)
DC COLOMBO NO: 16657/L

Vs.

1. Narangodage Amarapala,
   No. 449,
   Elvitigala Mawatha,
   Colombo 05.
   Defendant

AND BETWEEN

1. Jayawardene Liyanage Gunadasa,
   (Deceased)
   No. 449,
   Elvitigala Mawatha,
   Colombo 05.
   Plaintiff-Appellant

1A. Gamekankanamge Gunawathie,
No. 01/11,
Samaranayake Road,
Kolonnawa.

1B. Jayawardeneliyanage Prasanna,
No. 01/11,
Samaranayake Road,
Kolonnawa.

1C. Jayawardeneliyanage Lasantha,
No. 01/11,
Samaranayake Road,
Kolonnawa.

1D. Jayawardeneliyanage Achini
No. 01/11,
Samaranayake Road,
Kolonnawa.

Substituted Plaintiff- Appellants

Vs.

1. Narangodage Amarapala,
(Deceased)
No. 449,
Elvitigala Mawatha,
Colombo 05.

Defendant-Respondent

1A. Indra Josephine Jayasinghe,
No. 449/1A,
Elvitigala Mawatha,
Colombo 05.

1B. Narangodage Ishan Dilantha,
No. 449/1A,
Elvitigala Mawatha,
Colombo 05.

1C. Narangodage Hasini Chathurani,
No. 449/1A,
Elvitigala Mawatha,
Colombo 05.

Substituted Defendant-Respondents

AND NOW BETWEEN

1A. Indra Josephine Jayasinghe,
No. 449/1A,
Elvitigala Mawatha,
Colombo 05.

1B. Narangodage Ishan Dilantha,
No. 449/1A,
Elvitigala Mawatha,
Colombo 05.

1C. Narangodage Hasini Chathurani,
No. 449/1A,
Elvitigala Mawatha,
Colombo 05.

Substituted Defendant-Respondent- Petitioners

Vs.

1A. Gamekankanamge Gunawathie,
No. 01/11,
Samaranayake Road, Kolonnawa.

1B. Jayawardeneliyanage Prasanna,
No. 01/11, Samaranayake Road,
Kolonnawa.

1C. Jayawardeneliyanage Lasantha,
No. 01/11, Samaranayake Road,
Kolonnawa.

1D. Jayawardeneliyanage Achini
No. 01/11, Samaranayake Road,
Kolonnawa.
Substituted Plaintiff- Appellant-Respondents

Before: P. Padman Surasena, J.
Yasantha Kodagoda, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Dr. Jayatissa de Costa, P.C., with D.D.P. Dasanayake for the Substituted Defendant-Respondent-Appellant.
Asthika Devendra with Nihara Gooneratne for the Substituted 1A to 1D Plaintiff-Appellant-Respondents.

Written submissions:
by 1A to 1D Plaintiff-Appellant-Respondents on 01.11.2018
by 1A to 1C Defendant-Respondent-Petitioners on 16.11.2016

Argued on: 15.02.2022

Decided on: 20.05.2022

Mahinda Samayawardhena, J.

The plaintiff filed this action in the District Court seeking ejectment of the defendant from the premises in suit and damages on the basis that the defendant is in unlawful possession of the premises, the leave and license given to him by the plaintiff having been terminated by P4 effective from 31.01.1994. The defendant sought dismissal of the plaintiff's action on the basis that the plaintiff was the defendant's licensee whereas he (the defendant) was the tenant of the owner of the premises, namely Thillairajah. The fact that Thillairajah was the owner of the premises is undisputed. After trial, the District Court held with the defendant and dismissed the plaintiff's action. On appeal by the plaintiff, the Court of Appeal set aside the judgment of the District Court and entered judgment for the plaintiff. Hence this appeal by the defendant to this Court.

This Court granted leave to appeal to the defendant on three questions of law, which are, verbatim, as follows:

(a) Has the Court of Appeal erred in not considering that the leave and license alleged to have been granted to the defendant by the plaintiff has not been established?
(b) Has the Court of Appeal erred in not considering the fact that the defendant had been possessing the property in dispute long before November 1990, the month in which the plaintiff alleged to have given leave and license to the defendant which fact clearly establishes that the defendant had not entered into the premises on the leave and license of the plaintiff?
(c) Has the Court of Appeal erred in stressing that the defendant has failed to prove tenancy with V. Thillairajah

despite the fact that the fundamental issue of the case was whether the defendant came to the premises on the leave and license of the plaintiff?

The first and second questions relate to the burden of proof and the third to the onus of proof.

Although the defendant's case, as crystallised in the issues raised before the District Court, was that he was the tenant of Thillairajah, he admitted in evidence that he did not have any receipts issued by Thillairajah acknowledging payment of rent. He also admitted that there was not a single correspondence between him and Thillairajah. Conversely, the plaintiff marked several letters exchanged between him and Thillairajah manifesting the relationship between them as landlord and tenant. In one of those letters, namely P16 dated 20.07.1985, Thillairajah *inter alia* says "*I am the owner of the shop and that you are my tenant ever since you got into occupation and you have been paying me the rent so long for several years*."

Moreover, as evidenced by P1 dated 16.11.1992, the defendant deposited rent in respect of the premises for November 1992 in the Colombo Municipal Council in the name of the plaintiff stating that the plaintiff was his landlord. The Colombo Municipal Council transmitted the rent by way of a Money Order to the plaintiff in terms of section 21 of the Rent Act. Immediately thereafter, the plaintiff by P2 informed the Colombo Municipal Council that he is not prepared to accept the rent for the reasons stated therein.

It is significant to note that none of those documents tendered in evidence was marked "subject to proof". Further, the plaintiff was

never cross-examined on P1. The defendant's vague and belated attempt to disown P1 in his evidence shall be rejected as an afterthought. The contention of the defendant that P1 was not proved is unsustainable. A party cannot make a complaint to the Trial Court or the Appellate Court that a document has not been proved when he remained silent at the time of the document being marked in evidence: section 154(3) of the Civil Procedure Code.

There is no necessity to refer to all the documents marked by the plaintiff in evidence. P16 and P1 respectively are in my view more than sufficient to prove that the plaintiff, not the defendant, is the tenant of Thillairajah and the defendant is in occupation of the premises under the plaintiff.

One of the main issues raised by the defendant in the District Court was that when Thillairajah was admittedly the owner of the premises, the plaintiff could not have given leave and license to the defendant to occupy the premises. Although this issue had been answered in favour of the defendant by the District Court, the Court of Appeal rightly reversed that finding. The plaintiff need not be the owner of the premises to give leave and license to the defendant to occupy the premises. A licensee can become a licensor if he permits a third party to occupy the premises. Once the license of the latter is later terminated, he must vacate the premises. He is estopped from challenging or questioning the authority of the licensor to grant him leave and license: section 116 of the Evidence Ordinance. (*Mary Beatrice v. Seneviratne [1997] 1 Sri LR 197, Wimala Perera v. Kalyani Sriyalatha [2011] 1 Sri LR 182, Ahamed Saheed v. Abdul Hameed, SC/APPEAL/4/2013, SC Minutes of 23.05.2018*)

By the third question of law, the defendant argues that the Court of Appeal misapplied the onus of proof, in that the Court was more concerned about the defendant's claim that he was the tenant of Thillairajah when the real issue to be decided was whether the defendant was the licensee of the plaintiff. I am afraid I cannot agree with this line of argument. The Court of Appeal addressed its mind to the real issue, i.e. whether the defendant was the licensee of the plaintiff. In resolving that issue, the Court of Appeal also rightly considered the matter put in issue by the defendant himself in the District Court, i.e. whether he (the defendant) was the tenant of Thillairajah. This is not shifting the burden of proof to the defendant.

This is not a criminal case where the accused is entitled to remain silent allowing the prosecution to prove the case beyond reasonable doubt. This is a civil case where the plaintiff shall prove his case on a balance or preponderance of probabilities. This means the plaintiff in a civil case should prove that his version is more probable or more likely than that of the defendant. In a civil case as much as in a criminal case the defendant can remain silent, as the overall burden lies with the plaintiff. If he remains silent, the Court can *inter alia* draw a presumption against him: illustration (f) of section 114 of the Evidence Ordinance. If the defendant elects to give evidence and/or lead evidence on his behalf, the Court is entitled to consider such evidence to decide whether the plaintiff proved his case. If that is not permissible, there is no purpose in allowing the defendant to lead evidence in a civil case.

I answer all three questions of law in the negative and affirm the judgment of the Court of Appeal. 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

Subasinghe Mudiyanselage Rosalin
Bertha of Dummalasooriya (Deceased).
Plaintiff

Mary Margrat Miranda
Solangarachchi of Dummalasooriya.
Substituted Plaintiff

SC APPEAL NO: SC/APPEAL/160/2016
SC LA NO: SC/SPL/LA/454/2013
CA NO: NWP/HCCA/KUR/161/2003
DC KULIYAPITIYA NO: 5879/P

Vs.

1. Maththumagala Kankanamlage Juwan Appu of Dummalasooriya (Deceased).
1A. Maththumagala Kankanamlage Rathnasena of Dummalasooriya.
2. Bulathsinhala Arachchige Karunarathne of Dummalasooriya (Deceased).
2A. Randeni Koralalage Ewgin Hemalatha Randeni of Dummalasooriya (Deceased).
2A1. Bulathsinhala Arachchige Indrani Mallika of Abaya Dispensary, Abinawarama Road, Balapitiya.

2B. Bulathsinhala Arachchige Siriwardena of Dummalasooriya.

2C. Bulathsinhala Arachchige Indrani Mallika of Abaya Dispensary, Abinawarama Road, Balapitya.

2D. Bulathsinhala Arachchige Rohini Thamara of Dummalasooriya.

3. Mihindu Kulasooriya Muthuporuthotage Edward Fernando of Dummalasooriya (Deceased).

3A. Mihindu Kulasooriya Muthuporuthotage Mary Theresa Fernando of Dummalasooriya.

4. Rathnasekera Don Steven of Dummalasooriya (Deceased).

4A. Rathnasekera Don Francis of No. 311, North Bathagama, Ja-Ela.

5. Hetti Arachchige Saranelis of Madampe (Deceased).

5A. G.B. Kusuma Doluweera of Paththalagedara, Weyangoda.

5AA. Karuppu Appuhamilage Karu Hemachandra of Paththalagedera, Weyangoda.

5B. Kuruppu Appuhamilage Karu Hemachandra of Paththelagedara, Weyangoda.

6. Vidane Kankamalage Agnes of Dummalasooriya (Deceased).

6A. Herath Mudiyanselage Anulawathi of Suduwella, Warimarga Bungalow, Madampe.

7. Wickarama Arachchige Podihamy of

Katuwalla, Pannala.

8. Jayasekera Vidanelage Edward Jayasekara of Koruwalla,
Pannala (Deceased).
9. Herath Mudiyanselage Tikiri Bandara of Dummalasooriya.
10. Doluwarannegamage Don Kusumawathie of Paththalagedara, Weyangoda (Deceased).

10A. K.H. Premachandra of
Paththalagedera, Weyangoda.

11. Wanni Arachchige Siyadoris Appuhamy of Dummalasooriya (Deceased).

11A. Wanni Arachchige Wasantha Soma Wanniarachchi of
Dummalasooriya.

12. Maththumagala Kankanamlage Podi Hamine of Dummalasooriya.
13. Randeni Koralalage Ewgin Hemalatha of Dummalasooriya.

13A. Bulathsinhala Arachchilage Siriwardena of Dummalasooriya.

14. K.A. Baba Singho of Dummalasooriya.

14A. Kangani Arachchilage Gunawathie of Dummalasooriya.

15. Administrative Officer of Village Council of Dummalasooriya.

15A. District Development Council of Kurunegala.

15B. Bingiriya Pradeshiya Sabawa of Bingiriya.

15C. Kurunegala Provincial Council of

Kurunegala.

16. Maththumagala Kankanamlage Jayasekera of Dummalasooriya.

Defendants

AND BETWEEN

16. Maththumagala Kankanamlage Jayasekera of Dummalasooriya.

16th Defendant-Appellant

Vs.

Mary Margrat Miranda Solangarachchi of Dummalasooriya.

Substituted Plaintiff-Respondent

1A. Maththumagala Kankanamlage of Rathnasena, Dummalasooriya (Deceased).

2A1. Bulathsinhala Arachchige Indrani Mallika of Abaya Dispensary, Abinawarama Road, Balapitiya.

2B. Bulathsinhala Arachchige Siriwardena of Dummalasooriya.

2C. Bulathsinhala Arachchige Indrani Mallika of Abaya Dispensary, Abinawarama Road, Balapitiya (2A1 Defendant).

2D. Bulathsinhala Arachchige Rohini Thamara of Dummalasooriya.

3A. Mihindu Kulasooriya Muthuporuthotage

Mary Theresa Fernando of Dummalasooriya.

4A. Rathnasekera Don Francis of No. 311, North Bathagama, Ja-Ela.

5AA. Karuppu Appuhamilage Karu Hemachandra of Paththalagedera, Weyangoda.

5B. Kuruppu Appuhamilage Karu Hemachandra of Paththelagedara, Weyangoda.

6A. Herath Mudiyanselage Anulawathi of Suduwella, Warimarga Bungalow, Madampe.

7. Wickarama Arachchige Podihamy of Kotuwalla, Pannala.

8. Jayasekera Vidanelage Edward Jayasekera of Kotuwalla, Pannala.

9. Herath Mudiyanselage Tikiri Bandara of Dummalasooriya.
Presently at No. 8/26, Beddagana Road (North), Rajamal Uyana Housing Scheme, Pitakotte, Kotte.

10A. K.H. Premachandra of Paththalagedera, Weyangoda.

11A. Wanni Arachchige Wasantha Soma Wanniarachchi of Dummalasooriya.

12. Maththumagala Kankanamlage Podi Hamine of Dummalasooriya.

13A. Bulathsinhala Arachchilage Siriwardena of Dummalasooriya.

14A. Kangani Arachchilage Gunawathie of Dummalasooriya.

15B. Bingiriya Pradeshiya Sabawa of Bingiriya.

15C. Kurunegala Provincial Council of
Kurunegala.
Defendant-Respondents

AND BETWEEN

2B. Bulathsinhala Arachchige Siriwardane of
Dummalasooriya.
2B/13A Substituted Defendant-Respondent-
Petitioner

2C. Bulathsinhala Arachchige Indrani Mallika of
Abaya Dispensary, Abinawarama Road,
Balapitiya.
2A1/2C Substituted Defendant-
Respondent-Petitioner

Vs.

Mary Margrat Miranda Solangarachchi of
Dummalasooriya.
Substituted Plaintiff-Respondent
Respondent

1A. Maththuumagala Kankanamlage
Rathnasena of Dummalasooriya (Deceased).
1B. M.K Manel of Dummalasooriya.
2D. Bulathsinhala Arachchige Rohini Thamara
of Dummalasooriya (Deceased).
2DA. Bulathsinhala Arachchige Sirwardena of

Dummalasooriya.

3A. Mihindu Kulasooriya Muthuporuthotage Mary Theresa Fernando of Dummalasooriya (Deceased).

4A. Rathnasekera Don Francis of No. 311, North Bathagama, Ja-Ela (Deceased).

5AA. Karuppu Appuhamilage Karu Hemachandra of Paththalagedera, Weyangoda.

5B. Kuruppu Appuhamilage Karu Hemachandra of Paththelagedara, Weyangoda.

6A. Herath Mudiyanselage Anulawathi of Suduwella, Warimarga Bungalow, Madampe.

7. Wickarama Arachchige Podihamy of Kotuwalla, Pannala.

8. Jayasekera Vidanelage Edward Jayasekara of Kotuwalla, Pannala (Deceased).

8A. Wickrama Arachchige Podihamy of Kotuwalla, Pannala.

9. Herath Mudiyanselage Tikiri Bandara of Dummalasooriya.
Presently at No. 8/26, Beddagana Road (North) Rajamal Uyana Housing Scheme, Pitakotte, Kotte.

10A. K.H. Premachandra of Paththalagedera, Weyangoda.

11A. Wanni Arachchige Wasantha Soma Wanniarachchi of Dummalasooriya.

12. Maththuumagala Kankanamlage Podi Hamine of Dummalasooriya (Deceased).

12A. Wanniarachchige Wasanthasoma Wanniarachchi of Dummalasooriya.

13A. Bulathsinhala Arachchilage Siriwardena of Dummalasooriya.

14A. Kangani Arachchilage Gunawathie of Dummalasooriya.

15B. Bingiriya Pradeshiya Sabawa of Bingiriya.

15C. Kurunegala Provincial Council of Kurunegala.

Defendant-Respondent-Respondents

16. Maththumagala Kankanamlage Jayasekera of Dummalasooriya.

16th Defendant-Appellant-Respondent

AND NOW BETWEEN

Bulathsinhala Arachchige Indrani Mallika of No. 17, Abaya Dispensary, Abinawarama Road, Balapitiya.

2C/2A Substituted Defendant-Respondent-Petitioner-Petitioner

Vs.

Bulathsinhala Arachchige Siriwardane of Dummalasooriya.
Presently at Gampahawaththa,

Dummalasooriya.
2D A/2B/13A Substituted Defendant-Respondent-Petitioner-Respondent

AND

Mary Margrat Miranda Solangarachchi of Dummalasooriya.
Substituted-Plaintiff-Respondent-Respondent

1B. M.K Manel of Dummalasooriya.
2DA. Bulathsinhala Arachchige Siriwardena of Gampahawaththa, Dummalasooriya.
3AA. Kasadoruge Hubert Thimothi Perera
3AB. Thanuja Subashini
3AC. Nayana Ruwan Eranda
3AD. Lahiru Mahesh Niranda
All of Ranthatiyana, Weerakodiyana.
4AA. Rathnasekara Don Leynard Hilary Ranjith of Bernadeth Mawatha, Kandana, Rilaula.
5AA. Kuruppu Appuhamilage Karu Hemachandra of Paththalagedera, Weyangoda.
5B. Kuruppu Appuhamilage Karu Hemachandra of Paththalagedera, Weyangoda.
6A. Herath Mudiyanselage Anulawathi of Suduwella, Warimarga Bangalow, Madampe.
7. Wickrama Arachchige Podihami, Katuwallam of Pannala.
8A. Wickrama Arachchige Podihamy of

Katuwalla, Pannala.

9. Herath Mudiyanselage Tikiri Bandara of Dummalasooriya.
   Presently at No. 8/26, Beddegana Road (North) Rajamal Uyana Housing Scheme, Pitakotte, Kotte.

10A. K.H. Premachandra of Paththalagedera, Weyangoda.

11A. Wanni Arachchige Wasantha Soma Wanniarachchi of Dummalasooriya.

12A. Wanniarachchige Wasanthasoma Wannirachchi of Dummalasooriya.

13A. Bulathsinhala Arachchige Siriwardane of Dummalasooriya.

14A. Kangani Arachchige Gunawathie of Dummalasooriya.

15B. Bingiriya Pradeshiya Sabawa of Bingiriya.

15C. Kurunegala Provincial Council of Kurunegala.
   Defendant-Respondent-Respondents

16. Maththumagala Kankanamalage Jayasekera of Dummalasooriya
   16th Defendant Appellant Respondent

Before: L.T.B. Dehideniya, J.
Murdu N.B. Fernando, P.C., J.
A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Rohan Sahabandu, P.C., with Nathasha Fernando and S. Senanayake for the 2A/2C Substituted Defendant-Respondent-Petitioner-Appellant.

Dr. Sunil Coorey with Sudarshani Coorey for the Substituted Plaintiff-Respondent-Respondent.

S.N. Vijithsingh for the 1A Defendant-Respondent-Respondent- Respondent.

Rajitha Perera, D.S.G., for the 15C Defendant-Respondent-Respondent-Respondent.

Argued on : 13.09.2022

Written submissions:

by 2A/2C Substituted Defendant-Respondent-Petitioner-Appellant on 31.10.2016. and 07.10.2022

by Substituted Plaintiff-Respondent-Respondent on 22.02.2017 and 26.10.2022

by Substituted 1B Defendant-Respondent-Respondent on 29.09.2022

by 15C Defendant-Respondent-Respondent-Respondent on 18.11.2022

Decided on: 02.12.2022

Mahinda Samayawardhena, J.

The plaintiff filed this action in the District Court of Kurunagala on 07.01.1966 (about 57 years ago) seeking to partition the land described in the schedule to the plaint among the plaintiff and the 1st-9th defendants. The judgment of the District Court was delivered on 27.10.2003 (nearly 38

years after the institution of the action). Only the 16th defendant appealed against the judgment. The High Court of Civil Appeal in Kurunagala by judgment dated 21.07.2011 dismissed the appeal. The 16th defendant did not appeal to the Supreme Court against that judgment. Nearly one year after the pronouncement of the judgment of the High Court of Civil Appeal, the then substituted 2nd defendant, namely Bulathsinhala Arachchige Siriwardana (who is also designated as the 2B/13A/2C/2A1 defendant), filed an application in the High Court of Civil Appeal by way of a petition and affidavit dated 07.06.2012 seeking to set aside the judgment of the High Court of Civil Appeal and the District Court "on the ground of *per incuriam*" and order retrial. Perusal of the said petition and affidavit makes it crystal clear that the substituted 2nd defendant challenges the judgment of the District Court on the merits. According to him, the District Judge's analysis of the evidence led at the trial and the share allocation in the judgment, particularly in respect of his case, are wrong. After canvassing the judgment of the District Court on the merits, he also attempts to challenge the judgment on the premise that, although the 1(a) defendant had died before the delivery of the judgment in the District Court, and the 3(a) and 12th defendants and some other defendants had also died between the delivery of the judgment in the District Court and the delivery of the judgment in the High Court of Civil Appeal, the judgments had been delivered without effecting substitution of the deceased parties.

In my view, the High Court of Civil Appeal should have dismissed this application *in limine* because the substituted 2nd defendant could not have made "a *per incuriam* application", so to speak, seeking to set aside the partition judgment delivered nine years ago. If the substituted 2nd defendant was dissatisfied with the judgment of the District Court, he ought to have filed (a) a final appeal or (b) a revision application or (c) a *restitutio in integrum* application against the judgment of the District

Court. If he was dissatisfied with the judgment of the High Court of Civil Appeal, he ought to have filed an appeal in this Court with the leave of this Court first had and obtained. The substituted 2nd defendant actively participated at the trial and the District Judge allotted him shares in the judgment. Having failed to file a final appeal against the judgment of the District Court, he would have known that his revision or *restitutio in integrum* application would not have passed the threshold test. This may be the reason he filed a special *per incuriam* application seeking to set aside the partition judgment, which, in my view, has no place in law.

It is a rudimentary principle in law that a decision is not considered *per incuriam* because the judge's factual findings are faulty. The conclusiveness and finality of partition judgments subject to very limited grounds is well-established. It is not necessary to discuss that aspect in detail in this judgment. Simply stated, a partition judgment cannot be challenged in the manner the substituted 2nd defendant attempts to do in this case. The substituted 2nd defendant has no right to seek to set aside the judgments on the ground that some parties had died pending action simply because he cannot represent them in Court or speak on their behalf. The intention of the substituted 2nd defendant is clear; he wants to see that the judgment of the District Court is set aside at any cost. This is clearly an abuse of the process of Court to achieve his ulterior motive.

Be that as it may, the High Court of Civil Appeal accepted the application, issued notice on the parties and, after inquiry, dismissed the application on the basis that the failure to substitute deceased parties does not vitiate the judgment entered in a partition case. The High Court of Civil Appeal relied upon the judgment of the Court of Appeal in *Jane Nona and Others v. Surabiel and Others* [2013] 1 Sri LR 346 in preference to the judgment of the Supreme Court in *Karunawathie v. Piyasena and Others* [2011] 1 Sri LR 171. It is against this judgment of the High Court of Civil Appeal

dated 26.09.2013 that the substituted 2nd defendant filed this appeal with leave obtained from this Court. This Court granted leave on two questions of law:

(a) Was the judgment of the Supreme Court in Karunawathie v. Piyasena and Others [2011] 1 Sri LR 171 given per incuriam?

(b) Can an inferior Court refuse to follow a judgment of the Supreme Court or the Court of Appeal on the ground of per incuriam?

These two questions revolve around three main concepts: *stare decisis*, precedent and *per incuriam*.

Stare decisis is an abbreviation of the Latin phrase *stare decisis et non quieta movere* (to stand by precedent and not to disturb settled points). Edgar Bodenheimer in *Jurisprudence: The Philosophy and Method of the Law*, Harvard University Press (1976), describes *stare decisis* in the following terms:

> *Stated in a general form, stare decisis signifies that when a point of law has been once settled by a judicial decision, it forms a precedent which is not to be departed from afterward. Differently expressed, a prior case, being directly in point, must be followed in a subsequent case.*

This doctrine is not a rule of statute but a concomitant of judicial comity. The main object of *stare decisis* is to ensure the uniformity, consistency, certainty and predictability of the law. Let the law be stable rather than perfect is the rationale of this doctrine. It is conceded that one of the hallmarks of any good decision-making process is consistency. If the law is uncertain, people will find it difficult to conduct their day-to-day affairs: they enter into agreements, purchase properties etc. predicting fixed legal consequences. If a decision on identical facts is to change from one division of the Court to another, not only individuals but the whole system

will suffer. Basnayake C.J. in *Bandahamy v. Senanayake* (1960) 62 NLR 313 at 344 remarked:

> *It is recognised on all hands that especially in regard to property rights and in commercial matters where frequent changes in the law would be unsettling it is better that a decision should be wrong than that it should upset what has been settled and on the basis of which people have transacted business and dealt with property.*

A precedent in law is a decision of the Court which is considered an authority for deciding subsequent analogous cases involving identical or similar facts or similar legal issues. The application of precedent is not mechanical. The judge must decide whether or not the precedent is authoritative or binding. If the facts or issues of a case differ from those in a previous case, the previous judgment cannot be a precedent. This is distinguishing which is different from overruling. Overruling is a method by which the Court negates a precedent.

However, it may be emphasised that the doctrine of *stare decisis* should not be an excuse for inertia nor should it facilitate the judge's desire to rest in the comfort zone. In *Gunaratne Menike v. Jayatilaka Banda* [1995] 1 Sri LR 152 at 157, G.P.S. de Silva C.J. remarked that "*The principle laid down in a decision must be read and understood in the light of the nature of the action, and the facts and circumstances the Court was dealing with.*" In *Mary Beatrice v. Seneviratne* [1997] 1 Sri LR 197 at 203, Senanayake J. quoted with approval the following pertinent observation of Earls of Halsbury L.C. in the House of Lords decision of *Quinn v. Leathem* [1901] AC 495 at 506:

> *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 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.*

The House of Lords and now the Supreme Court of the United Kingdom stands at the summit of the English Court structure and its decisions are binding on all lower Courts (*Broome v. Cassell & Co Ltd* [1972] AC 1027).

L.J.M. Cooray in *An Introduction to the Legal System of Sri Lanka*, page 156 states:

> *Sri Lanka has adopted the English doctrine of stare decisis. Yet the opinions of the writers on the Roman-Dutch law have been referred to by our courts, and cases are decided on their authority. Thus it can be said that Sri Lanka has been influenced both by the common law doctrine of judicial precedent (to a greater degree) as well as the civil law doctrine of textual precedent.*

Decisions that the highest Court make become binding precedent on lower Courts in the hierarchy (*Walker Sons & Co UK Ltd v. Gunatilake and Others* [1978-79-80] 1 Sri LR 231). The seven-judge bench that heard *Bandahamy v. Senanayake* (1960) 62 NLR 313 accepted the theory of precedent as part of our law. *Vide* also *Billimoria v. Minister of Lands and Land Development and Mahaweli Development* [1978-79-80] 1 Sri LR 10, *Ganeshanantham v. Vivienne Goonewardene and Three Others* [1984] 1 Sri LR 319, *Jeyaraj Fernandopulle v. Premachandra De Silva* [1996] 1 Sri LR 70, *Gunasena v. Bandaratilleke* [2000] 1 Sri LR 292, *Stassen Exports Ltd. v. Lipton Ltd. and Another* [2009] 2 Sri LR 172.

Nevertheless, in *Bandahamy v. Senanayake*, Basnayake C.J. at page 344 accepted that:

> *It would appear from the decisions both here and abroad cited above that the doctrine of stare decisis is not a rigid doctrine and that the practice varies from country to country and that the attitude of Judges to the doctrine is not uniform and varies according to the class of case which comes up for consideration.*

Summarising the *cursus curiae* developed over the years it was *inter alia* further stated at page 345:

> *(i) That however representative a bench may be, its decision is not regarded as binding if there has been a mistake in the decision, or relevant decisions or statutes have not been considered.*
>
> *(j) That the Court is slow to depart from a decision of long standing affecting property rights or commercial transactions even where it does not agree with it.*
>
> *(k) That in criminal matters, where the interests of justice or the liberty of the subject requires it, previous decisions are not adhered to with the same rigidity as in civil cases, where it is in the interests of justice or the liberty of the subject that a different view which commends itself to the Court should be taken.*

In this sense, precedent, unlike statute, does not absolutely bind judges. There is space for flexibility. If judges are absolutely bound by precedent, there is no room for the development of the law. Conversely, if there is no binding force of precedent, the doctrine of *stare decisis* will be confined to law books and law schools and uncertainty in the law will be the order of the day.

That *stare decisis* is not an absolute rule of law is undisputed; there are widely accepted exceptions to the doctrine of *stare decisis*. One such exception is the previous decision being given *per incuriam*, a matter alluded to in *Bandahamy v. Senanayake*, as reproduced above. It is this exception which is the subject matter of this appeal.

The earliest leading case which considered exceptions to the doctrine of *stare decisis* is *Young v. Bristol Aeroplane Co. Ltd.* [1944] KB 718, decided by the full Court of six members of the Court of Appeal of England and Wales in the year 1944. The exceptions as summarised by Lord Green M.R. in the course of his judgment are:

(i) *The court is entitled and bound to decide which of two conflicting decisions of its own it will follow.*
(ii) *The Court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords.*
(iii) *The Court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.*

In elaborating on *per incuriam*, Lord Greene M.R. at page 729 stated:

> *Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam.*

Vide Halsbury's Laws of England, 5th edition (2015), Volume 11, Lexis Nexis, page 63.

The word *incuria* means carelessness and the term *per incuriam* appears to mean *per ignoratium* – through ignorance or lack of care. *Black's Law Dictionary*, 11th edition, pages 1374-1375, defines *per incuriam* as *"(Of a judicial decision) wrongly decided, usu. because the judge or judges were ill-informed about the applicable law*."

The primary value of a precedent is not the decision reached but the reason for the decision or the proposition of law which forms part of the *ratio decidendi*. The judgment is authoritative only as to its *ratio decidendi*. If the reason is faulty, the precedent loses its character.

In *Moosajee v. Carolis Silva* (1967) 70 NLR 217 at 228-229, Tambiah J. held that if the *ratio decidendi* of a judgment is obscure, the decision has no binding effect.

> *The three judges who decided the case of Neate v. de Abrew [(1883) 5 SCC 126] had given three different reasons. With respect to the learned judges who decided that case, the reasons given by them are demonstrably erroneous. Are the hands of future generations of judges tied and are they to follow this erroneous decision? The answer to this question is found in the dictum of Denning L.J. who said: (vide the dictum of Denning L.J. in Ostime v. Australian Provident Society (1959) 2 A.E.R. 245 at 256). "The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction, you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps."*

> *The English principle of stare decisis has been adopted by us. As this dictum of Lord Denning shows, in the United Kingdom a liberal view is now being taken permitting judges to depart from wrong decisions of a binding nature. In the Dominion jurisdiction, even a more liberal view is being now taken. In Ceylon, it would be sufficient to state that we should be content to follow the English principles on this matter which has been succinctly set out by the House of Lords in Scrutton Ltd. v. Midland Silicones Ltd. (1962) 1 A.E.R. 12. One of the principles enunciated in this case is that if a ratio decidendi of a case is obscure, the decision has no binding effect. The ratio decidendi of Neate v. de Abrew is obscure and we are not bound to follow it.*

Hence, a decision *per incuriam* is one given in ignorance or forgetfulness of the law by way of statute or binding precedent, which, had it been considered, would have led to a different decision. It must be reiterated that a decision will not be regarded as *per incuriam* merely on the ground that another Court thinks that it was wrongly decided; the fault must derive from ignorance of statutory law or binding authority. Also the authority must be a binding rule of law and not merely an authority that is distinguishable.

This does not mean that a decision *per incuriam* is only a decision given in ignorance of either statute or binding precedent; there can be other instances where a decision may be regarded as *per incuriam*, but such instances are rare. However, of these two exceptions also (i.e. failure to follow a statutory provision and failure to abide by binding precedent), ignorance or forgetfulness of a statute is undoubtedly an instance of a decision given *per incuriam*.

In *Bonulami v. Home Secretary* [1985] QB 675 Stephenson L.J. stated at 682:

> *Failure to consider a statutory provision is one of the clearest cases in which, on the principles laid down in Young v. British Aeroplane Co., this court is not bound to follow its own decisions.*

Morrelle Ltd. v. Wakeling [1955] 2 QB 389 is considered a leading authority that defined *per incuriam*. Lord Evershed M.R. declared at 406:

> *As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some feature of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam, must, in our judgment, consistently with the stare decisis rule which is an essential part of our law, be of the rarest occurrence.*

In *Nicholas v. Penny* [1950] 2 KB 466 at 472 Lord Goddard C.J. refused to follow an earlier decision stating:

> *That decision is not a very satisfactory one because the prosecutor was not represented on appeal, and a case which has not been argued on both sides has nothing like the weight of authority of one that has been fully argued… Without necessarily saying that we can always differ from previous decision of the divisional court merely because it has not been argued on both sides, the court is not obliged to follow that decision for it has been laid down by the Court of Appeal in Young v. British Aeroplane Co.…that where material cases or statutory provisions, which show that a court has decided a case wrongly, were not brought to its attention the court is not bound by that decision in a subsequent case.*

In *Farook v. Attorney General* [2006] 3 Sri LR 174 the Court of Appeal refused to follow the Supreme Court case of *Weerappan v. The Queen* (1971) 76 NLR 109 on the premise that the attention of the Court had not been drawn to the relevant provisions of the law. Basnayake J. (with the agreement of Balapatabendi J.) stated at 177:

> *In Weerappan Vs. Queen one accused held the hands of the deceased while another stabbed him on the chest and inflicted an injury which cut the cartilage of two ribs and cut also the walls of the pericardium and the right ventricle. The injury was necessarily fatal. The court considered that the single stab injury inflicted might indicate the absence of the murderous intention. Hence the verdict was substituted to one of culpable homicide not amounting to murder. The third limb of Section 294 of the Penal Code and Illustration (c) was given no attention. Therefore with all due respect to the Their Lordships, I am of the view that this Judgment was decided per incuriam and should not be followed.*

Karunawathie v. Piyasena [2011] 1 Sri LR 171 is a partition case where the 20th defendant had filed an appeal before the Supreme Court against the judgment of the High Court of Civil Appeal. After leave to appeal had been granted and prior to the argument, counsel for the 20th defendant-appellant moved the Court to effect substitution of the deceased 2nd and 15th defendants. The Supreme Court noted that the 2nd defendant had died before the judgment of the High Court of Civil Appeal and the 15th defendant had died before the judgment of the District Court but substitution for the deceased parties had not been effected. The Court, having taken the view that when a party to a case dies during the pendency of the case it would not be possible for the Court to proceed with the matter without bringing in the legal representatives of the deceased in his place, set aside the judgments of both Courts and directed the District

Court to rehear the case after taking steps according to the law. The Supreme Court did not hear the appeal on the merits.

In *Jane Nona v. Surabiel* [2013] 1 Sri LR 346, the Court of Appeal, after analysing the applicable legal provisions in the case of substitution pending determination of a partition action, did not follow the Supreme Court decision in *Karunawathie v. Piyasena* on the basis of *per incuriam*. Chitrasiri J. stated at pages 357-358:

> *In the circumstances, this Court is entitled in law to consider the said decision in Karunawathie Vs. Piyasena (supra) was given in per incuriam and accordingly to consider it as an exception to the application of the doctrine of stare decisis. This is absolutely because the case law cannot overrule statutory provisions laid down by an enactment of the Legislature.*
>
> *In the circumstances, if I may say so respectfully, that the decision in Karunawathie Vs. Piyasena is not absolutely binding the Court of Appeal since there had been failure to consider specific provisions in the partition law in respect of non-substitution, in the room of deceased parties in partition actions.*

In the Court of Appeal case of *Sitti Nufeesa v. Chandrasena and Others* (CA/APPEAL/654 & 655/2000(F), CA Minutes of 03.08.2018) Amarasekara J. took the same view:

> *This court observes that the Honorable Supreme Court in making the decision in Gamaralalage Karunawathie Vs. Godayalage Piyasena has not considered the amendments brought to the Partition Law by the amending Act No.17 of 1997. Especially it has not considered the provisions of section 48(1) and section 81 mentioned before in this order. K.T. Chithrasiri J., Judge of the Court of Appeal (as he then was) in the aforesaid Judgement Jane Nona and Others Vs. Chalo*

> *singho has discussed in detail a similar situation and has considered the Judgement in Gamaralalage Karunawathie Vs. Godagelage Piyasena is not absolutely binding on this court as it was given in per incuriam, since the Supreme Court failed to consider the specific provisions in the Partition Law. I too agree with the view that the aforesaid decision of the Supreme Court was made in per incuriam. For the reasons mentioned before, I am of the view that this court need not follow the aforesaid decision of the Supreme Court as it was made in per incuriam without considering of the relevant statutory provisions.*

The Supreme Court judgment in *Karunawathie v. Piyasena* is *per incuriam*, as section 48(1)(b) and 48(6) of the Partition Law No. 21 of 1977 and section 81(9) of the Partition Law as amended by the Partition (Amendment) Act No. 21 of 1997 expressly stipulate that failure to substitute the heirs or legal representatives of a party who dies pending determination of the action does not invalidate the proceedings in such action or judgment or decree entered thereon; anything done in the action shall be deemed to be valid and effective and in conformity with the provisions of the Partition Law and shall bind the legal heirs and representatives of such deceased party or person.

Section 48(1)(b) reads as follows:

> *Save as provided in subsection (5) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, and in the case of an interlocutory decree, subject also to the provisions of subsection (4) of this section, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever*

right, title or interest they have, or claim to have, to or in the land to which such decree relates and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree. In this subsection "omission or defect of procedure" shall include an omission or failure to substitute the heirs or legal representatives of a party who dies pending the action or to appoint a person to represent the estate of the deceased party for the purposes of the action.

Section 48(6) is to the following effect:

Where by an interlocutory or final decree a right, share or interest has been awarded to a party but such party was dead at the time, such decree shall be deemed to be a decree in favour of the representatives in interest of such deceased person at the date of such decree.

Section 81 of the Partition Law was repealed and replaced by the Partition (Amendment) Act No. 17 of 1997. After this amendment, section 81(1) reads as follows:

Every party to a partition action or any other person required to file a memorandum under this Law, (hereinafter referred to as "the nominator") shall file, or cause to be filed in court, a memorandum, substantially in the form set out in the Second Schedule to this Law, nominating at least one person, and not more than three persons, in order of preference, to be his legal representative for the purposes of the action in the event of his death pending the final determination of the action.

Section 81(9) enacts:

> *Notwithstanding that a party or person has failed to file a memorandum under the provisions of this section, and that there has been no appointment of a legal representative to represent the estate of such deceased party or person, any judgment or decree entered in the action or any order made, partition or sale effected or thing done in the action shall be deemed to be valid and effective and in conformity with the provisions of this Law and shall bind the legal heirs and representatives of such deceased party or person. Such failure to file a memorandum shall also not be a ground for invalidating the proceedings in such action.*

I must add that these provisions are equally applicable in proceedings before the Court of Appeal or the Supreme Court.

By reading the judgment of the Supreme Court in *Karunawathie v. Piyasena*, it is abundantly clear that unfortunately the attention of the Supreme Court had not been drawn to any of these sections of the Partition Law, and the judgment of the Supreme Court was delivered in ignorance or forgetfulness of the said express statutory provisions. The judgment of the Supreme Court is based on a series of Indian authorities which are irrelevant in the teeth of our express statutory provisions. I have no scintilla of doubt that if the attention of the Supreme Court had been drawn to those statutory provisions, the Court would not have set aside the judgments of both Courts on failure to effect substitution of the deceased parties.

The five-judge bench of the Court of Appeal in *Davis v. Johnson* [1979] AC 264 presided over by Lord Denning M.R. who at page 271 described the said bench as "a court of all the talents" considered the binding nature of previous wrong decisions of the Court of Appeal. Sir Barker P. in the course of his judgment stated at page 290:

> *The Court is not bound to follow a previous decision of its own if satisfied that that decision was clearly wrong and cannot stand in the face of the will and intention of Parliament expressed in simple language in a recent statute passed to remedy a serious mischief or abuse, and further adherence to the previous decision must lead to injustice in the particular case and unduly restrict proper development of the law with injustice to others.*

Lord Denning M.R. in *Farrell v. Alexander* [1976] 1 QB 345 at 359 stated:

> *No court is entitled to throw over the plain words of a statute by referring to a previous judicial decision. When there is a conflict between a plain statute and a previous decision, the statute must prevail. That appears from the decision of the House of Lords in Campbell College, Belfast (Governors) v. Northern Ireland Valuation Commissioner [1964] 1 WLR 912.*

The Supreme Court judgment in *Karunawathie v. Piyasena* is *per incuriam* and we would accordingly overrule that decision.

Learned President's Counsel for the substituted 2nd defendant candidly and unequivocally admits that the judgment in *Karunawathie v. Piyasena* is *per incuriam*. The next question is, if a judgment delivered by a superior Court is *ex facie per incuriam*, should lower Courts be bound by it until it is overruled by a numerically superior bench? Learned President's Counsel for the substituted 2nd defendant strenuously submits that this is so.

According to this argument, even if the Supreme Court decision in *Karunawathie v. Piyasena* is *ex facie per incuriam* due to failure to follow statutory law, lower Courts including the Court of Appeal shall disregard the statute and follow the erroneous decision of the Supreme Court

because of the operation of the doctrine of *stare decisis*. I am afraid I cannot agree.

The doctrine of *stare decisis* did not come about to protect the hierarchy of the Courts; it is not a question of superiority. The maxim *judicandum est legibus non exemplis* means adjudication is to be according to declared law, not precedent. If a decision is *ex facie per incuriam*, such as in *Karunawathie v. Piyasena*, it ceases to be a binding precedent and the doctrine of *stare decisis* has no applicability. There is no necessity to wait until it is overruled by a five-judge bench. What happens if it is never overruled? Then should all Courts perpetuate the admittedly erroneous decision and act in violation of the express statutory provisions, in derogation of the intention of the legislature? The Supreme Court judgment in *Karunawathie v. Piyasena* was delivered on 05.12.2011 (11 years ago) and it has not been overruled until today. Far from being overruled, learned President's Counsel for the substituted 2nd defendant submits that a numerically equal bench of the Supreme Court in *William Singho v. Japin Perera and Others* (SC/HC/CALA/145/2011, SC Minutes of 08.06.2012) followed the judgment in *Karunawathie v. Piyasena* by refusing leave to appeal. If the Court of Appeal in *Jane Nona v. Surabiel* had also followed *Karunawathie v. Piyasena*, knowing very well that it is *per incuriam* but on the basis of a self-imposed fetter and ordered retrial as was done in *Karunawathie v. Piyasena* and the appellant did not have the financial resources to come before this Court to challenge the bad precedent, what would have been the position? Then should all Courts continue to breach express statutory provisions by following an erroneous decision in the name of *stare decisis*? I repeat I cannot subscribe to such a view.

This is not a case of misinterpretation of the law but misapplication of the law. If it were the former, the legislature could have passed new legislation

practically overruling the Supreme Court decision in *Karunawathie v. Piyasena* as has been done in the past. For instance, to nullify the effect of the judgment of the Court of Appeal in *Wilson v. Sumanawathie* (CA 535/95/F, CA Minutes of 30.11.2007), which was confirmed by the Supreme Court by refusing leave, where it was held that a donor could revoke a deed of gift on gross ingratitude without a decision of Court, the Revocation of Irrevocable Deeds of Gift on the Ground of Gross Ingratitude Act No. 5 of 2017 was passed. To give another example, to nullify the effect of several judgments handed down by the Supreme Court including *Mervin Silva v. Anil Shantha Samarasinghe* (SC/APPEAL/45/2010, SC Minutes of 11.06.2019), where it was held that compliance with section 68 of the Evidence Ordinance is mandatory in order to prove any document such as a deed irrespective of an objection taken against it, section 154A was introduced to the Civil Procedure Code by Civil Procedure Code (Amendment) Act No. 17 of 2022. But the legislature cannot rectify the error made in *Karunawathie v. Piyasena* by passing new legislation because legislation has already been passed to this effect and the error was misapplication of such legislation by the Supreme Court.

However much a decision is bad in law, the overruling of it does not automatically take place. A litigant has to invoke the jurisdiction of the Supreme Court in that regard, as in this case, and bear the costs of litigation. Litigation is not only costly but also time-consuming. This case which commenced in 1966 is a textbook case to illustrate this.

Learned President's Counsel for the substituted 2nd defendant argues that the Court of Appeal ought to have referred the question to the Supreme Court *ex mero motu* in terms of Rule 21 of the Supreme Court Rules of 1991.

According to Rule 20(1), the Court of Appeal can, upon an application made by a party, grant leave to appeal to the Supreme Court in respect of any substantial question of law. Rule 20(1) reads as follows:

> *When a submission is made, by or on behalf of a party to any matter or proceeding in the Court of Appeal, at any time before the conclusion of the hearing by the Court of Appeal, that a substantial question of law is involved in such matter or proceeding, it shall be lawful for an application to be simultaneously made, by or on behalf of any party, that such question of law be forthwith recorded and that the Court of Appeal, in its final order or judgment, do grant leave to appeal to the Supreme Court in respect of such question.*

According to Rule 21, the Court of Appeal can, *ex mero motu*, grant leave to appeal to the Supreme Court upon any substantial question of law. Rule 21 reads as follows:

> *Notwithstanding that no such submission or application has been made in terms of rule 20(1), it shall be lawful for the Court of Appeal, ex mero motu, either in its final order or judgment, or in a separate order made at the time of such final order or judgment, to grant leave to appeal to the Supreme Court upon any substantial question of law involved in such matter or proceeding:*
>
> *Provided that any party may make an application for leave to appeal upon any other substantial question of law under and in terms of rule 22.*

In *Jane Nona v. Surabiel*, the appellant did not appeal to the Supreme Court against the dismissal of his appeal by the Court of Appeal; either he would have been content with the decision of the Court of Appeal or he did not have the time and money to expend on flogging a dead horse. In such circumstances, if the Court of Appeal had granted leave to appeal to the

Supreme Court *ex mero motu* on the question whether the Supreme Court judgment in *Karunawathie v. Piyasena* is *per incuriam* (which has already been held by the Court of Appeal to be so), the appellant in the Court of Appeal would have had to carry the burden of prosecuting the appeal in the Supreme Court. Who will bear the costs of litigation in such an appeal? Can such a burden be thrust upon a party by Court? Is it fair? If the appellant upon legal advice or otherwise thinks that the Court of Appeal judgment is correct on that matter, what is expected from the appellant in the Supreme Court? Are we to engage in an academic exercise in Court at the expense of litigants? As Abrahams C.J. stated more than eight decades ago in *Velupillai v. The Chairman, Urban District Council* (1936) 39 NLR 464 at 465 "*This is a Court of Justice, it is not an Academy of Law*." We need to understand the practical realities of the law. We must at least strike a balance between the spirit of the law and its letter.

Lord Denning M.R. in *Farrell v. Alexander* [1976] 1 QB 345 at 359-360 explained this in this way:

> *I have often said that I do not think this court should be absolutely bound by its previous decisions, any more than the House of Lords. I know it is said that when this court is satisfied that a previous decision of its own was wrong, it should not overrule it but should apply it in this court and leave it to the House of Lords to overrule it. Just think what this means in this case. These ladies do not qualify for legal aid. They must go to the expense themselves of an appeal to the House of Lords to get the decision revoked. The expense may deter them and thus an injustice will be perpetrated. In any case, I do not think it right to compel them to do this when the result is a foregone conclusion. I would let them save their money and reverse it here and now. I would allow the appeal, accordingly.*

Learned President's Counsel for the substituted 2nd defendant strongly relies on the House of Lords decision in *Cassell & Co Ltd v. Broome* [1972] AC 1027 in support of his argument. Hence let me dwell on that case for a while. In this case, the House of Lords totally disapproved of the observations made by Lord Denning M.R. in the Court of Appeal case of *Broome v. Cassell & Co Ltd* [1971] 2 QB 354 in relation to a former House of Lords decision, namely *Rookes v. Barnard* [1964] AC 1129, which severely limited the circumstances under which exemplary (punitive) damages could be awarded. The Court of Appeal described *Rookes v. Barnard* as decided "*per incuriam*" or "unworkable". This the Court of Appeal stated on two fundamental grounds: that in coming to the conclusion on the question of awarding exemplary damages in addition to compensatory damages, Lord Devlin in *Rookes v. Barnard* overlooked (a) two previous House of Lords decisions; and (b) the two categories identified as those in which the power to award exemplary damages should be retained had not been suggested by counsel in the course of their arguments. In the Court of Appeal case, Lord Denning at page 384 further stated:

> *This case may, or may not, go on appeal to the House of Lords. I must say a word, however, for the guidance of judges who will be trying cases in the meantime. I think the difficulties presented by Rookes v. Barnard are so great that the judges should direct the juries in accordance with the law as it was understood before Rookes v. Barnard. Any attempt to follow Rookes v. Barnard is bound to lead to confusion.*

The House of Lords found these statements unwarranted. Lord Hailsham of St. Marylebone L.C. who presided over the bench of the House of Lords stated at page 1054:

Moreover, it is necessary to say something of the direction to judges of first instance to ignore Rookes v. Barnard as "unworkable." As will be seen when I come to examine Rookes v. Barnard in the latter part of this opinion, I am driven to the conclusion that when the Court of Appeal described the decision in Rookes v. Barnard as decided "per incuriam" or "unworkable" they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable. The course taken would have put judges of first instance in an embarrassing position, as driving them to take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is no guarantee that other Lords Justices would have followed them and no particular reason why they should) and the House of Lords. But, much worse than this, litigants would not have known where they stood. None could have reached finality short of the House of Lords, and, in the meantime, the task of their professional advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them, would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection. The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in Young v. Bristol Aeroplane Co. Ltd. [1944] K.B. 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even

> *this House, since it has taken freedom to review its own decisions, will do so cautiously.*

The two previous decisions of the House of Lords which the Court of Appeal considered to have been overlooked in *Rookes v. Barnard* are *E. Hulton & Co. v. Jones* [1910] AC 20 and *Ley v. Hamilton* 153 LT 384. On this point and the second point that the decision in *Rookes v. Barnard* was not based on the arguments of counsel, Lord Diplock in the House of Lords in *Cassell & Co Ltd v. Broome* stated at page 1131:

> *I find the suggestion that E. Hulton & Co. v. Jones, the leading case on innocent defamation, is to be regarded as an authority for an award of exemplary damages, quite unacceptable. Ley v. Hamilton was discussed at some length in Lord Devlin's speech. I myself agree with his interpretation of Lord Atkin's speech. The Court of Appeal did not and in this they now have the powerful support of my noble and learned friend, Viscount Dilhorne. But, however wrong they may have thought Lord Devlin was, they cannot have thought that he had overlooked Ley v. Hamilton.*
>
> *The second reason I find equally unconvincing. On matters of law no court is restricted in its decision to following the submissions made to it by counsel for one or other of the parties. After listening to a lengthy argument which embraced a full examination of a large and representative selection of the relevant previous authorities this House was fully entitled to come to a conclusion of law and legal policy different from that which any individual counsel had propounded.*

This goes to show that the two reasons given by Lord Denning to treat the House of Lords decision in *Rookes v. Barnard* as *per incuriam* is clearly unacceptable and the advice given to the lower Court judges not to follow

the House of Lords decision in *Rookes v. Barnard* is unwarranted. The Court of Appeal merely did not agree with the judgment of the House of Lords. That does not give licence to the Court of Appeal to treat the House of Lords decision as *per incuriam*.

Lord Hailsham at page 1075 stated:

> *Lord Devlin [in Rookes v. Barnard] was, of course, perfectly well aware that, in drawing these conclusions from the authorities, he was making new law in the sense in which new law is always made when an important new precedent is established. Thus, he said, at p. 1226:*
>
> *"I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range. I shall not, therefore, conclude what I have to say on the general principles of law without returning to the authorities and making it clear to what extent I have rejected the guidance they may be said to afford."*

It was held by the House of Lords in *Cassell & Co Ltd v. Broome* that *Rookes v. Barnard* was not inconsistent with any earlier decision of the House of Lords. On the other hand, if the House of Lords consciously departed from settled law for whatever reason, the Court of Appeal cannot treat such decision as *per incuriam*.

The facts in *Karunawathie v. Piyasena* are totally different to those of *Cassell & Co Ltd v. Broome*. Unlike in *Cassell & Co Ltd v. Broome*, everybody including the learned President's Counsel for the substituted 2nd defendant-appellant in the instant case say in unison that *Karunawathie v. Piyasena* is *per incuriam* for failure to follow statute law.

The dicta in *Cassell & Co Ltd v. Broome* should be appreciated and understood on the unique facts and circumstances of that case.

It is well-known that distinguishing the undistinguishable on spurious grounds is a popular method adopted by judges to not follow bad precedents. In *Jones v. Secretary of State* [1972] 1 All ER 145 at 149, Lord Reid acknowledged this when he stated "*it is notorious that where an existing decision is disapproved, but cannot be overruled courts tend to distinguish it on inadequate grounds*".

Referring to Rule 21 of the Supreme Court Rules (cited earlier in this judgment), learned President's Counsel for the substituted 2nd defendant submits that "*The observations of Cross is not applicable to our decisions, as there are provisions, to deal with that kind of situation.*" I have already stated that Rule 21 has no practical value to the litigant. What are the "observations of Cross" learned President's Counsel is alluding to? Professor Rupert Cross on *Precedent in English Law*, 1st edition (1961), at pages 130-131 states:

> *No doubt any court would decline to follow a case decided by itself or any other court (even one of superior jurisdiction) if the judgment erroneously assumed the existence or non-existence of a statute, and that assumption formed the basis of the decision. This exception to the rule of stare decisis is probably best regarded as an aspect of a broader qualification of the rule, namely, that courts are not bound to follow a decision reached per incuriam.* (emphasis added)

Justice Soza (with the agreement of Justice Tambiah) in the Court of Appeal case of *Ramanathan Chettiar v. Wickramarachchi and Others* [1978-79] 2 Sri LR 395 at 411 quoting with approval the above paragraph of Professor Cross states "*This is obviously because case law cannot overrule statutory provisions laid down by enactments of the Legislature*."

Although we discuss this under the rule of *per incuriam*, this is attributable to legislative supremacy over common law.

Justice Soza in this case after analysing the law on *stare decisis* and *per incuriam* in great detail refused to follow two Supreme Court decisions (*Messrs. Kurunegala Estate Limited v. The District Land Officer, Matale District*, Appeal No. BR/3528/ML/47, Supreme Court 4 of 1976 decided on 01.04.1977, BR 3325/CL/834, Supreme Court 1/75 decided on 11.05.1977) on an identical question on the basis that in those two decisions the Supreme Court had failed to consider the statute law as amended, and had the attention of the Court been properly drawn to those substantial amendments, the Court would have decided the case differently. Accordingly, the Court of Appeal held at page 411 "*Both these decisions have been given per incuriam and accordingly we are not bound by them*."

This judgment of Soza J. has been followed by subsequent decisions including *The Galle Municipal Council and Others v. Galle Festival (Guarantee) Ltd.* (CA/PHC/155/2010, CA Minutes of 01.03.2019) where Janak de Silva J. in the Court of Appeal stated "*This court is bound by the Judgment of the Supreme Court unless it is one made per incuriam (Ramanathan Chettiar v. Wickremarachchi and Others (1979) 2 Sri LR 395).*" Accordingly, the Court of Appeal did not follow the Supreme Court decision in *Sirimal and Others v. Board of Directors of the Co-operative Wholesale Establishment and Others* [2003] 2 Sri LR 23 stating that "*the dicta of Weerasuriya J. in Sirimal and Others v. Board of Directors of the Co-operative Wholesale Establishment and Others (supra) is per incuriam as R. v. North and East Devon Health Authority, ex p. Coughlan [2000] 2 WLR 622) was not considered.*" *R. v. North and East Devon Health Authority, ex p. Coughlan* is a leading English authority on legitimate expectation which recognises three possible categories with the Court taking a different role

in respect of each category but the Supreme Court in that case did not consider the third category at all.

According to *Salmond on Jurisprudence* (edited by Glanville Williams), 11th Edition, London Sweet & Maxwell, page 203, even a lower Court can impugn a precedent if the previous decision has been given in ignorance of a statute. It is further stated that even if the attention of the Court is drawn to the relevant statute, if the Court fails to apply it, the binding effect of the authority dwindles.

> *Ignorance of statute. A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of a statute, i.e. delegated legislation. This rule was laid down for the House of Lords by Lord Halsbury in the leading case, and for the Court of Appeal it was given as the leading example of a decision per incuriam which would not be binding on the court. The rule apparently applies even though the earlier court knew of the statute in question, if it did not refer to, and had not present to its mind, the precise terms of the statute. Similarly, a court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such incuria as to vitiate the decision. Even a lower court can impugn a precedent on such grounds*. (emphasis added)

In the name of certainty in law, which is the main objective to be achieved by the doctrine of *stare decisis*, we must not perpetuate error. Justice Soza at page 410 emphasises this in the following manner:

> *The doctrine of stare decisis is no doubt an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs as well as a basis for orderly development of legal rules. Certainty in the law is no doubt very*

> *desirable because there is always the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into. Further there is also the especial need for certainty as to the criminal law. While the greatest weight must be given to these considerations, certainty must not be achieved by perpetuating error or by insulating the law against the currents of social change.*

When the precedent is plainly and admittedly wrong, the obligation to follow ceases because then the judge has a greater obligation to preserve the rule of law. There cannot be any difficulty in understanding the underlying rationale: in order to be a binding precedent, the judgment must be according to the law. C.K. Allen, *Law in the Making*, 7th edition (1964), at pages 294-295 states:

> *For all practical purposes, a precedent which ignores or misconceives a clear and positive rule of law is no precedent. In the last analysis, the judge follows 'binding' authority only if and because it is a correct statement of the law. In almost all cases it is, to him, a correct statement of the law because it is not open to him to set up his own opinions against a higher authority; but where it is plainly and admittedly founded on error, his obligation disappears. He owes a higher obligation to his mistress, the law.*

Professor Allen at page 294 cites *Dugdale v. D.* (1872) LR 14 Eq 234 where Malins V.C. went so far as to say: '*The Court is not bound to follow a decision even of the Court of Appeal if clearly erroneous*'.

The foregoing analysis goes to show that although the principal requirement of the doctrine of *stare decisis* or precedent is that the Court respects earlier judicial decisions on materially identical facts, the doctrine also requires the Court to depart from such decisions when

following them would perpetuate legal error or injustice. Between uniformity and accuracy, the latter must prevail. The beneficial effect of such a flexible course of action outweighs the harmful effect of uncertainty which it may induce. Uniformity in decision making is good but justice is better. The law cannot, nay need not, be separated from justice. Uniformity may not always be appropriate as judges need to stay alert and keep apace with changes in society; law is not a static but dynamic concept.

I answer the two questions of law upon which leave to appeal was granted in the following manner;

(a) Yes, the judgment of the Supreme Court in *Karunawathie v. Piyasena* [2011] 1 Sri LR 171 has been given *per incuriam*.

(b) Yes, a lower Court can decline to follow a decision given *per incuriam* by a superior Court in instances where the defect clearly appears on the face of the judgment such as in *Karunawathie v. Piyasena*. The decision not to follow a previous binding authority on the basis of *per incuriam* shall not be a matter of interpretation or preference (as in the Court of Appeal judgment in *Cassell & Co Ltd v. Broome* [1971] 2 QB 354).

The appeal is accordingly dismissed. Given the importance of the question of law involved in this appeal, I make no order for costs.

Judge of the Supreme Court

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

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., J.
I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, 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

AHAMED LEBBE HADIAR ATHAMLEVVAI

No. 1, Second Cross Street, Batticaloa.

-PLAINTIFF-

Vs.

1. ADAMBAWA MAHMOOTHU, (Deceased)
2. SEYADU PATHTHUMMAH, (Deceased)

70/1, Main Street, Batticaloa.

-DEFENDANTS-

FOUSIYA UMMAH ABDUL CADER

70/1, Main Street, Batticaloa.

SUBSTITUTED-DEFENDANT

S.C. (Appeal) No: 164/12

S.C (HCCA) LA APPLICATION NO: 186/11

HIGH COURT CIVIL APPEAL NO:

EP/HCCA/BC/80/09

D.C BATTICALOA NO: 4006/L

AND

AHAMED LEBBE HADJIAR ATHAMLEVVAI

No. 1, Second Cross Street, Batticaloa.

-PLAINTIFF-APPELLANT-

Vs.

FOUSIYA UMMAH ABDUL CADER

70/1, Main Street, Batticaloa.

-SUBSTITUTED-DEFENDANT-

RESPONDENT-

AND NOW

AHAMED LEBBE HADIAR ATHAMLEVVAI
No. 1, Second Cross Street, Batticaloa.
-PLAINTIFF-APPELLANT-PETITIONER

Vs.

FOUSIYA UMMAH ABDUL CADER
70/1, Main Street, Batticaloa.
-SUBSTITUTED-DEFENDANT-
RESPONDENT-RESPONDENT-

Before: Priyantha Jayawardena, PC, J.
Vijith K Malalgoda, PC, J.
L.T.B. Dehideniya, J.

Counsels: V. Puvitharan, PC, with Anuja Rasanayakham for the Plaintiff-Appellant-Petitioner.

S. Mandaleswaran, PC, with S. Abinaya for the Substituted Defendant-Respondent-Respondent.

Argued on: 03.02.2020
Decided on: 25.07.2022

L.T.B. Dehideniya, J.

The Plaintiff- Appellant- Appellant (hereinafter sometime referred to as the Appellant) instituted this action for a declaration of title on long chain of title. At finally, the Appellant claimed that he became the owner of the land by Deed marked P1. This Deed was tendered in evidence subject to proof.

The Respondent stated that he was a tenant under A.M. Meera Lebbe Marikkar who was the original owner and on the death of him he possessed the land for a long period and acquired the prescriptive title. Though he claimed that he has acquired prescriptive title, he has not prayed for a positive judgment other than a dismissal of the action.

The learned District Judge dismissed the plaint on the basis that the Appellant had failed to prove the title deed. Being aggrieved by the said judgment, the Appellant appealed to the Civil Appellate High Court of Eastern Province Holden at Baticloa where the Learned High Court Judge too affirmed the judgment of the learned district judge. The appellant being aggrieved by the said judgment presented this appeal to this court. The Court granted leave to appeal on the following questions of law;

1) Did the learned Judges of the High court err in law in holding that the Deeds P1 and P2 have not been proved without giving due weight to the well-established principle reiterated by the Supreme Court and the Court of Appeal in ***Balapitiya Gunananda Thero v. Talalle Meththananda Thero (1997) 2 Sri L.R 101*** and ***Sri Lanka Ports Authority And Another v Jugolinija- Boal East (1981) 1 Sri L.R 18*** that if no objection is taken to receive in evidence at the close of a party's case a document which was earlier marked subject to proof then the said document would be considered as evidence before court for all purpose?
2) Did the learned Judges of the High Court err in law in holding that the Plaintiff has failed to prove the document P1 and P2 in terms of Section 68 and 69 of the Evidence Ordinance

without giving any weight to the other relevant provisions of the Evidence Ordinance, particularly in view of the fact that the document P3, a deed attested by the same Notary attesting the document P1, and admitted in evidence without being marked subject to proof, was before court?

This being a *rei vindicatio* action the plaintiff has to establish his title. Until the title is established the defendant need not to prove anything. Once the plaintiff proves title, the burden shifts on to the defendant to show that he has independent right in the form of prescription as claimed by him.

His Lordship Justice Saleem Marsoof PC in the case of ***Jamaldeen Abdul Latheef V. Abdul Majeed Mohamed Mansoor And Another [2010] 2 Sri L.R 333*** considering a long line of cases held that;

*"In Dharmadasa v. Jayasena(12) De Silva, C.J/. equated an action for declaration of title with the rei vindicatio action, and at 330 of his judgement quoted with approval the dictum of Heart, J., in Wanigaratne v. Juwanis Appuhamy **(**13),for the proposition that the burden is on the plaintiff in a rei vindicatio action to clearly establish his title to the corpus, echoing the following words of Withers, J., in the old case of Allis Appu v. Endis Hamy (supra) at 93-*

In my opinion, if the plaintiff is not entitled to rei vindicate his property, he is not entitled to a declaration of title...

If he cannot compel restoration, which is the object of a rei vindicatio, I do not see how he can have a declaration of title. I can find no authority for splitting this action in this way in the Roman-Dutch Law books, or decisions of court governed by the Roman-Dutch Law.

As Ranasinghe, J., pointed out in Jinawathie v. Emalin Perera (14) at 142, a plaintiff to a rei vindicatio action "can and must succeed only on the strength of his own title, and not upon the weakness of the defence." In Wanigaratne v. Juwanis Appuhamy, (supra) at page

168, Heart, J., has stressed that "the defendant in a rei vindicatio action need not prove anything, still less his own title." Accordingly, the burden is on the Respondents to this appeal to establish their title to the land described in the schedule to their petition …"

At the trial for the Appellant only the Appellant and the surveyor gave evidence. The title deed of the appellant was marked as P1 and it was marked subject to proof. Appellant did not call any witness to prove the execution of P1. At the closer of the evidence the Appellant read P1 in evidence and the Respondent did not object to the document.

The issue in the instant appeal is whether the P1 can be used as evidence. The Appellant has not called any witness to prove the execution of P1. Since the defendants have not objected to the document marked P1 at the closer of Appellant case the Counsel argue that the P1 becomes evidence as per the Judgement in ***Sri Lanka Ports Authority And Another v Jugolinija- Boal East (1981) 1 Sri L.R 18.*** In the said case at p. 23-24 Samarakoon CJ, held that;

"When P1 was marked during the trial objection was taken "as the author of P1 has not been called". I take it, what was meant was, that P1 be rejected unless the author was called to prove the document. Counsel for the respondent closed his case leading in evidence P1 and P2. There was no objection to this by counsel for the appellants who then proceeded to lead his evidence. 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 Judgement was followed in ***Balapitiya Gunananda Thero v. Talalle Meththananda Thero*** (1997) 2 Sri L.R 101. Where at p. 105 G. P. S. De Silva CJ, held that;

"...however, was marked in evidence subject to proof and the District Court held that the document was not proved, although P5 was read in evidence at the close of the plaintiff's case without objection. This finding of the District Court was reserved by the Court of Appeal on the basis of the decision in Sri ***Lanka Ports Authority And Another v Jugolinija-***

Boal East. *In that case when P1 was marked in the course of the trial objection was taken but when the case for the plaintiff was closed reading in evidence P1, no objection was taken by the opposing counsel".*

Section 68 of the Evidence Ordinance provides that a document which is required to be attested shall not be used in evidence until at least one attesting witness is called to give evidence. The Section 68 read thus;

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

In **Wijegoonatilleke v. Wijegoonatilleke 60 NLR 560** Basnayaka CJ held that, *"In our opinion a Notary who attests a deed is an attesting witness within the meaning of that expression in section 68 and 69 of the Evidence Ordinance*". If the notary knows the executer the notary also can be witnesses. Neither of them were called as witnesses and no reason was given for not calling either. Under these circumstances whether the deed can be accepted as evidence is the issue.

As Tambiah J explained in ***Jayasinghe v. Samarawickrema (1982) 1 Sri. L.R 349*** *at p. 359* citing Sarkar's Law of Evidence*, "Section 68 of the Evidence Ordinance lays down that documents required by law to be attested shall not be used as evidence unless at least one attesting witness is called to prove its execution. If he is alive and subject to process of the Court. 'This is not the same thing as saying that a document required to be attested by more than one witness shall be proved by the evidence of only one witness. S. 68 only lays down the mode of proof and not the quantum of evidence required. More than one attesting witness may be necessary to prove a document according to the circumstances of a case' (Sarkar's Law of Evidence, 10th Edn. P. 591)".*

His Lordship Justice Sisira De Abrew with the agreement of myself and Justice Padmam Surasena, considered the decisions of the said ***Sri Lanka Port Authority And Another v Jugolinija- Boal East (1981)*** and ***Balapitiya Gunananda Thero v. Tallalle Meththananda Thero (1997) 2 Sri L.R 101*** cases and several other relevant cases and held in the case of ***Dadallage Anil Shantha Samarasinghe Vs Dadallage Mervin Silva SC Appeal 45/2010*** S/C Minute dated 11.6.2019 that;

> *"Considering all the above matters, I hold that when a document which is required to be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance is produced in evidence subject to proof but not objected to at the close of the case of the party which produced it, such a document cannot be used as evidence by courts if it is not proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance. I further hold that failure on the part of a party to object to a document during the trial does not permit court to use the document as evidence if the document which should be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance has not been proved. I would like to note that the acts performed or not performed by parties in the course of a trial do not remove the rules governing the proof of documents".*

As mentioned above, if the witness is not called cannot be considered as evidence. In the case of ***Amarasinghe Arachchige Don Dharmarathna v. Dodamgodage Premadasa and Others*** SC Appeal No.158/2013, Decided on: 12th October 2016, Prasanna Jayewardene, PC, J, has applied the same principle. His Lordship noted that;

> *"Our Courts have consistently taken the view that, other than in instances where a notarially attested Deed is admitted by the opposing party or is produced in evidence without objection or requirements of proof,* ***the requirements of Section 68 of the Evidence Ordinance are imperative and that Deed will not be considered in evidence unless the testimony of, at least, one attesting witness has been led****. Thus, in Bandaiya v. Ungu [15*

NLR 263]. Lascelles CJ described the requirements of Section 68 of the Evidence Ordinance as a "wholesome rule" and held that, a notarially attested Deed shall not be used as evidence until one attesting witness at least has been call for the purpose of proving its execution, if there be an attesting witness alive, capable of giving evidence and subject to the process of the Court. [Emphasis is added]"

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..."*

E.R.S.R.Coomaraswamy in The Law of Evidence Vol 2 Book 1 at page 108 explains the object of calling the witness. He says "In *Solicitor General vs. Ava Umma* 71 NLR 512 at 515-516" T.S. Fernando J. said "*The object of calling the witness is to prove the execution of the document. Proof of the execution of the documents mentioned in Section 2 of No. 7 of 1940 (Prevention of Frauds Ordinance) means proof of the identity of the person who signed as maker and proof that the document was signed in the presence of a notary and two or more witnesses present at the same time who attested the execution."*

Coomaraswamy further say thus;

"Stephen says that the rule in Section 68 is probably the most ancient, and is, as far as it extends, the most inflexible of all the rules of evidence. As Lord Ellenborough says in R. vs. Harringworth the rule ... is universal that you must first call the subscribing witness; and it is not to varied in each particular case by trying whether, in its application, it may not be productive of some inconvenience, for then there would be no such thing as a general rule."

Coomaraswami in the same book 106 states that "*if the witness is alive the subject to the process of the court and capable of giving evidence a witnesses shall be called. If further states that if one attesting witness, satisfying the three requirements set out above, can be called, he must be called.*

The omission to call such a witness, where execution is denied or not admitted, is fatal to the admissibility of the *document."*

In the instant case the title Deed marked P1 was presented in evidence subject to proof. It means that the defendant is not admitting the title Deed of the Appellant. Since this is a Deed attested by a Notary Public in front of two attesting witnesses Section 68 of the Evidence Ordinance comes into operation. It becomes a necessary to call at least one of the attesting witness to prove the execution. The Appellant has failed to call any of such witness. Therefore the Deed marked P1 was not proved and therefore it cannot be considered as evidence. If Appellant has failed to establish his title in a *rei vindicatio* action, he is not entitle to any relief.

Not challenging the document marked P3 will not establish the execution of P1.

I answer the both question of law in negative.

Appeal dismissed. Subject to costs fixed at Rupees 25000.00.

Judge of the Supreme Court

Priyantha Jayawardena, PC, J.
I agree

Judge of the Supreme Court

Vijith K. Malalgoda, PC, J.
I agree

Judge of the Supreme Court

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal 169/2014

SC/SPL/LA/194/2013

CA (Writ) 761/2009

Kapukotuwa Mudiyanselage Jayatissa,
No. 09/01,
Neelapola,
Seruwila.
PETITIONER

Vs.

1. Divisional Secretary,
   Divisional Secretariat,
   Serunuwara.

2. District Secretary,
   District Secretariat, (Kachcheri)
   Trincomalee.

3. Deputy Commissioner of Lands,
   Office of the Additional Commissioner of Lands,
   Trincomalee.

4. Commissioner General of Lands,
   No. 07,
   Gregory's Avenue,
   Land Commissioner General's Department,
   Colombo 07.

5. Additional Commissioner of Land Development,
   No. 07,
   Gregory's Avenue,
   Land Commissioner General's Department,
   Colombo 07.

6. K. H. Sandya Kumari,
   No. 10,
   Neelapola,
   Neelagala. (via Kantale)

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

AND NOW BETWEEN

Kapukotuwa Mudiyanselage Jayatissa,
No. 09/01,
Neelapola,
Seruwila.

PETITIONER - APPELLANT

Vs

1. Divisional Secretary,
   Divisional Secretariat,
   Serunuwara.

2. District Secretary,
   District Secretariat, (Kachcheri)
   Trincomalee.

3. Deputy Commissioner of Lands,
   Office of the Additional Commissioner of Lands,
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   No. 07,
   Gregory's Avenue,
   Land Commissioner General's Department,
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   No. 07,
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   Land Commissioner General's Department,
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6. K. H. Sandya Kumari,
   No. 10,
   Neelapola,

Neelagala. (via Kantale)

7. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.
   RESPONDENT - RESPONDENTS

Before: **P. PADMAN SURASENA J**

ACHALA WENGAPPULI J

MAHINDA SAMAYAWARDHENA J

Counsel: Ranjan Suwandaratne PC with Anil Rajakaruna for the Petitioner-Appellant.

Vikum de Abrew PC, ASG for the 1st to 5th and 7th Respondent-Respondents.

Jagath Nanayakkara for the 6th Respondent-Respondent.

Argued on: 26-11-2021

Decided on: 10-11-2022

P Padman Surasena J

The Petitioner-Appellant claims that he is the occupant of the state land in extent of 02 Acres and 2 Roods, bearing No. in 217B, situated in Neelapola Grama Niladari Division of Serunuwara Divisional Secretariat Division in Trincomalee District. Admittedly, he is an unauthorized occupant of the aforementioned state land. According to him, upon applications made by such unauthorized occupants, it is customary for the state authorities in Serunuwara area to regularize such unauthorized occupations by granting permits to such unauthorized occupants under the Land Development Ordinance. He

states that this is to enable such unauthorized occupants to continue occupation of such state lands.

According to the Petitioner-Appellant, he had come into the occupation of the said state land in 1995/1996 and has started cultivating in the same. It was the position of the Petitioner-Appellant that the 6th Respondent-Respondent (Hereinafter referred to as the 6th Respondent) had attempted to disturb his possession of this land in the year 2003 on the basis that her father (the 6th Respondent's father) was the original permit holder of the land. The Petitioner-Appellant states that he had thereafter written the letter dated 21st May 2003 produced marked **P 1** to the District Secretary (the 2nd Respondent-Respondent), requesting him to resolve the dispute.

The Petitioner-Appellant had also lodged the complaint dated 03rd June 2003 in Serunuwara police relating to the aforementioned dispute. He has produced a copy of the said complaint to Police, marked **P 2**.

Subsequently, on 09th June 2003 the Petitioner-Appellant had met the Commissioner General of Lands (the 4th Respondent-Respondent), seeking to resolve the dispute. In this regard, the Commissioner General of Lands, by letter dated 09th June 2003 produced marked **P 3**, had called from the Assistant Commissioner of Lands (Trincomalee) (the 3rd Respondent-Respondent), the report of the inquiry held by him in relation to this dispute. The contents of this letter shows that it had pre-supposed that an inquiry had already been held by the Assistant Commissioner of Lands (Trincomalee) by this time.

The Petitioner-Appellant had further stated that he was compelled to make further representation to the Divisional Secretary Serunuwara (the 1st Respondent-Respondent), as the Assistant Commissioner of Lands (Trincomalee), had failed to hold an inquiry according to the provisions of the Land Development Ordinance; i.e., the failure of the Assistant Commissioner of Lands (Trincomalee) to prepare and submit a report in relation to the above dispute to the Commissioner of Lands, as per the instructions in the letter dated 9th June 2003 (**P 3**).

Following the representation made by the Petitioner-Appellant, the Divisional Secretary Serunuwara by letter dated 06th August 2003 produced marked **P 4**, had brought to the notice of the District Secretary of Trincomalee, the complaint made by the Petitioner-Appellant who had alleged that the Assistant Commissioner of Lands (Trincomalee) had caused him an injustice in the inquiries conducted up to that time.

In the meantime, Serunuwara Police acting on the complaint dated 10th June 2003 made by the Petitioner-Appellant, had filed the report dated 20th June 2003 (produced marked **P 6**) in Muthur Magistrate's Court under section 66(1) of the Primary Court Procedure Act No. 44 of 1979. The Petitioner-Appellant states[1] that the Primary court had upheld the fact that he is in possession of that land, in that proceedings. He had produced the relevant Primary Court order dated 11th September 2003 [**P 6(a)**] which is in Tamil language.[2]

Thereafter, the Commissioner General of Lands, by the letter dated 2nd October 2003[3] produced marked **P-5**, had reminded and again requested the Assistant Commissioner of Lands (Trincomalee) to submit a report setting out answers to the two queries made in the said letter. The said queries were whether a permit has been issued to the 6th Respondent and whether the Petitioner-Appellant was in possession of the disputed land. The letter **P 5** is a reminder to the letter **P 3**.

The Petitioner-Appellant states that he thereafter (after the Magistrate's court upheld his possession), requested the Divisional Secretary by the letter dated 11th February 2004 (produced marked **P 7**), to issue him a permit for the disputed land. The Divisional Secretary thereafter by letter dated 13th February 2004 (produced marked **P 8**), had forwarded the said request to the Assistant Commissioner of Lands (Trincomalee).

The Petitioner-Appellant further states that although an inquiry was thereafter conducted by two officers as advised by the Assistant Commissioner of Lands (Trincomalee), the

[1] Petition dated 6th November 2009 filed in the Court of Appeal in paragraph 17 & 18.
[2] No translation has been provided.
[3] The date of the said letter is as per the Petition dated 6th November 2009 filed in the Court of Appeal. The letter marked P 5 only indicates that the same was issued in October 2003.

said inquiry was not conducted impartially. Accordingly, the Petitioner-Appellant by letters dated 21st July 2004 and 28th July 2004 marked **P 9** and **P 10** respectively informed the District Secretary of Trincomalee, about the conduct of the said officers and requested him to take necessary action in that regard. In addition to the aforementioned letters, the Petitioner-Appellant had also filed a complaint dated 15th July 2004 in the Serunuwara police station regarding the same. This has been produced marked **P 11**.

Thereafter, upon a request made by the Petitioner-Appellant, the District Secretary of Trincomalee, by letter dated 02nd August 2004 produced marked **P 12**, had advised the Commissioner of Lands to hold a fresh inquiry with different officials. The inquiry report dated 23rd July 2004 is the report pertaining to the alleged partial inquiry referred to in the letter **P 12**.

The 3rd Respondent-Respondent, the Assistant Commissioner of Lands (Trincomalee) (Hereinafter sometimes referred to as the 3rd Respondent) has admitted the letter **P 12**.[4] The 3rd Respondent has produced that report (dated 23rd July 2004) marked **3R 2**. This shows that the District Secretary of Trincomalee (2nd Respondent-Respondent), had not accepted the inquiry report dated 23rd July 2004 which had recommended granting of the permit relating to the disputed land to the 6th Respondent.

The Petitioner-Appellant states that he had also made a formal application to issue the permit under his name by relying on the Magistrate's Court order. The Petitioner-Appellant has produced the said formal application, marked **P 13**. In the meantime, the Petitioner has also made several requests to the Respondents requesting for the permit to be issued to him. The said request letters have been produced marked **P14**, **P15**, **P16**, **P17**, **P18**.

On or about 6th March 2009, the Petitioner-Appellant had received summons (**P 19**) as the 6th Respondent had instituted the action bearing No. 2373/2009 in the District Court of Trincomalee. The 6th Respondent had instituted the said action relying on a permit

[4]The affidavit dated 11th November 2019 filed by the 3rd Respondent in the Court of Appeal in paragraph 16.

issued in her name for the same land under the Land Development Ordinance. The said permit has been produced marked **P 21**.

It is the position of the Petitioner-Appellant that he was neither informed nor aware of holding of any inquiry before the Assistant Commissioner of Lands (Trincomalee) had prepared the inquiry report dated 23rd July 2004 (**3R 2**).[5]

It was in the above circumstances that the Petitioner-Appellant had filed the instant writ application in the Court of Appeal against the Respondent- Respondents praying *inter alia* for:

i. a writ of *certiorari* to quash the permit issued to the 6th Respondent,
ii. a writ of *mandamus* against the 1st to 5th Respondent-Respondents to compel them to take steps to rectify the erroneously issued permit and to restore his rights and privileges.

The grounds upon which the Petitioner-Appellant had filed the instant writ application in the Court of Appeal can be gathered by paragraph 37 of the petition dated 06th November 2009 filed in the Court of Appeal. According to the said paragraph 37 of the petition dated 06th November 2009, the Petitioner-Appellant had complained to the Court of Appeal that the permit of the 6th Respondent has been issued contrary to law, is *ultra vires*, and is voidable. The followings can be taken as the summary of the complaint to the Court of Appeal.

i. The said permit has been issued violating the principles of natural justice and in violation of the principle of Audi Alteram Partem

ii. The Respondents have no legal basis to arrive at such a recommendation to grant a permit to the 6th Respondent in view of the long term possession by the Petitioner of the said land.

[5] The affidavit dated 06th November 2008 filed by the Petitioner-Appellant in the Court of Appeal in paragraph 25.

iii. The Petitioner who made numerous requests to obtain a permit, had not been given any notice of any inquiry prior to the recommendation on 30th October 2006 and in any event prior to the permit was issued.

iv. The Respondents have abused the powers vested in them and come to conclusions acting with bias and ulterior motives.

v. In any event the Respondents have not considered that the 6th Respondent cannot rely on the succession of a permit which has been issued to any other person not being in possession for over 13 years.

vi. The said permit as well as the recommendation clearly violate the legitimate expectation of the Petitioner to obtain a permit of the land of which he had been in possession for over 13 years.

vii. The said decisions clearly violate the legal rights and legitimate expectations, benefits and rights of the Petitioner under the Land Development Ordinance to enjoy the continuous occupation and cultivation of the land under a permit that should be issued to him.

viii. The said permit was issued to the 6th Respondent by error and on the false representations of the 6th Respondent.

After concluding the argument of the case, the learned Judges of the Court of Appeal had pronounced the judgment dated 05th July 2013 holding *inter alia* that the Petitioner-Appellant did not have a valid permit; the Petitioner-Appellant's long term unauthorized possession does not entitle him a permit in his name; the Petitioner-Appellant had deliberately refused to participate in the inquiry stating his reasons to the Assistant Commissioner of Lands (Trincomalee) on 23rd February 2003 which he had recorded in the document he had produced marked **3 R1** in the Court of Appeal. It was due to the above reasons that the Court of Appeal had dismissed the application of the Petitioner-Appellant.

Being aggrieved by the judgment of the Court of Appeal, the Petitioner-Appellant had sought Special Leave to Appeal against the judgment. The Supreme Court, upon hearing the learned counsel for the Petitioner-Appellant and the learned Deputy Solicitor General, by its order dated 22nd September 2014, had granted Special Leave to Appeal on the following two questions of law (verbatim):

a. *Have Their Lordships of the Court of Appeal totally failed to consider the fact that the Respondents have failed to hold a proper and due inquiry in relation to the application made by the Petitioner to obtain a permit in order to regularize his possession of the property which he was cultivating for an extremely long period of time.*
b. *Have their Lordships of the Court of Appeal failed to consider the fact that the final inquiry dated 23rd July, 2004 has not been informed to the Petitioner nor he was provided an opportunity to place his facts at the inquiry in arriving at their final conclusion?*

A closer look at the above questions of law shows that they would finally rest on the question whether the Petitioner was provided an opportunity to participate in the inquiry before arriving at the final conclusion. Thus, I would first focus on the above question and it would be convenient to focus more on the question of law set out in (b) above for that purpose.

Let me commence with the position of the Petitioner-Appellant with regard to the question of law set out in (b) above. It is the position of the Petitioner-Appellant that he was unaware of the date fixed for the inquiry which had taken place on 23rd July 2004 Moreover, it is his position that he was not provided with an opportunity to be heard since the Respondent had not informed him the date fixed for the inquiry. According to the Petitioner-Appellant he had neither received any notice nor received any reports or decisions concluded during the said inquiry. The Petitioner-Appellant further claims that it was the influence of the 6th Respondent which led the Respondents not to provide him an opportunity to present his case and that influence resulted in the relevant permit

being issued to the 6th Respondent despite the continuous occupation of the land by him for a long time.

Let me at this stage turn to the position taken up by the 3rd Respondent in relation to the Petitioner-Appellant's complaint. Nowhere in his affidavit, the 3rd Respondent has asserted that he had taken any step to notify the Petitioner- Appellant about the holding of an inquiry. Leaving alone informing the Petitioner-Appellant about the date fixed for the inquiry, the 3rd Respondent in his affidavit has not even mentioned as to when this purported inquiry was conducted. Moreover, the 3rd Respondent has neither produced nor relied on any document/material to convince Court that he had taken any step to notify the Petitioner-Appellant about the holding of an inquiry before the inquiring officer prepared his report dated 23rd July 2004.

In the above circumstances, it is not difficult for me to conclude that no state authority has either taken any step to inform the Petitioner-Appellant, the date fixed for the inquiry or to provide him an opportunity to present his case before deciding to grant the relevant permit to the 6th Respondent despite the Petitioner-Appellant's complaint that he has been in long term possession of the land.

By the letter dated 06th August 2004 marked **3 R3**, it is clear that the Commissioner of Lands had directed the Assistant Commissioner of Lands (Trincomalee) to take steps to issue a permit to the 6th Respondent acting on the inquiry report dated 23rd July 2004 (**3 R2**). Although the 3rd Respondent-Respondent has admitted the letter **P 12** (the letter by the District Secretary advising the Commissioner of Lands to hold a fresh inquiry with different officials), he has not even attempted to explain whether any action was taken in that regard. It is relevant to note that the letter dated 06th August 2004 marked **3 R3**, deciding to issue a permit to the 6th Respondent had been issued just 03 days after the letter **P 12**. Thus, it is clear that the request to conduct an inquiry through an independent official could not have been done before deciding to issue the impugned permit to the 6th Respondent by the letter dated 06th August 2004 marked **3 R3**.

The document marked **3 R2**, the inquiry report dated 23rd July 2004 submitted by Mr. D. M. N. Dissanayake, Assistant Commissioner of Lands (Trincomalee), seeks to assert that the Petitioner-Appellant had deliberately defaulted appearing in the inquiry and that led to the issuance of the permit to the 6th Respondent. The Assistant Commissioner Lands-Trincomalee in the same report has also adverted to the fact that the Petitioner-Appellant, even previously had behaved in a similar manner.[6]

If that was the case, the question arises as to why the Assistant Commissioner Lands-Trincomalee did not think it was prudent to send a written notice to inform the Petitioner-Appellant, the date fixed for the inquiry or to provide him an opportunity to present his case before deciding to grant the relevant permit to the 6th Respondent. The Assistant Commissioner Lands-Trincomalee had not done so.

Moreover, the 3rd Respondent seems to have relied only upon the document marked **3R 2**, which is the very document challenged by the Petitioner-Appellant. The 3rd Respondent has not been able to produce any other independent document to convince Court that he had taken all possible steps to comply with the Rules of Natural Justice.

It must to be noted that the Land Development Ordinance has set out the procedure to be followed when granting permits to the State Lands. Similarly, the said Ordinance has set out detailed procedure as to how a person could succeed to a land in respect of which a previous permit has already been granted to another. Moreover, the said Ordinance has also set out the procedure to be followed when the State wants to cancel such permits. For instance, section 106 of the ordinance requires the Government authority to issue a notice in the prescribed form asking the permit holder to show cause why his permit should not be cancelled. Section 107 of the Ordinance states that the date specified in such notice shall not be less than 30 days from the date of the issue of such notice. Additionally, section 108 of the Ordinance requires that a copy of such notice to be affixed in a conspicuous position on the relevant land. Such are the statutory requirements set out in the Ordinance designed as safeguards to uphold the principals of

[6] Report dated 23rd July 2004 marked 3 R2 in paragraph 4.

Natural Justice in those circumstances. Thus, the State officials, although the instant situation is different from those described above, cannot and should not deviate from giving sufficient notice at least to the rival party who will be directly affected by the decision to be taken. This is nothing but compliance of rules of Natural Justice in its simplest form.

The inquiry report dated 23rd July 2004 (**3R 2**) does not set out a specific legal provision under which the inquiring officer and the other state officers had acted when they had decided to grant the permit to the 6th Respondent. While the 3rd Respondent does not take up the position that the permit to the 6th Respondent was issued subsequent to a holding of a land kachcheri in terms of chapter III of the Ordinance, he also does not say that the 6th Respondent has succeeded to the land in terms of chapter VII of the Ordinance.

The Respondents have denied that they are aware of any customary practice in Serunuwara area to grant permits under the Land Development Ordinance to unauthorized occupants, upon applications made by them to regularize their illegal occupation of state lands.[7] If that is the stated position of the Respondents, then they are obliged to satisfy Court how and under what provision of law they have taken steps to issue a permit to the 6th Respondent. The Respondents maintain silence on this issue.

Despite the above denial by the Respondents, it is an admitted fact by the Respondent that an inquiry was held. Although the Respondents have stated in their objections that they are bound by the provisions of the Land Development Ordinance, the provision under which they held this inquiry is only known to them. Be that as it may, whatever the nature of the inquiry the Respondents had conducted, that inquiry had decided that the Petitioner-Appellant is not entitled to a permit under the Land Development Ordinance.

Thus, it can reasonably be inferred that the 3rd Respondent has held this inquiry as per the said practice adverted to above, by the Petitioner-Appellant. In such an event, I am

[7] The affidavit dated 11th February 2011 filed by the 3rd Respondent in the Court of Appeal in paragraph 8; The statement of objections dated 11th February 2011 filed by the 1st -5th Respondents in the Court of Appeal in paragraph 6.

unable to accept that there is no obligation on the part of the Government officers dealing with the property rights of the citizens to give due notice of such inquiries to all the parties concerned. This is more so because upholding the rule *Audi Alteram Partem* is seen permeating throughout the Land Development Ordinance from its inception.

Let me now turn to the Judgment of the Court of Appeal.

The Court of Appeal had gone on the basis that the Petitioner had refused to participate at the inquiry and conducted himself in an unacceptable manner. Thus, the Court of Appeal appears to have placed the full reliance on the inquiry report dated 23rd July 2004 (**3 R2**). As that is the document the Petitioner-Appellant had sought to impugn in this very application, I am of the view that it is not correct for the Court of Appeal to have relied upon the very impugned document to conclude that the Petitioner-Appellant had refused to participate at the inquiry. Moreover, the Court of Appeal has only focused in its judgment, the argument that the Petitioner-Appellant is not entitled to a permit on his claim of long-term possession. This is besides the Petitioner- Appellant urging the breach of the rule *Audi Alteram Partem*, as his first ground for the issuance of a writ of *certiorari*.[8]

The Court of Appeal in its judgement has not considered at all, the question whether the Petitioner-Appellant was given notice of the inquiry held on 23rd July 2004 to enable him to place his facts before the inquiring officer. Thus, I have to answer the question of law set out in (b) above in the affirmative and in favour of the Petitioner-Appellant. As mentioned above, considering the fact that the case of the Petitioner- Appellant finally would finally rest on the question whether the Petitioner was provided an opportunity to participate in the inquiry before arriving at the final conclusion, I find that answering the same is sufficient to dispose the instant application. Thus, I would not endeavor to consider the question of law (a).

For the foregoing reasons, I set aside the judgment dated 05th July 2013 of the Court of Appeal. I hold that the Respondents have breached the rules of Natural Justice namely the rule *Audi Alteram Partem* when deciding to grant the permit to the 6th Respondent.

[8] Petition dated 6th November 2009 filed in the Court of Appeal in paragraph 37.

This has rendered the said decision and all subsequent actions relying on that decision null and void. In those circumstances, I proceed to issue a writ of *certiorari* quashing the permit issued to the 6th Respondent produced marked **P 21**. I direct the 1st-5th Respondent-Respondents to hold a proper inquiry according to law, after giving due written notice to all the parties concerned and arrive at an appropriate conclusion with regard to the granting of the permit to the relevant land. The fresh inquiry must be conducted by an independent officer other than those involved at any step in the previous process. Appeal is allowed.

The Petitioner-Appellant is entitled to the costs of litigation in both Courts.

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

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

SC APPEAL NO: 170/2019
SC LA NO: SC/HCCA/LA/36/2018
HCCA: WP/HCCA/COL/112/2014(F)
DC COLOMBO: 02227/09/DMR

Vs.

Ceylinco General Insurance Ltd,
No. 69, Janadipathi Mawatha,
Colombo 01.
Defendant

AND BETWEEN

Attorney General,
Attorney General's Department,
Colombo 12.
Plaintiff-Appellant

Vs.

Ceylinco General Insurance Ltd,
No. 69, Janadipathi Mawatha,
Colombo 01.
Defendant-Respondent

AND NOW BETWEEN

Ceylinco General Insurance Ltd,
No. 69,
Janadipathi Mawatha,
Colombo 01.
Defendant-Respondent-Appellant

Vs.

Attorney General,
Attorney General's Department,
Colombo 12.
Plaintiff-Appellant-Respondent

Before: P. Padman Surasena, J.
Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: N.R. Sivendran with Sankamali Somaratna for the Defendant-Respondent-Appellant.
Sureka Ahmed, S.C., for the Petitioner-Appellant-Respondent.

Argued on : 11.02.2022

Written submissions:
by the Defendant-Respondent-Appellant on 11.02.2020
by the Plaintiff-Appellant-Respondent on 28.08.2020

Decided on: 17.11.2022

Mahinda Samayawardhena, J.

The plaintiff (the Attorney General on behalf of the State) filed this action against the defendant insurance company in the District Court of Colombo seeking to recover a sum of Rs. 818,061.20 with legal interest on the advance payment bond marked P1 read with P3, P6 and P7. The defendant filed answer seeking dismissal of the action. After trial, the District Court dismissed the plaintiff's action on the basis that the plaintiff had failed to make a valid demand during the validity period of the bond. On appeal, the High Court of Civil Appeal set aside the judgment and directed the District Court to enter judgment for the plaintiff on the basis that the demand on the advance payment bond was made during the validity period. Hence this appeal by the defendant. This court granted leave to appeal on the question whether the High Court of Civil Appeal erred in law in directing the District Court to enter judgment for the plaintiff when the demand on the advance payment bond was made after the lapse of the validity period of the bond.

Advance payment bonds, performance bonds, performance guarantees, bank guarantees, letters of guarantee, letters of credit etc. fall into one category and practically perform the same function. Performance bonds are common in construction contracts and real estate development. It guarantees due performance of the underlying contract between the employer and the contractor. Its purpose is to provide a prompt and readily realisable security for obligations undertaken in the underlying contract. That is the fundamental purpose of a performance bond. In all these transactions three parties can be identified: (a) the principal (obligor/debtor/contractor) at whose instance the instrument is issued; (b) the guarantor (surety/the financial institution, e.g. bank) who guarantees due performance of the obligations of the principal to the beneficiary; and (c) the beneficiary (obligee/creditor/employer) for whose

benefit the instrument is issued. In these instruments, the word bond and guarantee are used interchangeably. An advance performance bond is an instrument obtained from the guarantor by the principal for issuance to the beneficiary as a condition precedent to payment of an advance for works to be performed by the principal (since money is required for initial expenses such as labour, equipment, raw material). A performance bond is an instrument obtained from the guarantor by the principal for issuance to the beneficiary as a condition precedent to due execution of the overall contract. However in practical terms a performance bond covers both these aspects: advance payment and overall discharge of obligations. In all these instances, with the issuance of the bond, the guarantor guarantees to the beneficiary payment of the agreed amount without conditions, unless the bond is conditional, no sooner it is presented according to its terms to the guarantor for payment. Although a bond can be conditional or unconditional, the trend is that these bonds are issued at the instance of the principal to be payable to the beneficiary "on demand" without any conditions.

The following passage by Dr. Wickrema Weerasooriyia in *A Textbook of Commercial Law (Business law)* (4th edn) at page 647 shows that there is no clear difference between advance payment bonds and performance bonds.

> *The Third Party client wants an assurance that the contractor will perform the work satisfactorily and on time. The client has also to give the contractor what is called a "mobilization advance" so that the contractor can get together the required labour, equipment and raw material etc. In that context, the contractor gets its banker to issue the Performance Bond to the client. The Bond states that the contractor will perform as contracted and in the case of default, the Bank will pay the client. The Bank normally has money of the*

> *contractor in a bank account or fixed deposit to cover the amount of the bond.*

In *Banking Law and Practice* by R.K. Gupta (Volume 1, 2011 (reprint), Modern Law Publications) a performance guarantee is defined as follows:

> *The performance guarantees are issued by the banks on behalf of their clients in favour of third parties assuring that the customer on behalf of which guarantee is issued, will perform his obligations as per the terms and conditions of the contract, failing which the bank will compensate the third party by paying the amount specified in the guarantee. The performance guarantees are usually obtained where the contractor undertakes to complete the assignment within a specified period in accordance with the terms and conditions of the contract e.g. building and engineering contract.*

The International Chamber of Commerce Uniform Rules for Demand Guarantees (URDG 758) defines a demand guarantee or guarantee as "*any signed undertaking, however named or described, providing for payment on presentation of a complying demand*."

In *Siporex Trade S.A. v. Banque Indosuez* [1986] 2 Lloyd's Law Reports 146, the purpose of a performance bond was descried as follows:

> *The whole commercial purpose of a performance bond was to provide a security which was to be readily, promptly and assuredly realisable when the prescribed event occurred; a purpose reflected in the provision that it should be payable on first demand; the bank guarantor was not and ought not to be concerned in any way with the rights and wrongs of the underlying transaction.*

Although there are three identifiable parties in these transactions as stated above, if the bond or guarantee is unconditional and payable on-

demand, it is trite law that transactions between the guarantor and the beneficiary under the performance bond are not tripartite transactions among the guarantor, the beneficiary and the principal, but simply autonomous or standalone transactions between the guarantor and the beneficiary despite reference being made to the underlying contract between the beneficiary and the principal. In other words, the guarantor shall not be entitled to refuse payment to the beneficiary due to issues between the guarantor and the principal or due to issues between the principal and the beneficiary. If the beneficiary makes the demand in accordance with the terms of the bond or guarantee, the guarantor has no option but to honour it. Any dispute between the principal and the beneficiary on the underlying contract shall be resolved in separate proceedings to which the guarantor will not be a party.

In *Tukan Timber LTD v. Barclays Bank PLC* [1987] 1 QB 171 at 174, Hirst J. observed:

> *It is of course very clearly established by the authorities that a letter of credit is autonomous, that the bank is not concerned in any way with the merits or demerits of the underlying transaction, and only in the most extremely exceptional circumstances should the Court interfere with the paying bank honouring a letter of credit in accordance with its terms bearing in mind the importance of the free and unrestricted flow of normal commercial dealings.*

In *Power Curber International Ltd. v. National Bank of Kuwait SAK* [1981] 3 All ER 607 at 614 Lord Denning M.R. observed "*Letters of credit have become established as a universally acceptable means of payment in international transactions. They are regarded by merchants the world over as equivalent to cash*".

In *R.D. Harbottle (Mercantile) Ltd v. National Westminster Bank Ltd* [1977] 2 All ER 862 at 870, Kerr J. remarked:

> *It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts.*

In *Sztejn v. J. Henry Schroder Banking Corporation* (1941) 31 N.Y.S. 2d 631 at 633 Shientag J. said:

> *It is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller. The issuing bank agrees to pay upon presentation of documents, not goods. This rule is necessary to preserve the efficiency of the letter of credit as an instrument for the financing of trade.*

Vide also *Edward Owen Engineering Ltd v. Barclays Bank International Ltd* [1978] 1 QB 159, *Pesticides India v. State Chemical and Pharmaceutical Corporation of India* (1983) 54 CompCas 147 Delhi, ILR 1981 Delhi 864.

Notwithstanding that these performance bonds are autonomous and standalone, if fraud is alleged and *prima facie* established, of which the guarantor has knowledge or notice, this general principle can be relaxed appropriately. In such event, the court can even issue an interim injunction preventing the bank from making payment on the instrument pending determination of the action. I must add that the mere sending of

a notice by the principal to the guarantor alleging fraud on the part of the beneficiary will not allow the guarantor to refuse payment; nor will the court clothe itself with jurisdiction on such bare assertions to stop payment on bonds or guarantees considered to be the lifeblood of international commerce or equivalent to cash. The court shall not make interim orders *ex parte* or inter *partes* unless a strong *prima facie* case has been made out on fraud. The fraud shall be of a serious character that goes to the root of the underlying contract; an alleged violation of a term of the contract such as delivery of substandard goods, an allegation of overpayments or underpayments are not sufficient enough to establish fraud. The court must guard itself against making this universally acceptable mode of payment in national and international trade ineffectual or nugatory by granting interim orders as a matter of course or as a matter of routine.

Examples for the applicability of such exception are rare. In *Edward Owen Engineering Ltd v. Barclays Bank International Ltd* (*supra*) at 169 Lord Denning M.R. stated "*the bank ought not to pay under the credit if it knows that the documents are forged or that the request for payment is made fraudulently in circumstances when there is no right to payment.*" At page 171 it was further observed:

> *All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without*

proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.

Ackner, L.J., in *United Trading Corporation S.A. and Murray Clayton Ltd v. Allied Arab Bank Ltd* [1985] 2 Lloyd's Law Reports 554 at 561 observed:

We would expect the Court to require strong corroborative evidence of the allegation, usually in the form of contemporary documents, particularly those emanating from the buyer. In general, for the evidence of fraud to be clear, we would also expect the buyer to have been given an opportunity to answer the allegation and to have failed to provide any, or any adequate answer in circumstances where one could properly be expected. If the Court considers that on the material before it the only realistic inference to draw is that of fraud, then the seller would have made out a sufficient case of fraud.

In *Indica Traders (Pvt) Ltd v. Seoul Lanka Construction (Pvt) Ltd* [1994] 3 Sri LR 387 at 398, S.N. Silva J. (later C.J.) held:

It is thus clear that business transactions between a bank and a beneficiary, constituted in the nature of a performance bond, a performance guarantee, letter of guarantee or irrevocable letter of credit, whereby the bank is obliged to pay money to a beneficiary, are not tripartite transactions between the bank (surety), the beneficiary (creditor) and the party at whose instance the bond, guarantee or letter is issued (the principal debtor) but, simply transactions between the bank and the beneficiary. A bank thereby guarantees to the beneficiary payment of money and is obliged to honour that guarantee according to its terms. Any dispute that may arise between the beneficiary (creditor) and the party at whose instance the guarantee or letter is given (the principal debtor), on the underlying contract, cannot be urged to restrain the bank from

honouring the guarantee or letter according to its terms. In an application for an injunction to restrain the bank from making payment, the Court has to consider whether there is a challenge to the validity of the bond, guarantee or letter itself, upon which payment is claimed and whether the conditions as specified in the writing are satisfied. If the challenge to the validity is not substantial and the conditions as specified in the writing are met, prima facie no injunction should be granted and the bank should be left free to honour its obligation.

The only exception to this general rule is where it is established by the party applying for the injunction that a claim for payment upon such bond, guarantee or letter is clearly fraudulent. A mere plea of fraud put in for the purpose of bringing the case within this exception and which rest on the uncorroborated statement of the applicant will not suffice. An injunction may be granted only in circumstances where the Court is satisfied that the bank should not effect payment. Therefore, an injunction may be granted on the ground of fraud only where there is clear evidence as to:

(i) the fact of fraud and,
(ii) the knowledge of the bank as to the facts constituting the fraud.

In relation to the standard of proof of fraud, it was further held at 399:

In any event, a default or a violation of a contract or even the receipt of an over payment does not constitute fraud. Fraud as contemplated in the exception stated above carries a far more serious connotation. It is such fraudulent conduct on the part of the beneficiary as would strike at the very root of the transaction and vitiate the bond, guarantee or letter.

In *Hemas Marketing (Pvt) Ltd v. Chandrasiri* [1994] 2 Sri LR 181 at 186-187, Ranaraja J. stated:

> *Bank guarantees like letters of credit and performance bonds are a "new creature" of the commercial world. per Lord Denning Edward Owen Engineering Ltd. v. Barclays Bank International Ltd (1978) All ER 976 at 981. They were established as a universally acceptable means of payment equivalent to cash in trade and commerce, on the basis that the promise of the issuing bank to pay was wholly independent of the contract between the buyer and the seller and the issuing bank would honour its obligations to pay regardless of the merits or demerits of the dispute between the buyer and the seller. (Power Curber International Ltd. v. National Bank of Kuwait [1981] 3 All ER 607) When a bank has given a guarantee, it is required to honour it according to its terms and is not concerned whether either party to the contract which underlay the contract was in default. (Edward Owen – (supra)). The whole purpose of such commercial instruments was to provide security which was to be readily, promptly and assuredly realisable when the prescribed event occurred. No bank is obliged to give such a guarantee unless they wished to and no doubt when they did so they properly exacted commercial terms and protected themselves by suitable cross indemnities. Siporex Trade SA v. Banque Indo Suez (1986) 2 Lloyd's Law List Reports 146. It is only in exceptional circumstances that courts will interfere with the machinery of obligations assumed by the banks. They are the lifeblood of international commerce. Such obligations are regarded as collateral to underlying rights and obligations between merchants at either end of the banking chain. Courts will leave the merchants to settle their disputes under the contracts by litigation. The courts are not concerned with the difficulties to enforce such claims. These are risks which merchants*

take. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd. [1977] 2 All ER 862. If court interferes with a bank's undertaking it will undermine its greatest asset – its reputation for financial and contractual probity. Sir Donaldson MR - Boliventer Oil SA v. Chase Manhattan Bank [1984] 1 All ER 351 at 352. The only exception to that rule is where fraud by one of the parties to the underlying contract has been established and the bank had notice of the fraud. (Edward Owen - supra, Boliventer - supra). A mere plea of fraud put in for the purpose of bringing the case within this exception and which rests on the uncorroborated statements of the applicant will not suffice. An injunction may be granted only in circumstances when the court is satisfied that the bank should not effect payment. (S.N. Silva, J., Indika Traders v. Seoul Lanka Construction (Pvt) Ltd. CA 916/93).

(*Vide* also *Pan Asia Bank Ltd v. Bentota MPCS Ltd and Another* [2012] 1 Sri LR 51)

In the instant case, the Commander of the Sri Lanka Army (the employer) entered into an agreement with M/s Nimali Builders (the contractor) for the latter to construct two storage ammunition dumps at the Ambepussa Army camp. The defendant (guarantor) issued P1 in favour of the Commander of the Sri Lanka Army guaranteeing payment of Rs. 809,880.00 from 03.10.2003 to 01.01.2004 "*in accordance with the said contract or in accordance with any subsequent agreement affecting the period of repayment*". The validity period was thereafter extended by P3 from 03.10.2003 to 10.10.2004 and the value of the bond was increased to Rs. 818,061.20.

It is common ground that in terms of paragraph 4 on page 2 of P1, there shall be a demand made during the validity period for the defendant to make the payment. The demand was made by the plaintiff by P7 dated

05.11.2004, which falls outside the extended validity period of P3, i.e. 10.10.2004.

The High Court of Civil Appeal set aside the judgment of the District Court and held with the plaintiff on the following basis:

(a) paragraph 3 of P1 provides for entering into "*any subsequent agreement affecting the period of repayment*";
(b) the plaintiff "*made a subsequent alteration affecting the period of repayment unilaterally*" and conveyed it to the defendant by P6 dated 05.10.2004, a date that falls within the validity period, "*but there was no objection to this alteration*" and "*tacit agreement of the [defendant] could therefore be inferred upon its failure to resist the alteration*" and hence "*it can safely be concluded that the [plaintiff] has made his claim during the validity period of the said advance payment bond*".

I am unable to accept this reasoning by any standard. What did the plaintiff convey to the defendant by P6? The plaintiff stated, "*The under mentioned bonds issued by you in respect of the above contract on behalf of M/s Nimali Builders, 292, Hospital Road, Kelanimulla, Angoda to be with held with immediate effect to keep our rights in accordance with the conditions of guarantee bonds*." Although the learned High Court Judge says that by this expression the plaintiff made an alteration affecting the period of repayment, which was tacitly accepted by the defendant in remaining silent, I cannot arrive at such a conclusion by reading the above. For me, this expression has no clear meaning to warrant a response. Learned State Counsel in this regard refers to issue No. 6 raised by the plaintiff and the answer of the learned District Judge given thereto which reads as follows:

එසේ ගිවිසුම අවසන් කිරීමට සිදුවීම හේතුවෙන් පැ1 අත්තිකාරම් බැඳුම්කරය මත වූ අයිතිය තහවුරු කර ගැනීම සඳහා එකී බැඳුම්කරය රඳවා තබාගන්නා බව විත්තිකරුට 2004.10.05 දිනැතිව දන්වා ඇත්තේද?

මුදල් රඳවා තැබීමට ඉල්ලා ඇත.

In accordance with this issue, the position of the plaintiff before the District Court was that by sending P6, the plaintiff informed the defendant that the plaintiff retains the bond in order to enforce the rights on the bond. The answer given to this issue is that the plaintiff has requested to retain the money. This itself explains that P6 is a document open to different interpretations. P6 is definitely neither a demand for payment on the bond nor a demand or request for further extension of the validity period of the bond beyond 10.10.2004 (the extended period agreed upon by P3).

The bond concerned was payable on demand. What is meant by a demand? A demand in this context means a clear request for payment of an amount due. The ICC Uniform Rules for Demand Guarantees (URDG 758) defines a demand as "*a signed document by the beneficiary demanding payment under a guarantee.*" A working definition for a valid demand was given in *Re Colonial Finance, Mortgage, Investment and Guarantee Corporation Ltd (1905) 6 SR (NSW) 1* cited in *Union Bank of Colombo Ltd v. Emm Chem (Pvt) Ltd and Others* (SC/APPEAL/CHC/22/11, SC Minutes of 07.03.2019):

> *there must be a clear intimation that payment is required to constitute a demand; nothing more is necessary, and the word 'demand' need not be used; neither is the validity of a demand lessened by its being clothed in the language of politeness. It must be of a peremptory character and unconditional, but the nature of the language is immaterial provided it has this effect.*

Contracts of guarantees are generally strictly construed. This happens in both ways: against the guarantor as well as in favour of the guarantor. It all depends on the terms of the guarantee. In *Blest v. Brown* (1862) 45 ER 1225 at 1229, Lord Campbell stated:

> *It must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he has entered into.*

There is no unilateral extension of time in P6, as the learned High Court Judge states, which could have been understood by the defendant to object to or accept tacitly or expressly. Even assuming the language in P6 is crystal clear, can the validity period of the bond be extended unilaterally by the plaintiff? The answer should be in the negative. For how long was an extension sought or agreed upon? There is no such indication in P6. An extension cannot be forever. It is uncontested that P1 provides for entering into "*any subsequent agreement affecting the period of repayment*" but P6 does not constitute a "*subsequent agreement affecting the period of repayment*".

The terms of a written contract cannot be implied in this manner. A high standard is required before a term will be implied into a contract. Imputing a term that the period of payment was extended for an indefinite period without the consent of the other party flouts commercial common sense. Terms are generally implied by necessary implication, by law or by custom. If the wording of a contract is capable of more than one meaning, it should be construed to further the parties' common intention and the essential purpose of the contract. Prof. C.G. Weeramantry in *The Law of Contracts*, vol II, page 572 states that terms are implied when

"*such implication is necessary in order to give to the contract the business efficacy which the parties intended*." However, he adds "*If the document will be effective without the term, no such implication will be made. An implied term cannot be added merely on the ground of reasonableness, but its existence must be a necessary implication from the circumstances of the case and the language of the contract.*"

An implied term can be discerned when it is obvious that such a term should be read into the contract. In *Reigate v. Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 at 605 Scrutton L.J. observed:

> *The first thing is to see what the parties have expressed in the contract…A term can only be implied if it is necessary in the business sense to give efficacy to the contract, that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, "What will happen in such a case?" they would both have replied: "Of course so and so will happen; we did not trouble to say that; it is too clear"*

Similar sentiments were echoed by MacKinnon L.J. in *Shirlaw v. Southern Foundries (1926) Ltd.* [1939] 2 KB 206 at 227:

> *Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, 'Oh, of course.'*

In *Pan Asia Bank Ltd. v. Bentota MPCS Ltd* [2012] 1 Sri LR 51, Basnayake J. observed:

> *The effect of a guarantee, like that of other contracts, depends on the words of the contract. In Smith Vs. Hughes* (*1871) LR 6 QB 597 at 607 Blackburn J said "If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the party's terms". The question to be answered always is what is the meaning of what the parties have said? not what did the parties mean to say (Lord Simon of Glaisdae L Schuler AG Vs. Wickman Machine Tool Sales Ltd. [1973] All ER 39).*

Law of Guarantees by Geraldine Andrews and Richard Millett (6th edn, Sweet and Maxwell) at page 643 states "*the nature of performance guarantees is such that it is very difficult to persuade a court to imply terms into them."* The court cannot imply a term which is inconsistent with the express language of the bond agreed upon (*B.P. Refinery (Westernport) Pty Limited v. Shire of Hastings* (1977) 180 CLR 266, *Duke of Westminster v. Guild* [1985] QB 688). The bond in question expressly stipulates that a demand should be made before 10.10.2004 but no such demand was made.

I have no hesitation in holding that the High Court of Civil Appeal clearly erred when it held that the validity period of the advance payment bond was extended by P6 and therefore the demand made by P7 dated 05.11.2004 is within the extended validity period of the bond. There was no demand made during the validity period of the advance payment bond. I answer the question of law on which leave to appeal was granted in the affirmative, set aside the judgment of the High Court of Civil Appeal, 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

Arjuna Obeyesekere, J.

I agree.

Judge of the Supreme Court

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

SC/ Appeal 175/2016

Supreme Court Special Leave to Appeal Application No. 11/16

C.A Appeal No. CA 413/99 (F)

DC Kegalle Case No. 3781/L

Nandawathie Kodituwakku nee A.R Nandawathie,
Landewelawatte, Karagahawela,
Bandarawela.

Plaintiff

Vs.

1. Wanigasinghe Aratchchige Piyadasa,
   Waharakgoda, Ussapitiya
2. Ananda Ajith Chandralal,
   Landewelawatte, Karagahawela,
   Bandarawela.
3. Sumith Prasanna Rohitha,
   Landewelawatte, Karagahawela,
   Bandarawela.

Defendants

AND BETWEEN

Nandawathie Kodituwakku nee A.R Nandawathie,
Landewelawatte, Karagahawela,
Bandarawela.

Plaintiff- Appellant

Vs.

1. Wanigasinghe Aratchchige Piyadasa,
   Waharakgoda, Ussapitiya
2. Ananda Ajith Chandralal,
   Landewelawatte, Karagahawela,
   Bandarawela.
3. Sumith Prasanna Rohitha,
   Landewelawatte, Karagahawela,
   Bandarawela.

Defendants-Respondents

AND NOW BETWEEN

1. Wanigasinghe Aratchchige Piyadasa,
   Waharakgoda, Ussapitiya

1st Defendant- Respondent- Petitioner

Vs.

Nandawathie Kodituwakku nee A.R Nandawathie,
Landewelawatte, Karagahawela,
Bandarawela.

Plaintiff- Appellant- Respondent

1. Ananda Ajith Chandralal,
   Landewelawatte, Karagahawela,
   Bandarawela.
2. Sumith Prasanna Rohitha,
   Landewelawatte, Karagahawela,
   Bandarawela.

Defendants- Respondents-Respondents

Before: B.P Aluwihare, PC, J.
L.T. B Dehideniya, J.
P. Padman Surasena, J.

Counsels: Ms. L.M.C.D Bandara for the 1st Defendant- Respondent-Appellant
W. Dayaratne PC. With Ms. R. Jayawardene for the Plaintiff-Appellant-Respondent

Argued on: 02.07.2019

Decided on: 18.11.2022

L.T.B. Dehideniya, J.

The Plaintiff-Appellant-Respondent (hereinafter sometimes referred to as the 1st Respondent) instituted an action in the District Court of Kegalle by plaint dated 05.01.1987 seeking a declaration of title and ejectment of the 1st Defendant-Respondent-Appellant (hereinafter sometimes referred to as the Appellant) from the property in question called "Arambahena", more fully described in the schedule to the Plaint. The 1st Respondent's complaint is that the Appellant was in unlawful and forcible occupation in the said property. The 1st Respondent stated that Alexander Reed (1st Respondent's father) was the original owner of the land and it was transferred to his three sons namely, A.R. Jayewardene, A.R. Ananda Ajith Chandralal (2nd Respondent) and A.R. Sumith Prasanna Rohitha (3rd Respondent) by virtue of the Deed No. 5746 dated 14.12.1980 marked **P-1**. A.R. Jayawardane demised unmarried and issueless and his 1/3rd share devolved on his siblings, the 1st, 2nd and 3rd Respondents.

The 1st Respondent states that Alexander Reed, the original owner of the property, gave permission to the Appellant to live in the cadjan house in the said land and to cultivate chena cultivation in the land by the informal agreement dated 07.01.1977 marked as **P-2**.

The Appellant in his amended answer dated 08.03.1991 had denied the title of the 1st Respondent and claimed that the Appellant was in possession of a property called "Egodahena" and not "Arambahena". He claims that the original owner of the said property is one Ukku Banda and on his death it was devolved on his son Punchi Banda. The said Punchi Banda transferred the property to the Appellant by deed No: 3813 dated 10.12.1987 which is a date after filing this case in the District Court. He further claims title to it by way of prescriptive title.

The 1st Respondent's position was that the Appellant entered in to the property in question with leave and license of Alexander Reid and the Appellant is bound to leave the property upon the

request. However, the 1st Respondent stated that the Appellant refused to leave the property on request and continues to remain in occupation of the said property illegally and forcibly.

The Appellant's contention is that he has been in occupation of the land in question and acquired the prescriptive title,

The Learned District Judge decided that lands which were described in the Plaint and the amended answer are similar to each other and there is no dispute on the identity of the corpus. This finding has not been contested in the Appeal. After conclusion of the trial, the learned District Judge delivered the judgement dated 23.04.1999 in favour of the Appellant and dismissed the Plaint, holding that the 1st Respondent has failed to prove her title to the land and the Appellant has proved that he has been in the possession of the land. Being dissatisfied by the said judgement the 1st Respondent tendered an appeal there from to the Court of Appeal. Upon hearing the parties, the Court of Appeal delivering the judgement dated 17.12.2015 in favour of the 1st Respondent, set aside the Judgement of District Court holding that the 1st Respondent has proved the title to the land. It is from the aforesaid judgement that this appeal is preferred.

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

1) Has the Court of Appeal erred in Law by granting the Respondent the relief prayed for by her in paragraph (a) of the prayer to the Plaint, to which the Respondent was not entitled to?

The Appellant's case is based on the ground that the 1st Respondent has failed to prove the title to the land in suit which the Appellant has been in possession for a long period of time. It was further submitted by the Appellant that the Appellant has title to the same land by the Deed No. 3813 dated 10.12.1987. The Appellant denies 1st Respondent's title and the purported license granted by Alexander Reid and denied the cause of action of the 1st Respondent and

further stated that the land in suit was originally owned by Ukku Banda whose intestate rights were devolved on Punchi Banda who had transferred his rights to the Appellant. The Appellant further claimed that the Appellant and his predecessors have been in the possession of the said land for more than ten years and therefore, has a right to claim prescriptive title on long and undisturbed possession.

In the eyes of the law, since the 1st Respondent sought a declaration of title to the property in question, the burden of proof is on the 1st Respondent to prove that he is the owner of the property. This view is supported by a range of judicial decisions. In the case of ***D.A.Wanigaratne v. Juwanis Appuhamy*** 65 NLR 167 wherein this court held that in an action rei vindicatio the plaintiff must prove and establish his title.

A similar view was expressed in the case of ***Dharmadasa v. Jayasena*** [1997] 3 Sri L.R 327.

Per G.P.S. De Silva C.J., at p.330

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

In the case of ***Hariette v. Pathmasiri*** [1996] 1 Sri L R 358 court held that our law recognises the right of a co-owner to sue a trespasser to have his title to an undivided share declared and for ejectment of the trespasser from the whole land because the owner of the undivided share has an interest in every part and portion of the entire land.

Therefore, it is important for this Court to examine whether the 1st Respondent has proved his title. For this purpose, in addition to the paper title, the Court should observe how the parties have exercised their title rights. The 1st Respondent submits that her father Alexander Reid has gifted the land in question to his three sons A.R Jayawardena, the 2nd Respondent and the 3rd Respondent by the Deed No. 5746 dated 14.12.1980 marked **P-1**. When said A.R Jayawardena died unmarried and issueless, his rights were devolved on the 1st, 2nd and 3rd Respondents.

Consequently, the 1st Respondent became entitled to 1/9th share of the land in question and the 2nd and the 3rd Respondents to 4/9 shares each.

The 1st Respondent has led evidence at the trial court to prove that she is a co-owner of the land in suit. According to the District Court judgement (Page 3), the Learned District Judge accepted the same and held that 1st, 2nd and 3rd Respondents are co-owners of the land. The 2nd Respondent had produced the deed marked **P-1** and other documents marked **P-2 to P-8** to substantiate the paper title to the land and no objection was taken at the close of the 1st Respondent's case in the original court. However, after considering the evidence tendered by the 1st Respondent, the Learned District Judge reached conclusion that the 1st Respondent has failed to prove her title to the land and the Appellant has possessed the land for a long period of time.

When deciding which party has proved that he has the title to the land in question, it is important to probe the evidence on how the 1st Respondent and the Appellant has exercised their title rights. The 1st Respondent has led evidence to substantiate that Alexander Reid had leased the land in question to the lessee named G.R Wijeratne in 1965 for five years by deed of lease No.20690 dated 03.07.1965 and afterwards Alexander Reed and G.R Wijeratne filed a case bearing No. 17673 in the District Court of Kegalle to eject three people who were in the unlawful possession of the land in suit. The said case was concluded and the final decree (document marked **P-5)** was entered declaring that Alexander Reed is the owner of the land.

Thereafter, Alexander Reid leased the land in suit to W.A David by the deed No.21439 dated 28.09.1972. Consequently, Alexander Reed filed the case bearing No.1273/L (document marked **P-6**) to eject W.A David and T.D Andiris from the property. When examining the documents including the terms of settlement marked **P-6A**, tendered by the 1st Respondent related to the said case, it appears that W.A David and T. D Andiris has admitted that Alexander

Reid was the owner of the land in question. The 1st Respondent had led evidence to prove that the land was again leased by the deeds of Lease No. 984 dated 13.02.1978 (document marked **P-4**) and No.7922 dated 16.10.1992 (document marked **P-7**) to a lessee named Warshakone. When the trial was taken up, the said lessee Warshakone gave evidence and stated that while he was enjoying the possession of the land in suit under the lessor Alexander Reid, the Appellant was staying at the cadjan house under the license of Alexander Reed. Warshakone further stated that Alexander Reid had given permission to Appellant only to occupy the Cadjan house in the land to attend chena cultivations.

Aforementioned documentary evidence had been marked and produced to the original court without any objection from the Appellant. The said documentary evidence and the evidence of the said witnesses give an indication to Court on how Alexander Reid had exercised his title rights.

When carefully considering all the documentary evidence and oral evidence led by the 1st Respondent, the original owner Alexander Reid and his successors had been exercising their title rights to the land in suit for a long period of time. Further, it is clear to this Court that the 1st Respondent and her predecessors were aware of their rights and actively engaged in protecting their rights.

It is a question with great importance before this Court is that, whether the Appellant has a right to claim prescriptive title to the land in question against the 1st Respondent. Appellant's position is that the Appellant is not a licensee of Alexander Reid and he is not the original owner but the subject matter is originally owned by Ukku Banda whose intestate rights were devolved on Punchi Banda who has later transferred his rights to the Appellant. The Appellant further denied the rights of the 1st Respondent and claimed prescriptive rights by long, uninterrupted and adverse possession over ten years.

Section 3 of the Prescription Ordinance No.22 of 1871 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.

The present law governing the prescription of immovable properties has been discussed in a long line of case law jurisprudence. In the eyes of the law, as a mode of proof of prescriptive possession, mere statements of Defendant's possession of the land by residing on it or cultivating for over ten years is not enough to substantiate the evidence of uninterrupted and adverse possession.

In ***Hassan V. Romanishamy*** 66 C.L.W Vol. LX VI at page 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 vegetables", are not sufficient to entitle him to a decree under section 3 of the Prescription Ordinance, nor is the fact of payment or rates by itself proof of possession for the purposes of this section

Further, it is a well-established legal principle that a person who bases his title in prescriptive possession must show compelling evidence that his possession was hostile to the original owner and the acts of the person in possession should be irreconcilable with the rights of the true owner. This principle is laid down in the case of ***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 the case of ***Jayasinghe Pathman v. Korale Kankanamge Somapala*** (SC Appeal 06/2014, SC minutes dated- 19.11.2021) this Court discussed the distinction between 'occupation' and 'possession' and it was held that in order to possess a land a person must occupy a land with the intention of holding the land as the owner. Further, it is clear that such possession should be proved by specific facts and general statements of witnesses that a person 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.

At p.11

"..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."

When observing the evidence in the present application, it shows that the Appellant has started occupying the land in question with the consent and licence of Alexander Reid. The 1st Respondent had led oral and documentary evidence to prove that the Appellant came into occupation of the land in question under the permission given by way of an agreement (document marked **P-2**).

The Appellant led evidence to establish that he was occupying the land in question as the owner by leading evidence of the renovations that the Appellant made throughout the time. However, according to the proceedings most of the said renovations had been done after instituting this action in the original Court.

Based on the factual evidence and case laws pertaining to the present application, I am of the view that, the Appellant has been residing in the premises as a mere occupant and a licensee of the original owner Alexander Reid. It is quite clear that the 1st Respondent has tendered adequate amount of evidence to display how the 1st Respondent and her predecessors have exercised their title rights by leasing the property to different parties and constituting several actions in the court to declare title before and after the Appellant has started occupying the land in question. Therefore, it appears that the Learned District Judge has erred in deciding that the Appellant has claimed prescriptive title by long possession. The Appellant has failed to prove his adverse possession hostile to the 1st Respondent. Therefore, the Appellant's mere long possession, cultivation and renovations done on the 1st Respondent's property has no legal validity upon claiming Prescriptive rights.

The Appellant's contention is that document marked **P-2** which was signed by the Appellant on 07.01.1977 is a forged document and the Appellant did not sign such document. The Appellant denied the contents of the said document as a whole. Nevertheless, **P-2** was marked subject to proof when it was produced at the Trial, but has not been objected to at the time the 1st Respondent closed his case. By not objecting to the document **P-2** at the time of closing the case, **P-2** has been accepted by Court as a document which was produced in evidence. The Appellant admitted the same in the Court of Appeal. The law consider this legal scenario as *cursus curiae* of the Original Civil Courts.

In the case of ***The Sri Lanka Ports Authority and Another v. Jugolinija-Boal East*** [1981] 1 Sri L.R 18 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."*

Provisions similar to the aforesaid legal principle laid down by ***The Sri Lanka Ports Authority and Another v. Jugolinija-Boal East*** [1981] 1 Sri L.R 18 has been recently introduced to the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, No. 17 of 2022. **Section 3 (a) ii** of the said Act provides that if a document is objected to being received as evidence, but not objected at the close of a case, the court shall admit such deed or document as evidence without requiring further proof.

> **<u>Section 3 (a) ii</u>**
>
> "Notwithstanding anything contained in section 2 of this Act, and the provisions of the Evidence Ordinance, in any case or appeal pending on the date of coming into operation of this Act –
>
> (a) (ii) if the opposing party has objected to it being received as evidence on the deed or document being tendered in evidence but not objected at the close of a case when such document is read in evidence,
>
> the court shall admit such deed or document as evidence without requiring further proof;"

When considering aforementioned legal context with regard to the present application, in a situation where law provides that a document which was not objected at the close of a case shall be admitted in court without requiring further proof, the Appellant of the present application

cannot deny the fact that the document marked **P-2** has already become a proven evidence before the Court. Therefore, it is evident that the Appellant cannot challenge the legal validity of the document marked **P-2** in this Court.

For the circumstances discussed above, it is the view of this Court that the 1st Respondent has proved her title and the Appellant has failed to substantiate his prescriptive title to the land.

I answer the questions of law as follows;

1) No

Therefore, I affirm the judgement of the Court of Appeal.

Judge of the Supreme Court

B.P Aluwihare PC, J.

I agree

Judge of the Supreme Court

P. Padman Surasena J.

I agree

Judge of the Supreme Court

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

Wedikkarayalage Nirosha Sanjeewani,
Adurapotha, Kegalle.
Plaintiff

SC APPEAL NO: SC/APPEAL/180/2011
SC LA NO: SC/HCCA/LA/309/2011
HCCA KEGALLE NO: SP/HCCA/KEG/717/2010(F)
DC KEGALLE NO: 5955/L

Vs.

Hewavitharanage Podimenike,
"Saman Nivasa",
No. 40, Hitinawatte,
Colombo Road, Kegalle.
Defendant

AND BETWEEN

Wedikkarayalage Nirosha Sanjeewani,
Adurapotha, Kegalle.
Plaintiff-Appellant

Vs.

Hewavitharanage Podimenike,
"Saman Nivasa",
No. 40, Hitinawatte,

Colombo Road, Kegalle.
Defendant-Respondent

AND NOW BETWEEN

Hewavitharanage Podimenike,
"Saman Nivasa",
No. 40, Hitinawatte,
Colombo Road, Kegalle.
Defendant-Respondent-Appellant

Vs.

Wedikkarayalage Nirosha Sanjeewani,
Adurapotha, Kegalle.
Plaintiff-Appellant-Respondent

Before: S. Thurairaja, J.
Kumuduni Wickremasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Dr. Sunil Coorey with Sudarshani Coorey for the Defendant-Respondent-Appellant.
Ishan Alawathurage for the Plaintiff-Appellant-Respondent.

Argued on: 27.10.2022

Written submissions:
by the Plaintiff-Appellant-Respondent on 16.02.2012
by the Defendant-Respondent-Appellant on 16.12.2011

Decided on: 21.11.2022

Mahinda Samayawardhena, J.

The plaintiff filed this action against the defendant in the District Court of Kegalle seeking a declaration of title to the land described in the second schedule to the plaint, ejectment of the defendant therefrom, and damages. The plaintiff claimed title to the land on the deed of transfer marked P1 read with the deed of rectification marked P2 executed in favour of her by the defendant. The defendant filed answer seeking dismissal of the plaintiff's action and made a claim in reconvention on the basis that, although the deed appears to be an outright transfer, it was in fact security for a loan obtained from the plaintiff's husband and therefore the plaintiff is holding the property subject to a constructive trust created in favour of the defendant, as the defendant never intended to transfer the beneficial interest in the property to the plaintiff.

The trial commenced on 16.09.1999 with the raising of 23 issues and ended after nearly a decade on 24.06.2009. Both parties called several witnesses and marked several documents. After trial, the learned District Judge by a comprehensive judgment dated 15.03.2010 held with the defendant.

Being dissatisfied with the judgment, the plaintiff appealed to the High Court of Civil Appeal of Kegalle. The High Court set aside the judgment of the District Court and ordered a retrial. This appeal is against the judgment of the High Court. This Court granted leave to appeal on the following questions of law formulated by counsel for the plaintiff:

(a) Did the High Court err in holding that the failure on the part of the learned District Judge to state in his judgment the section of Chapter IX of the Trusts Ordinance under which he had held that the Plaintiff-Appellant was holding the property concerned on a constructive trust

on behalf of the Defendant-Respondent is fatal and affects the very root of the impugned judgment?

(b) Did the High Court err in failing to realize and appreciate that it was under section 83 of the Trusts Ordinance that the learned District Judge has held that the property in suit was subject to a constructive trust, although the learned District Judge did not state so anywhere in his judgment?

(b) Was the failure to mention section 83 in the judgment of the District Judge only a technicality and in no way fatal and did such failure not in any manner affect the legality or validity of the judgment?

(c) Did the High Court fail to act on the principle of law that where a judge had the power to act as he has done, his failure to invoke the correct provision of law in so doing, and/or his invoking the wrong provision of law, does not in any way affect the validity or legality of what he has done?

(d) Did the High Court err by relying on a quotation from the judgment of His Lordship Chief Justice Basnayake in the decision of Wijewardena v. Lenora 60 NLR 457 because the said quotation had no relevance to the decision to be given by the High Court in this appeal?

(e) Did the High Court err in holding that, "this court is of the view that learned counsel appearing on both sides missed the salient point of argument involved in the case", in view of the fact that the point on which the High Court based its decision is totally untenable and bad in law?

(f) Did the High Court err by violating the Defendant-Respondent's right to be heard by the High Court in deciding this appeal when the High Court decided this appeal on a point that had not been raised by either party and on which the Defendant-Respondent had no opportunity of being heard before the High Court?

The learned High Court Judge quite categorically accepts that "*The learned District Judge while pronouncing the impugned judgment had stated the reasons that prompted him to hold that the plaintiff-appellant is holding the property concerned on behalf of the defendant-respondent on a constructive trust.*" He does not state that those reasons are faulty or unacceptable. He accepts them. Then he states that both counsel "*missed the salient point of argument involved in this case*" which "*is fatal and affects the very root of the impugned judgment*". What is this most important point?

The learned High Court Judge says "*a party who is claiming a constructive trust to be in existence has to bring his case within any of the provisions of section 83 to 96 of the Trusts Ordinance…that the learned District Judge had erred himself in law when he failed to mention under which section of chapter IX of Trusts Ordinance that the plaintiff-appellant was holding the property concerned on a constructive trust on behalf of the defendant-respondent*". This is a point that has not been raised by either party before the High Court. It is this point that the learned High Court Judge says "*is fatal and affects the very root of the impugned judgment*". On this basis alone, the judgment of the District Court was set aside and a retrial ordered.

Chapter IX of the Trusts Ordinance (sections 82-98) deals with categories of constructive trusts. But there was no issue at the trial in the District Court or in the High Court on appeal regarding the number of the section of the Trusts Ordinance that is applicable in this case. In the District Court, the plaintiff claimed title to the land on deed P1 read with P2 and the defendant stated that the plaintiff is holding the land relevant to this deed on a constructive trust in favour of her, because she never intended to transfer the beneficial interest in the land to the plaintiff. These positions were expressly stated in the pleadings and in the issues. The

plaintiff knew the defendant's position from the time the answer was filed. At the argument before this Court, in answering a specific question posed by the Court, learned counsel for the plaintiff candidly admitted that on the facts and circumstances of this case there is no doubt that the applicable section is section 83 of the Trusts Ordinance, but regrettably did not accept that the judgment of the High Court was wrong. In my view, the judgment of the High Court is manifestly wrong and must be set aside.

The High Court Judge has cited *Bernedette Valangenberg v. Happuarachchige Anthony* [1990] 1 Sri LR 190 in support of his proposition. But nowhere in that judgment does it state that unless the relevant section of the Trusts Ordinance is mentioned in the judgment, a case filed on a constructive trust must fail. The other case cited by the High Court Judge, namely, *Wijewardene v. Lenora* (1958) 60 NLR 457, has no application at all in resolving this issue.

Although section 149 of the Civil Procedure Code permits the District Judge to amend the issues or frame additional issues at any time before passing the decree, the Judge shall use his discretion with caution, particularly when he unilaterally decides to raise an issue unknown to both parties in the course of writing the judgment.

Although a new issue taken in isolation may appear to be a pure question of law, the Judge needs to analyse the evidence and interpret the law to answer that question. *Hammed v. Cassim* [1996] 2 Sri LR 30 provides a classic example. In that case, during the course of writing the judgment, the District Judge raised the following issue: "*Can the plaintiff have and maintain the action in view of provisions of section 22(7) of the Rent Act?*" The District Judge held with the plaintiff on the issue of reasonable requirement, on the basis of which the case was filed against the defendant for ejectment; but in view of his answer in the negative to this

new issue, he dismissed the plaintiff's action. On appeal, although Ranaraja J. referring to section 149 of the Civil Procedure Code stated "*In the present appeal, the relevant issue is a question of law on which it was not absolutely necessary for the Judge to hear either party before answering it. Thus I am of the view there was no prejudice caused to either party on that score*", after analysing the evidence of the case and interpreting section 22(7) of the Rent Act he came to the conclusion that "*The learned District Judge was therefore in error in holding that the plaintiff was debarred by section 22(7) from instituting the action against the defendant*". Had the District Judge afforded the parties an opportunity to make submissions on that legal issue before the pronouncement of the judgment, the learned District Judge also should have come to the same conclusion. This does not mean that a Judge cannot raise an issue and answer it during the course of writing the judgment without hearing the parties; he can, but he must exercise his discretion with restraint and circumspection. The case must be decided by the Judge as it was presented before him by the rival parties, keeping in mind that the system of justice we practice is adversarial, not inquisitorial. Even if it is inquisitorial, the Judge cannot decide a matter without giving a hearing to both parties. The rule of *audi alteram partem* is applicable to all decision-making authorities including Judges.

Let us assume that citing the section in the judgment is a legal requirement. What prejudice did failure to do so cause to either party? For all intents and purposes, the trial proceeded on the basis that the defendant asserts a constructive trust against the title deed of the plaintiff in terms of section 83 of the Trust Ordinance. The District Judge accepted the defendant's position. The matter shall end there. Whilst setting out the jurisdiction of the Court of Appeal, the proviso to Article 138 of the Constitution states, "*no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity,*

which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

Is it necessary to cite the section in the judgement and does failure to do so vitiate the judgment? When invoking the jurisdiction of a Court it is salutary to mention the specific section under which it is invoked. But if a party fails do so or cites a wrong section in this process, the application need not be dismissed if the Court has jurisdiction to deal with the matter, unless it has caused prejudice to the opposite party to meet the plaintiff's case. The same will apply to any other decision including judicial pronouncements: citing the wrong section or failure to cite the relevant section by the Judge in the order or judgment will not *ipso facto* vitiate the decision.

Bindra on the Interpretation of Statutes (1975) 6th Ed. at page 153 states:

> *It is a well-settled principle of interpretation that as long as an authority has power to do a thing, it does not matter if it purports to do it by reference to a wrong provision of law.*

Solicitor-General v. Perera (1914) 17 NLR 413 was a criminal case filed under the Excise Ordinance where the license to sell liquor was cancelled for failure to make some payment due. The Government Agent cancelled the license under section 26(1)(a) of the Ordinance when the correct section was section 26(1)(b). When the conviction for selling liquor without a license was contested in appeal on this basis, Pereira J. rejected it stating at page 416 "*the fact that sub-section (a) of section 26 was cited did not render the cancellation of the license any less effectual. The Government Agent was not bound to cite any section at all.*"

In *Peiris v. The Commissioner of Inland Revenue* (1963) 65 NLR 457 it was held that a certificate issued to the Magistrate in recovery proceedings under section 80(1) of the Income Tax Ordinance was not invalidated by

the mistake of the Assistant Commissioner of Inland Revenue where he had purported to act under section 64(2)(b) although the correct procedure would have been under section 65. Sansoni J. (later C.J.) stated at 458: "*It is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another Statute which conferred that power.*" This was quoted with approval by Soza J. in *Leechman & Co. Ltd. v. Rangalla Consolidated Ltd* [1981] 2 Sri LR 373 at 379-380 and *Kumaranatunga v.* Samarasinghe [1983] 2 Sri LR 63 at 73-74. *Vide* also *Jayawardane v. Ran Aweera* [2004] 3 Sri LR 37 at 41.

I answer all the questions of law upon which leave was granted in the affirmative and set aside the judgment of the High Court and restore the judgment of the District Court. The defendant is entitled to costs in all three Courts.

Judge of the Supreme Court

S. Thurairaja, J.
I agree.

Judge of the Supreme Court

Kumuduni Wickremasinghe, J.
I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

SC/APPEAL/184/14

SC (HCCA) LA No. 498/2012

SG/HCCA/RAT Appeal No. 80/08 (F)

District Court of Ratnapura

Case No. 7251/L

Gallage Saummehammy alias Somawathie,

Gallage Mandiya,

Doloswala, Nivithigala.

Plaintiff.

Vs.

I. A. Dharmapala,

Gallage Mandiya,

Doloswala, Nivithigala.

Defendant.

AND BETWEEN

I. A. Dharmapala,

Gallage Mandiya,

Doloswala, Nivithigala.

Defendant - Appellant

Vs.

Gallage Saummehammy alias Somawathie,

Gallage Mandiya,

Doloswala, Nivithigala.

Plaintiff - Respondent.

AND NOW BETWEEN

Gallage Saummehammy alias Somawathie,

Gallage Mandiya,

Doloswala, Nivithigala.

Plaintiff – Respondent - Petitioner.

Vs.

I. A. Dharmapala,

Gallage Mandiya,

Doloswala, Nivithigala.

Defendant –Appellant – Respondent.

Before: Priyantha Jayawardena, PC, J.

Vijith K. Malalgoda, PC, J.

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

Counsel: B.O.P. Jayawardena with Oshada Rodrigo for the Plaintiff – Respondent – Petitioner.

Arosha Silva instructed by Ms. Sheela Jayawardena for the Defendant - Appellant – Respondent.

Argued on: 10.12.2019

Decided on: 08.09.2022

E. A. G. R. Amarasekara J

Introduction

The Plaintiff – Respondent – Petitioner (hereinafter referred to as the Plaintiff – Petitioner or the Plaintiff) instituted an action in the District Court of Ratnapura against the Defendant – Appellant – Respondent (hereinafter referred to as the Defendant – Respondent or the Defendant) by her plaint dated 08.02.1985, inter alia praying for a declaration of title to the land described in the schedule 'B' and for ejectment of the Defendant and his servants and agents etc. from the land described in the schedule 'C' of the plaint which is a portion of the land described in the schedule 'B'. The said plaint was amended thrice, and by the final amended plaint dated 02.02.2001, the Plaintiff inter alia prayed for a declaration of title to the land described in the schedule 'A', for the ejectment of the Defendant and others claiming under him from the land described in the schedule 'C' to the plaint and for damages. However, the position of the Plaintiff is that this prayer for declaration of title to the land described in schedule 'A' to the final amended plaint was an obvious oversight- vide her written submissions dated 13.11.2014. As per the paragraphs 6,7 and 10 of her final amended plaint, in fact she has claimed a declaration of title to the land described in schedule 'B' and 'C' to the amended plaint and land described in 'C' has been described as a part of land described in schedule 'B' to the plaint. The land in schedule 'B" has been described as a separated portion of the land in schedule 'A' of the said amended plaint with the consent of other co-owners, from the latter part of 1964.

<u>The stance taken by the Plaintiff in her final amended Plaint.</u>

The plaintiff in her final amended plaint inter alia averred that;

- The land described by the schedule 'A' to the amended plaint was owned by Gallage Pinhami, Gallage Mithuruhami and Gallage Dingirihami in equal proportions, namely 1/3rd each.
- Subsequent to the demise of Pinhami his undivided 1/3rd share to the land was devolved on his sons namely, Appuhamy and Mudalihamy in equal proportions.

- Subsequent to the demise of Appuhamy his undivided 1/6th share devolved on his son Gallage Rathranhamy only, owing to the fact that Appuhami's daughters contracted deega marriages.
- Said Rathranhamy transferred the undivided 1/6th share owned by him to his daughter, the Plaintiff, subject to his life interest by deed of gift No. 403 dated 18.05.1964. Subsequent to the demise of Rathranhamy plaintiff became entitled to undivided 1/6th share.
- Thereafter, with the consent of the other co-owners to the land the Plaintiff separated a part from the said land and built a house therein. Said separated land possessed by the plaintiff is depicted in Plan No. 3078 prepared by Ramakirishnan, Licensed Surveyor which is described in schedule 'B'.
- The Plaintiff and her predecessors were in prescriptive possession in the land described in the schedule 'B' for a period of more than 10 years and has acquired prescriptive title to the said land.
- On or around February 1984 the defendants who had no right whatsoever to the land described in the schedule 'B' entered into a portion in the southern side of the said land stating that it is part of Brahmanagewatte and started unlawful possession of that part causing damages. Said portion unlawfully possessed by the defendant is depicted as 2A in the plan No. 3078 A and is described in schedule 'C'.
- Lots No. 13 and 15 along with lot No.2A of the said plan No. 3078A were in the possession of the Plaintiff for more than 10 years and she has acquired prescriptive title to them.

The stance taken by the Defendant.

The Defendant filed his answer dated 25.02.1988 and amended the same on 21.01.1997. In the amended answer the defendant inter alia stated that;

- Although the Plaintiff has stated that she got her undivided 1/6th share separated from the land described in the schedule 'A' to the amended plaint, which is of nearly 3 acres in extent, with the consent of the other co-owners and started possessing the said separated block of land of 1A:0R:1Perch, the other co-owners never agreed to such separation.

- The Plaintiff claims that she became entitled to the said land by deed of gift No. 403. However, no plan depicting the said 'Meneriwatta' or 'Meneri Owita' mentioned in the said deed has been tendered. The plan produced by the plaintiff is a plan prepared by the Land Reform Commission which has no connection with neither the Plaintiff nor the Defendant, and the Plaintiff has superimposed the said plan with a part of plan no. 1291 produced by the Defendant. Anyhow, there is no land called 'Meneriwatta' or 'Meneri Owita' found in the said plan no.1291.

- Without prejudice to what is stated above, being a co-owner, the Plaintiff cannot claim a divided specific portion of land from this action.

Further replying to the plaint, the Defendant has set out a pedigree starting from Brahmanage Mithruhamy and Mudalihamy as the original owners to a land called Brahamanagewatte and Owita which is described in the schedule to the amended answer. As per the said pedigree he has shown his entitlement to 1/15th of the said land and his position is that, for that 1/15th share, he is in possession of lot 15 of plan no.1291 dated 19.11.1993 made by Sirinanda Pasquel, Licensed Surveyor to the said land. It appears that, as per the stance taken up by the Defendant, the Defendant's contention is that by superimposing a plan made by Land Reform Commission with the said plan the Plaintiff has attempted to claim a portion from said Brahmanagewatta and owita as part of Mineriwatte alias Mineriowita. Accordingly, the Defendant – Respondent claimed undivided rights to a land called 'Brahmanagewatta' alias 'Owita' and prayed for the dismissal of the action filed by the Plaintiff. The Defendant has claimed damages for his plantation in case the court decides in favour of the Plaintiff.

The Plaintiff filed a replication replying to the claim in reconvention made by the Defendant refuting the claim of the Defendant to plantations.

Trial

After filing of the pleadings, the trial has proceeded on 15 issues raised and out of them 1st – 6th issues were made on behalf of the plaintiff and 7th to 15th issues were made on behalf of the Defendant. Through their respective issues, the Plaintiff has attempted to focus on his alleged title to the land named Lot 2 of Minneriwatte alias Minneriowita of plan no.563 made by L. U. Kannangara L.S and more fully

described in the schedule 'B' to the final amended plaint and to the portion allegedly encroached by the defendant from the said land described in schedule 'B' which is described in the schedule 'C' to the plaint as lot 2A of plan no. 3078 made by S. Ramakrishnan L.S, while the Defendant has attempted to claim title to a land named Brahmanagewatte and Owita as per his amended answer.

The Plaintiff and one Dingirimahaththaya had given evidence for the Plaintiff's case and the Plaintiff had closed her case reading in evidence the documents marked P1, P1a, P2, P2a, P3 and Z and no objections were raised or reiterated to the said documents at the close of the plaintiff's case-vide journal entry dated 28.06.2007. The Defendant had given evidence and closed his case reading in evidence the documents marked V1, V1a, V2, and V3. The Defendant's documents also were not objected at the close of the Defendant's case. Hence, all the afore-mentioned documents can be considered as evidence for all the purposes of the case at hand. Further, the learned District Judge has referred to the deed marked P4 in his judgment. Even though there is no reference to such marking of the said deed in evidence, no party has taken up the position that the learned District Judge had considered a document that was not tendered in evidence. In fact, the Plaintiff has given evidence with regard to the contents of the said deed no.403 on 12.09.2001. Perhaps, due to a clerical error the marking of the said deed has not gone into the proceedings.

District Court Judgment

Subsequent to the trial, learned District Judge delivered the judgment on 19.06.2008 answering the issues in favour of the Plaintiff and allowing the prayer of the plaint inter alia for the following reasons;

- As per the plaintiff's stance, the original owners to the land named Mineriowita alias Mineriwatta, the land claimed by the Plaintiff, were Pinhamy, Mudalihamy (Correct name as per evidence shall be Mithuruhamy) and Dingihamy and after the death of Pinhamy his 1/3rd share devolved upon Mudalihamy and Appuhamy. On the death of Appuhamy, his 1/6th share devolved upon Rathranhamy due to the deega marriage of his sisters. Rathranhamy was the father of the Plaintiff and he conveyed his 1/6th share to the Plaintiff. Thus, the Plaintiff became entitled to 1/6th share by deed No. 403, marked P4 and the defendant had not shown that this evidence relating

to the plaintiff's rights cannot be accepted. Thus, it can be accepted that the plaintiff is entitled to 1/6th share.

- The defendant claims his entitlement to Brahmanagewatta and Owita but his stance that Gallage clan and Brahmanage clan amicably partitioned and possessed 1/2 each of the said Brahmanagewatta cannot be accepted since the Defendant resides, as per his address, in Gallage Mandiya that belongs to Gallage People.
- The chain of title stated by the defendant to the land he claimed lacks clarity and therefore failed to establish the devolution of title to him.
- However, in a declaration of title case, the Plaintiff must prove his title.
- As the evidence of both parties is compatible as to the time the Plaintiff came to reside in the land, it can be accepted that the Plaintiff came to reside in the land somewhere close to 1981 (it appears it was wrongly typed as 1918 when it should be 1981 as per the reference to the relevant item of evidence -vide paragraph 2 of the page 7 of the District Court Judgment.).
- As per the evidence led by both parties, it is clear that the dispute has arisen owing to the lack of clarity relating to the boundary between the lands they claimed, and the disputed portion of land of 4.8 perches is depicted in plan no.3078 made by S. Ramakrishnan, marked P1.
- Even though there is evidence to show Defendant's occupation in the land he claimed for a very long time, the Defendant has failed to establish that the defendant acquired prescriptive rights over the disputed portion of land as part of the said land he claimed by adducing substantial evidence.
- The plan no.1291, marked V1 to show the land claimed by the Defendant, cannot be used reliably in deciding the rights as it was prepared at the instance of the Defendant without the participation of the Plaintiff and the southern boundary of lot 13 of that plan, which is described as the Plaintiff's land by the Defendant, is an undefined boundary. However, as per the superimposition plan marked P2, made by S. Ramakrisnan L.S, the disputed portion shown as lot 2A in Plan marked P1 is found within lot 15 of V1 for which the Defendant claim possession and title and the dispute is that the Defendant has encroached and has been in the possession of Lot 2A claimed by the Plaintiff.

- Plan No. 563 made by L. U. Kannangara L S, produced by the Plaintiff marked Z can be preferred over the Defendant's plan marked V1 since the said plan Z had been prepared by an independent source, long before the present dispute arose. As per the said plan, it is proved that the Lot 2 of the said plan is Meneriwatta which belongs to the Plaintiff. The Plaintiff claims that lot 2 is in her possession in lieu of 1/6th share she has. Even the Plaintiff has described schedule B of the Plaint using this Plan. Lot 4 of this plan, which is below lot 2, is Brahmanagewatta claimed by the Defendant. Even plan P1 depicts the lot 2 of this plan marked Z and the superimposition plan marked P2 has shown lot2 of P1 in green. Thus, it is established that disputed portion of land, namely lot 2A falls within the Plaintiff's land Mineriwatta but now it has gone into the land of the defendant. Hence, it is established that the disputed portion of land of 4.8 perches belongs to the Plaintiff.
- The Plaintiff has not led evidence with regard to the compensation and even though, the Defendant has claimed compensation for the plantation he has not led evidence as to the plantation within the disputed area and its value.

Based on the reasons elaborated above, the learned District Judge of Rathnapura decided that the Plaintiff is entitled to the land described in the schedule B to the plaint and to the plantations and buildings standing thereon and further to eject the Defendant and everyone under him from the land described in the schedule C to the plaint and to restore the possession of it to the Plaintiff with costs of the action.

Judgment of the Provincial High Court of Civil Appeal

Being aggrieved by the said judgment the Defendant preferred an appeal to the Provincial High Court of Civil Appeals of Sabaragamuwa Province holden at Ratnapura. Subsequent to the hearing, Learned High Court judges by their judgment dated 03.10.2012 dismissed the action of the Plaintiff inter alia on the following grounds;

- As stated in the plaint, evidence and the written submissions of the plaintiff, even though it is clear that the Plaintiff has basically claimed entitlement only to 1/3rd share of the land described in the schedule A to the plaint, she has stated in the plaint that the Defendant is a trespasser and she filed this action

for a declaration to the effect that she is the owner of the land more fully described in the schedule A to the plaint.

- Even though, an owner of an undivided share of a land can obtain a judgment in favour of him to evict a trespasser and to have his title to the undivided share declared, he cannot obtain a judgment in favour of him for a declaration of title to the whole land and for the eviction of the trespasser without making the other co-owners parties to the case. Therefore, the petitioner cannot maintain this case. Further, if a co-owner wants to institute an action to evict a trespasser from a co-owned land, he is able to do so only if he prays for a declaration of title to his undivided share and accordingly prays to evict the trespasser (In this respect, the learned High Court Judges have referred to certain decision of our superior courts, namely **Hevawitharana V Dangan Rubber Company 17 N L R 49, Sura V Fernando 1 A C R 95, Unus Lebbe V Zayee 1893(3) S C R 56, Arnolisa V Dissan 4 N L R 163** etc.)
- Section 12 of the CPC allows a plaintiff to file an action only for his undivided shares.
- The Plaintiff while claiming entitlement to 1/3 share of the land cannot maintain an action to declare title to the entire land and therefore, there is a reason to dismiss the Plaintiff's action.

On the footing of the aforementioned reasons, the learned High Court Judges have dismissed the plaint without costs. Even though there is no declaration as to the allowing or dismissal of the appeal made to it, the outcome of the above decision amounts to an allowing of the appeal made to it since the judgment of the High Court of Civil Appeal overturns the Judgment of the learned District Judge referred to above.

Appeal to this Court

Being aggrieved by the judgment delivered by learned High Court Judges the Plaintiff preferred an appeal to this court. The matter was supported before this court on 03.10.2014 and this court was inclined to grant leave to appeal on the grounds laid down in paragraph 18 subparagraphs (i), (ii), (iii), (iv) and (v)of the petition dated 12.11.2012 (Vide journal entry dated 03.10.2014). Thereafter, this matter was taken up for argument on 10.12.2019 and on that date, parties have

agreed before this court to confine this appeal to the questions of law set out in paragraph 18 subparagraphs (iv) and (v) of the petition dated 12.11.2012 (vide journal entry dated 10.12.2019) which are as follows;

> "(iv) Have the Learned High Court Judges erred in law when they decided that a co-owner cannot have and maintain an action to eject a trespasser without making other co-owners, parties to the action?
>
> (v) Have the Learned High Court Judges erred in law when they decided that the District Court has no authority to declare a co-ownership to the corpus in the action?"

Moreover, this court raised the following question of law arising from the judgment of the Civil Appellate High Court dated 03.10.2012;

> "Did the High Court erred in law by holding that a co-owner of a land is not entitled to claim for a declaration to the entire land?"

As per the direction parties also have filed written submissions.

Analysis

First of all, it must be noted that the action filed in the District Court was not an action against the other co-owners but an action to evict the purported trespasser, namely the Defendant. Thus, other co-owners are not bound by the said judgment. In the last amended plaint, the Plaintiff has averred that he was a co-owner to the land described in the schedule A to the plaint and got the land described in the schedule B to the plaint separated in lieu of his entitlement to the share in land described in the schedule A and became the owner of that portion of the land described in the schedule B of the plaint and the Defendant is in unlawful and forcible possession of the land described in the schedule C of the plaint which is a portion of the land described in the schedule B to the plaint. The Plaintiff has even claimed exclusive title by prescription to the said separated portion of land described in the schedule B to the plaint. The alleged cause of action is based on violation of his rights emanating from his title to the land described in the said schedule B to the plaint by the said encroachment triggering his entitlement for a declaration of title to said portion of land described in schedule B to the plaint and eviction of the defendant from the land described in schedule C to the plaint with damages claimed in the plaint- vide paragraphs 2 to 10 of the amended plaint dated

02.02.2001. It appears even the issues raised on behalf of the plaintiff on 12.09.2001 were based on the same premise as averred in the body of the plaint- vide issues no. 1 to 6. Thus, it appears that the prayer no. 1 for a declaration of title to the land described in the schedule A to the plaint is a mistake as the body of the plaint contains a cause of action based on the Plaintiff's sole title to the land described in the schedule B to the plaint. However, I do not think this mistake itself is sufficient to dismiss the Plaintiff's action since, if there is an error in the prayer no.1, the Court may decline to grant relief under prayer no.1 and consider the possibility of granting relief in prayer no.2 to 4 if the cause of action is proved. Further, as decided in the cases **Dharmasiri V Wickrematunga (2002) 2 Sri. L. R 218** and **Jayasinghe V Tikiri Banda (1988) 2 CALR 24**, in a declaration of title action, absence of a prayer for declaration of title does not prevent the relief of ejectment, if in the body of the plaint title is pleaded and issues were framed and accepted by the court accordingly, and the title of the plaintiff is proved. Thus, in a declaration of title and ejectment case or in a *rei vindicatio action* what is necessary is to prove title to the disputed portion of land and its unlawful possession by the Defendant. Therefore, in the case at hand, to grant reliefs under prayers no 2 to 4, it is sufficient to prove title to the land in schedule B to the plaint and the unlawful possession of the Defendant in the portion of land in schedule C to the plaint which is a portion of land in schedule B to the plaint along with the damages caused, even if it is assumed that there is an error in the prayer no.1 when it is read with the body of the plaint. However, learned District judge has not granted damages prayed for as no assessment of damages was placed before the District Court.

As per the answer given to the issue no.3 raised at the trial and the reasons given by the learned District Judge it is clear that even the learned District Judge did not consider that the Plaintiff has established exclusive title of the Plaintiff by prescription to the land described in the schedule B to the Plaint, but both the judgments of the courts below have considered that the evidence led at the trial has established the Plaintiff's co-ownership to the land described in schedule A to the Plaint. Even the Plaintiff while giving evidence has admitted there are other co-owners. Hence it is a correct finding that the Plaintiff has not proved her sole prescriptive title to purported separated portion in schedule B of the plaint, but due to P4 and oral evidence the plaintiff had given, it is clear that at least she should be a co-owner to the land in schedule A. Thus, her co-ownership to the portion

described in schedule B also has to be considered as established since it becomes a part of the land in schedule A. The learned District Judge in his judgment at page 4 has indicated why he accepted that the Plaintiff had 1/6th share in the land described in schedule A to the plaint. Even though the Plaintiff is in possession of the land described in the schedule B to the plaint except the disputed portion she, as explained above, has not established that she acquired prescriptive title to the said separated portion described in schedule B to the Plaint against the other co-owners. Then as said above she at least remains a co-owner to the land described in the schedule A and B to the plaint. Even the learned High Court Judges have not found fault with the learned District judge for his conclusion that the Plaintiff is still a co-owner of Minneriwatte, and it does not appear to be in dispute even before us.

The Defendant supports the position taken by the learned High Court judges which was to the effect that even though a co-owner can seek a declaration for his co-ownership as well to eject a trespasser, a co-owner cannot claim the ownership for the entire property without making other co-owners parties to the case, and therefore he cannot maintain this case. Thus, the Defendant does not challenge the co-ownership of the Plaintiff but he challenges the judgment of the District Court on the ground that the Plaintiff as a co-owner cannot file and maintain this action claiming title to the entire property without making other co-owners parties to the action. On the other hand, the Plaintiff challenges the conclusions reached by the learned High Court judges.

Without shifting away from the inference made above that prayer no.1 in the plaint is an error as per the contents of the body of the Plaint which should not be considered in granting relief, even if it is considered as a correct prayer, it is relevant to see whether the Plaintiff has prayed there to declare him as the sole owner of the entire land described in the schedule A to the Plaint as it appears to be one of the conclusions of the learned High Court Judges for their decision to dismiss the Plaint. What is prayed in Sinhala in prayer no. 1 is as follows;

“ මෙහි පහත ‘අ’ උපලේඛනයේ සඳහන් ඉඩමේ සහ එහි වගාවේ සහ ගොඩනැගිලිවල හිමිකම් පැමිනිලිකාරිය සතු බව ප්‍රකාශ කරන ලෙසටත්”

What is prayed there was not that he be declared as the sole owner but to declare his title or entitlement to the land described in schedule A to the plaint. A co-owner

has title or entitlement to every grain of sand in the entire land along with the other co-owners to the extent of his share. Nowhere in the body of the plaint the Plaintiff has referred to the sole ownership of land described in the schedule A to the plaint. The prayer has to be understood in accordance with his stance in the body of the plaint. Thus, it appears the learned High Court Judges misread the prayer no. 1 as one claiming sole ownership to the land described in schedule A to the plaint. As per the plaint, she has claimed exclusive prescriptive title to portion in schedule B of the plaint which she failed to establish and evidence only proved her co-ownership.

Even though the Plaintiff failed in proving her sole ownership to the land in schedule B of the plaint in the manner stated in the body of the amended plaint, she has proved that at one time she became an owner of $1/6^{th}$ share of the land in schedule A of the plaint which is the bigger land. When the court found that she failed to prove her exclusive title to the carved out smaller portion in schedule B, her status would remain as a co-owner to the larger land as well as to the carved out smaller portion in schedule B. Disputed portion described in schedule C to the plaint has been described as part of schedule B of the plaint. Now it becomes pertinent to see:

- Whether a co-owner needs to add other co-owner/s as a party / parties to such an action filed to eject the trespassers, and
- Whether a claim of sole ownership to a portion of land by a co-owner disqualified him/her from being successful in obtaining relief to eject a trespasser from the said land.

Unus Lebbe V Zayee (1893) 3 S C R 56 was decided as far back as 1893 and it was held that one of several owners of a land may maintain an action against a trespasser without making his co-owners parties to the suit. **Arnolisa V Dissan 4 N L R 163** was an action filed by some of the co-owners against another set of co-owners. There it was sent back to the original court to add other co-owners. However, in the course of the Judgment Bonser C.J referring to a previous decision by Phear C. J. and Berwick A. J. reported in 2 S.C. C. 148 had stated that an action of that sort could not be maintained unless the other co-sharers were made parties to it, and that, while it might be competent to one of several co-owners to bring an action against a mere transgressor who interfered with his possession without

joining the other co-owners as co-plaintiffs, it was not competent, where the defendant was not a mere trespasser, but was a co-owner, to maintain such an action in the absence of some of the co-owners. **Geeta V Fernando (1905) 4 Bal.100** is another example to show that a joint owner need not join the other co-owners to sue for the ejectment of a trespasser. Thus, it is clear that our law even as far back as early 19th century accepted the competency of a co-owner to sue a trespasser without making the other co-owners parties to his action against the trespasser. Though not directly related to the ejectment of a trespasser, In **Rockland Distilleries V Azeez 52 NLR 490** it was held that a co-owner can institute an action for damages caused to the common property without joining the other co-owners as parties to the action.

After considering some of the cases referred above, in **Hevawitarane V Dangan Rubber Co. Ltd. 17 N L R 49** Pereira J. Stated as follows;

"I *have always understood the law, both before and after the coming into operation of Civil Procedure Code, to be that the owner of an undivided share of land might sue a trespasser to have his title to the undivided share declared and for ejectment of the trespasser from the whole land, the reason for this latter right being that the owner of the undivided share has an interest in every part and portion of the entire land*."

Thus, it is clear a co-owner gets this right as a vindication of his title in every part and portion of the entire land, which title he holds in common with the other co-owners. Even if other co-owners are not made parties to the action, a co-owner should have to be permitted to sue the trespasser when such an act of trespass violates his rights of ownership or title. In the case presented by the plaint, the cause of action was based on violation of the plaintiff's rights as the owner of the land described in the schedule B to the plaint. Even it is proved that she is not the sole owner but a co-owner, violation relates to her rights as an owner.

It is worthy to refer to **Hariette V Pathmasiri (1996) Sri L R 358** where the plaintiff of that case appeared to have co-ownership to the land in schedule 1 of that case and ejectment of the defendant was sought from the land in schedule 2 of that case which was a part of the land in said schedule 1 with a declaration of title to said land in schedule 2, and where defendant claimed prescriptive title to said land in schedule 2 against the claim of plaintiff that the license given to the defendant was

terminated. The plaintiff in that case did not give evidence and it appears that the plaintiff in that case was only able to prove his rights to the undivided share in the land in schedule 1 of that case and evidence of termination of the license was not reliable to be acted upon. Even though the learned justices in that case had referred to the afore-mentioned **Hevawitarane V Dangan Rubber Co.Ltd.** decision and afore quoted paragraph from the said judgment, they came to the conclusion that the plaintiff in that case had not sought a declaration of title to the undivided share to the land in schedule 1 of that case and for the ejectment of the defendant but had pleaded that she possessed the land in schedule 2 in lieu of her undivided share and sought for the ejectment of the defendant from that land, and as thus, she cannot stop at adducing evidence of paper title to an undivided share but it was her burden to adduce evidence of exclusive possession and the acquisition of prescriptive title by ouster in respect of the smaller land described in schedule 2. It appears that the said case was decided against the plaintiff in that case since she failed to prove the case formulated by her.

I must admit that there are certain similarities between the present case at hand and the said **Harriet V Pathmasiri**, since even in this case the Plaintiff had averred that she had once entitled to undivided share in the land in schedule A to the plaint and in lieu of that she had prescribed to land in schedule B to the plaint. However, the said **Harriet V Pathmasiri** can be distinguished from this irrespective of the other reasons given in that decision since the termination of license was not proved, the cause of action based on unlawful possession as a trespasser could not have been succeeded. With regard to the other reasons stated in that decision, I observe that it has not been considered in that decision the entitlement of a plaintiff to get a lesser relief than what he has prayed for in the plaint- see **Allis V Seneviratne and Others (1989) 2 Sri L R 335**. However, in that backdrop, it is pertinent to discuss the decision in **Attanayake V Ramyawathie (2003) 1 Sri L R 401**. Her ladyship Bandaranayake J (as she then was) has delivered the judgment while His lordship Yapa J and His Lordship S N Silva CJ who wrote the judgment in the above **Harriet V Pathmasiri** case agreeing to her judgment. The afore referred **Hewavitharana V Dungan Rubber Company Ltd, Harriet V Pathmasiri and Allis V Senavirathna** were among the previous decisions that have been considered in the said Judgment of **Attanayake V Ramyawathie**. The plaintiff in said **Attanayakae V Ramayawathie** sued the defendant not as a co-owner but as the owner for a

declaration of title to the land in suit and ejectment of the defendant. Defendant also claimed title to the same land. The said plaintiff lost his case due to the fact he failed to prove title to the land she was claiming in the said case. The court further observed that the defendant in that case remained as a licensee. However, with regard to the question whether a co-owner of a land who sues a trespasser for a declaration of title and ejectment is entitled to maintain the action if he institutes the action as the sole owner of the premises, the court held as follows;

"*I am of the firm view that, if an appellant had asked for a greater relief than he is entitled to, the mere claim for a greater share in the land should not prevent him, having a judgment in his favour for lesser share in the land. A claim for a greater relief than entitled to should not prevent an appellant from getting a lesser relief. However, it is necessary that the appellant adduces evidence of ownership for the portion of land he is claiming for a declaration of title. It is amply clear that the appellant in the instant case has not been able to adduce such evidence.*

In such circumstances the question raised by the counsel for the appellant is answered in the following terms. A co-owner of land who sues a trespasser for a declaration of title and ejectment is entitled to maintain the action even if he instituted the action as the sole owner of the land and premises. The fact that an appellant has asked for a greater relief than he is entitled to, should not prevent him from getting the lesser relief which he is entitled to. However, in such a situation, there is a burden on such person who makes the claim, to adduce evidence of ownership to the allotment of land."

What has been referred above establish that in our law a co-owner need not add other co-owners as parties to the action filed to eject a trespasser but he has to prove his title/ownership to the land he claims and further that a claim of sole ownership to a portion of land by a co-owner does not disqualify him/her from being successful in obtaining relief to eject a trespasser from the said land.

For the foregoing reasons I am of the view that even though the learned high court judges referred to some relevant decided cases they erred in law when coming to the conclusions they reached.

The learned District Judge has correctly found that the Plaintiff is still a co-owner to the main land described in the schedule A to the plaint, and has not established his prescriptive title to the purported separated portion of the said land depicted

in schedule B to the plaint. He has given sufficient reasons to say why he accepts that disputed portion depicted in schedule C belongs to the land claimed by the plaintiff, namely Minneriwatte alias Meneriowita, referring to the relevant plans and superimpositions done. The land claimed by the Defendant is Brahmanage watte. Though, there is evidence to show that there had been a dispute for a considerable period of time in relation to the disputed area and the boundary separating the two lands, the Defendant has failed in establishing that he had adverse possession to the identified portion as the disputed area for more than ten years.

Thus, I answer the questions of laws as follows;

1. Have the Learned High Court Judges erred in law when they decided that a co-owner cannot have and maintain an action to eject a trespasser without making other co-owners, parties to the action?

Yes

2. Have the Learned High Court Judges erred in law when they decided that the District Court has no authority to declare a co-ownership to the corpus in the action?

Yes, however, it is not necessary to have a prayer for declaration if the title is averred and proved.

3.Did the High Court erred in law by holding that a co-owner of a land is not entitled to claim for a declaration to the entire land?

Yes. Even if he has claimed ownership to the entire land, lesser relief declaring that he is only a co-owner can be granted by the court. On the other hand, prayer for a declaration of title is not a must in a vindicatory action, if the title is averred and proved. As per our law even a co-owner is entitled to obtain the relief of ejectment of a trespasser. However, even though it is proved that plaintiff is a co-owner to the land in schedule A to the plaint, it is not proper to grant the relief in prayer (1) to the plaint when the Plaintiff herself takes up the position that it is a prayer made by mistake. It appears the learned district judge has not granted relief as per prayer (1) to the plaint. The learned District Judge in his judgment at page 12, second paragraph, has stated the Plaintiff has title to the land described in the schedule B to the plaint and to the buildings and plantation standing thereon. As per the

reasons given in the judgment of the learned District Judge and above in this judgment, it has to be understood as the title she has as one of the co-owners of the said land.

For the reasons given above, we set aside the judgment dated 03.10.2012 of Civil Appellate High Court of Ratnapura and affirm the judgment dated 19.06.2008 of the District Court of Ratnapura.

The Appellant is entitled to the costs in this court as well as to costs in courts below.

…….

Judge of the Supreme Court

Priyantha Jayawardena, PC, J

I agree.

……

Judge of the Supreme Court

Vijith K. Malalgoda, PC, J

I agree.

……

Judge of the Supreme Court

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

SC/Appeal/199/17
SC/HCCA/LA: 342/16
CP HCCA /FA: 15/2015
D.C Kandy Case No: L/1240/12

An application under Sections 75 and 76 of the Trusts Ordinance.

1. Subramaniam Ramasamy
   No. 68, Colombo Road,
   Kandy.
2. Balasubramaniam Vaitheeswaran
   No.74, Colombo Road,
   Kandy.

PETITIONERS

Vs.

V. R. Soundarajan
No. 40, Venkarasamy Road,
ChettianKottam,
Erode 63800
Tamil Nadu- South India.

RESPONDENT

AND

In the matter of an Appeal against the order dated 19/11/2014 delivered in case No. 1240/L/2012 under the Civil Procedure Code.

V. R. Soundarajan
No. 40, Venkarasamy Road,
ChettianKottam,

Erode 63800
Tamil Nadu- South India.
RESPONDENT-APPELLANT

Vs.

1. Subramaniam Ramasamy
   No. 68, Colombo Road,
   Kandy.
2. Balasubramaniam Vaitheeswaran
   No.74, Colombo Road,
   Kandy.

PETITIONERS-RESPONDENTS

AND NOW

In the matter of an application under Section 839 of the Civil Procedure Code.

Nadesan Sathasivam
No. 128/11, Vihara Lane,
Mulgampola,
Kandy.
PETITIONER

Vs

V. R. Soundarajan
No. 40, Venkarasamy Road,
Chettian Kottam,
Erode 6380
Tamil Nadu- South India.
RESPONDENT-APPELLANT-
RESPONDENT

1. SubramaniamRamasamy
   No. 68, Colombo Road,
   Kandy.
2. Balasubramaniam Vaitheeswaran
   No.74, Colombo Road,
   Kandy.

PETITIONERS-RESPONDENT-RESPONDENTS

AND NOW BETWEEN

In the matter of an Application for Leave to Appeal to the Supreme Court under Section 5C of the Act No.54 of 2006 from the Order of the High Court of Civil Appeal holden in Kandy dated 2nd June 2016.

Subramaniam Ramasamy
No. 68, Colombo Road,
Kandy.

PETITIONER-RESPONDENT-RESPONDENT-PETITIONER

Vs

V. R. Soundarajan
No.40, Venkarasamy Road,
Chettian Kottam,
Erode 63800
Tamil Nadu- South India.

RESPONDENT-APPELLANT-RESPONDENT-RESPONDENT

Nadesan Sathasivam
No. 128/11, Vihara Lane,

Mulgampola,
Kandy.
PETITIONER-RESPONDENT

Balasubramaniam Vaitheeswaran
No.74, Colombo Road,
Kandy.
PETITIONER-RESPONDENT
RESPONDENT -RESPONDENT

Before: E.A.G.R. AMARASEKARA, J.
K.K. WICKREMASINGHE, J. &
A.L.S. GOONERATNE, J.

Counsel: Dr. K. Kang-Isvaran PC with K.V. S Ganesharajan, Lakshmanan Jeyakumar, Sriranganathan Ragul and K. Nasikethan for the 1st Petitioner-Respondent-Respondent-Appellant.
S. Kumarasingham with Srivanthi Indrakumar for the Respondent-Appellant-Respondent-Respondent and Petitioner-Respondent

Argued On: 19.03.2021

Decided On: 24.02.2022

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

The Petitioner – Respondent - Respondent – Petitioner, Subramaniam Ramasamy (hereinafter sometimes referred to as the Petitioner) together with the Petitioner – Respondent – Respondent – Respondent, Balasubramaniam Vaitheeswaran, (hereinafter sometimes referred to as the Petitioner – Respondent-Respondent) filed by way of summary procedure an action before the District Court of Kandy against the Respondent – Appellant – Respondent – Respondent, V.R. Soundarajan (hereinafter sometimes referred to as the Appellant- Respondent) under Sections 75 and 76 of the Trust Ordinance inter alia praying for an order nisi declaring that the office of trustees of Sri Selvavinyagar Temple Trust has

become vacant and to appoint (1) Duraisamypillai Sivasubramaniam, (2) Perumal Palaniappan, (3) Ratnasabapathy Mohan and (4) Govindasamy Krishnamoorthy as trustees and members of the Board of Management of the said trust. Upon supporting the matter, the District Court entered order nisi dated 02/02/2012 as prayed for in the petition and appointing the trustees named in the said petition. Said order nisi being served, Appellant - Respondent filed his objections by way of a statement of objections dated 02/07/2013. Subsequent to an inquiry learned District Judge by his order dated 19.11.2014 made the order nisi absolute appointing the above named four persons as trustees of Sri Selvaninayagar temple and its temporalities.

Aggrieved by the said Order, Appellant-Respondent preferred an appeal to the Civil Appellate High Court. During the pendency of the appeal in the Civil Appellate High Court, Petitioner – Respondent, Nadesan Sathasivam filed a petition and an affidavit under section 839 of the Civil Procedure Code, naming him as intervenient-petitioner, purporting to seek him to be added as a party to the said appeal. It must be noted that as per the caption of the said petition filed under section 839, even V.R. Soundarajan, Appellant Respondent has also joined as a petitioner along with the Petitioner- Respondent, Nadesan Sathasivam. It was inter alia stated in the said petition dated 31.01.2016, that;

- Affairs of the temple and its temporalities were managed by an instrument of trust bearing No. 3220 dated 20.11.1939 attested by C. Sivaparagasam NP.
- The age-old temple was built and managed by the Family Trust of Ana Runa Leyna of Devakotte South India and one Ramanathan Chettiyar a direct decendant of the said family became the Trustee of the Temple.
- Verappan Chettiyar, son of Ramanathan Chettiyar became the trustee of Sri Selvinayagar temple as provided in the trust instrument on the death of his father, thus ensuring that the hereditary rights of the temple are preserved.
- Verappan Chettiyar has appointed one K. Gunaratnam to handle the day-to-day administration of the temple. Gunaratnam engaged one Pasupathy to assist him in his duties, and on the demise of Pasupathy, said Gunaratnam came forward to appoint Govindasamy Krishnamoorthy (one

of the persons sought to be appointed as a trustee in the District Court action).

- Group of worshippers opposed to the said appointment of Govindasamy Krishnamoorthy and filed a civil action styled X 10804 in the District Court Kandy pertaining to which a settlement was arrived.
- As per the terms of settlement entered in the District Court V.R. Soundararajan, Appellant– Respondent took the appointment as the trustee of the temple and appointed Govindasamy Krishnamoorthy to manage the day-to-day affairs in keeping with the terms of settlement and the aforesaid trust instrument.
- They (This appears to mean the petitioners of the said petition, namely Appellant-Respondent and Petitioner- Respondent) were totally dissatisfied with the manner the temple was managed and there were many instances where the handling of affairs by the said Govindasamy was found wanting or against the norms followed by any place of worship of Hindus.
- On complaints made by them (Petitioners of the said petition) and several others, the Appellant-Respondent cancelled the power of attorney given to Govindasamy Krishnamoorthy.
- Only two individual worshippers filed an action in the District Court under section 75 and 76 of the Trust Ordinance praying to appoint four persons (including Govindasamy Krishnamoorthy) as trustees and members of the Board of management of the said trust and temporalities. Proper procedures would have been to invoke the provisions of Section 102 of the Trust Ordinance.
- When ordering the order nisi a serious error had been made by the learned District Judge by completely overlooking section 76(2)(d) of the Trust Ordinance, where it provides that in appointing the new trustees the court shall have regard to the interest of all the beneficiaries.
- Two applicants' voice cannot be considered to be a 'representative voice' of a large number of worshippers, and the order made in the District Court is prejudicial to the worshippers of the temple who are represented adequately by the 20 intervenient – petitioners.

- Order made by the District Court also violates section 76(1)(b) of the Trust Ordinance which provides that the court shall have regard to the wishes of the person if any empowered to appoint new trustees.
- Clauses 7 and 8 of the trust instrument states that a surviving kith or kin of Ana Runa Lena family would qualify as one empowered to appoint new trustees.

However, though there are prayers ; for a stay order, for entertaining and acceptance of the petition, for issuance of notices and costs and other relief, it is pertinent to note that in the said petition filed purporting to seek intervention, there is no prayer seeking to allow the intervention of the Petitioner-Respondent or the 20 people who are purported to be represented by the Petitioner-Respondent or them to be added as parties.

The Petitioner and the Petitioner – Respondent-Respondent filed objections to Petitioner- Respondent's application for intervention by way of statement of objection dated 29.02.2016 wherein it was inter alia stated that;

- Petitioner Respondent was not a party before the District Court Kandy case No. 1240/L/2012.
- The present matter being a final appeal the Petitioner-Respondent is not entitled to file any document for intervention.
- Although the Petitioner-Respondent has filed the petition on the basis that he is representing the 20 worshippers, the case filed in the District Court was under section 75 and 76 of the Trust Ordinance and that the petitioner-Respondent or any other devotees are not entitled to make any application at this stage.
- Purported petition filed by the Petitioner-Respondent is liable to be dismissed *in limine* in as much section 839 of the Civil Procedure Code does not empower to file any application before the court hearing the appeal for the purposes of intervention.
- The purported application for intervention is misconceived in law.
- The reliefs prayed for in the purported petition for intervention do not comply with an application for intervention.

Subsequently, learned Civil Appellate High Court judges by its order dated 02/06/2016 allowed the application for intervention. Learned High Court judges in its order inter alia stated that;

- Reliefs sought in the original court was to declare that the office of the trustee has become vacant and to appoint a new board of trustees named in the application.
- When a charitable trust based on a trust instrument which has laid down conditions for the appointment of trustees was in existence, the application has been made under sections 75 and 76 of the Trust Ordinance to appoint new trustees and not under section 102 of the Trust Ordinance. Thus, majority of the worshippers would not have been aware that there going to be a change in the trusteeship.
- Thus, there is a serious issue to be considered in appeal whether the learned judge has considered section 76(2)(d) of the Ordinance, where it states it should have regard to the interests of all the beneficiaries.
- This is a case inherent powers should be exercised for the ends of justice and to prevent abuse of the process of court.

Being aggrieved by the said order of the High Court of Civil Appeals the Petitioner preferred an appeal to this court. When this matter was supported before this court, having heard the learned counsel, this court was inclined to grant leave to appeal on the questions of law set out in paragraph 12(a) to (e) of the petition which are as follows; (Vide journal entry dated 13.10.2017)

a) Is the order of the High Court of Civil Appeal holden in Kandy and dated 2nd June 2016 contrary to Law?
b) Did the High Court of Civil Appeal misdirected itself in law in coming to the conclusion that the Petitioner – Respondent is entitled to be added as a party in appellate proceedings?
c) Did the High Court of Civil Appeal misdirect itself in law in calling in aid section 839 of the Civil Procedure Code in allowing the Petitioner – Respondent's application for intervention?
d) Did the High Court of Civil Appeal misdirect itself in law in delving into the merits of the Appeal when the only matter before them at present was the purported application for intervention?

e) Did the High Court of Civil Appeal misdirect itself in law in calling in aid **Mahanayake Thero Malwatte Vihare Vs Registrar General, Kaviratne and Others Vs Commissioner General of Examination** and **Seneviratne Vs Abeykoon** in allowing the purported application for intervention?"

Moreover, when this matter was taken up for argument before this court on 19.03.2021, Mr. Kumarasingham, counsel for the Appellant Respondent and Petitioner-Respondent suggested two more questions of law which are as follows;

a) "Is the inherent power of a court within the meaning of the provisions of section 839 of the Civil Procedure Code synonymous and one and the same with inherent jurisdiction of a court and,
b) If so, is section 839 of very narrow scope and of limited application?"

Since Mr. Kanag-Isvaran PC had no objections for them, this court recorded the above as additional questions of law in addition to the questions of law for which leave to appeal had already been granted.

The outcome of this appeal will depend on whether allowing to intervene at the appeal stage before the Civil Appellate High Court was legally correct. In this regard, it is worthwhile to observe that what was before the learned High Court Judges was an appeal against the order absolute made by the learned District Judge of the Kandy District Court confirming the order nisi issued in an action filed under summary procedure as described above. Unlike a leave to appeal application or a writ application or a revision application etc. filed in a court with appellate or supervisory jurisdiction, an appeal against a final order or judgment as contemplated in section 754(1) of the Civil Procedure Code (hereinafter sometimes referred to as a direct appeal) commences in the original court itself by filing notice of appeal in terms of section 755 of the said code suspending the exercise of jurisdiction of the original court till the appeal is decided. The other applications, namely for writs, revisions or leave to appeal etc. mentioned above inviting the exercise of appellate or supervisory jurisdiction originate in the court that have the appellate or supervisory jurisdiction. Hence, a direct appeal is a continuation of the process started by a filing of the plaint or petition in the original court. Thus, with regard to intervention or addition of parties, it is worthwhile to look at the section 18 of the Civil Procedure Code. In terms of the said section 18, for the effectual and complete adjudication and settlement of all

the questions involved, a court is empowered to add a party on an application made by a party before the hearing or at any time by the court without such application. Since such addition is allowed for the effectual and complete adjudication and settlement of all the questions involved in the action, it is clear that such addition has to be done before the judgment or the final order. In **Banda V Dharmaratne 24 N L R 210,** it was stated that the court has the power to add a party after trial is concluded but before the judgment is entered. It must be also noted that as per section 19 of the Civil Procedure Code no person shall be allowed to intervene in a pending action otherwise than in pursuance of, and in conformity with, the aforesaid provisions of section 18. The only exception is that any person on whose behalf an action is instituted or defended under section 16 of the said code can apply to court to make him a party. In terms of section 16, to sue or to be sued in a representative capacity, notices have to be served on the relevant persons by giving personal notice or through public advertisement as prescribed by the said section. Giving such notices, the court gives an opportunity to relevant persons to object to such permission being given to sue or be sued in a representative capacity and also there is an opportunity for the court to get it verified whether the representative character of the proposed intervenient party is genuine. All these steps described above as to the addition of parties, and filing or defending action in representative character have to be taken place in the original court at the commencement or anyway, prior to the delivery of judgment as the case may be.

As mentioned above, a direct appeal that commences with the filing of notice of appeal in terms of section 755(1) of the Civil Procedure Code in the original court is a continuation of the process started with the plaint/petition and is not a new application that originates in the court with the appellate jurisdiction. As such tendering of an application by a new party to intervene is contrary to the aforesaid provisions, namely sections 18,19 and 16 of the Civil Procedure Code.

Since the original action was filed in terms of summary procedure under chapter XXIV of the Civil Procedure Code, I would also like to refer to the following provisions in the Civil Procedure Code, namely sections 384, 385, 386, and 387.

These sections show how the respondents shall place matters in opposition through objections and how they shall place evidence as well as the petitioner's

right to reply and his entitlement to place additional evidence and the manner of placing evidence before the final order. By allowing new parties to intervene at the appeal stage, the learned High Court Judges have disregarded all these provisions and has open a gate for new parties to challenge the final order without any adjudication by the original court of the matters presented by the purported intervenient parties. As per section 390 of the Civil Procedure Code in an action or application under summary procedure, petitioner and the respondents are the parties to the action. Thus, the final order delivered by the original court relates to the cases presented by the said parties. By allowing new parties to intervene in the appeal stage, the learned High Court judges have attempted to make the final order, which was challenged in appeal, an order between the original petitioners, original respondents and the intervenient parties in appeal when there was no opportunity for the Petitioner to challenge the position of the intervenient parties before the final order made by the original court. Even the original court did not have an opportunity to adjudicate the said stance of the intervenient party. Further, Respondent Appellant being a petitioner to the application for intervention, it appears that the learned High Court Judges have given him an opportunity to challenge the final order through a new stance presented by the intervenient parties. Thus, it is clear that the allowing of intervention at appeal stage was prejudicial to the rights of the Petitioner as contemplated by aforesaid sections 384 to 387 of the Civil Procedure Code. One must not forget that the Civil Appellate High Court was sitting in appeal when that order was made and was not sitting as a court of first instance. It is true that on certain occasions a court sitting in appeal is empowered to entertain fresh evidence but it is not an unrestricted power that can pave way to allow new parties to intervene and bring in new stances or to present a new case. As held in **Ratwatte Vs Bandara 70 NLR 231**, reception of fresh evidence in a case can be justified, if following three conditions are fulfilled;

- It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial[1],

[1] Rev.Kiralagama Suumanatissa Thero V Aluwihare (1985) 1 Sri L R 19, Meegama Gurunnanselage Don Sirisena Wijeyakoon V Indrani Margret Wijeyakoon (1986) 2 C A L R 378

- The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive,
- The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible.

Since one has to give reasons why the evidence could not have been obtained with reasonable diligence for use at the trial, such fresh evidence can be allowed when a party to the original court action make an application and not to new parties who wants to join in the appeal stage. On the other hand, the application filed in the High Court has no prayer to allow fresh evidence and as such it was not an application to lead fresh evidence.

Even though, the Petitioner Respondent and the Appellant Respondent argue that intervention at the appeal stage is not barred by any positive legal provision and it should be allowed, what explained above clearly indicate that allowing of intervention of a new party at the appeal stage in a direct appeal is contrary to express provisions in the Civil Procedure Code and it also was inimical to the rights of the Petitioner. It must be stated that section 839 of the Civil Procedure Code is not intended to authorize a court to override the express provisions of the Civil Procedure Code- vide **Kamala V Andris 41 NLR 71**. Even in **Wakachicku Construction Co. Ltd. Vs Road Development Authority (2013)1 S L R 164**, it was held that the court's power to interpose its inherent authority cannot be invoked in regard to matters which are sufficiently covered by a specific provision of the relevant Act. As explained above Civil Procedure Code provides when and how addition of a party can be done.

On the other hand, inherent powers of the court are adjunct to the existing Jurisdiction of the court and cannot be made the source of new jurisdictions – vide **All Ceylon Commercial and Industrial Workers Union Vs Ceylon Petroleum Corporation (1995) 2 Sri L R 295** and **Jeyaraj Fernandopulle V De Silva (1996) 1 Sri L R 70.** The Civil Appellate High Court was sitting in appeal when it made the order allowing the intervention. Thus, on that occasion, the High Court's inherent powers were adjunct to its appellate jurisdiction. By allowing intervention it has decided to hear, in the manner a court of first instances does, a new stance or a

case of a new party which was not tested in the original court. Thus, it appears the Civil Appellate High Court has stepped outside its inherent powers as an Appellate Court and decided to exercise powers of an original court.

Moreover, whether in fact the Petitioner-Respondent represents 20 other worshipers is a matter of fact, if this application for intervention was done before the original court, as mentioned above the original court would have issued notices and take necessary steps prior to giving permission to a party to appear in the representative capacity. Further, the counsel for the Appellant Respondent in his written submissions tendered on21.05.2018 states that the purported notarially attested trust deed no. 3220 never surfaced in the original court. However, it is a misleading statement as the said deed was referred to in paragraph 6 of the petition dated 31.01.2012 to the District Court and was marked as P1. Further the said paragraph had been admitted by the Respondent Appellant in his objections- vide paragraph 7 of the objections dated 2.7.2013. Furthermore, nothing is said why the Appellant Respondent could not take up the present position that he now takes up with the Petitioner Respondent, when he presented his case in the original court. It must be noted that the Appellant Respondent and the Petitioner Respondent are Represented by the Same Counsel and have joined together as petitioners in presenting the purported petition for intervention. If the High Court is to get the genuineness of representative character of the Petitioner Respondent or new facts revealed in the said petition for intervention verified during the appeal it has to act as an original court but not as a court sitting in appeal. On the other hand, following excerpts from the order dated 02.06.2016 (which is titled as Judgment) indicates that the learned High Judges had gone in to the merits of the application and have taken the representation of 20 worshipers through the Petitioner-Respondent and the validity and relevancy of certain facts stated in the purported petition for intervention as true, even when the notices were not served on the relevant worshipers to get that verified before giving permission to the Petitioner Respondent to appear in representative character, and also when the Petitioner did not have a chance to challenge those facts in the Original Court. The said excerpts are as follows;

"*In the instant matter what has to be considered is if, the intervention is not allowed, whether the intervenient parties interests are going to be affected and will prejudice be caused to them*."

"Therefore, *it is obvious that the majority of the worshipers would not have been aware that there was going to be a change in the trusteeship."*

Further, Appellant Respondent being a petitioner to the purported application to intervention, has not shown why he could with due diligence present his case in the original court in the manner now he presents it along with the Petitioner Respondent. There is no prayer in the petition before the High Court of Civil Appeal to lead fresh evidence in appeal or no clear prayer to allow intervention either. It appears, by making this strange application for intervention at the appeal stage, the Appellant Respondent and the Petitioner Respondent were trying to circumvent the failure on the part of the Appellant Respondent that took place in the District Court by not applying for addition or intervention as well as in not presenting the case in the manner they now want to present. As shown above, there is a procedure to add a party which has to be done before the final judgment and allowing intervention is not adjunct to the appellate jurisdiction of court sitting in appeal for hearing a direct appeal from the court below.

Further, since the order made by the court below was between parties to that action, if there are other beneficiaries of the trust, they must advice themselves to what steps to be taken in that regard. However, they should not be allowed to interfere with the findings of a contested action between other parties at the appeal stage prejudicing the rights of the Petitioner. In my view, a court sitting in appeal has no jurisdiction to sit as an original court to decide an action between original parties and new intervenient parties who came forward at the appeal stage, since the law expect to add parties or allow intervention prior to the final judgement or order. It appears that the Petitioner Respondent and the Appellant Respondent argue that since there is no provision to intervene during the appeal stage intervention should be allowed under section 839. In my view, there is no need to provide for intervention at the appeal stage when the law expects such intervention prior to the final judgment or order. On the other hand, section 839 is there to prevent abuse of the process of the court. Allowing intervention in this

manner may promote abuse of the process of the court since it may pave for intervention evading the rights of the Petitioner as explained above.

Petitioner Respondent has made submissions in relation to Article 134(3) of the Constitution. It is not necessary to discuss the application of the said Article as it is a provision relating to the jurisdiction of the Supreme Court but not to the Civil Appellate High Court which made the impugned order. The scope and the limitation of the said Article has to be decided in a suitable case when hearing of a new party by the Supreme Court becomes an issue.

It is also argued that since there is no positive law that prohibits a third-party intervention in Appellate proceedings, the courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided by the code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law, and as a matter of general principle, prohibitions cannot be presumed. It must be stated here that what is expressly stated excludes the others. As shown above, there are express provisions in the Civil Procedure Code which provides for the addition of parties and intervention in an action. As explained above it has been held by our courts that it has to be done before the final judgment. Thus, the said argument cannot hold water.

The cases, **Kavirattne and Others Vs Commissioner General of Examination 2012 BLR 139** and **SeneviratneV Abeykoon (1986) 2 S L R 1** cited by the learned High Court Judges have no direct relevance to the matter at hand, namely the allowing of intervention of a party at appeal stage. Kaviratne case was a Fundamental Rights application that originates in the supreme court and, there, intervention has been allowed before the final order and as such it is not an occasion that allowed intervention during the appeal stage from a direct appeal from an original court. The case Senaviratne V Abeykoon was a case in which the original court itself used inherent powers to restore the possession, when there was no express provision. In that case, the plaintiff took law into his own hands and evicted the other party from the possession when the District Court gave the defendant right to stay in the property. The said case also had nothing to do with the addition of parties at the appeal stage. The learned High Court Judges have also referred to the decision of **Maha Nayaka Thero Malwatta Vihare V Registrar General 39 N L**

R 186 in support of their decision, but it appears to be a decision made by the then Supreme Court in the exercise of its original writ Jurisdiction. Following excerpt at page 189 indicates that intervention was allowed before the final order.

"*After order nisi had been issued on the Registrar-General, Urapola Ratnajoti submitted his petition and affidavit on February 23,1937, and prayed to be allowed to intervene, and to be heard before final order was made. As he was vitally concerned in the matter, he was given the opportunity he sought and his counsel was heard……"*

Thus, the above is not a decision that support the proposition that a court sitting in appeal in a direct appeal has inherent powers to allow intervention of new parties at the appeal stage and to hear a new stance or a case presented by them. Even though, the learned counsel appearing for the Petitioner Respondent as well as for the Appellant Respondent has referred to several decided cases, none of them, in my view supports the said proposition.

Counsel for the Appellant Respondent and Petitioner Respondent while referring to many decisions made on writ applications has attempted to establish that the learned High Court Judges' impugned decision is correct, but neither allowing intervention nor rejecting intervention in writ applications has any relevance as those occasions are not occasions that allow intervention during the appeal stage of a direct appeal. The journal entries dated 17.12.2013 and 30.12.2013 of Nuwara **Passa Pedige Sugathan and Emage William V Nuwara Passa Pedige Gunawathie C A Appeal No.663/99** tendered by the said counsel with a motion does not indicate whether the intervention was allowed during the pendency of that appeal by the Appeal Court. Even if it was allowed by the Appeal Court it does not give reasons for why and how it allowed the intervention. Thus, the said journal entries cannot be considered as a decision that indicates that the intervention of parties at the appeal stage in a direct appeal is legally correct or feasible.

As per the reasons elaborated above, it is my view that the impugned order of the Civil Appellate High Court of Kandy, dated 02.06.2016 is contrary to law and the said High Court misdirected itself in law in coming to the conclusion that the Petitioner – Respondent is entitled to be added as a party in appellate

proceedings. Further, it misdirected itself in law in calling in aid section 839 of the Civil Procedure Code in allowing the application for intervention and in delving into the merits of the Appeal by accepting certain facts as true or proved when the only matter before them at that occasion was the purported application for intervention. As explained above, the said High Court misdirected itself in law in calling in aid Mahanayake Thero Malwatte Vihare Vs Registrar General, Kaviratne and Others Vs Commissioner General of Examination and Seneviratne Vs Abeykoon in allowing the purported application for intervention. Thus, the questions of laws allowed at the time of granting of leave have to be answered in the affirmative and in that context, answering them is sufficient to allow the appeal and I do not see it is necessary to answer the additional questions suggested by the counsel for the Petitioner Respondent and the Appellant respondent. As a passing remark, I would prefer to state that the first additional question of law(a) is more academic than one need to be answered to solve the matter before us. Since the word Jurisdiction indicates the extent of the power to make legal decisions and judgments and sometimes it connotes the authority a court has, one can say the term “inherent jurisdiction” can be used synonymously with the term “inherent powers”. The second additional question of law(b) is also not necessary to be answered, since the view expressed above is that the Civil Appellate High Court’s order was outside its inherent powers adjunct to its appellate powers. However, it must be said that section 839 itself contains its limits as it can be used only to make orders necessary for the ends of justice or to prevent abuse of the process of court. It should not be used to prejudice accepted rights of a party. As explained above, it has been used in a prejudicial manner to the rights of the petitioner. Further, our courts through several decisions have explained several limits in using inherent powers, some of which have been referred to above, such as that it should not be used to override express provisions and it is adjunct to the existing jurisdiction.

For the foregoing reasons, I allow the appeal and set aside and vacate the impugned order(judgment) dated 02.06.2016 of the High Court of the Civil Appeal of the Central Province holden in Kandy while dismissing the application dated 21.01.2016 of the Petitioner Respondent.

The Petitioner is entitled to the costs of this Court as well as costs of the court below.

……

Judge of the Supreme Court

K.K Wickremasinghe, 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 appeal in terms of section 5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, against an order pronounced by the High Court exercising its jurisdiction under section 2 of the said Act.

SC Appeal No. 210/2016

SC/HCCA/LA No. 48/2016

HC/(CIVIL)/50/2011/CO

(With SC Appeal No. 209/2016 &

SC Appeal No. 208/2016)

*(**IN THE COMMERCIAL HIGH COURT**)*

In the matter of an application for winding up by Court under Part XII of the Companies Act No. 7 of 2007.

Ran Malu Fashions (Private) Limited,
No. 3,
Bullers Lane,
Colombo 07.

PETITIONER

AND THEN BETWEEN

Wallabha Jayathissa Liyanage Upali Wijayaweera,
Acting Commissioner General of Labour,
Department of Labour,
Narahenpita,
Colombo 05.

INTERVINIENT- PETITITIONER

Vs

Ran Malu Fashions (Private) Limited,
No 3,
Bullers Lane,
Colombo 07.
PETITIONER- RESPONDENT

AND NOW BETWEEN

(IN THE SUPREME COURT)

Expolanka Freight (Private) Limited
No 10,
Mile Post Avenue,
Colombo 03.
CREDITOR -APPELLANT

Vs

Wallabha Jayathissa Liyanage Upali Wijayaweera
Acting Commissioner General of Labour
Department of Labour,
Narahenpita,
Colombo 05.
INTERVINIENT PETITITIONER - RESPONDENT

Ran Malu Fashions (Private) Limited,
No. 3,
Bullers Lane,
Colombo 07.
PETITIONER- REPONDENT-RESPONDENT

P. E. A. Jayawickrama and G. J. David
Liquidators of Ran Malu Fashions (Private) Ltd,
C/O SJMS Associates,
No. 11 Castle Lane,
Colombo 04.
LIQUIDATOR- RESPONDENT

Before : **P. PADMAN SURASENA J**

ACHALA WENGAPPULI J

MAHINDA SAMAYAWARDHENA J

Counsel : Kaushalya Thilakarathne for the Creditor-Appellant instructed by Malin Rajapakse.

Susantha Balapatabendi PC, ASG with Milinda Pathirana SDSG, Anusha Jayatilaka SSC and Sureka Ahmed SC for the Intervenient Petitioner-Respondent.

Nihal Fernando PC with Rohan Dunuwila and Anushka Weerakoon instructed by T. Pussewela for the Liquidator- Respondent.

Ravindranath Dabare instructed by Sanduli Karunaratne for the Intervenient Petitioners.

Argued on : 21-10-2021

Decided on : 08-07-2022

P Padman Surasena J

The Petitioner-Respondent-Respondent (Ran Malu Fashions (Private) Limited) (hereinafter sometimes referred to as "Ran Malu Fashions"), filed the petition dated 25th October 2011 in the Commercial High Court of Western Province, under part XII of the Companies Act No. 7 of 2007 (hereinafter sometimes referred to as the "Companies Act"), praying that the said company Ran Malu Fashions be wound up by Court. The learned Commercial High Court Judge on the application made by Ran Malu Fashions (as per the motions dated 25th October 2011 and 27th October 2011),[1] had appointed Mr. P. E. A. Jayewickreme and Mr. G. J. David of SJMS Associates (hereinafter sometimes referred to as the "Liquidators"), as provisional liquidators of Ran Malu Fashions. The said appointment of the provisional liquidators has been produced marked **X 3**.

Upon the said petition being advertised, a number of creditors of Ran Malu Fashions indicated their intention to appear at the hearing of the winding up Application. The Creditor-Appellant, Expolanka Freight (Private) Limited, (hereinafter sometimes referred to as "Expolanka") is one of the Companies that had given notice of its intention to be heard at the hearing of the winding up application.

Having dealt with various applications made by various parties including Expolanka, the learned Commercial High Court Judge by the order dated 18th January 2013 (produced marked **X4**), ordered that Ran Malu Fashions be wound up and confirmed the appointment of the provisional liquidators.

In carrying out the winding up process, the Liquidators filed several reports before the Commercial High Court informing Court about the progress of the winding up. Liquidators published notices calling on the creditors of Ran Malu Fashions to submit their claims upon which Expolanka submitted its claim for Rs. 1,774,333.06. Expolanka claims that

[1] Vide page 1238 and 1240 of Vol I of the brief.

the Liquidators have accepted its claim as it has not received any notice of rejection of its claim either under section 357(4) of the Companies Act or under Rule 69 and 71 of the Companies winding up Rules 1939. Expolanka also claims that the Liquidators have categorized its claim as a claim by an unsecured creditor of Ran Malu Fashions.

In the course of the winding up process, the Liquidators had filed several reports. They, in their report produced marked **X 5** dated 05th June 2014,[2] informed Court, the mode of settlement of Secured Claims, Preferential Claims and Unsecured Claims.

In the aforesaid report (**X 5**), the Liquidators informed Court *inter alia*, that certain claims made by the Commissioner of Labour were paid in full, as they are preferential claims.

However, the Liquidators in the same report, sought permission of Court to categorize the claim for Rs. 428,119,086.50 made by the Commissioner General of Labour on account of compensation for termination of services under the Terminations of Employment of Workmen (Special Provisions) Act No. 45 of 1971 (hereinafter sometimes referred to as TEWA), under "Unsecured Claims". The Liquidators in the same report, also had sought permission of Court to pay only 63.7% of the claim for Rs. 428,119,086.50 forwarded by the Commissioner General of Labour relating to the recovery of compensation payable under TEWA by Ran Malu Fashions, to its employees for the termination of their employments.

Thereafter, the Commissioner of Labour made an application to court by way of a petition dated 10th September 2014 marked **X 6**[3] seeking to admit its claim of Rs. 428,119,086.50 under the TEWA, as a Preferential claim under section 365 of the Companies Act.

The other creditors including Expolanka filed objections against the said application made by the Commissioner General of Labour. The said objection dated 12th January 2015, has been produced marked **X 7**. [4]

[2] Vide page 1125 of Vol I of the brief.
[3] Vide page 84 of Vol I of the brief.
[4] Vide page 151 of Vol I of the brief.

The learned Judge of the Commercial High Court, having considered the arguments, pronounced its order dated 25th July 2016, rejecting the objections raised by Expolanka and the other creditors, and admitted the claim of the Commissioner General of Labour for the sum of Rs. 428,119,086.50 as a Preferential Claim under section 365 of the Companies Act. The said order of the Commercial High Court, has been produced marked **X 10**.[5]

The learned Judge of the Commercial High Court in his order, has concluded that the claim made by the Commissioner General of Labour for Rs. 428,110,096.50, is a statutory due payable to the employees. He has then proceeded to hold that the claim made by the Commissioner General of Labour, is in fact, a Preferential Claim within the meaning of section 365 read with paragraph (g) of the Ninth Schedule to the Companies Act No. 07 of 2007 ((hereinafter sometimes referred to as the "Ninth Schedule"). Further, the learned High Court Judge has also stated that the claim made by the Commissioner General of Labour is not a Unsecured Claim. It is on that basis that the learned Commercial High Court Judge has stated that the Liquidators have no power to reduce the quantum of compensation decided and claimed by the Commissioner General of Labour and directed the Liquidators to comply with the above conclusion and submit a report to court in respect of the distribution of funds.

Being aggrieved by the aforesaid order, Expolanka preferred the Leave to Appeal Application (SC/HCCA/LA No. 48/2016) pertaining to the instant appeal (SC Appeal No. 210/2016) challenging the order dated 25th July 2016 of the Commercial High Court. The Liquidators too preferred the Leave to Appeal Application (SC/HCCA/LA No. 47/2016) pertaining to the appeal (SC Appeal No. 209/2016) challenging the same order (dated 25th July 2016) of the Commercial High Court.

This Court, when the said Leave to Appeal Application were supported before it, having heard the submissions of the learned Counsel for relevant parties, by its order dated 28th

[5] Vide page 821 of Vol I of the brief.

October 2016, has granted Leave to Appeal in respect of the following question of law which reads as follows.

> *"Whether the claim made by the Commissioner General of Labour under and in terms of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 as amended, can be considered as a preferential claim in terms of Section 365 and the 9 th Schedule of the Companies Act No. 07 of 2007".*

The learned Counsel appearing in each of these appeals, agreed that the said appeals can be heard together. They also agreed that it would suffice for this Court to pronounce one judgment in respect of all these appeals as it is only a single pure question of law that has to be decided by this Court. i.e., the question of law, this Court has granted Leave to Appeal, in both of those appeals.

As the above question of law involves interpretation of the relevant provisions of law referred to therein, it would be convenient to commence the relevant discourse with the reproduction of those provisions. They are as follows:

Section 365 of the Companies Act No. 07 of 2007.

> *365. (1) The liquidator shall pay out of the assets of the company the expenses, fees, and claims set out in the Ninth Schedule to the extent and in the order of priority specified in that Schedule and that Schedule shall apply to the payment of those expenses, fees, and claims according to its tenor.*
>
> *(2) Without limiting paragraph 7(b) of the Ninth Schedule, the terms "assets" in subsection (1) shall not include assets subject to a charge, unless—*
>
> *(a) the charge is surrendered or taken to be surrendered or redeemed under section 358; or*
>
> *(b) the charge was when created, a floating charge in respect of those assets.*

Paragraphs 1 and 2 of the Ninth Schedule to the Companies Act No 07 of 2007.

PREFERENTIAL CLAIMS

1. *The liquidator shall first pay, in the order of priority in which they are listed: —*

(a) the fees and expenses properly incurred by the liquidator in carrying out the duties and exercising the powers of the liquidator and the remuneration of the liquidator;

(b) the reasonable costs of a person who applied to the court for an order that the company be put into liquidation, including the reasonable costs of a person appearing on the application whose costs are allowed by the court;

(c) the actual out-of-pocket expenses necessarily incurred by a liquidation committee.

2. After paying the claims referred to in paragraph 1, the liquidator shall next pay the following claims :—

(a) all provident fund dues, employees trust fund dues and gratuity payments due to any employee;

(b) income tax charged or chargeable for one complete year prior to the commencement of the liquidation, that year to be selected by the Commissioner-General of Inland Revenue in accordance with the provisions of the Inland Revenue Act, No. 10 of 2006;

(c) turnover tax charged or chargeable for one complete year prior to the commencement of the liquidation;

(d) value added tax charged or chargeable for four taxable periods prior to the commencement of the liquidation, such taxable periods to be selected by the Commissioner- General of Inland Revenue in accordance with the provisions of the Value Added Tax Act, No. 14 of 2002;

(e) all rates or taxes (other than income tax) due from the company at the commencement of the liquidation which became due and payable within the period of twelve months prior to that date;

(f) all dues to the Government as recurring payments for any services given or rendered periodically;

(g) industrial court awards and other statutory dues payable to any employee;

(h) subject to paragraph 4, all wages or salary of any employee whether or not earned wholly or in part by way of commission, and whether payable for time or for piece work, in respect of services rendered to the company during the four months preceding the commencement of the liquidation;

(i) holiday pay becoming payable to an employee (or where the employee has died, to any other person in the employee's right), on the termination of the employment before or by reason of the commencement of the liquidation;

(j) unless the company has at the commencement of the liquidation, rights capable of being transferred to and vested in an employee under a contract of the kind referred to in section 24 of the Workmen's Compensation Ordinance, all amounts due in respect of any compensation or liability for compensation under that Ordinance, which have accrued before the commencement of the liquidation;

(k) subject to paragraph 4, amounts deducted by the company from the wages or salary of an employee in order to satisfy obligations of the employee.

Let me at this stage list out briefly, the main arguments advanced by the rival parties to this case.

<u>The following main arguments have been advanced on behalf of the Liquidators and Expolanka</u>:

1) The Companies Act No. 07 of 2007 does not list compensation to be paid under TEWA, as a preferential payment and if the legislature intended such claim to be included as a Preferential Claim, the legislature would have added it expressly in the same way it had added provident fund dues, employees trust fund dues and gratuity payments appearing in item No. 2(a) of the Ninth Schedule.

2) When interpreting "other statutory dues" referred to in item No. 2(g) of the Ninth Schedule, Court must adopt the *Ejusdem Generis* principle; as the said item No. 2(g) reads as "*industrial court awards and other statutory dues payable to any employee",* the phrase *'statutory dues payable to any employee'* must be confined to the same class or kind as *"industrial court awards"* ; the said item No. 2(g) "*industrial court awards and other statutory dues payable to any employee"* must therefore be interpreted necessarily as "other statutory dues as set out in the Industrial Disputes Act".

3) The Ninth schedule refers only to situations where a state/party/employee has already earned the money sought to be recovered from the company being wound up, and not a future unearned unascertained or probable debt.

<u>The following main arguments have been advanced on behalf of the Commissioner General of Labour:</u>

1) The Commissioner of Labour exercises a statutory power when making an order under the provisions of section 6A of TEWA; a claim made as per such an order is therefore a statutory claim.

2) The words "*other statutory dues*" found in item No. 2(g) in the Ninth Schedule, should be interpreted literally and given its ordinary meaning as it is a general phrase.

3) A phrase conjoined by the word "and" must be read separately; the word "*and*" found in item No. 2 (g) in the Ninth Schedule clearly indicates that Industrial Court Awards **and** other statutory dues are two or more separate sets of remedies available to an employee under two or more separate statutes; item No. 2(g) cannot therefore be confined only to the Industrial Disputes Act; the Appellants have intentionally ignored the words "*and other*" when interpreting item No. 2(g).

Having observed the inter-connection of the above arguments, I would not think that they should be dealt with separately in isolation to one another. Thus, to start with, it would be prudent to consider the nature of the claim put forward by the Commissioner General of Labour. The said claim has been made on account of compensation payable for termination of services under section 6A of TEWA which is as follows:

> *6A. (1) Where the scheduled employment of any workman is terminated in contravention of the provisions of this Act in consequence of the closure by his employer of any trade, industry or business, the Commissioner may order such employer to pay to such workman on or before specified date any sum of money as compensation as an alternative to the reinstatement of such workman and any gratuity or any other benefit payable to such workman by such employer.*

The word "Statutory" is defined in the Black's Law Dictionary 11th Edition, as follows;

1. *Of, relating to, or involving legislation <statutory interpretation>*
2. *Legislatively created <the law of patents is purely statutory>*
3. *Conformable to a statute <a statutory act>*

Therefore, the word "Statutory" denotes something which emanates consequent to a provision in a legislative enactment. The phrase "*statutory dues*" must therefore mean the dues which emanate from the provisions of such legislative enactments.
Section 6A of TEWA which I have reproduced above, clearly shows that it is the statute namely TEWA, which has conferred the power on the Commissioner to order an employer to pay to a workman a sum of money as compensation as an alternative to reinstatement.

One could observe numerous provisions scattered throughout TEWA which confer statutory powers on the Commissioner. For example: section 13 of TEWA, empowers the Commissioner to make directions calling for material from an employer; sections 17 and 17A of TEWA empower the Commissioner, to hold inquiries for the purpose of implementing the substantive provisions of the Act. It is noteworthy that section 17 of TEWA requires the Commissioner to conduct the aforesaid inquiries complying with the

principles of natural justice. The fact that the Commissioner is required by law to comply with the principles of natural justice when conducting such inquiries, is a clear and unambiguous indication that the Commissioner in such instances decides the rights of the parties to such inquiry. No state functionary can decide the rights of parties without any statutory power being conferred upon such functionary. Therefore, this too is a clear indication that in all those instances the Commissioner exercises nothing but statutory powers. Those are all powers conferred on the Commissioner by TEWA.

Thus, when the Commissioner orders an employer to pay to a workman, a sum of money as compensation, there cannot be any doubt that the Commissioner exercises a statutory power vested in him under section 6A of the said Act.

Moreover, the Commissioner calculates the quantum of such sums of money payable as compensation as per the formula set out in the Gazette Extraordinary of the Democratic Socialist Republic of Sri Lanka No. 1384/07 dated 15th March 2005. This is a Gazette issued by the Commissioner of Labour exercising a statutory power namely section 6D of TEWA. The Commissioner General of Labour has produced the said Gazette marked **A** in the Commercial High Court. This further confirms the proposition that it is a statutory power which the Commissioner exercises when he orders an employer to pay to a workman a sum of money as compensation for termination of services under section 6A of TEWA.

The item No. 2(g) of the Ninth Schedule *"industrial court awards and other statutory dues payable to any employee*" contains two items. The first of those is *"industrial court awards".* The second is *"other statutory dues payable to any employee*". These two phrases are conjoined by the word *"and"*. Therefore, they are two distinct items. Remedies available to an employee under Industrial Court Awards is different from a remedy available to an employee under other statutes which are commonly known as 'statutory dues'. The word "*other*" denotes statutes other than that under which an Industrial Court Award is made. If the argument of the Appellants is to be accepted, then that would amount to altering the phrase, *"other statutory dues"* to read as "such other statutory dues". Thus, if the argument of the Appellants is to be accepted, then they have

added the additional word "such" for their own benefit. However, it is the Appellants themselves who advocate the proposition that Court cannot read new words into existing provisions of law.

Maxwell on Interpretation of Statutes -12th Edition at page 33 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." "We are not entitled" said Lord Loreburn L.C., "to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself". A case not provided for in a statute is not to be dealt with merely because there seems no good reason why it should have been omitted, and the omission appears in a consequence to have been unintentional"* [emphasis added]

The maxim *Ejusdem Generis* is applicable in situations where the relevant statutory provision contains an enumeration of specific words. Bindra, 10th Edition page 758 states that the presence of following requirements are necessary for the application of that rule when interpreting a provision of law.

i. *The statute contains an enumeration by specific words;*
ii. *The members of the enumeration constitute a class or category;*
iii. *The class is not exhausted by the enumeration;*
iv. *A general term follows the enumeration;*
v. *there is a distinct genus which comprises more than one species;*
vi. *there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires*

One does not find in item No. 2(g) of the Ninth Schedule any such enumeration or listing of things which can satisfy the requirement in (i) above. Since there is no enumeration or listing of things, rest of the above requirements have no application to item No. 2(g)

of the Ninth Schedule. Therefore, in my view, Court cannot apply the maxim *Ejusdem Generis* in the instant situation.

The phrase "statutory dues" is a phrase commonly used in Labour Law. That simply means entitlements a workman would get under statutory provisions. This does not refer to one piece of legislation. One would find entitlements of workmen under numerous statutes.

Thus, on the consideration of the above arguments, I am unable to accept the submission of the Appellants that the *"other statutory dues payable to any employee*" must be limited to dues only under the Industrial Disputes Act.

Another argument advanced by the Appellants is that if the legislature intended to include all and sundry (including TEWA), under the phrase *"other statutory dues"* it need not have specifically listed only certain statutes to the exclusion of the others. It is their argument that the legislature would have merely stated that all statutory dues (for employees) shall be treated as preferential payments and not specifically list only certain statutes in the Ninth Schedule. It is their submission that the legislature has specifically identified and included only certain statutes because it had wanted only those statutes to be given preference in a process of winding up. They submit that Court cannot add another statute into item No. 2(g) of the Ninth Schedule.
The Appellants at no stage challenged the liability of the company under liquidation to pay the amount of the claim put forward by the Commissioner General of Labour. Their only argument is that it should not be considered as a preferential payment in terms of item No. 2(g) of the Ninth Schedule.

During the argument, the Counsel for the liquidators highlighted the development of the Companies Act by comparing the old Companies Act (Act No. 17 of 1982) with the present Act (Act No. 07 of 2007) and submitted that in both Acts, the Legislature has not included and/or expressly excluded any compensation payable under TEWA. It would be relevant at this stage to glance through section 347(1) of the Companies Act No 17 of 1982 which states as follows:

347. (1) In a winding up there shall be paid in priority to all other debts-

(a) income tax charged or chargeable for one complete year prior to the relevant date, such year to be selected by the Commissioner-General of Inland Revenue in accordance with the provisions of the Inland Revenue Act, No. 28 of 1979;

(b) business turnover tax charged or chargeable for one complete year prior to the relevant date, such year to be selected by the Commissioner-General of Inland Revenue in accordance with the provisions of the Finance Act, No. 11 of 1963;

(c) all rates, or taxes (other than income tax) due from the company at the relevant date, and having become due and payable within the twelve months immediately prior to that date;

(d) all dues to the Government of Sri Lanka as recurring payments for any services given or rendered periodically;

(e) all provident fund dues, gratuity payments, and industrial court awards payable to any employee or workman;

(f) all wages or salary (whether or not earned wholly or in part by way of commission) of any clerk or servant in respect of services rendered to the company during the four months immediately prior to the relevant date and. all wages (whether payable for time of work or for piece work) of any workman or labourer in respect of services so rendered;

(g) all accrued holiday remuneration becoming payable to any clerk, servant, workman or labourer (or in the case of his death to any other person in his right) on the termination of his employment before or by the effect of the winding up order or resolutions;

(h) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has at the commencement of the winding up, under such a contract with insurers as is referred to in section 24 of the

> *Workmen's Compensation Ordinance rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under such Ordinance, being amounts which have accrued before the relevant date.*

The Appellants rely on the fact that the *"employees trust fund dues"* which was not included in the order of priority under the Companies Act No. 17 of 1982 has been specifically included in the Companies Act No. 07 of 2007. It is their submission that if the legislature intended to include compensation payable under TEWA also in the order of priority in the Ninth Schedule of the Companies Act of 2007, it could have done it in the same way it added *"employees trust fund dues"* at the time it passed the new Companies Act in 2007.

Section 347 of the Companies Act No. 17 of 1982 was the then prevailed corresponding provision to the Ninth Schedule to the Companies Act No. 07 of 2007. Thus, it can be seen that although section 347 of the Companies Act No. 17 of 1982 had a place for the "*Industrial court awards*" in its long list, it had not recognized statutory dues (in that form) payable to an employee at any level in the said list. In contradistinction to the above, the present Act (Act No. 07 of 2007) has specifically listed 'statutory dues' in its Ninth Schedule. This development shows that the legislature has deliberately brought in "*statutory dues payable to any employee*" to the list in the Ninth Schedule to the Companies Act No. 07 of 2007. Item No. 2(g) is the level of priority, the legislature has thought fit it should confer on the category "*statutory dues payable to any employee*" in the Ninth Schedule. Had the Parliament intended to restrict "*other statutory dues*" only to dues arising out of the Industrial Disputes Act, the Parliament could have stated so to that effect by adding few more words to that item. However, that was not the case.

As has been adverted to above, according to section 365(1) of Companies Act No. 7 of 2007, it is mandatory for the liquidator to pay out of the assets of the company, the items set out in the Ninth Schedule in the order of priority specified in that Schedule. Thus, the items set out in the Ninth Schedule do not merely form a list of things but predominantly an order of priority. This is re-iterated at the very commencement of the Ninth Schedule

to the Companies Act No. 07 of 2007 by the phrase *"The liquidator shall first pay, in the order of priority in which they are listed".* It is in that backdrop that the legislature has deliberately prioritized *"all provident fund dues, employees trust fund dues and gratuity payments due to any employee"* by placing it as the first item in paragraph (2) of the Ninth Schedule. The legislature has not deliberately accepted that it should recognize the category "*statutory dues payable to any employee*" as an item requires a similar status of priority when paying out of the assets of the company. The paragraph 2(g) is the level/status of priority, the legislature had deliberately conferred on "*statutory dues payable to any employee"* in the Ninth Schedule. The legislature had wanted to give the exact same priority level/status to "*industrial court awards*" as well. In my view, that is the reason why the legislature in its wisdom has worded item No. 2(g) of the Ninth Schedule as *"industrial court awards and other statutory dues payable to any employee*". Therefore, in my view, it is not correct to argue that if the legislature intended to recognize the compensation payable under TEWA as a preferential payment, it should have added it specifically in the same way as employees' provident fund dues, trust fund dues and gratuity payments appearing in 2(a) of the Ninth Schedule. On the other hand, if the legislature had specifically recognized compensation payable under TEWA it would then deliberately give a different level of priority than the priority afforded commonly to all statutory dues. I am of the view that this is the mischief the legislature had wanted to avoid as there is no rational basis to recognize only the compensation payable under TEWA over the various other forms of statutory dues. Therefore, what the legislature had intended to prioritize at the level of paragraph 2(g) of the Ninth Schedule is not merely the compensation payable under TEWA but the category called 'statutory dues payable to any employee'. The argument of the Appellants that allowing TEWA to be read into item No. 2(g) in the Ninth Schedule would open the door for all other statutory dues, cannot succeed as the said term 'statutory dues' has been qualified by the phrase "*payable to any employee*" which automatically restricts the application of the provision.

For those reasons, I am unable to accept the argument of the Counsel for the Liquidators that if the legislature had wanted to give priority to the compensation payable under

TEWA, it should have specifically added it in no uncertain terms as it had done to the provident fund dues, employees trust fund dues and gratuity payments. Thus, when it is not possible to prevent 'the compensation payable under TEWA' falling under the category "*statutory dues payable to any employee*", it is not possible to prevent 'the compensation payable under TEWA' falling under item No. 2(g) of the Ninth Schedule to the Companies Act No. 07 of 2007.

Another argument put forward by the Liquidators and Expolanka is that the Ninth Schedule refers only to situations where a state/party/employee has already earned the money sought to be recovered from the company wound up and not future unearned unascertained or probable liabilities. In other words, their position is that the company wound up, should have already owed such money to state/party/employee as at the date of commencement of the winding up action. They argue that the compensation payable on account of termination of employment would be prospective damages and hence it was not the intention of the legislature to prioritize them over the creditors of the company who had actually lent money to the company. It is on that basis that they argue that item No. 2(g) of the Ninth Schedule should not be interpreted to include any claim under TEWA.

They made the above submission on the basis that the *"holiday pay becoming payable to an employee on the termination of the employment before or by reason of the commencement of the liquidation"* has been given a priority level [i.e., 2(i)] which is lower than that given to the item No. 2(g) in the Ninth Schedule. Thus, it is their submission that if prospective damages are given priority and paid (such as claims under TEWA), then the employees would lose what they had already earned. Therefore, it is their submission that such an interpretation would be prejudicial to the employees who have already worked and earned such money.

I am unable to subscribe to this view. It is not the way to look at the Ninth schedule. It has been the intention of the Parliament to regulate the termination of the services of workmen in certain employments by their employers. This was done by TEWA. In the following passage quoted from the Court of Appeal judgment in the case of Serendib

Coconut Products Ltd. (In Voluntary Liquidation) and others v Commisioner General of Labour and others[6] Justice Sripavan highlighted the importance of the above protection in following terms;

> *"The Termination of Employment of Workmen, (Special Provisions) Act is a special legislation which makes special provision in respect of the termination of the services of workmen in certain employments by their employers. By closure the workmen are suddenly thrown out of employment for no fault of theirs and have to face hardships; that is why the legislature gives a discretion to the Commissioner to make an order for compensation."*

In light of the above, it is clear that such employees by the mere fact of working in such employments have earned the protection they have been afforded by the law of the country. In my view, it is unreasonable for the creditors to claim their payments over the payments due to the workmen for the loss of their livelihood. Their livelihood is something protected by law. Creditors engage in a form of business when they lend money. They take a risk when such lending is not secured. Workers are merely engaged in their employment and work for the company. These employments are secured by TEWA if they fall under that Act. Thus, I am of the view that the legislature has rightly intended to recognize such claims as a preferential claim as per item No. 2(g) of the Ninth Schedule. It is not necessary for the legislature to specifically state 'claims under TEWA' because such claims are any way recognized as statutory dues.

Although I observe that there are other several subsidiary arguments considered by the learned Commercial High Court Judge I do not think it necessary for me to re-visit each of those arguments again. This is because most of those arguments are arguments arising out of, or connected with the main arguments I have already dealt with, in this judgment. Suffice it to state here that I do not find that the learned Commercial High Court Judge had erred at any point pertaining to the conclusions relating to those arguments.

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[6] 2004 (2) Sri L. R. 137 at page 138.

For the foregoing reasons, I hold that the order made by the Commissioner of Labour for compensation under section 6A of the Termination of Employment (Special Provisions) Act, is a statutory due within the meaning of item No. 2(g) of the Ninth Schedule to the Companies Act No. 07 of 2007. Therefore, the claim made by the Commissioner General of Labour for Rs. 428,110,096.50 is a preferential claim in terms of section 365 read with paragraph 2(g) of the Ninth Schedule to the Companies Act No 7 of 2007. It is not an unsecured claim as categorized by the Liquidators.

There is yet another Appeal namely, SC Appeal No. 208/2016, the argument of which was also taken up along with the arguments of SC Appeal No. 210/2016 and SC Appeal No. 209/2016. In SC Appeal No. 208/2016 too, this Court, by its order dated 28th October 2016, has granted Leave to Appeal in respect of the same question of law. While SC Appeal No. 208/2016 is a different case between different parties except for the Liquidators, the Liquidators in all three appeals are the same. While the question of law in respect of which, this Court has granted Leave to Appeal remains the same, the learned Judge of the Commercial High Court in his order in SC Appeal No. 208/2016 has held that the payments payable under TEWA, cannot be treated as a Preferential Claim specified in item 2(g) to the Ninth schedule to the Companies Act. Thus, the decision of the Commercial High Court pronounced in SC Appeal No. 208/2016 is quite the opposite of what was decided by the learned Judge of the Commercial High Court in SC Appeal No. 210/2016 and SC Appeal No. 209/2016.It was the same set of counsel who represented the parties of that case (i.e. SC Appeal No. 208/2016) also in this court during the argument and they relied on the same arguments which I have already dealt with.

The learned Judge of the Commercial High Court in his order in SC Appeal No. 208/2016 has held that the legislature did not intend to recognize the compensation payable under TEWA as a preferential payment, as it had not added it specifically in the same way as provident fund dues, employees trust fund dues and gratuity payments appearing in 2(a) of the Ninth Schedule. I have already dealt with this argument.

Further, the learned Judge of the Commercial High Court in SC Appeal No. 208/2016 has also held that the phrase "*other statutory dues payable to any employee*" should not be

broadly interpreted as to encompass any other statutory dues payable to an employee. However, the learned Judge of the Commercial High Court is silent in that order as to what other meaning which should be given to the phrase "*other statutory dues payable to any employee*", if it cannot be interpreted according to its usual meaning. Does it mean that the said phrase is redundant? I do not think so. As I have already stated above, it has been inserted as yet another item in the Ninth Schedule. That must be understood in its general sense. In my view, the maxim *Generalia Verba Sunt Generalita Intelligenda* which means 'words are to be understood generally' is applicable to the phrase in section 2(g) "*other statutory dues*". It is a general term which need to be understood generally as it is not qualified by a subsequent word. For those reasons, I hold that the learned Judge of the Commercial High Court in SC Appeal No. 208/2016 has erred in coming to the conclusion that the compensation payable under TEWA, cannot be treated as a Preferential Claim specified in item 2(g) in the Ninth schedule to the Companies Act No. 07 of 2007.

Learned Counsel appearing in each of the above three appeals agreed that all the three appeals should be heard together and that it would suffice for this Court to pronounce one judgment in respect of all three appeals. This is because it is only a single pure question of law that has to be decided by this Court in all these three appeals. That is the question of law, this Court has granted Leave to Appeal, in all three appeals. I answer the aforementioned question of law in respect of which this Court has granted Leave to Appeal, as follows:

> The claim made by the Commissioner General of Labour under the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 as amended, must be considered as falling under 'other statutory dues payable to any employee' (a preferential claim) in terms of section 365 and the item No. 2(g) in the Ninth Schedule to the Companies Act No 07 of 2007.

This judgment must apply to SC Appeal No. 210/2016, SC Appeal No. 209/2016 and SC Appeal No. 208/2016 as well.

I set aside the order dated 04th July 2016 pronounced by the learned Judge of the Commercial High Court in case No. HC Civil No. 03/2009/CO pertaining to SC Appeal No. 208/2016 (SC/HC/LA No. 39/2016).

I affirm the order dated 25th July 2016 pronounced by the learned Judge of the Commercial High Court in case No. HC Civil No. 50/2011/CO pertaining to SC Appeal No. 209/2016 and SC Appeal No. 210/2016.

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

Lakshani Madusha Sammuarachchi,
"Suramya", Welimanna, Aranayake.
Petitioner

SC APPEAL NO: SC/APPEAL/220/2017
SC LA NO: SC/HCCA/LA/343/16
HCCA KEGALLE NO: SP/HCCA/KEG/117/2012
DC MAWANALLA NO: 24/T

Vs.

Surangi Deepika Jayawardhena,
"Suramya", Welimanna, Aranayake.
Respondent

AND BETWEEN

1. Nirmala Shiranthani Siriwardhena,
   2/55, Welimanna, Aranayake.
2. Krishan Lakshman Siriwardhena,
   "Suramya", Welimanna, Aranayake.

Intervenient Petitioners

Vs.

1. Lakshani Madusha Sammuarachchi
   Petitioner-Respondent
2. Surangi Deepika Jayawardhena
   Respondent-Respondent
   Both of,
   "Suramya", Welimanna, Aranayake.

AND BETWEEN

1. Nirmala Shiranthani Siriwardhena,
   2/55, Welimanna, Aranayake.
2. Krishan Lakshman Siriwardhena,
   "Suramya", Welimanna, Aranayake.

Intervenient Petitioner-Petitioners

Vs.

1. Lakshani Madusha Sammuarachchi
   Petitioner-Respondent-Respondent
2. Surangi Deepika Jayawardhena
   Respondent-Respondent-Respondent
   Both of,
   "Suramya", Welimanna, Aranayake.

AND NOW BETWEEN

Lakshani Madusha Sammuarachchi,
"Suramya", Welimanna, Aranayake.
Petitioner-Respondent-Respondent-Appellant

Vs.

1. Nirmala Shiranthani Siriwardhena,
   2/55, Welimanna, Aranayake.
2. Krishan Lakshman Siriwardhena
   Intervenient Petitioner-Petitioner-Respondents
3. Surangi Deepika Jayawardhena
   Respondent-Respondent-Respondent-Respondent
   Both of, "Suramya", Welimanna, Aranayake.

Before: P. Padman Surasena, J.
Yasantha Kodagoda, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Asthika Devendra with Milinda Sarathchandra for the Petitioner-Respondent-Respondent-Appellant.

Ravindra Anawaratne with D.L.W. Somadasa for the 1st Intervenient Petitioner-Petitioner-Respondent.

Pubudu De Silva for the 2nd Intervenient Petitioner-Petitioner-Respondent.

Argued on: 07.06.2022

Written submissions:

by the Petitioner-Respondent-Respondent-Appellant on 23.01.2018 and 07.07.2022.

by the 1st Intervenient Petitioner-Petitioner-Respondent on 04.07.2022.

by the 2nd Intervenient Petitioner-Petitioner-Respondent on 09.04.2018 and 06.07.2022.

Decided on: 17.11.2022

Mahinda Samayawardhena, J.

The original petitioner filed this application in the District Court of Mawanella on 17.09.2010 making her mother the respondent, seeking to admit the last will tendered with the petition to probate and to issue the probate in her name for the administration of the estate of the deceased. The deceased was the uncle of the original petitioner and by this last will he bequeathed all his property to the original petitioner subject to the life interest of the original petitioner's mother, who is the elder sister of the

deceased. Newspaper publications were properly done in terms of section 529 of the Civil Procedure Code and nobody came forward to object to the original petitioner's application. The court made order on 06.05.2011 issuing the probate to the original petitioner and follow up orders were made accordingly.

Pending termination of the proceedings, nearly one year after the issuance of the probate, the two intervenient petitioners who are the siblings of the deceased and the original respondent made an application to the District Court under section 839 of the Civil Procedure Code seeking to recall the probate and to issue the same in the name of the 1st intervenient petitioner on the basis that: the purported last will is a fraudulent document; they had no knowledge of the testamentary proceedings; and the intestate estate of the deceased should devolve on the two intervenient petitioners and the original respondent in equal shares because they are the natural heirs of the deceased. The District Court made order dated 08.06.2012 rejecting this application. On appeal, the High Court of Civil Appeal by judgment dated 02.06.2016 set aside the order of the District Court and allowed the appeal. Hence this appeal by the original petitioner.

Maasdorp's Institutes of South African Law at page 146 states "*A will is a declaration made by any person during his lifetime as to what he wishes should become of his property after his death*". In terms of section 21 of the Judicature Act No. 2 of 1978 testamentary jurisdiction is vested in the District Court. The Wills Ordinance No. 21 of 1844 lays down the substantive law regarding last wills. The Civil Procedure Code lays down the procedure to be adopted in testamentary proceedings. I must state at the outset that the testamentary procedure contained in the Civil Procedure Code is complex and complicated. This procedure has undergone a series of amendments over a considerable period of time and it will continue to change. If I may trace the recent history, the procedure

was substantially changed by the Civil Procedure Code (Amendment) Law No. 20 of 1977. Thereafter, the entire chapter 38 under the heading 'Testamentary Actions' was repealed and replaced with a new chapter by the Civil Procedure Code (Amendment) Act No. 14 of 1993. After Act No. 14 of 1993, chapter 38 was further amended by Act Nos. 38 of 1998, 34 of 2000, 20 of 2002, 4 of 2005 and 11 of 2010. There are substantial differences including the content and numbering of sections between the old procedure and the new procedure and therefore cases decided under the old procedure may not be relevant although they are cited and followed without fully appreciating the differences between the two. For instance, sections 536 and 537 governed the recall of probate under the old procedure whereas under the new procedure it is sections 537 and 538 that govern the same. Hence in referring to or citing previous decisions, care must be taken not to go by section numbers alone. A case in point might be *Shanthi Goonetilake v. Mangalika [2006] 3 Sri LR 331* where the Court of Appeal seems to have relied on the judgments decided under the old procedure to deal with an application filed under the new procedure.

In the first place, the sections relevant to testamentary procedure cannot be found in one place in the Civil Procedure Code. They are in several places: chapter 38 under the heading '*Testamentary Actions*' with sections 516-554A is in one place whereas chapter 54 under the heading '*Of Aiding, Supervising, and Controlling Executors and Administrators*' with sections 712-722 and chapter 55 under the heading '*Of the Accounting and Settlement of the Estate*' with sections 723-744 are in a completely different place. Chapter 38A under the heading '*Insolvent Testamentary Estates*' with sections 554F-554T, chapter 38B under the heading '*Foreign Probates*' with sections 554U-555BB and chapter 38C under the heading '*General and Transitional Provisions in Testamentary Matters*' with sections 554CC-554DD were introduced by the Civil Procedure Code (Amendment) Law No. 20 of 1977.

Furthermore, the law on testamentary procedure itself has been influenced by different legal systems. L.J.M. Cooray in *An Introduction to the Legal System of Sri Lanka* states at pages 26-27 "*The offices of executor and administrator are copied from English law and the rules governing executors and administrators are to be found in the Civil Procedure Code, 1977, and have been influenced by English law. But they are given effect to in a Roman-Dutch atmosphere because Roman-Dutch rules generally apply regarding heirs and testate succession.*" As pointed out by Bertram C.J. in *De Zoysa v. De Zoysa (1924) 26 NLR 472 at 476,* Wijeyewardene J. in *De Silva v. Jayakody (1941) 42 NLR 226 at 229-230* and Sirimane J. in *Pathmanathan v. Thuraisingham (1970) 74 NLR 196 at 199-200*, our testamentary law relating to chapters 54 and 55 has been taken almost verbatim from the Code of Civil Procedure of the State of New York.

All these factors have contributed to create *inter alia* redundancies, obscurities, inconsistencies, overlaps etc. within the stipulated procedure. For these reasons, in the course of this judgment I will endeavour to throw some light (albeit not comprehensively) on some practical aspects of general importance in the testamentary procedure.

In terms of section 517 of the Civil Procedure Code, when a person dies leaving a last will, the person appointed therein as executor can apply to the District Court in terms of section 524 to have the will proved and the probate issued to him; or any other interested person can apply to have the will proved and letters of administration issued with the will annexed.

> *517(1). When any person shall die leaving a will under or by virtue of which any property in Sri Lanka is in any way affected, any person appointed executor therein may apply to the District Court of the district within which he resides, or within which the testator resided at the time of his death, or within which any land belonging to the testator's estate is situate, within the time limit and in the manner*

specified in section 524, to have the will proved and to have probate thereof granted to him; any person interested, either by virtue of the will or otherwise, in having the property of the testator administered, may also apply to such court to have the will proved and to obtain grant to himself of administration of the estate with copy of the will annexed.

(2) If any person who would be entitled to administration is absent from Sri Lanka a grant of letters of administration with or without the will annexed, as the case may require, may be made to the duly constituted attorney of such person.

As the law stands today, how the application for probate shall be made is stated in section 524 of the Civil Procedure Code. Accordingly, the application shall be made by petition and affidavit (but not by way of summary procedure) and the petition shall set out *inter alia* the matters stated in section 524(1)(a)-(d). They are: the fact of the making of the will, the detail and situation of the deceased's property, the heirs of the deceased to the best of the petitioner's knowledge, the grounds upon which the petitioner is entitled to have the will proved, and the character in which the petitioner makes the claim.

524(1). Every application to the District Court to have the will of a deceased person proved shall be made within a period of three months from the date of finding of the will, and shall be made by way of petition and affidavit and such petition shall set out in numbered paragraphs-

(a) the fact of the making of the will;
(b) the details and situation of the deceased's property;
(bb) the heirs of the deceased to the best of the petitioner's knowledge;

(c) the grounds upon which the petitioner is entitled to have the will proved; and

(d) the character in which the petitioner claims (whether as creditor, executor, administrator, residuary legatee, legatee heir or devisee).

(2) If the will is not already deposited in the District Court in which the application is made, it must either be appended to the petition, or must be brought into court and identified by affidavit, with the will as an exhibit thereto, or by parol testimony at the time the application is made.

(3) Every person making or intending to make, an application to a District Court under this section to have the will of a deceased person proved, which will is deposited in another District Court, is entitled to procure the latter for the purpose of such application. Also the application must be supported by sufficient evidence either in the shape of affidavits of facts, with the will as an exhibit thereto, or of oral testimony, proving that the will was duly executed according to law, and establishing the character of the petitioner according to his claim.

(4) The petitioner shall tender with the petition proof of payment of charges to cover the cost of publication of the notice under section 529.

One of the main issues relating to the mode of application is whether compliance with all the provisions of section 524(1)(a)-(d) is mandatory or directory. If it is mandatory, for instance, failure to mention one property of the deceased or one heir of the deceased would render the entire proceedings void *ab initio*. The section requires the heirs of the deceased to be stated in the petition "*to the best of the petitioner's knowledge*". The

language itself gives the indication that it is not mandatory. If the petitioner is a stranger to the family and has no personal knowledge of the heirs of the deceased, for instance, he will not be able to list out the names of the heirs of the deceased. Hence as was held in *Biyanwila v. Amarasekere (1965) 67 NLR 488* and *Pieris v. Wijeratne [2000] 2 Sri LR 145*, the provisions of section 524(1)(a)-(d) are directory and not mandatory. However, willful suppression of material particulars will not be tolerated by court. It is in this context that Sirimane J. in the *Biyanwila* case stated at page 494 "*I am of the view that the provisions of this section [524] are only directory, and that a failure to strictly comply with those provisions, does not render the proceedings void ab initio. They are, however, voidable, and in an appropriate case a party may ask the court for relief under section 839 of the Civil Procedure Code*." Referring to the failure to name heirs as parties to the application for probate, in the Supreme Court case of *Actalina Fonseka v. Dharshani Fonseka [1989] 2 Sri LR 95 at 99*, Kulatunga J. stated "*However, such failure is a relevant fact in determining whether probate had been obtained by fraud*."

Let me now consider the application made by the intervenient petitioners seeking to recall the probate. The intervenient petitioners made this application under section 839 of the Civil Procedure Code.

> *839. Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

It is not possible for the legislature to anticipate and make provision to cover all possible contingencies. If there is no specific provision, it lies within the inherent power of the District Court in terms of section 839 of the Civil Procedure Code to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of court.

Nevertheless, express provisions cannot be made nugatory by the inherent power of the court. Inherent jurisdiction can be invoked if and only if there is no provision in the law (*Kamala v. Andris (1939) 41 NLR 71*, *Leechman & Company Ltd v. Rangalla Consolidated Ltd [1981] 2 Sri LR 373*, *Seneviratne v Abeykoon [1986] 2 Sri LR 1*, *Abeygunasekera v. Wijesekara [2002] 2 Sri LR 269*, *Ravi Karunanayake v. Wimal Weerawansa [2006] 3 Sri LR 16*).

Specific provisions are found in sections 537 and 538 to deal with recalling, revoking or cancelling probate, letters of administration or certificate of heirship. Section 537 deals with the grounds upon which probate can be recalled, and section 538 stipulates that such application shall be made by way of summary procedure. The intervenient petitioners neither filed an application for recalling the probate under section 537 nor followed summary procedure as required by section 538. As learned counsel for the original petitioner points out, it is obvious that the application of the intervenient petitioners in the District Court was procedurally flawed and the District Court ought to have dismissed it *in limine*. However the court did not do so. Nor did counsel for the original petitioner object to the intervenient petitioners' application in the District Court on that basis. The original petitioner objected to it on the basis that the intervenient petitioners did not make the application within the time stipulated in the newspaper publication made under section 529 of the Civil Procedure Code.

Unlike in a situation where there is patent or total want of jurisdiction, when the court has plenary jurisdiction to deal with a matter and the question is on invoking such jurisdiction in the right manner, a party cannot keep silent and take up an objection as to procedure when the final order is made against him. Any objection as to latent or contingent want of jurisdiction shall be taken at the first available opportunity (section 39

of the Judicature Act No. 32 of 1978; *Navaratnasingham v. Arumugam [1980] 2 Sri LR 1 at 5-6*). It is only if want of jurisdiction is patent that the matter can be raised at any time, even for the first time on appeal, in which event the whole proceedings including the judgment becomes a nullity *ab initio* due to *coram non judice* (*Beatrice Perera v. The Commissioner of National Housing (1974) 77 NLR 361 at 366-370*, *Abeywickrama v. Pathirana [1986] 1 Sri LR 120*).

In *Dabare v. Appuhamy [1980] 2 Sri LR 54* the defendant sought to dismiss the plaintiff's action on *res judicata* but the objection was overruled. On appeal by the defendant, the plaintiff submitted that the dismissal of his former action was invalid as the court had followed the wrong procedure, in that, instead of summary procedure, regular procedure had been followed. At that time, the plaintiff had not objected to the wrong procedure being followed. Rejecting that argument and allowing the appeal, the court stated that notwithstanding that the wrong procedure had been followed, the order of dismissal made by the court was valid since the court had jurisdiction to hear and determine the action and the plaintiff did not take objection to the wrong procedure being followed at that time. Wrong procedure can be validated by acquiescence, waiver or inaction on the part of the parties.

I might also mention that when the court has plenary jurisdiction, it cannot dismiss an application merely because the caption in the application refers to a wrong section. If the Judge thinks that the applicant has come under a wrong section but the court has jurisdiction to make a suitable order had the application been made under the correct section, the Judge shall not dismiss the application *in limine* on that ground alone, unless such reference to the wrong section in the caption has caused prejudice to the opposite party in meeting the applicant's case in the proper context.

Bindra on the Interpretation of Statutes (1975) 6th Ed. at page 153 states: "*It is a well-settled principle of interpretation that as long as an authority has Power to do a thing, it does not matter if it purports to do it by reference to a wrong Provision of law.*" In *Peiris v. The Commissioner of Inland Revenue* (1963) 65 NLR 457 Sansoni J. (later C.J.) stated at 458: "*It is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another Statute which conferred that power.*" This principle was recognised in *Solicitor-General v. Perera (1914) 17 NLR 413 at 416, Peiris v. The Commissioner of Inland Revenue (1963) 65 NLR 457 at 458, Jayawardane v. Ran Aweera [2004] 3 Sri LR 37 at 41* and *Kumaranatunga v. Samarasinghe [1983] 2 Sri LR 63 at 73-74*.

In the case of *Jayasekera v. Lakmini [2010] 1 Sri LR 41 at 51* the Supreme Court pointed out that even if the attention of the court has not been drawn to the relevant statutory provision through which relief could be granted, "*it is undoubtedly incumbent upon the Court to utilize the statutory provisions and grant the relief embodied therein if it appears to Court that it is just and fair to do so.*" In *Wilson v. Kusumawathi [2015] BLR 49* also the Supreme Court took the same view.

In the instant case the District Court while recognising that the intervenient petitioners could not come under section 839 nevertheless considered the intervenient petitioners' application under section 537 but held that there were no sufficient grounds to recall the probate.

The High Court of Civil Appeal set aside the order of the District Court on two main grounds: (a) failure on the part of the original petitioner to name the intervenient petitioners as respondents to the main application as necessary parties; and (b) failure on the part of the District Judge to come

to a definite finding that the last will was proved before issuance of the probate.

There is no dispute that the names of the intervenient petitioners are included in the body of the petition of the original petitioner. The High Court of Civil Appeal in several places of the impugned judgment emphasises that the intervenient petitioners are the natural heirs of the deceased in the event the testator died intestate and therefore naming them only in the body of the petition is insufficient and they ought to have been named as necessary parties (respondents) to the application. The High Court of Civil Appeal further states that non-compliance with section 524(5) makes the application of the original petitioner bad in law because if no such affidavit as required by that section was tendered, the intervenient petitioners should have been named as respondents.

Section 524(5) which stated "*If the petitioner has no reason to suppose that his application will be opposed by any person, he shall file with his petition an affidavit to that effect and may omit to name any person in his petition as respondent*" was repealed, and section 524(1)(bb) which requires the petitioner to name in the body of the petition "*the heirs of the deceased to the best of the petitioner's knowledge*" was introduced by the Civil Procedure Code (Amendment) Act No. 38 of 1998.

Whether we agree or not, as the law stands today (which was the law applicable at the time the original petitioner filed the application), in the case of proving a last will, the law does not require the petitioner (a) to name the heirs of the deceased <u>as respondents</u> to the application or (b) to file an affidavit with the petition to say that he has no reason to suppose that his application will be opposed by any person (thereby omitting to name any person in his petition as a respondent).

I must also add that less than three weeks after the filing of the application by the original petitioner in the District Court, section 524(4) was further amended by the Civil Procedure Code (Amendment) Act No. 11 of 2010 whereby the requirement of tendering with the petition "*the consent in writing of such respondents as consent to his application*" under section 524(4)(b) was also removed.

The intention of the legislature is clear by looking at section 528 of the Civil Procedure Code, which sets out what an application for letters of administration or certificate of heirship (in the case of death without a last will) should constitute. Whilst section 528(1)(c) requires the petitioner to set out in the body of the petition *"the heirs of the deceased to the best of the petitioner's knowledge"*, section 528(2) states that the petitioner "*shall name the next of kin of the deceased as respondents. If the petitioner has no reason to suppose that his application will be opposed by any person, he shall file with his petition an affidavit to that effect.*" Section 528(3)(b) further states that "*The petitioner shall tender with the petition the consent in writing of such respondents as consent to his application.*" Section 528(3) was further amended by the Civil Procedure Code (Amendment) Act No. 11 of 2010 with the introduction of section 528(3)(c) which requires the petitioner to tender with the petition "*notices on the respondents who have not consented to the application, requiring them to file objections if any, to the application on or before the date specified in the notice under section 529. Such notice shall be sent by the probate officer by registered post.*"

Let me reproduce section 528 as it stands today for convenience:

> *528(1). Every application to the District Court for grant of letters of administration or for the issue of certificates of heirship shall be made within three months from the date of death, and shall be made by way of petition and affidavit, and such petition shall set out in numbered paragraphs-*

(a) the fact of the absence of the will;

(b) the death of the deceased;

(c) the heirs of the deceased to the best of the petitioner's knowledge;

(d) the details and the situation of the deceased's property;

(e) the particulars of the liabilities of the estate;

(f) the particulars of the creditors of the estate;

(g) the character in which the petitioner claims and the facts which justify his doing so;

(h) the share of the estate which each heir is entitled to receive, if agreed to by the heirs.

(2) The application shall be supported by sufficient evidence to afford prima facie proof of the material averments in the petition, and shall name the next of kin of the deceased as respondents. If the petitioner has no reason to suppose that his application will be opposed by any person, he shall file with his petition an affidavit to that effect.

(3) The petitioner shall tender with the petition-

(a) proof of payment of charges to cover the cost of publication of the notice under section 529;

(b) the consent in writing of such respondents as consent to his application;

(c) notices on the respondents who have not consented to the application, requiring them to file objections if any, to the application on or before the date specified in the notice under section 529. Such notice shall be sent by the probate officer by registered post.

This shows that the legislature did not intend to include the requirement of the naming of heirs or next of kin of the deceased as respondents in an

application filed before the District Court to have the last will of the deceased proved.

Hence the finding of the High Court of Civil Appeal that the failure to name the intervenient petitioners as respondents to the application as necessary parties is fatal does not represent the correct position of the law.

Nonetheless I must add that although naming heirs as respondents is not mandatory, it is all the more salutary for any petitioner to name the heirs or at least potential contesting heirs of the deceased as respondents for transparency and to bring early finality to the case. In my view, if there is a statutory requirement that the heirs of the deceased to the best of the petitioner's knowledge be made respondents and notice be served on them where there is no written consent to the petitioner's application, prolonged litigation in the case of testacy can be minimised. It may be recalled that in *Biyanwila* case (*supra*), Sirimane J. at page 494 whist stating that failure to strictly comply with section 524 does not render the proceedings void *ab initio*, further remarked that *"They are, however, voidable, and in an appropriate case a party may ask the court for relief under section 839 of the Civil Procedure Code*"; and in *Actalina Fonseka's* case (*supra*) at page 99, Kulatunga J. stated "*However, such failure is a relevant fact in determining whether probate had been obtained by fraud*."

When the District Court refused the application of the intervenient petitioners for recalling the probate on the basis that there were insufficient grounds to allow the application, the High Court of Civil Appeal posed the question whether there were sufficient grounds for the District Court to issue the probate in favour of the petitioner in the first place. The High Court of Civil Appeal concluded that the issuance of probate becomes relevant if and only if the District Court comes to the definite finding that the will has been proved, but in this case the District

Judge has not done so before the issuance of the probate to the original petitioner. There is force in this finding.

A testamentary action is similar to a partition action. The District Judge hearing a testamentary action has a special duty to give effect to the intention of the testator in the case of testacy and make a proper distribution of property in the case of intestacy. In the full bench decision of the Supreme Court in *Adoris v. Perera (1914) 17 NLR 212 at 214*, Lascelles C.J. remarked "*A judgment granting probate of a will is a judgment in rem, and is binding on the world*." Further as stated by Chitrasiri J. in *Sadhana Dharmabandu v. Mallika Homes Ltd* [2009] *1 Sri LR 151 at 157* "*The purpose of testamentary actions is to ascertain the wish of a deceased person who cannot be called to court. Therefore, a duty is cast upon Court to ascertain the intention of a deceased person irrespective of adverse interests that may arise from other individuals.*" The absence of objections upon newspaper publications in terms of section 529 does not absolve the District Judge from this special duty.

For instance, in terms of section 516, when any person shall die leaving a will in Sri Lanka, the person in whose custody it shall have been deposited, or who shall find such will after the testator's death, shall produce the same to the District Court of the district in which such depository or finder resides, or to the District Court of the district in which the testator shall have died, as soon as reasonably possible after the testator's death. In terms of section 517, as I stated earlier, the person appointed executor of the last will or any interested party can make an application to the District Court under section 524 to have the will proved and probate granted to him or to have letters of administration issued to him with the will annexed. In terms of sections 518 and 519 of the Civil Procedure Code, when a will is deposited in court and no application has been made by any person to prove the will and the probate issued, it is the duty of the court

to take appropriate steps to appoint a person to administer the estate of the deceased or, if there is no fit and proper person to be so appointed, to appoint the public trustee as the administrator.

The High Court of Civil Appeal without referring to any section in the Civil Procedure Code on burden of proof or standard of proof of a will states "*In this action the petitioner-respondent has sought probate on the basis of a purported last will of the deceased executed in the presence of five witnesses. I am of the view such a document can be accepted as a valid last will if proved before a court of law and not otherwise*." The High Court of Civil Appeal seems to have taken the view that leading oral evidence to prove a last will is mandatory in each and every case. I do not think so. It is true that as a general rule the onus is on the propounder of the will to prove affirmatively that the will is the act and deed of the free and capable testator by removing all suspicious circumstances, if any, attached to the will. However I hasten to add that it is not the duty of the court to see that a testator makes a just distribution of his property. As long as it is affirmatively proved that the testator executed the will intending it to be his last will, the court cannot refuse to make a declaration that the will is proved on the ground that the distribution of the property in the will is *prima facie* unjustifiable and therefore the will is shrouded in suspicious circumstances (*Peries v. Perera (1947) 48 NLR 560*).

In terms of section 531(1), if no objections are received within the stipulated time after the newspaper publications, the court shall make order declaring the will proved if the court is satisfied that the evidence adduced is sufficient to afford *prima facie* proof as to the due making of the will and the character of the petitioner. What is necessary is *prima facie* proof and not strict proof by leading oral evidence.

> *531(1). If no objections are received in relation to any application received under section 524 and 528 in response to a notice published*

under section 529, on or before the date specified in such notice in respect of such application, the court shall-

(a) in the case of an application under section 524, if the court is satisfied that the evidence adduced is sufficient to afford prima facie proof as to the due making of the will and the character of the petitioner, it shall made order declaring the will to be proved and if the applicant claims-

(i) as the executor or one of the executors of the will and asks that probate thereof be granted to him the order shall declare that he is executor, and shall direct the grant of probate to him accordingly, subject to the conditions hereinafter prescribed; or

(ii) in any other character than that of executor, and asks that the administration of the deceased's property be granted to him, then the order shall include a grant to the applicant of a power to administer the deceased's property according to the will with a copy of the will annexed; or

(b) in the case of an application under section 528-

(i) make order for the grant of letters of administration to the petitioner subject to the conditions hereinafter prescribed; or

(ii) make order for the issue of a certificate of heirship in form No. 87A in the First Schedule, to each of the heirs mentioned in the application, stating also the share of the estate which each heir is entitled to receive, if agreed to by the heirs;

(c) in the case of an application under section 528 for the issue of certificates of heirship, make order for the grant of letters of administration, instead, to some person entitled to take out administration, subject to the conditions hereafter prescribed, if in the opinion of court it is necessary to appoint some person to administer the estate.

> *(2) The certificates of heirship issued under subsection (1)(b)(ii) above shall be sufficient proof of the true heirs of the deceased referred to therein, and may be produced for the purpose of claiming any share in respect of any right, title or interest, accruing upon intestacy.*
>
> *(3) For the purpose of making an order under subsection (1), the Probate Officer shall submit all papers, relevant to the application in question, to the District Judge in Chambers on the day following the date specified in the notice published under section 529, in respect of such application and the court shall forthwith make an appropriate order.*

Although section 531(3) enacts that "*For the purpose of making an order under subsection (1), the Probate Officer shall submit all papers, relevant to the application in question, to the District Judge in Chambers on the day following the date specified in the notice published under section 529, in respect of such application and the court shall forthwith make an appropriate order*", the District Judge is not expected to make a mechanical order that the will is proved. Section 531(3) requires the Probate Officer to submit papers to the District Judge for the latter to make an "*appropriate order*".

Section 531(1)(a) states that "*if the court is satisfied that the evidence adduced is sufficient to afford prima facie proof as to the due making of the will*", the court shall declare that the will is proved.

What is meant by "*the due making of the will*"? The constituent elements of the due execution of a will are set out in section 4 of the Prevention of Frauds Ordinance No. 7 of 1840.

> *4. No will, testament, or codicil containing any devise of land or other immovable property, or any bequest of movable property, or for any other purpose whatsoever, shall be valid unless it shall be in writing*

> *and executed in manner hereinafter mentioned ; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of a licensed notary public and two or more witnesses, who shall be present at the same time and duly attest such execution, or if no notary shall be present, then such signature shall be made or acknowledged by the testator in presence of five or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.*

In the instant case, the District Court has not considered at all the requirements of section 531(1)(a) and has merely made a perfunctory order to issue the probate to the original petitioner upon realising that no objections had been filed consequent to the newspaper publications – *vide* Journal Entry No. 4 dated 06.05.2011.

What is meant by *prima facie* proof? In *Velupillai v. Sidembram (1929) 31 NLR 97 at 99* Drieberg J. stated:

> *"Prima facie proof" in effect means nothing more than sufficient proof—proof which should be accepted if there is nothing established to the contrary; but it must be what the law recognizes as proof, that is to say, it must be something which a prudent man in the circumstances of the particular case ought to act upon—s. 3, Evidence Ordinance.*

Section 3 of the Evidence Ordinance in describing what is meant by 'proved' 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 might, under the circumstances of the*

particular case, to act upon the supposition that it exists." (*vide* also *Wickremasuriya v. Dedoleena [1996] 2 Sri LR 95 at 101-102*)

The learned District Judge did not exercise his judicial mind to consider whether the original petitioner had *prima facie* proved the due making of the will before he decided to issue the probate to the original petitioner. What the learned District Judge has recorded in the Journal Entry is that "*proof of publication is tendered; no objections; probate is issued in favour of the petitioner*".

I agree with the High Court of Civil Appeal that there was no definite finding that the will had been proved before the order was made to issue the probate, which is a *sine qua non* and a prerequisite to the issuance of the probate. Given the consequences which follow from that finding, it is not a curable procedural defect but non-compliance with a mandatory provision of the law. The order shall reflect due consideration of the evidence adduced by the petitioner.

It is similar but not identical to an *ex parte* judgment entered under section 85(1) of the Civil Procedure Code where the plaintiff is required to place evidence before the court in support of his claim by affidavit or oral testimony to the satisfaction of the court. Section 531 requires adducing sufficient evidence to afford *prima facie* proof of the due execution of the will, while section 85 requires placing evidence by affidavit or oral testimony to satisfy the court. Both under sections 85(1) and 531 of the Civil Procedure Code, the court cannot make a mechanical order without going into the merits of the application merely because the application is *ex parte* and there is no contesting party before court. In the instant case the District Judge did not make a mechanical order; he did not make any order at all in respect of proof of the will.

The last will in question is not a notarially attested document. It has been executed before five witnesses. In the application filed before the District Court seeking to recall the probate, the intervenient petitioners specifically aver fraud in the execution of the last will and state *inter alia* that the last will which is not an act and deed of the deceased has been prepared in the handwriting of the petitioner herself who is the sole beneficiary of it (subject to the life interest of the beneficiary's mother), and the deceased has placed his signature on a stamp issued about five years before the execution of the last will. The fact that the last will was prepared by the beneficiary in her own handwriting has not been controverted up to now. The District Court in the impugned order has not touched upon this vital matter which excites the suspicion of the court.

In *Pieris v. Wilbert (1956) 59 NLR 245*, an application for probate of a will was resisted on the ground that the testator was not in a fit state of mind at the time the will was executed. The petitioner was nominated in the will as executor and also as the sole heir of all the estate of the deceased. It was not disputed that the petitioner took an active part in getting the will executed. Against this backdrop, the Supreme Court at page 247 relied on the following passage from the judgment of Baron Parke in the Privy Council case of *Barry v. Butlin [1838] 2 Moo. P.C. 480 at 482-483*:

> *The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal and they have been acquiesced in on both sides. These rules are two: The first that the onus probandi lies in every case upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. <u>The second is that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite</u>*

> *the suspicion of the Court, and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.*

The same point, i.e. if a party writes or prepares a will under which he takes a benefit the court ought not to pronounce in favour of it unless the suspicion created by that act is removed, was highlighted in a number of cases including *The Alim Will Case (1919) 20 NLR 481*, *Arulampikai v. Thambu (1944) 45 NLR 457*, *Sithamparanathan v. Mathuranayagam (1970) 73 NLR 53*, *Ratnayake v. Chandratillake [1987] 2 Sri LR 299*.

The District Court mainly focused on the failure on the part of the intervenient respondents to file objections within the stipulated time mentioned in the newspaper publications. The explanation of the intervenient respondents is that the original petitioner, original respondent and 2nd intervenient petitioner are living at the same address but the original petitioner and her mother (the sister of the intervenient petitioners) concealed from them the existence of the last will and the testamentary case filed in court despite their names being disclosed in the body of the petition, and they came to know about the case only after they mistakenly received a postcard (as all are living at the same address) sent by the Attorney-at-Law of the original petitioner to the original respondent asking the latter to meet with the Attorney-at-Law for the testamentary case. The postcard had been tendered with the petition of the intervenient petitioners. This explanation is acceptable.

In *Actalina Fonseka's* case (*supra*) at pages 99-100, Kulatunga J. remarked:

Learned Counsel also submitted that notice of Order Nisi was advertised in the Newspaper as required by Section 532. That may be adequate in law. However, for determining whether probate was obtained by fraud it would be relevant to know whether having regard to the circumstances of the plaintiffs, such notice afforded to them an adequate opportunity of being aware of the case and whether the Defendants-Appellants kept the Plaintiff-Respondents out of the case being aware of the fact that the Plaintiff-Respondents were not likely to have read the Newspaper and become aware of the testamentary case.

On the allegations contained in the plaint the Court has to determine upon evidence whether the Plaintiff-Respondents were deliberately kept in the dark about the existence of the testamentary action to make it appear to the Court that there was no opposition to the grant of probate, whether the will is a forgery and whether probate had been obtained by fraud.

It is undeniable that the most appropriate time to object to the last will or grant of probate or letters of administration is within a date not earlier than sixty days and not later than sixty-seven days from the date of the first newspaper publication. The relevant section is section 529 of the Civil Procedure Code.

529(1). Every application to a District Court under section 524 or 528 shall be received by the Probate Officer of the District Court, and shall be registered in a separate register to be maintained for that purpose by the Probate Officer who shall thereafter cause the required publications to be made in terms of subsection (2).

(2) The Probate Officer of a District Court shall, on any day of the week commencing on the third Sunday of every month cause a notice in

form No. 84 in the First Schedule to be published in a prescribed local newspaper in Sinhala, Tamil and English, relating to-

(i) every application under section 524 or 528 received by that District Court in the preceding one month; and

(ii) every application under section 524 or 528 received by that District Court and incorporated for the first time in the notice published in respect of such District Court in the previous month,

so however that the information in respect of every application under section 524 or 528 received by every District Court is published on two separate occasions in two consecutive months.

(3) The notice published under subsection (2), shall call upon persons having objections to the making of an order declaring any will proved, or the grant of probate or of letters of administration with or without the will annexed, or the issue of certificates of heirship to any person specified in the application made under section 524 or 528, to submit their written objections, if any, supported by affidavit, before such date as is specified in the notice, being a date not earlier than sixty days and not later than sixty seven days from the date of the first publication referred to in subsection (2).

(4) Copies of such objections if any, shall be forwarded by the person making the same to the person making the application under section 524 or 528, as the case may be, and shall also be served on the other parties named in such objections.

However this is not the only occasion an objection could be raised against a declaration that the will is proved or against the grant of probate or letters of administration.

The following dicta contained in the Court of Appeal judgment in *Shanthi Goonetilake v. Mangalika [2006] 3 Sri LR 331 at 334* and made use of to dismiss applications *in limine* that "*The first publication in terms of section 529(2) was done on 23.04.2003. Objections to the granting of letters of administration could be entertained in terms of section 529(3) of the Civil Procedure Code only if such objections are submitted not earlier than 60 days and not later than sixty seven days from the date of the first publication referred to in section 529(2). However, the petitioner has not filed any objections to the order made by Court to grant letters of administration to the respondent as prescribed in section 529(2). When a period of time is specified by law before the expiration of which any act has to be done by a party in a Court of law, that Court has no jurisdiction to permit that act to be done after the expiration of that time within which it had to be done (Ceylon Breweries v. Fernando [2001] 1 Sri LR 270). Therefore when the petitioner has not made an application to recall the letters of administration within the period prescribed in section 529(3) of the Civil Procedure Code, the petitioner's application cannot be entertained*" does not, with respect, represent the correct position of the law. The law has provided for various opportunities to intervene, object and make applications for recall of probate or letters of administration etc. beyond the period stipulated in the newspaper publications. In point of fact, a person cannot make an application to recall the probate or letters of administration within the period prescribed in section 529(3) since at that time the court has not issued probate or letters of administration.

According to section 536, any person interested in the will or the deceased's property can intervene by filing in the same court a caveat before the final hearing of the petition.

> *536. At any time after the notice published under section 529 and before the final hearing of the petition, it shall be competent to any*

> *person interested in the will or in the deceased person's property or estate, though not a person specified in the petition, to intervene, by filling in the same court a caveat as set out in form No. 93 in the First Schedule against the allowing of the petitioner's claim or a notice of opposition thereto, and the court may permit such person to file objections, if any, and may adjourn the final hearing of the petition.*

In terms of section 537, probate, letters of administration or a certificate of heirship can be recalled, revoked or cancelled upon the court being satisfied that (a) the certificate should not have been issued or that the will ought not to have been held proved, (b) that the grant of probate or letters of administration ought not to have been made, or (c) that events have occurred which render administration impracticable or useless.

> *537. In any case where a certificate of heirship has issued, or probate of a deceased person's will or administration of a deceased person's property has been granted it shall be competent to the District Court to cancel the said certificate, or recall the said probate or grant of administration, and to revoke the grant thereof, upon being satisfied that the certificate should not have been issued or that the will ought not to have been held proved, or that the grant of probate or of administration ought not to have been made; and it shall also be competent to the District Court to recall the probate or grant of administration, at any time upon being satisfied that events have occurred which render the administration hereunder impracticable or useless.*

There is no time limit for an application under section 537 to be made but if the applicant says he was unaware of the newspaper publication calling for objections, such an application shall be made at the earliest possible opportunity of such applicant becoming aware of the case. The test is objective, not subjective.

In *Biyanwila v. Amarasekere* (*supra*), the appellant became aware of the fact that the respondent, her mother, had obtained the probate as executor of the last will in 1952 but about 9 years later in 1961 she came to court challenging the last will as a forgery. Whilst dismissing the appeal, Sirimane J. observed *inter alia* at 494:

> *In this case however one cannot disregard the long delay on the part of the appellant which places the respondent at an obvious disadvantage. An order revoking probate after the lapse of such a length of time, may even place the rights of third parties in jeopardy. Williams on Executors and Administrators says at page 81 of the 14th edition "Where a party who is…entitled to call in the probate and put the Executor to proof of the Will chooses to let a long time elapse before he takes this step he is not entitled to any indulgence at the hands of the Court."*

Prior to the Civil Procedure Code (Amendment) Act No. 14 of 1993 by which the whole chapter 38 under the title '*Testamentary Actions*' was repealed and replaced with a new chapter, the testamentary procedure had *inter alia* the following conspicuous features:

(a) application for probate or letters of administration shall be made by way of summary procedure – sections 524(1), 530(1)
(b) if the court is *prima facie* satisfied with the application, order *nisi* shall be issued in the first instance – sections 526, 531
(c) such order *nisi* will be served on the respondents and such other persons as the court shall think fit – sections 526, 531
(d) order *nisi* shall be published in newspapers – section 532
(e) if the petitioner has no reason to suppose that his application will be opposed by any person, he can file with his petition an affidavit to that effect and omit to name any person in his petition as respondent – section 525(1)

(f) in the case of an application for probate, if no respondent is named in the petition, the court may in its discretion make the order absolute in the first instance – section 529(1)

Except for (e) above, all these features were removed by the Civil Procedure (Amendment) Act No. 14 of 1993, and (e) was removed by the Civil Procedure (Amendment) Act No. 38 of 1998.

Under the repealed procedure, as held by the Full Bench of the Supreme Court in *Adoris v. Perera* (*supra*) "*When an issue of probate has followed upon an order nisi (and not upon an order absolute in the first instance), the summary procedure for the recall of probate provided in section 537 does not apply, and all parties are concluded by the issue of probate. But where there is fraud in connection with the obtaining of probate even upon an order nisi, an independent action might be brought to set aside the probate*."

When fraud is alleged in obtaining probate on a (purported) last will, whether under the old procedure or new procedure, institution of a separate action to unravel the fraud and cancel the probate is permissible. The same will apply in the case of letters of administration. This does not mean that the question of fraud cannot be adjudicated on in the testamentary proceedings itself; everything depends on unique facts of each case.

In *Actalina Fonseka's* case (*supra*) the Supreme Court allowed a separate action to be maintained seeking a declaration that the last will was a forgery and probate had been obtained by fraud. At page 102, Kulatunga J. stated:

> *An allegation that a will was forged intentionally to mislead the Court to granting probate for the administration of an estate which has in fact devolved on intestate heirs and that probate has been obtained by persons who forged such will without disclosing the heirs has to*

> *be viewed differently from an allegation that probate has been obtained by mere perjury. If it were otherwise it is not clear why our Courts have held that the proper procedure to impeach probate obtained on a forged will is by separate action - Tissera v. Gunatilleke Hamine 13 NLR 261; Adoris v. Perera 17 NLR 212; Biyanwila v. Amarasekera 67 NLR 488.*

Fraud cannot be suppressed by technicalities. Bertram C.J. in *Suppramaniam v. Erampakurukal* (*1922) 23 NLR 417 at 435* citing *Black on Judgments* Vol 1, Section 292-293 states "*Fraud is not a thing that can stand even when robed in a judgment*". In *Sirisena v. Kobbekaduwa, Minister of Agriculture and Lands (1974) 80 NLR 1*, Justice Vythialingam at page 66 and Justice Weeraratne at page 140 quoted with approval the following dicta of Lord Denning in *Lazarus Estates Ltd v. Bearely (1956) 1 All ER 341 at 345*:

> *No Judgment of a Court or order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is specially pleaded and proved. But once it is proved it vitiates judgments, contracts, and all transactions whatsoever.*

In *Pieris v. Wijeratne [2000] 2 Sri LR 145 at 152*, Jayawickrama J. held "*although according to section 536 of the Civil Procedure Code an application to recall the probate could be made only where an order absolute in the first instance has been made, in an appropriate case, depending on the circumstances, a court has jurisdiction to act under section 839 of the Civil Procedure Code and make an order as may be necessary for the ends of justice or to prevent abuse of the process of the Court.*"

The instant action was filed under the new procedure. As the law stands today, when applications are filed seeking probate or letters of

administration, the adoption of summary procedure, issuance of order *nisi* etc. are inapplicable (except in instances where an application for recalling probate or letters of administration is subsequently made under section 538). The parties have to follow neither the summary procedure (as contemplated in chapter 24 of the Civil Procedure Code) nor strictly the regular procedure (by way of plaint and answer) but rather a special procedure in that the application is made by way of petition and affidavit. The court makes substantive orders in the nature of order absolute in the first instance, not order *nisi*.

Interventions in testamentary actions are sought not only to challenge last wills and issuance of probate or letters of administration. Such applications are made by various persons interested in the estate for various purposes by adopting various procedures. It is not my intention to list out all such instances but I will highlight a few for better understanding of the nature and complexity of such applications.

For instance, under section 718(1) "*A creditor or any person interested in the estate, may present to the court in the action in which grant of probate or administration issued, proof by affidavit that an executor or administrator has failed to file in court the inventory and valuation, and account (or sufficient inventory and valuation, or sufficient accounts) required by law within the time prescribed therefor.*" It may be noted that this kind of application can be made by "*a creditor or any person interested in the estate*" by presenting "*proof by affidavit*" (not necessarily petition and affidavit). The correction of the inventory and accounts can be challenged in terms of section 718 (*De Zoysa v. De Zoysa (1924) 26 NLR 472*).

Section 720 provides another example: "*In either of the following cases a petition, entitled as of the action in which grant of probate or administration issued, may be presented to the court which issued the same, praying for a decree directing an executor or administrator to pay the petitioner's claim,*

and that he be cited to show cause why such decree should not be made (a) by a creditor, for the payment of a debt, or of its just proportional part, at any time after twelve months have expired since grant of probate or administration; (b) by a person entitled to a legacy, or any other pecuniary provision under a will, or a distributive share, for the payment or satisfaction thereof, or of its just proportional part, at any time after twelve months have expired since such grant." It may be noted that this kind of application can be made by "*a creditor*" or "*by a person entitled to a legacy, or any other pecuniary provision under a will, or a distributive share*" by presenting "*a petition*" (not necessarily a petition and affidavit).

Most intervention applications are in relation to claims on properties listed and unlisted in the inventory. Such movable and immovable property claims are not directly relevant to the main inquiry and are made from the time the action is instituted until the termination of the proceedings. These claims can be made *inter alia* by the parties to the case, heirs, third parties who have purchased rights from the heirs, persons claiming prescriptive rights, or any person interested in the estate.

The original petitioner shall set out in the original petition the details and the situation of the deceased's property as a requirement under sections 524(1)(b) and 528(1)(d), but this is not the inventory. The inventory is filed under section 539(1) after the court makes order on entitlement to probate or letters of administration and after the taking of the prescribed oath by the executor or administrator but before the issuance of probate or letters of administration.

> *539(1). In every case where an order has been made, by a District Court declaring any person entitled to have probate of a deceased person's will, or administration of a deceased person's property granted to him it shall be the duty of the said person, executor or administrator, in whose favour such order is made, to take within*

fifteen days of the making of such order, the oath of an executor or administrator as set out in form No. 92 in the First Schedule, and thereafter to file in court within a period of one month from the date of taking of the oath, an inventory of the deceased person's property and effects, with a valuation of the same as set out in form No. 92 in the First Schedule and the court shall forthwith grant probate or letters of administration, as the case may be.

Any application seeking inclusion or exclusion of properties before the inventory is filed under section 539 is premature. Such applications shall not be an impediment to decide the main application (i.e. proof of the last will if any and the finding of in whose favour probate or letters of administration should be issued).

In *Harold Fernando v. Fonseka [1998] 3 Sri LR 301* the Court of Appeal citing *Fernando v. Fernando (1914) 18 NLR 24*, *Kathirikamasegara Mudaliyar (1900) 5 NLR 29* and *Kantaiyar v. Ramoe (1904) 8 NLR 207* rightly held that the grant of probate or letters of administration is a distinct preliminary step in testamentary proceedings independent of claims to the estate by the heirs, and the question of entertaining claims to the estate on the ground that the claimant is an heir could form the basis of an inquiry at a subsequent stage of the proceedings.

What happens if the testator includes properties in the last will which do not belong to him and what happens if the executor disposes of such properties by way of executor conveyances? According to section 2 of the Wills Ordinance No. 21 of 1844 "*It shall be lawful for every person competent to make a will to devise, bequeath, and dispose of by will all the property within Sri Lanka which at the time of his death shall belong to him, or to which he shall be then entitled, of whatsoever nature or description the same may be, movable or immovable,…*" Inclusion in the last will of properties that the testator is not the owner, does not give any rights to

the purported beneficiaries. Anybody can include others' properties in his last will and bequeath them to his next of kin as he pleases, but that does not mean that after the death of the testator the beneficiaries can stake a claim on such properties on the strength of the last will.

In *Roslin Nona v. Herat (1960) 65 CLW 55* it was held that even if the executor or administrator sells such properties with the authority of the court, the buyer does not get title to such properties. In *Rosalin Nona's* case, the administratrix of the estate of a deceased intestate applied to the District Court for authority to sell certain immovable properties that allegedly belonged to the deceased. Two parties intervened in the testamentary case objecting to the sale on the basis that they had conclusive title to two of the lands by partition decrees. These objections were dismissed by the District Court. On appeal, the Supreme Court upheld that order. H.N.G. Fernando J. (later C.J.) with the agreement of T.S. Fernando J. whilst dismissing the appeal stated:

> *The usual restriction contained in a grant of letters, which prohibits the sale of immovable property by an administrator without the authority of the Court, is a measure designed for the protection of the estate and the heirs, and not for the protection of other interests. The grant of leave to sell is merely a release of the Administrator from the restriction imposed in the letters, and is neither an adjudication upon the title, if any, of the intestate or the Administrator, nor anything equivalent to an order for a sale in execution enforceable with the aid of the process of the court.*
>
> *The common law does not prevent a person from executing a transfer of property which may, in fact, belong or turn out to belong to another, although, of course, the transferee in such a case acquires no title as against the true owner. A transferee from an Administrator cannot claim to be in any better position on the score that the transfer was*

> *executed with the leave of the Court. If, therefore, an administrator claims any property as being the property of estate or as being liable to be sold in order to repay the debts of the estate or the expenses of administration, the court does not in the testamentary proceedings have jurisdiction to determine disputes as to title between the administrator and third parties. The Appellants had no right to call upon the court to adjudicate upon their claims of unencumbered title to the two lands in question. The action, if any, which they should take at this stage to protect their interests is not a matter upon which they can be advised by this court.*

Conversely, failure to include in the inventory a property that actually belonged to the deceased does not deprive the heirs of making a claim to that property on succession (*Fernando v. Dabarera (1971) 77 NLR 127*).

The question whether a disputed proprietary claim can be decided summarily (e.g. section 718) or later in the same proceedings by way of a judicial settlement (e.g. section 736) or whether a separate action needs to be filed on that claim is a vexed question. Such disputed proprietary claims are one of the main reasons for the delay in concluding testamentary actions in the District Court. The answer to this question depends on the nature and scope of the particular claim and the stage at which it is made. The decision needs to be taken on the unique facts and circumstances of each individual application. Broadly speaking, if the claim is by a party to the case or by an heir of the estate and the claim is not a complicated one, it can be decided in the testamentary case itself. But if it is by a third party and the claim is a complicated one with distinct causes of action which require raising issues and leading evidence of several witnesses, it is prudent that it be decided in a separate action. It is not practically possible to hear a case within a case.

However, in certain instances, deciding the issue in the case itself is mandatory. Section 736(2) provides for one such instance and enacts "*Where a contest arises between the accounting party and any of the other parties respecting any property alleged to belong to the estate, but to which the accounting party lays claim, or respecting a debt alleged to be due by the accounting party to the testator or intestate, or by the testator or intestate to the accounting party, the contest must be tried and determined in the same special proceeding and in the same manner as any issue arising on a civil trial*." In *Suppammal v. Govinda Chetty (1943) 44 NLR 193 at 19*5 it was observed "*These words are clear and peremptory. They require that, if at the stage of a judicial settlement, a question such as arose here, arises between an accounting party, that is to say, between an executor or administrator, and any of the other parties, that is to say, other parties to the testamentary suit, such as the widow in this case, that question must be determined "in the same special proceeding", that is to say in the proceeding for the judicial settlement*." The reference to *"the other parties"* in section 736(2) was construed as the other parties to the action, not third parties.

In the matter of the last will and testament of Don Cornelis Dias (1986) 2 NLR 252 it was held that in the case of a petition under section 712 to discover property withheld from an executor, if the respondent in terms of section 714(3) puts in an affidavit claiming to be the owner of such property, the only thing for the court to do is to dismiss the petition remitting the parties to the machinery of an ordinary action for the determination of their rights.

Conversely, when an application is made by a creditor under section 720 seeking a decree directing the executor or administrator to pay such claim, if the executor or administrator files an affidavit setting forth facts which

show to the satisfaction of the court that the validity of the claim is doubtful, then the court can dismiss the application.

In *De Silva v. Gomes (1928) 30 NLR 249* it was held "*An administrator, who is not prepared to admit the claim of a creditor, is not entitled to place upon the court the responsibility of a decision on the matter. In such a case it is left to the creditor to establish his claim by regular proceedings against the estate.*"

In *De Silva v. Jayakody (1941) 42 NLR 226* it was held "*Where a petition is presented to court by a creditor under section 720 of the Civil Procedure Code praying for a decree directing an executor or administrator to pay the creditor's claim and the respondent denies the validity and legality of the claim, the court is debarred from acting under the section and compelling payment of the disputed claim. In such a case the petition should be dismissed without prejudice to the creditor's right to bring a separate action."*

In *Suppammal v. Govinda Chetty (supra)* it was held "*Where an application was made by an heir of an estate for a direction to the administrator to have the inventory filed by him amended so as to include certain sums of money which the administrator claimed as his own the application fell within the scope of section 718 of the Civil Procedure Code. Where a question such as the above arises between the accounting party (i.e., the executor or administrator) and any of the other parties to the testamentary case, that question may be determined in the proceeding for judicial settlement and not by separate action. It would be within the discretion of the Court to direct amendment under section 718 or to refer a party to the procedure of section 736, viz., judicial settlement, according to the nature and scope of the particular application and the stage at which it is made.*" This was quoted with approval in *Jayantha de Soysa v. Naomal de Soysa [1997] 3 Sri LR 65.*

Filing the final account is a significant step in bringing the proceedings to termination.

In terms of section 551 every executor and administrator shall file in the District Court, on or before the expiration of twelve months from the date upon which probate or grant of administration is issued or within such further time as the court may allow, a true and final account of his executorship or administration verified on oath or affirmation. The form of the final account is found in Form No. 118A in the First Schedule to the Civil Procedure Code. It may be noted that distribution of the property is part of the final account.

In terms of section 724A, if the executor or administrator has failed to file the final account in court, any person interested in the estate can make an application to court in that regard and the court shall take appropriate steps. Further, while in terms of section 724B the court can discharge the executor or administrator if he files the final account together with other documents to establish that the entire estate has been duly administered and distributed, if objections arise the court shall direct a judicial settlement of the account in terms of section 724B(7).

Judicial settlement of such account plays a vital role in the termination of testamentary proceedings. Sections 725 and 726 provide how the procedure in relation to judicial settlement of such account can be invoked. Section 729 allows an executor or administrator to move for a judicial settlement of the account as well.

> *725. In any of the following cases, and either upon the application of a party mentioned in the next section or of its own motion, the court may from time to time compel a judicial settlement of the account of an executor or administrator:-*

(a) where one year has expired since grant to him of probate or administration;

(b) where such grant has been revoked, or for any other reason his powers have ceased;

(c) where he has sold or otherwise disposed of any immovable property of the testator, or devisable interest therein, or the rents, profits, or proceeds thereof, pursuant to a power in the will, where one year has elapsed since the grant of probate to him.

726(1). The application for a judicial settlement in the last section mentioned shall be by petition, entitled as of the action in which grant of probate or administration issued, and may be presented by a creditor, or by any person interested in the estate or fund, including a child born after the making of a will; or by any person in behalf of an infant so interested; or by a surety in the official bond of the person required to account, or the legal representative of such surety.

(2) Upon the presentation thereof, citation shall issue accordingly; but in a case specified in paragraph (a) of the last preceding section the court may, if the petition is presented within less than eighteen months after the issue of probate or administration, entertain or refuse to entertain it in its discretion.

However all the complicated proprietary issues in relation to the case cannot be settled and decided by a judicial settlement of the account alone.

In *Holsinger v. Nicholas (1918) 20 NLR 417* it was held "*The object of a judicial settlement is that all matters that may arise in the course of the administration of the estate between the accounting party and the beneficiary should be dealt with promptly and in an expeditious manner, so*

that the whole question might be finally wound up in those proceedings. If the Judge thinks that the matter is of such complication and importance that it can only be inquired into by a regular action, he might suspend the settlement until that matter is determined by a regular action, or conclude the settlement subject to the determination of that matter."

This judgment was referred to in *Zain v. Sheriff (1937) 40 NLR 310* when the court decided "*Proceedings for a judicial settlement are not appropriate for the purpose of deciding a question which could not be finally determined without other persons who are not parties to the testamentary suit.*"

In *Pathmanathan v. Thuraisingham (1970) 74 NLR 196* it was held *"Disputed claims cannot be adjudicated upon in an inquiry relating to the judicial settlement of the accounts of executors and administrators under Chapters 54 and 55 of the Civil Procedure Code. In such proceedings, therefore, a legatee cannot claim as a creditor that a certain sum of money is due to him from the estate of the testator, if the claim is disputed by the executor. Such a disputed claim can only be made by way of a separate action."* This was reiterated in *Imbulmure v. The Public Trustee [2012] 2 Sri LR 413.*

This court granted leave to appeal to the original petitioner on the following questions of law as formulated by the petitioner at paragraph 18(b), (c), (d), (e), (g) and (h) of her petition. They are reproduced below with the answers:

> Q. Did the High Court err in law by coming to the conclusion that the appellant has failed to comply with section 524(5) of the Civil Procedure Code when it has been repealed by the Civil Procedure Code (Amendment) Act No. 38 of 1998?
>
> A. Yes.

Q. Did the High Court err in law by failing to consider that the petitioner-respondents should establish a *prima facie* case before the learned District Judge under section 537 read with 538 since summary procedure should be adopted in determining an application thereunder and/or that the petitioner-respondent has failed to establish a *prima facie* case before the District Court?

A. The original petitioner has not objected to the procedure before the District Court and therefore it cannot be canvassed before the Supreme Court. The intervenient petitioners have established a *prima facie* case before the District Court.

Q. Did the High Court fail to consider and/or conclude and/or give reasons as to whether the High Court was satisfied with the application of the petitioner-respondents before the District Court?

A. Reasons have been given. If the reasons are inadequate, this court has justified the conclusion of the learned High Court Judges with reasons.

Q. Did the High Court err in law by allowing intervention and filing objections even after considering the same under section 537 which only permits the court to recall the probate?

A. No. Recalling probate does not end the matter; the court shall take follow up steps.

Q. Did the High Court err in law by concluding that the petitioner-respondents are necessary parties to the appellant's application although the appellant has complied with section 524?

A. Yes. But on that ground alone the Judgment of the High Court of Civil Appeal cannot be set aside.

Q. Did the High Court err in law by allowing the petitioner-respondents' application on the basis that probate has been issued instead of letters of administration whereas it was not a ground urged by the petitioner-respondents in their application before the District Court?

A. No. A question of law can be raised for the first time on appeal. On the facts of this case, as the petitioner was not named as the executor of the will, what the District Court ought to have issued was not probate but letters of administration with the will annexed. However that matter does not go to the root of the case. In my view, that matter has been highlighted by the High Court of Civil Appeal to emphasise that the District Court did not consider the merits of the petitioner's application before issuing the probate to the original petitioner. This is understood by the following part of the judgment: "*In the instant action the learned District Judge has merely issued a probate without considering the facts presented before him. Therefore, I am of the view that the issuing of the probate has no validity in law. If the learned District Judge took care to look at the provisions as to testamentary procedure and if he was of the view that the will has been proved, it was letters of administration with the will annexed and not a probate that should have been issued.*" I accept that the finding of the High Court of Civil Appeal that "*the procedure adopted by the learned District Judge to issue probate in itself would amount to a serious miscarriage of justice*" is a misdirection in law.

At the time of granting leave, this court had allowed the intervenient petitioners to reserve the right to raise any questions of law before the appeal was taken up for hearing. Accordingly learned counsel for the 2nd intervenient petitioner has raised several questions of law in the written submissions filed prior to the argument and the same were reiterated at

the time of the argument. Learned counsel for the original petitioner has addressed those questions of law in his post-argument written submissions. In summary, these are the questions of law raised by the original petitioners:

(i) Has the learned District Judge failed to comply with section 531(1)(a) when making the order dated 06.05.2011?
(ii) Has the learned District Judge failed to follow section 524 when making the order dated 06.05.2011?

I answer (i) above in the affirmative and (ii) in the negative. By (ii) above, what the intervenient petitioners submit is that naming them as respondents in the testamentary proceedings is a legal requirement under section 524. I am unable to agree with it.

I affirm the finding and the conclusion of the High Court of Civil Appeal that the order of the District Court dated 08.06.2012 shall be set aside on the failure of the learned District Judge to satisfy himself that the will was duly made as required by section 531(1)(a) of the Civil Procedure Code before the issuance of probate to the original petitioner, which goes to the root of the case, and dismiss the appeal 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 appeal under Article 128(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No: 223/2016
SC (Spl) LA No: 94/2016
HCALT No: 117/2012
LT Application No: 13/59/2006

M.S.P. Nanayakkara,
No. 13, M.J.C. Fernando Mawatha,
Idama, Moratuwa.

APPLICANT

vs.

The Associated Newspapers of Ceylon Limited,
'Lake House,'
No. 35, D.R. Wijewardena Mawatha, Colombo 10.

RESPONDENT

And between

The Associated Newspapers of Ceylon Limited,
'Lake House,'
No. 35, D.R. Wijewardena Mawatha, Colombo 10.

RESPONDENT – APPELLANT

vs.

M.S.P. Nanayakkara,
No. 13, M.J.C. Fernando Mawatha,
Idama, Moratuwa.

APPLICANT – RESPONDENT

And now between

The Associated Newspapers of Ceylon Limited,
'Lake House,'
No. 35, D.R. Wijewardena Mawatha, Colombo 10.

RESPONDENT – APPELLANT – APPELLANT

vs.

M.S.P. Nanayakkara,
No. 13, M.J.C. Fernando Mawatha,
Idama, Moratuwa.

APPLICANT – RESPONDENT – RESPONDENT

Before: **P. Padman Surasena, J**
E.A.G.R. Amarasekara, J
Arjuna Obeyesekere, J

Counsel: Anura Ranawaka with Kalana Batagoda for the Respondent – Appellant – Appellant

Srinath Perera for the Applicant – Respondent – Respondent

Argued on: 28th January 2022

Written Submissions: Tendered on behalf of the Respondent – Appellant – Appellant on 16th December 2016

Tendered on behalf of the Applicant – Respondent – Respondent on 23rd February 2017

Decided on: 6th December 2022

Obeyesekere, J

In this appeal, the Respondent – Appellant – Appellant [*the Appellant*] is challenging the judgment of the Provincial High Court of the Western Province holden in Colombo by which the High Court affirmed the Order of the Labour Tribunal, reinstating the Applicant – Respondent – Respondent [*the Respondent*] in service with back wages at the rate of half-months' salary from the date of termination until reinstatement.

Appointment and interdiction

The Respondent had joined the Appellant as an Assistant Store Keeper on 3rd November 1986, and had been appointed as a Purchasing Officer in 1988. With the retirement of the Store Keeper in 2002, the newly appointed Store Keeper had brought to the attention of the Appellant that there was a large stock of motor vehicle spare parts in the stores that had not been inventorised. Investigations had thereafter been carried out by the Internal Audit Division of the Appellant and the Auditor General's Department. Based on their findings that the Respondent had been involved in certain irregularities that had taken place when purchasing motor vehicle spare parts during the period of 2001 – 2003, the Respondent had been placed under interdiction on 26th February 2003.

Charge sheet issued to the Respondent

The Respondent had thereafter been issued with a charge sheet on 9th August 2005. He had however refused to answer the charge sheet on the basis that his response would be used against him in a parallel investigation that was being conducted by law enforcement authorities in respect of the said irregularities. Although the Appellant had thereafter issued the Respondent with an amended charge sheet dated 26th September 2005, the Respondent had not been afforded an opportunity of responding to the said amended charge sheet.

The amended charge sheet contained the following charges:

1. ඔබ වර්ෂ 2001 සිට 2003 පෙබරවාරි මාසය දක්වා කාලය තුළ ලංකාවේ සීමාසහිත එක්සත් ප්‍රවෘත්ති පත්‍ර සමාගමේ මිළදි ගැනීමේ නිළධාරියෙකු වශයෙන් සේවයේ යෙදි සිටියදි ආයතනයට අවශ්‍ය වාහන අමතර කොටස් සඳහා ලියාපදිංචි සැපයුම්කරුවන්ගෙන් ලබාගත් බැව් සඳහන් ව්‍යාජ ඉන්වොයිස් පත්‍රිකා හා ව්‍යාජ ලිපි ලේඛන ඉදිරිපත් කොට මුල්‍යමය වංචාවක් සිදුකොට ඇත.

2. වාහන වල අමතර කොටස් මිලදි ගැනීමට යෙදා ගන්නා ඉල්ලුම්පත් වල (Purchasing Requisitions) අයුතු හා ව්‍යාජ අන්දමට වෙනස් කොට වැඩිපුර අමතර කොටස් ඇතුලත් කොට ඒවා ලබාගැනීමට කටයුතු කිරීම. මෙහිදි:

   (a) අමතර කොටස් මිළදි ගැනීමේ නියෝග පොත ඔබගේ අභිමතය පරිදි අයුතු ලෙස පාවිච්චි කිරීම.

   (b) ආයතනය මගින් ගෙවීම් කරනු ලබන චෙක්පත් වලට අමතරව ඔබ විසින් පෞද්ගලිකව ගෙවීම් කටයුතු සිදු කිරීමෙන් මුල්‍යමය වංචාව සිදු කිරීමට උපයෝගි කොට ගැනිම.

   (c) අදාළ ක්‍රෙඩිට් නොටස් (Credit Notes) සහ රීෆන්ඩ් නොටස් (Refund Notes) ආයතනයට ඉදිරිපත් නොකිරීම.

3. ඉහත අංක 01 දරණ චෝදනාවෙහි සඳහන් ක්‍රියාකලාපය තුළදි ඔබගේ භාර්යාවගේ නමින් කොළඹ 10 ඩාලි පාර අංක 413 යන ව්‍යාජ ලිපිනයේ "එක්සලන්ට් ට්‍රේඩර්ස්" නමැති සැපයුම්කරු වෙතින් භාණ්ඩ මිලදි ගැනීම සහ ඒ බවට ව්‍යාජ ඉන්වොයිස් ඉදිරිපත් කරමින් ආයතනය නොමග යවමින් ආයතනය ඔබ කෙරෙහි තබා තිබූ විශ්වාසය කඩ කිරීම.

4. ඉහත අංක 1 සහ 2 දරණ චෝදනාවන්හි සඳහන් ක්‍රියාකලාපයන් තුලදි ඔබ ව්‍යාජ ඉන්වොයිස් හා ලේඛණ මගින් ආයතනයට රුපියල් මිලියන 01 ක පමණ මුල්‍යමය වංචාවක් සිදුකොට ඇත .

5. ඉහත අංක 1 සිට 4 දක්වා චෝදනා වල සඳහන් ක්‍රියාකලාපයේදි ආයතනය සතු මුදල් වංචනික සහ අයුතු සහගත ලෙස ලබා ගනිමින් හා පරිහරණය කිරීමෙන් බලවත් විශමාචාරයක් සිදුකොට ඇත .

6. ඉහත අංක 1 සිට 5 දක්වා චෝදනා වල සඳහන් ක්‍රියාවන් එකක් හා/හෝ කිහිපයක් හා/හෝ සියල්ලම හා/හෝ සිදු කරීමෙන් ආයතනය ඔබ කෙරෙහි තැබූ විශ්වාසය කඩවන අයුරින් ක්‍රියාකොට ඇත .

Even though the Respondent had been requested to be present for a domestic inquiry on 4th November 2005, he had declined to participate and the inquiry had proceeded in his absence. Pursuant to the findings of the domestic inquiry, the Appellant, by its letter

dated 13th July 2006, had terminated the services of the Respondent with effect from 26th February 2003.

Order of the Labour Tribunal

Aggrieved by the said decision, the Respondent had made an application to the Labour Tribunal in terms of Section 31B of the Industrial Disputes Act [*the Act*], seeking reinstatement with back wages. After a lengthy inquiry where the Respondent too had given evidence, the Labour Tribunal, by its Order dated 6th September 2012, had determined as follows:

(a) The Appellant has failed to establish Charge Nos. 1, 2, 4, 5 and 6;

(b) The termination of the services of the Respondent is unjustified;

(c) The Respondent must be reinstated with effect from 1st November 2012, with back wages for the period commencing from the date of termination and until reinstatement;

(d) However, the fact that the Respondent failed to disclose that his wife was a partner of 'Excellent Traders' from whom spare parts had been purchased for the Appellant, which arises from Charge No. 3, had been established;

(e) Taking into consideration the aforementioned failure on the part of the Respondent to disclose the said relationship between his wife and 'Excellent Traders,' the Respondent would only be entitled to back wages calculated at the rate of half-month's salary.

While **the Respondent did not challenge that part of the order referred to in (d) and (e) above**, the Appellant, acting in terms of Section 31D of the Act lodged an appeal in the High Court against the order for reinstatement. By its judgment dated 28th April 2016, the High Court affirmed the findings of the Labour Tribunal and dismissed the said appeal.

Questions of law

Dissatisfied with the judgment of the High Court, the Appellant sought and obtained leave to appeal from this Court on 31st October 2016 on the following questions of law:

1. Have the Labour Tribunal and the High Court erred in law and in fact by granting relief to the Respondent after coming to the finding that the Respondent had purchased spare parts from a business called Excellent Traders where the Respondent's wife was a partner, without disclosing that fact to the Appellant?

2. Has the Respondent acted in breach of the trust and confidence reposed on him by the Petitioner, by his aforesaid action?

Although leave has been granted only in respect of the above two questions of law which relate to Charge No. 3, and therefore, on the face of it, the scope of this appeal is limited to an examination of the facts and circumstances relating to that charge, it is difficult to consider the said questions of law in a vacuum. Hence, I would at the outset very briefly consider the evidence relating to the several allegations that were made against the Appellant in order to place the issues raised in the above questions of law in their proper perspective.

Procurement procedure followed by the Appellant

The starting point would be the evidence of R.S. Siriwardena, an officer attached to the Internal Audit Division of the Appellant who carried out the initial investigation, and who explained the procedure that was followed by the Appellant when purchasing spare parts.

In his evidence, he stated that when spare parts are required, the Transport Manager would initiate a request by the submission of the 'Purchase Requisition Form,' which consists of five sections, namely Sections 'A' – 'E'. Section 'A' is completed by the Transport Manager who shall specify on the said Form, the items that are required and the quantities of each such item. This Form is thereafter forwarded to the Chief Store Keeper who shall confirm in Section 'B' if the said items are available in the Stores. If the

said items are not available, the requisition shall be forwarded to a Committee consisting of *inter alia* the Accountant and the General Manager of the Appellant for their approval to proceed with the purchase of the said items. The approval of the Committee is recorded in Section 'C'.

The Form is thereafter sent to the Purchasing Department where the Respondent was attached to, for the purpose of calling for quotations from registered suppliers of the Appellant. Upon receipt of the quotations, Section 'D' of the said Form is completed by inserting the prices that have been quoted in respect of each of the items that were requested by the Transport Manager. The Form is thereafter sent back to the Transport Manager who would recommend from which supplier the purchase must be made. The recommendation of the Transport Manager shall be recorded by completing Section 'E' of the Form.

The Purchase Order addressed to the supplier recommended by the Transport Manager is prepared only thereafter, and is issued to the Purchasing Officer (i.e., the Respondent) who would call over at the office of the supplier mentioned therein and collect the goods. The Respondent would thereafter hand over the goods to the Store Keeper. Payment in favour of the supplier is processed only thereafter, with the 'Purchase Requisition Form' being compared with the 'Goods Received Note' prior to the preparation of a cheque drawn in favour of the supplier.

Thus, according to the above evidence of Siriwardena, even though the Respondent '*may have been privy*' to the calling of quotations by the Purchasing Department, the involvement of the Respondent in the above process was limited to collecting the goods from the suppliers who had been selected by the Transport Manager and handing over the said goods to the Store Keeper. I must state that this evidence does not seem credible for two reasons. The first is, if this was the only function of the Respondent, it is a function which can be performed by an Office Assistant and does not require the services of an officer in the executive grade. The second is the Report of the Auditor General.

Findings of the Auditor General

The outcome of the investigation carried out by the Auditor General's Department was damning. Its report had revealed that among the suppliers from whom purchases had been made was a partnership by the name of 'Excellent Traders' where the wife of the Respondent was a partner during the period of 2001 – 2003. The total value of purchases made from this supplier during the year of 2002 was Rs. 1,802,353.34.

It was the position of the Audit Superintendent, as borne out by his report dated 17th March 2003, that:

(a) The Requisition Forms had been altered by the insertion of additional items in Section 'A' of the Form;

(b) The invoices submitted by suppliers had been altered and/or false or forged invoices said to have been issued by suppliers had been submitted to support purchases that had already been made;

(c) The Respondent had been involved in the calling of quotations, recording same, preparing the 'Goods Received Notes' and handing over of the goods collected, without any form of supervision;

(d) Purchases had been made only from four suppliers including 'Excellent Traders', although 37 suppliers had been pre-registered;

(e) Although purchases had been made from 'Excellent Traders', there was no such business enterprise at the given address.

Thus, although Siriwardena explained the text book manner in which orders should be placed and purchases made, the report of the Auditor General portrayed a completely different picture of a procurement process plagued with irregularities.

Explanation of the Respondent

The Respondent took up the position that his involvement in the entire procurement process to which I have adverted, was limited to collecting the Purchase Order from the Transport Manager, collecting the goods that had been listed therein from the relevant supplier and thereafter handing over the said goods to the Store Keeper with the relevant invoice. While submitting that there was no allegation that he did not duly hand over the goods, the Respondent stated in his evidence that:

(a) The initial request for the goods must be made by the Transport Manager and that he, as Purchasing Officer, has no involvement in that decision;

(b) Quotations are called by the Purchasing Department;

(c) The decision as to which quotation should be accepted is taken by the Transport Manager;

(d) The Transport Manager must approve the quotations, thereby preventing items which had not been requested for in Section 'A' of the 'Purchase Requisition Form' at the outset, from being added subsequently;

(e) Payment is made by an account payee cheque drawn in the name of the supplier, after having verified that the goods requested in the Purchase Requisition Form have in fact been handed over to the Stores as reflected in the Goods Received Note.

I have carefully considered the evidence led before the Labour Tribunal and observe that even though the several irregularities that are referred to in the Audit Report have been substantiated by documents, there is no evidence that the alterations were done by the Respondent. However, it is clear that one or more of the personnel involved in the procurement process had been involved in the irregularities mentioned in the said Audit report, a fact which has been admitted by the witnesses called by the Appellant, and observed by the Labour Tribunal in its Order. The alterations effected on the 'Purchase Requisition Form', as observed earlier, could not have gone undetected by the Transport Manager, as he is required to certify prior to approving payment that the goods ordered

correspond with the goods reflected in the 'Goods Received Note', unless he too was involved.

Findings of the Labour Tribunal on Charge Nos. 1 and 2

The Labour Tribunal has held that the Respondent was not guilty of any wrongdoing relating to the matters alleged in Charge Nos. 1 and 2, and that the termination of his services was unjustified, for the following reasons:

(a) There is no proof that the alterations to the Purchase Requisition Forms had been done by the Respondent as the alterations were not in his handwriting;

(b) The goods that have been ordered by way of the Purchase Requisition Forms have been received by the Store Keeper, as reflected by the Goods Received Notes;

(c) Payment has been made based on the said Goods Received Notes and the Purchase Requisition Forms;

(d) The selection of the supplier was done by the Transport Manager and the Respondent was not involved in that process.

These findings of the Labour Tribunal have been affirmed by the High Court and were not canvassed before us.

Findings of the Labour Tribunal on Charge No. 3

This brings me to Charge No. 3, which forms the basis for the aforementioned questions of law – i.e., non-disclosure by the Respondent of the fact that he had a personal interest in one of the suppliers, and the Appellant's resultant loss of confidence in the Respondent.

In his evidence, the Respondent has stated that 'Excellent Traders' was registered for the first time as a supplier of the Appellant in late 2001. He has admitted that he was aware of the involvement of his wife in the said business, and that although he himself has

collected goods from 'Excellent Traders,' he never informed the Appellant of this fact. Contrary to how a reasonable prudent man would have acted in similar circumstances, the Respondent does not appear to have seen anything wrong in failing to disclose the said fact, with his explanation being that the decision to purchase spare parts from 'Excellent Traders' was not a decision that was taken by him.

The Labour Tribunal, while holding that the Respondent failed to disclose the involvement of his wife in 'Excellent Traders,' and that the Appellant may have suffered a financial loss as a result of the said non-disclosure, has also held that there was no evidence that the Respondent influenced the selection of 'Excellent Traders' for the supply of spare parts, or that the Respondent benefitted from the said transactions.

The stark reality however, which has also been raised in the report of the Auditor General, is that quotations have been called by the Purchasing Department, to which the Respondent had been attached for over 13 years, and hence the involvement of the Respondent could not have been limited to the extent claimed by him, especially when one considers (a) that the value of the orders placed in favour of Excellent Traders during the first year of it being registered as a supplier amounted to almost Rs. 2 million; and (b) the acknowledgement by the witnesses of the Appellant that others in the procurement process may have been involved in the irregularities identified in the report of the Auditor General's Department. While the Labour Tribunal must proceed only on the evidence placed before it, the Respondent's involvement in the commission of the irregularities identified by the Auditor General is an inescapable conclusion when everything is looked at in context.

Back wages limited to half months' salary

Having concluded that the Respondent is guilty of not disclosing the relationship between 'Excellent Traders' and his wife, the Labour Tribunal instead of considering the second element of Charge No. 3 – i.e., the consequential loss of confidence – went onto hold that the Respondent must be reinstated in service in the same or a comparable post. It is clear from the Order of the Labour Tribunal that the decision to reinstate was influenced by

the fact that the Appellant did not take any disciplinary action against others who were involved in the irregularities identified in the report of the Auditor General.

However, the Labour Tribunal held that the Respondent should only be paid half months' salary for the period he was not in service, for the following reason:

> "අසාධාරණ අන්දමින් ඉල්ලුම්කරුව සේවයෙන් පහ කිරීම මත ඔහු සේවය අහිමිව සිට කාල සීමාව වෙනුවෙන් සම්පූර්ණ හිඟ වැටුප් සමඟ නැවත සේවය ලබා ගැනීමට ඉල්ලුම්කරුට හිමිකම තිබුණද, එමගින් වගඋත්තරකරුට අත් විඳීමට සිදු විය හැකි මුල්‍යමය තත්ත්වයද **ඉල්ලුම්කරුගේ භාර්යාව එක්සලන්ට් ට්‍රේඩර්ස් නමැති ආයතනයේ හවුල් කරුවකු බවට වගඋත්තරකාර ආයතනයට ආයතනයේ සැපයුම් කරුවකු ලෙස ලියා පදිංචි වීමට පෙර දන්වා සිට බවට කරුණු හෙලි කිරීමට ඉල්ලුම්කරු අසමත් වී තිබීමද,** යන කරුණු දෙක සැලකිල්ලට ගනිමින් දෙපාර්ශවයටම සාධාරණ වන පරිදි හිඟ වැටුපෙන් අඩක් ගෙවන ලෙසට වගඋත්තරකරුට නියෝග කිරීමට තීරණය කරමි."

It is clear from the above that the Labour Tribunal has considered as critical the non-disclosure by the Respondent of the relationship his wife had with 'Excellent Traders'. This is the reason that led the Labour Tribunal to declare that the Respondent is only entitled to one half of his monthly salary. In my view, the said non-disclosure is critical when one considers that the post of Purchasing Officer is a position of responsibility and requires the holder of that post to act with utmost honesty and integrity. If the Respondent's wife was keen to engage in a business that supplied goods to her husband's employer, the Respondent owed a duty at the very least to report that fact to the Appellant prior to any business transaction taking place between the Appellant and the wife of the Respondent. Failure to do so can give rise to a potential conflict of interest, which must be avoided at all times.

This position is clearly reflected in Section 1:5 of Chapter XLVII of the Establishments Code in the following manner:

> "*An officer shall not do anything which will bring his private interests into conflict with the public duty or which compromises his office. He should so conduct himself at all times as to avoid giving rise to any appearance of such conflict or of being so compromised …*"

It is perhaps appropriate to observe at this stage that in 2019, the Commission to investigate allegations of Bribery and Corruption issued a publication dealing with conflict of interest. In its introduction, the Commission has stated that, "***One of the root causes of corruption is the absence of an effective conflict of interest framework***. *The recognition of conflict of interest is synonymous to nipping the bud of a plant, which would be harder to cut down, once it grows in to a fully-fledged tree. This endeavor aims at introducing guidelines to permeate a society sans conflict of interest.* ***This is a mechanism to weed out the seeds of corruption by mitigating the potential risks***." [emphasis added]

Even though no evidence had been led that the Appellant had in place procedures that required any potential conflict of interest to be declared or that the Establishments Code applied to the Respondent, I agree with the finding of the Labour Tribunal that the Respondent owed a duty to disclose the aforementioned relationship which gives more than an appearance of a conflict of interest, and which the Respondent by his own admission had failed to do.

The Labour Tribunal, and the High Court which affirmed the findings of the Labour Tribunal, have not considered the following:

(a) Whether the said non-disclosure has resulted in the Appellant losing confidence in the Respondent, as claimed by the Appellant, and which in fact was an integral part of Charge No. 3;

(b) If there is loss of confidence, whether the termination of the services of the Respondent was justified.

The failure to consider these matters forms the basis of the two questions of law which need to be decided in this appeal.

It is in the above factual circumstances that I must consider whether the aforementioned non-disclosure can lead to the Appellant losing confidence in the Respondent in a manner that justifies the termination of the services of the Respondent, and if so, whether the

Labour Tribunal erred when it ordered reinstatement of the Respondent with back wages, albeit limited to 50% of his salary.

Loss of confidence and its consequences

The critical importance of the confidence that an employer must have in its employees has been highlighted in the following passage from **Democratic Workers' Congress v De Mel and Wanigasekera** [CGG 12432 of 19th May 1961 at para 24], which has been cited with approval by this Court *inter alia* in **Peiris v Celltel Lanka Limited** [SC Appeal No. 30/2009; SC Minutes of 11th March 2011 at pages 8-9] and **People's Bank v Lanka Banku Sevaka Sangamaya** [SC Appeal No. 209/2012; SC Minutes of 16th November 2015 at pages 18-19]:

> "*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 fulfil his obligations towards the other. Otherwise it would really mean an employer being compelled to employ a person in a position of responsibility even though he has no confidence in the latter*."

Loss of confidence therefore arises in a situation where, due to certain circumstances, an employer loses confidence in an employee in a way that the employer no longer considers it appropriate to continue to employ such person within the organisation.

S. R. De Silva in his book, **The Legal Framework of Industrial Relations in Ceylon** [(1973) at page 553] has stated as follows:

> "*Loss of confidence may justify a termination or, in a case where a termination is held to be unjustified, may be an argument against the award of reinstatement. Though theoretically there is no restriction as to the class of employee in respect of*

whom termination of employment may be effected on the ground of loss of confidence, ***it usually applies in respect of employees who hold positions of trust and confidence*** *such as accountants, cashiers and watchers or who perform a certain degree of responsible work. The type of conduct that can reasonably be said to lead to loss of confidence by an employer in an employee is generally that which involves bribery and corruption, collection of unauthorized commissions, revealing confidential information, having an interest in a rival business, dissuading clients and customers, transferring business orders to competitors, conniving actively or passively at thefts, defalcations and fraud, sabotage and undermining discipline or loyalty…"* [emphasis added]

In '**The Law of Dismissal**' [(2018) at page 123], S.R. de Silva has stated further that:

"*Loss of confidence is not confined to conduct involving dishonesty. Thus, for instance, loss of confidence in an employee for making disparaging remarks concerning a senior planter to junior planters has been held to be justified [The Ceylon Mercantile Union v. Geo Steuart & Co. Ltd. CGG 14773 of 3 November, 1967]. In another case, the Court of Appeal, in concluding that the termination was justified, held that there was reasonable suspicion of the employee's complicity in the theft and that, although insufficient to bring home a charge of theft, it was sufficient to establish negligence having regard to his position as a security guard [Ceylon Cold Stores Ltd. v. Gunapala – CA/398/1980 – CAM 06.08.1982]*."

Loss of confidence in the banking sphere

The issue of loss of confidence has been considered by this Court in the past, mostly in cases involving bank employees.

In **National Savings Bank v Ceylon Bank Employees' Union** [(1982) 2 Sri LR 629], the bank had dismissed a clerk in its service for an alleged misconduct at an examination conducted by the Bankers' Training Institute, which had later been admitted by the workman. Soza, J held at page 632 that:

"… 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 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 Amarasuriya is therefore justified. The order of the learned President cannot be allowed to stand …*" [emphasis added].

A similar conclusion was reached in **Bank of Ceylon v Manivasagasivam** [(1995) 2 Sri LR 79] where at the instance of the employee, the bank had certified the signature of two persons who had subsequently used such certification to fraudulently transfer a large sum of money from Sri Lanka to accounts which had been opened in a Swiss bank. In reversing the decision of the High Court which had ordered reinstatement of the employee, Chief Justice G.P.S. De Silva held as follows at page 83:

"*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*."

People's Bank v Lanka Banku Sevaka Sangamaya [supra] and **Ceylon Bank Employees' Union v Hatton National Bank** [SC Appeal No. 75/2012; SC Minutes of 14th October 2021] are two cases where bank employees had issued several cheques to third parties without

sufficient funds being available in their accounts. In the latter case, my brother Surasena, J, having carried out a detailed survey of the cases involving loss of confidence, held as follows at page 15:

> "*The facts and the circumstances of the instant case, clearly justify 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*."

Loss of confidence in a non-banking environment

The issue of loss of confidence in a non-banking environment was considered by this Court in **Peiris v Celltel Lanka Limited** [supra]. The appellant was an Assistant Manager (Credit Collection), a position which this Court described as being "*of responsibility which demands integrity, competency, reliability and independence.*" Referring to the nature of the appellant's services which was to independently handle the respondent's work in the outstation districts, it was held by Tilakawardane, J as follows at page 8:

> "*… 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*" [emphasis added].

At pages 9-10, Tilakawardane, J summarised the position in the following manner:

"… In cases of employment which demand a high level of responsibility and autonomy, ***a lapse in integrity is the precise sort of moral turpitude that can result in a particularly devastating structural and managerial breakdown*** *simply because of the reliance and expectation placed in the hands of such positions, and as such is the sort of transgressive behaviour for which termination of services can be justified.*" [emphasis added]

Thus, in **Peiris**, this Court drew a nexus between the high level of responsibility and autonomy that the employee had been entrusted with, and the loss of confidence resulting from a breach thereof, in order to justify termination of the services of the employee.

A broader approach

A much broader approach going beyond the test of the employee occupying a position of responsibility and based on the trust that an employer is entitled to have in its employees was adopted by this Court in **Kosgolle Gedara Greeta Shirani Wanigasinghe v Hector Kobbekaduwa Agrarian Research and Training Institute** [SC Appeal No. 73/2014; SC Minutes of 2nd September 2015], where Wanasundera, J held as follows at pages 10-11:

"*The Appellant argued* ***that she did not hold a fiduciary position*** *in the Respondent Institution and therefore the final charge in the charge sheet regarding "loss of confidence" does not apply to her. I see this concept in a different way. All the*

workers in any institution work for the employer. The employer has employed each and every person having allocated some part of the work of the employer. Let it be the Chief Executive Officer, let it be a clerk or a peon or even a sanitation labourer, they are employed under the employer. ***The employer trusts that they will do their part of the work properly.*** *The employer thus has trust on them. The CEO is a very highly trusted person. The officers are also trusted with may be a little lesser degree than the CEO. The minor employee also is trusted, may be even to a lesser degree than the officer. No employee is distrusted.* ***Without trust, an employer cannot and will not employ any person.*** *The employee knows that he is trusted not to be negligent in his work, not to be indisciplined, not to be fraudulent, not to work without due care for co-workers etc.* ***They are tied to the employer with the bond of trust****. I am of the view that each and every employee is holding a fiduciary position in relation to the employer.* ***The employee cannot break his trust and work at his or her free will and leisure***" [emphasis added].

While I am in agreement with Wanasundera, J that trust is one of the core features of an employer – employee relationship, there are two matters that I must advert to at this stage.

The first is that the trust and confidence that an employer must have in an employee is encapsulated in the duty of fidelity that an employee owes his employer. As observed in **Finlay Rentokil (Ceylon) Ltd v A. Vivekananthan** [(1995) 2 Sri LR 346], an employee owes a duty of fidelity to his employer during the period of his contract of employment. This duty is one of good faith and loyalty, and will require the employee to serve his/her employer faithfully and to avoid situations of conflict or any appearance of any conflict between their own interests and that of their employer.

The second is with regard to the view expressed *"that each and every employee is holding a fiduciary position in relation to his employer*." While it is certainly possible for fiduciary duties to arise in employment relationships, it is not the norm. In **Gower's Principles of Modern Company Law** [10th edition (2016): §16–11], for instance, it has been observed that although subject to a number of qualifications, in principle, the employment

relationship is not a fiduciary relationship, so that it would be inappropriate to apply the full range of fiduciary duties even to senior employees.

Whether a fiduciary relationship arises in an employer – employee relationship was considered by the Singapore High Court in the recent case of **Sumifru Singapore Pte Ltd v Felix Santos Ishizuka** [2022 SGHC 14], where it was held that, "*the duties that the employee owes his employer is primarily a matter of contract, and the imposition of additional fiduciary obligations on the employee is the exception rather than the norm.*" This echoes the view taken by the Court of Appeal of England and Wales in **Ranson v Customer Systems Plc** [2012 EWCA Civ 814], which relied on the pronouncements from **Hospital Products Ltd v United States Surgical Corporation** [1984 156 CLR 41 at page 97], of the High Court of Australia (which has later been cited with approval by the Privy Council in **Kelly v Cooper** [1993 AC 205 at page 214]), and **University of Nottingham v Fishel** [2000 ICR 1462 at page 1491].

Taking into consideration the above judicial pronouncements, I am of the view that an employee is expected at all times to serve his employer:

(a) with honesty and integrity;

(b) in a manner that does not breach the trust that has been placed in him/her;

(c) in a manner that fosters the confidence that the employer has in him/her.

While the above would undoubtedly include a requirement that all matters that may give rise to a conflict of interest or any matter that may give rise to the employer losing confidence in the employee be reported to the employer forthwith, failure to act as set out above may result in the employer losing confidence in the employee.

I must however, add a word of caution. An employer cannot, merely to justify the termination of the services of an employee, claim that he has lost confidence in an employee. As pointed out by this Court in **Bank of America v Abeygunasekara** [(1991) 1 Sri LR 317 at page 328], "*the mere assertion by an employer is not sufficient to justify the*

termination of a workman on the ground of loss of confidence. When such an assertion is made it is incumbent on the Labour Tribunal to consider whether the allegation is well founded. Therefore it would become necessary for the employer to lead evidence of facts from which such an assertion could be proved directly or inferentially."

Furthermore, such a claim must always be considered in the context of the breach of discipline that is said to have been committed by an employee. As Amerasinghe, J stated in **Premadasa Rodrigo v Ceylon Petroleum Corporation** [(1991) 2 Sri LR 382 at pages 392-393]:

> "*Whether the termination of the appellant's services was justifiable or not, whether it was, as Mr. Goonesekere claims "disproportionate," depends on what he did or omitted to do and whether what he did or omitted to do, as a matter of law, and not as a mere whim or fancy of the employer, warranted dismissal (Cf. Michael v. Johnson Pumps AIR 1975 SC 661 at p. 666 para. 22, per Krishna Iyer, J.).* ***I agree with learned counsel for the appellant that an employer cannot claim to have a right to dismiss an employee merely because he says he has lost confidence in an employee****. As Justice Krishna Iyer pointed out, with great respect, albeit somewhat quaintly, in Michael v. Johnson Pumps, (supra) at p. 666 para. 19, loss of confidence is "no new armour for the management: otherwise security of tenure, ensured by the new industrial jurisprudence and authenticated by a catena of cases of the Supreme Court, can be subverted by this neo-formula"* [emphasis added].

In the above circumstances, I am of the view that whether an employer has lost confidence in an employee is a matter that must be determined on the facts and circumstances of each case, with factors such as the incident or breach of discipline that gave rise to the loss of confidence, and the position held by the employee being relevant factors in arriving at such determination.

Loss of confidence in the Respondent

Having laid down the legal context in which the argument of the Appellant that it has lost confidence in the Respondent must be considered, I shall now re-visit the factual circumstances of this case.

I have already held that the post of Purchasing Officer is a position of responsibility and requires the holder of that post to act with utmost honesty and integrity. This requirement would extend to all those involved in procurement in any establishment, thus ensuring that such persons are beyond suspicion. I would even go to the extent of stating that honesty and integrity that is expected from those involved in procurement in any work place is similar to those employed by banks. All persons involved in procurement must not make a business out of their employment by selecting friends and family for the supply of goods and services to the employer in a manner that benefits such friends and family over the interests of their employer. Therefore, the ideal situation would be that the Respondent's immediate family members should not have had any business dealings with the Appellant, as long as the Respondent was in the employment of the Appellant, as it can give rise to a conflict of interest or at the very least, an appearance of a conflict of interest.

Even if that cannot be practically achieved, at a bare minimum, the Respondent, having been the Purchasing Officer of the Appellant since 1988 and knowing fully well that as a member of the Purchasing Department, he is privy to price sensitive information as well as its decisions especially in the absence of any evidence that the Appellant had in place *Chinese Walls*, owed a duty to have declared to the Appellant the fact that his wife was a partner of 'Excellent Traders' the moment the said entity was pre-registered as a supplier.

As an additional measure, the Respondent should have thereafter, having discussed the matter openly with the management, sought a transfer from the Purchasing Department, thus ensuring absolute transparency. This is the manner in which any reasonable, prudent and right thinking employee who has no financial benefit to derive from such a transaction would have acted. A disclosure of this fact by the Respondent would in all probability have led the Appellant to transfer the Respondent to a different division,

where he would not have been privy to any of the information or decisions relating to the selection of the successful supplier for the supply of goods and services to the Appellant. If that was not possible, and as a last resort, the Appellant could have even disqualified 'Excellent Traders' from the bidding process, in order to safeguard its own interests.

An employer should have the confidence to entrust duties and responsibilities to its employees in the expectation that the said duties and responsibilities shall be discharged honestly and faithfully. Although an employer will have in place supervisory structures to ensure due performance, an employer cannot be expected to keep a constant watch on all its employees. It is for this reason that honesty, integrity, loyalty and trust forms the bedrock of an employer-employee relationship. The situation inside a Purchasing Department is akin to a trading room in a stock brokers office or a directors' office of a listed company where price sensitive information is always floating in the air but with the expectation that confidentiality shall be maintained at all times with regard to such information and that such information shall not be used to one's personal benefit.

In this case, the Respondent had been the Purchasing Officer for a very long period of time and it is fair to assume that he had won the confidence of the Appellant. In such a scenario, it was the duty of the Respondent, as well as all those involved in the procurement process, to ensure that it purchases for the Appellant the best product at the most economical price. That cannot simply be achieved when an insiders' wife is a partner of a supplier. As observed earlier, one reason for the Labour Tribunal to award only half months' salary to the Respondent was the finding that a financial loss may have been caused to the Appellant.

That the confidence that the Appellant had in its employees involved in procurement including the Respondent has been breached is evident when one considers the aforementioned report of the Auditor General where he has identified the manner in which invoices had been tampered with or forged invoices had been presented and the fact that while orders were only placed with four of the thirty seven registered suppliers, orders totaling almost Rs. Two million had been placed with 'Excellent Traders' in the first year of its registration, in spite of 'Excellent Traders' not even having an office at the given

address. In fact, the investigation that led to the dismissal of the Respondent commenced when the newly appointed Store Keeper brought to the attention of the Appellant that there was a large stock of spare parts which had not been inventorised, from which an inference can possibly be drawn that spare parts which were not required by the Appellant may have been purchased.

Taking into consideration the facts and circumstances peculiar to this case, I am of the view that the failure to disclose the above relationship is a serious breach of discipline on the part of the Respondent that goes to the very root of the employer – employee relationship and is sufficient to substantiate the claim of the Appellant that it has lost trust and confidence it was entitled to have in the Respondent. I would therefore answer the second question of law - i.e., "*Has the Respondent acted in breach of the trust and confidence reposed on him by the Petitioner, by his aforesaid action?*" in the affirmative.

Consequences of a finding that an employer has lost confidence in an employee

I have already observed that confidence, trust, honesty, loyalty and integrity are at the core of an employer-employee relationship and are therefore indispensable. The result of that confidence and trust being forfeited, as in this case, is that the very foundation on which the contractual relationship between the employer and employee stands has been completely destroyed. In such a situation, the only course of action available to the Appellant was to have terminated the services of the Respondent. I am therefore of the view that:

(a) the termination of the services of the Respondent is justified;

(b) forcing the Appellant to employ a person such as the Respondent in whom it can no longer have confidence, even in any other capacity, is simply not just and equitable;

(c) having found the Respondent guilty of non-disclosure of the said relationship, the Labour Tribunal and the High Court erred in law when it it held that the termination of services was nonetheless unjustified and ordered the reinstatement of the Respondent with back wages.

There is one other matter that I must advert to, prior to answering the first question of law. That is whether an employee whose termination of services is justified is nevertheless entitled to the payment of compensation. This is an issue that has been answered in the negative as well as in the affirmative in the past. In **People's Bank v Lanka Banku Sevaka Sangamaya** [supra], the Labour Tribunal, having held that the termination of services is justified had awarded compensation. In appeal, Sisira De Abrew, J set aside the order for compensation on the basis that, "*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*.". This conclusion has been followed by this Court in **Ceylon Bank Employees' Union v Hatton National Bank** [supra].

In **David Michael Joachim v Aitken Spence Travels Limited** [SC Appeal No. 9/2010; SC minutes of 11th February 2021], Kodagoda, J having considered several previous judgments of this Court including **Saleem v Hatton National Bank** [(1994) 3 Sri LR 409] and **People's Bank v Lanka Banku Sevaka Sangamaya** [supra], held that while an employee whose termination of services is lawful and justified cannot as of right claim compensation,

> "*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 …*
>
> *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).*
>
> *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."

Thus, while it is clear that the awarding of compensation even where termination of services is justified is the exception, I am of the view that an employee who is guilty of misconduct that brings into question his integrity, loyalty, trust and honesty is not entitled to the payment of any compensation. Taking into consideration the facts and circumstances of this case and the conduct of the Respondent, I am of the view that there is no justification at all to make an order for the payment of compensation to the Respondent. To make such an order would be to reward dishonest conduct.

I would therefore answer the first question of law, as well, in the affirmative.

The Order of the Labour Tribunal and the judgment of the High Court are accordingly set aside and this appeal is allowed. I make no order for 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

1. Kukule Kankanamge Chandrasena
   Yakupitiya, Bellana.
2. Edirisinghe Athukoralage Pushpalatha
   Yakupitiya, Bellana.
   Plaintiffs

SC APPEAL NO: SC/APPEAL/233/2017
SC LA NO: SC/HCCA/LA/390/2015
HCCA KALUTARA NO: WP/HCCA/KAL/47/2010(F)
DC MATHUGAMA NO: 198/MB

Vs.

1. Liyanage Don Buddhadasa
   Yakupitiya, Bellana.
   Defendant

AND BETWEEN

Liyanage Don Buddhadasa
Yakupitiya, Bellana.
Defendant-Appellant

Vs.

1. Kukule Kankanamge Chandrasena
   Yakupitiya Bellana.
2. Edirisinghe Athukoralage Pushpalatha
   Yakupitiya, Bellana.
   Plaintiff-Respondents

AND NOW BETWEEN

Liyanage Don Buddhadasa
Yakupitiya,
Bellana.
Defendant-Appellant-Appellant

Vs.

1. Kukule Kankanamge Chandrasena
   Yakutupitiya,
   Bellana.
2. Edirisinghe Athukoralage Pushpalatha
   Yakupitiya,
   Bellana.

Plaintiff-Respondent-Respondents

Before: P. Padman Surasena, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Niranjan de Silva for the Defendant-Appellant-Appellant.
Dr. Sunil Coorey with Ms. Sudarshani Coorey for the Plaintiff-Respondent-Respondents.

Argued on : 26.11.2021

Written submissions:

by the Defendant-Appellant-Appellant on 10.12.2021

by the Plaintiff-Respondent-Respondents on 11.03.2019

Decided on: 21.11.2022

Mahinda Samayawardhena, J.

The two plaintiffs filed this action against the defendant in the District Court of Matugama seeking to discharge the usufructuary mortgage marked P3 executed in favour of the defendant in lieu of interest to be paid on Rs. 20,000 borrowed by the 1st plaintiff from the defendant and, once the payment is made, to eject the defendant from the two boutique rooms mortgaged. The defendant filed answer seeking dismissal of the action or a declaration that he is the owner of the boutique rooms marked 1, 2 and 3 in plan V1 or compensation for improvements made. After trial, the District Court entered judgment for the plaintiffs and on appeal the same was affirmed by the High Court of Civil Appeal. Hence the defendant is before this court. This court granted leave to appeal on the following questions of law:

The questions of law on behalf of the defendant:

(1) *In view of the answers to issues 12 to 15 in that since the original boutique rooms mortgaged to the defendant were not in existence on the ground at the time of the filing of the present action in the District Court, could the plaintiffs have and maintained the present action on the strength of the said usufructuary mortgage?*

(2) *Since there is evidence before court to the fact that the defendant had constructed buildings bearing Nos. 1, 2 and 3 in plan V1 and also due to the fact that issue No. 16 of the defendant has been answered in the affirmative, is the defendant entitled to compensation for the said buildings?*

The question of law on behalf of the plaintiffs:

(3) *Should the mortgage bond P3 be interpreted to mean that the boutique rooms which replaced the rooms that existed at the time of*

its execution are to be understood to be the subject matter of the mortgage bond?

The execution of the usufructuary mortgage P3 was recorded as the first admission at the trial. By this admission, the defendant admitted that P3 was executed in favour of the defendant in order for him to possess the two boutique rooms mentioned therein in lieu of payment of interest on Rs. 20,000 borrowed by the 1st plaintiff from the defendant.

Although question No. 1 above presupposes that both boutique rooms were not in existence at the time of filing this action, issues 12-15 and the answers thereto do not refer to both boutique rooms but only to one of them. Question No. 1 is a misleading question. Let me reproduce those issues and answers for better understanding.

12. පැමිණිලිකරු විසින් මෙම නඩුවට අදාල අංක 1386 සහ 1981.12.17 දරණ උගස්කරය ලිවීමට පෙර මෙම භබගත් ස්ථානයේ පැමිණිලිකරු විසින් මැටියෙන් සාදන ලද කඩකාමර දෙකක වැල්දොඩම් එකතු කිරීමේ ව්‍යාපාරයක් පවත්වාගෙන ගියේද? - ඔව්.

13. පැමිණිලිකරුගේ එකී ව්‍යාපාරය බිඳ වැටීම හේතුකොට ගෙන පැමිණිලිකරු විසින් එකී කඩ කාමර දෙක අංක 1386 දරණ පොලීමරා උගස්කරය මත විත්තිකරුට පවරා දුන්නේද? - ඔව්.

14. ඒත් අවුරුදු කීපයකට පසු පැමිණිලිකරු විසින් එකී කඩ කාමර දෙකෙන් එකක් විත්තිකරුගෙන් ආපසු ඉල්ලා ගත්තේද? - ඔව්.

15.ඉන්පසුව පැමිණිලිකරු එකී කඩකාමරය කඩා දමා එකී ස්ථානයේ පදිංචිව නිවසක් තනන ලද්දේද? - ඔව්

The defendant's position is that after mortgaging the two boutique rooms, the 1st plaintiff retook possession of one of them and, having demolished the same, constructed a new house for the plaintiffs to live in, which is now identified as the rooms marked 4, 5 and 6 in plan V1 produced by the defendant.

In respect of the other boutique room, the defendant's position is that he demolished it and constructed three rooms marked 1, 2 and 3 in plan V1

"on the understanding that the 1st plaintiff would take steps to transfer the said boutique rooms" to him. I must re-emphasise that this boutique room is not covered by issues 12-15.

Are the three rooms marked 1, 2 and 3 in plan V1 completely new structures or built on existing structures? The answer to that question is found in the surveyor's report to V1 marked by the defendant himself as V3. It reads as follows:

> වැඩිදියුණු කිරීම්:- රතුපාට A දරණ ගෙයට හබකරමින් පාර්ශව කරුවන් භුක්ති විඳී. එහි විස්තරාත්මක සැලැස්ම විශාල කර පසුපිටේ පෙන්වා ඇත. එහි සඳහන් රතුපාට අංක 1, 2, සහ 3 වශයෙන් පෙන්වා ඇති කාමර තුන විත්තිකරුවන් භුක්ති විඳී. මෙය උළුසෙවිළිකල අහල් 11 පළල මැටි බිත්ති සහිත කපරාරුකරන ලද අවුරුදු 25ක් පමණ වයසැති ස්ථිර ගොඩනැගිල්ලකි. PQ, RS යන ස්ථාන වලදී යටලීයේ පැරණි පිරිද්දුම් ඇති ස්ථාන වේ. TU යන ස්ථානයේදී යටලීයේ නව පිරිද්දුම් ස්ථානයකි. එය 1 වන පැමිණිලිකරු පදිංචිවී සිටින අංක 4ට යාකිරීම සඳහායි. මෙම ගෙයට (අංක 1, 2, සහ 3 යන කාමර සඳහා) විත්තිකරු විසින් බල්බ් 7ක් යොදාගෙන විදුලිය ලබා ගෙන ඇත. මෙහි අද දිනට තක්සේරුව අනුව රුපියල් 75,000/= කි. ඊට යටවී ඇති බිම් ප්‍රමාණය පර් 2.69කි. ඒ සඳහා පර්චසයක් රුපියල් 7,000/= බැගින් රුපියල් 18,300/= කි.
>
> රතුපාට 4, 5 සහ 6 දරණ අලුතින් තනන ලද ස්ථිර ගෙයට 1 වන පැමිණිලිකරු භුක්ති විඳී. මෙහි අහල් 8.6 සහ අහල් 5 පළල කපරාරු කරන ලද ගඩොල් බිත්ති සහිත උළුසෙවිළි කළ ඇස්බැස්ටොස් සීලිම සහිත ගෙයකි. මෙම ගෙයට පසුපිටේ පෙන්වා ඇති පරිදි විදුලිය ලබාගෙන විදුලි බුබුලු 12ක් පැමිණිලිකරු පරිභෝජනය කරයි. අංක 1, 2, සහ 3 සඳහා එම පැරණි කඩ කාමර 2 සහ පිටුපස ඇති කාමරය විත්තිකරු විසින් තනා විදුලිය ලබාගෙන ඇතිබව කියයි. නමුත් එය පැමිණිලිකරු විසින් තනා ඇතිබව ඔහු කියා සිටී.

According to this report, the three rooms marked 1, 2 and 3 are not new structures but improvements made on the then existing structures. Plan V1 and its report V3 are the defendant's documents marked in evidence by the defendant himself in support of his case. Therefore we have to accept V1 and V3.

I answer the question of law No. 1 in the affirmative.

This leads me to consider question of law No. 2. This question revolves around compensation for improvements. At the argument, learned counsel for the plaintiffs agreed to pay compensation for the said three rooms as calculated by the court commissioner in V3. I have no better suggestion to make. That is what the defendant has prayed for in the prayer to the answer.

> එසේ හෙයින් මෙම විත්තිකරු ගරු අධිකරණයෙන් ඇයද සිටින්නේ,
>
> (අ) පැමිණිල්ල ගාස්තුවට යටත්කොට නිෂ්ප්‍රභා කරන ලෙසත්,
>
> (ආ) විත්තිකරු විසින් සද්භාවයෙන් සාදා ඇති අංක 343 පිඹුරේ 'ඒ' ලෙස සඳහන් කල ගොඩනැගිල්ල කාමර අංක 1, 2, 3 විත්තිකරුට හිමිවිය යුතු බවට නියෝගයක් සහ/හෝ එකී වැඩි දියුණු කිරීම්වලට අදාල 343 පිඹුරේ සඳහන් වටිනාකම්වල එකතුව විත්තිකරුට හිමිවිය යුතු බවට නියෝග කරන ලෙසත්,
>
> (ඇ) ගරු අධිකරණයට හැඟෙන වෙනත් සහ වැඩි මනත් සහන ලබාදෙන ලෙසත්ය.

Plan No. 343 referred to in the prayer quoted above is plan V1 and the defendant seeks compensation as calculated therein, which is Rs. 75,000.

I answer question No. 2 in the affirmative. The defendant is entitled to compensation for the improvements in a sum of Rs. 75,000. This is in addition to the Rs. 20,000 deposited by the plaintiffs in court, with accrued interest.

In view of the above, there is no necessity to answer question of law No. 3 raised by the plaintiffs.

Subject to the above variation in respect of compensation, the appeal is dismissed 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

In the matter of an appeal to the Supreme Court in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with Section 5C(1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, as amended by Act No. 54 of 2006.

SC Appeal No. 234/2017
SC/HC/CA/LA No.378/2016
WP/HCCA/MT/No. 78/2013(F)
DC Nugegoda No. 1291/10/M

People's Bank,
No. 75, Sir Chittampalm A. Gardiner Mawatha,
Colombo 2.

PLAINTIFF

vs.

Jagoda Gamage Nishantha Pradeep Kumara,
No. 8/18, Katuwawala Lane,
Boralesgamuwa.

DEFENDANT

And between

People's Bank,
No. 75, Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.

PLAINTIFF – APPELLANT

vs.

Jagoda Gamage Nishantha Pradeep Kumara,
No. 8/18, Katuwawala Lane,
Boralesgamuwa.

DEFENDANT – RESPONDENT

And Now Between

People's Bank,
No. 75, Sir Chittampalm A. Gardiner Mawatha,
Colombo 2.

PLAINTIFF – APPELLANT – APPELLANT

vs.

Jagoda Gamage Nishantha Pradeep Kumara,
No. 8/18, Katuwawala Lane,
Boralesgamuwa.

DEFENDANT – RESPONDENT – RESPONDENT

Before: **L.T.B. Dehideniya, J**
Kumudini Wickremasinghe, J
Arjuna Obeyesekere, J

Counsel: Rasika Dissanayake for the Plaintiff **–** Appellant **–** Appellant

Written Submissions: Tendered on behalf of the Petitioner on 16th August 2019

Argued on: 26th October 2021

Decided on: 12th December 2022

Obeyesekere, J.

The three questions of law that need to be answered in this appeal are centered on (a) Section 85 of the Civil Procedure Code, and (b) whether the evidence that was presented by the Plaintiff – Appellant – Appellant [*the Plaintiff*] was sufficient to satisfy the District Court that the Plaintiff was entitled to the relief claimed by it.

Background facts

The facts of this matter briefly are as follows.

The Plaintiff is a licensed commercial bank incorporated under the provisions of the People's Bank Act No. 29 of 1961, as amended. In August 2010, the Plaintiff had filed a plaint in the District Court of Nugegoda against the Defendant – Respondent – Respondent [*the Defendant*] claiming a sum of Rs. 565,742.56, together with interest at the rate of 35% per annum with effect from 1st November 2008.

The Plaintiff had averred in the said plaint that on 15th March 2007, the Defendant had opened Current Account No. 306-1002-4053-7427 in his name at the Maharagama Branch of the Plaintiff and that the Defendant had maintained and operated the said current account thereafter. A copy of the mandate signed by the Defendant at the time he opened the said account and which contains the terms and conditions relating to the operation of the said current account had been tendered together with the plaint.

The Plaintiff had stated that on 2nd September 2008, the Defendant had made a request to the Maharagama Branch of the Plaintiff that a temporary overdraft facility of Rs. 1,268,000/= repayable within thirty days, be granted to him on the above current account. I must observe that the plaint does not specify if the said request was made in writing, or was an oral request of the Defendant. Be that as it may, the Plaintiff states that it acceded to the said request and honoured the cheque presented by the Defendant, thereby permitting the Defendant to overdraw his current account, subject to the payment of interest at the rate of 35% per annum on the overdrawn sum of money and the settlement of such amount within thirty days.

It had been averred further that even though the Defendant had settled part of the monies withdrawn on 2nd September 2008, he had failed to settle in full the said overdraft facility in spite of the undertaking given by him that the amount overdrawn will be settled within thirty days. Accordingly, as at 1st November 2008, the current account of the Defendant had a debit balance of Rs. 565,742.56. On 30th November 2008, the said current account had been categorised as a non-performing account.

By letter dated 30th July 2009 sent through its Attorney-at-Law, the Plaintiff had demanded that the Defendant pay the aforesaid sum of Rs. 565,742.56, together with interest at the rate of 35% per annum with effect from 1st November 2008. The Plaintiff states that the Defendant failed to respond to the said letter of demand.

It is in this background that the Plaintiff filed the aforementioned action in the District Court of Nugegoda, seeking judgment *inter alia* in a sum of Rs. 565,742.56, together with interest at the rate of 35% per annum with effect from 1st November 2008 until the date of the decree, and legal interest on the sum awarded until payment in full.

Ex-parte trial against the Defendant

Even though summons had been issued on the Defendant on several occasions, the Fiscal had reported that the Defendant was not available at the address specified in the plaint. Acting on an affidavit filed by the Manager of the Maharagama Branch of the Plaintiff that the Defendant is in fact resident at the said address, the District Court had directed that summons be served on the Defendant by substituted service. The Fiscal had thereafter reported to Court that the summons was pasted at the said address. As the Defendant failed to appear even thereafter on the summons returnable date, the District Court had fixed the case for *ex-parte* trial against the Defendant, as provided for by Section 84 of the Civil Procedure Code.

Evidence on behalf of the Plaintiff had been submitted by way of an affidavit of Chandrani Bogoda, the Manager of the Maharagama Branch of the Plaintiff. Although she had reiterated the aforementioned factual matters set out in the plaint, and categorically

stated that the Defendant had been permitted to overdraw his account by a sum of Rs. 1,268,000.00, she had not produced any documents that reflect a request by the Defendant for the said overdraft facility, nor the cheque by which the Defendant had withdrawn the said sum of money.

The Statement of Account pertaining to the aforementioned current account of the Defendant which had been tendered with the plaint was re-tendered with the affidavit. Although the said Statement of Account comprising of a single page confirms that the current account of the Defendant had a debit balance of Rs. 567, 242.56 as at 4th August 2009, and that the balance had come down to Rs. 565,242.56 by 31st October 2009, the entries relating to the current account on the said Statement of Account are limited to those transactions that had taken place from 15th April 2009. It is observed that neither the entry by which the Defendant made the first withdrawal of Rs. 1,268,000 nor the subsequent payments that the Defendant had made in order to reduce the debit balance to Rs. 565,742.56 by 1st November 2008, are reflected in the said Statement of Account.

Judgment of the District Court

The learned District Judge of Nugegoda, by his judgment dated 7th October 2013, had held as follows:

> "පැමිණිල්ලේ ස්ථාවරය වුයේ මෙම නඩුවේ විත්තිකරු විසින් දිවිරුම් ප්‍රකාශයේ 8 වන ඡේදයේ දක්වා ඇති පරිදි රු. 1,268,000 ක තාවකාලික අයිරා පහසුකමක් 2008.09.02 දින හෝ ආසන්න දිනයක අයැද සිටින ලද අතර එම 2008.09.02 දින ගිණුමට අයිරා කරන ලද බවයි. මෙම නඩුවේදි පංගම ගිණුම ආරම්භ කිරීමට අදාල කොන්දේසි හා මැන්ඩේට් පත්‍ර ඉදිරිපත් කර තිබුණත් එසේ **පැමිණිලිකරු කියා සිටින පරිදි 2008.09.02 දින පැමිණිල්ලේ දක්වා සිටින පරිදි ගිණුම අයිරා කළ බව සනාථ කිරීමට මෙම නඩුවේ කිසිදු ලේඛණයක් ඉදිරිපත් කර නැත්තේ ය.** ඒ අනුව පැමිණිල්ල විසින් ඉදිරිපත් කරන ලද කරුණු සනාථ වී ඇති බවට අධිකරණයට සෑහීමට පත් වීමට හැකියාවක් නැත. එබැවින් මෙම නඩුව ගාස්තු රහිතව නිෂ්ප්‍රභා කරමි."

Thus, it is clear that the learned District Judge had dismissed the action due to the failure on the part of the Plaintiff to produce any documents to satisfy Court that the Defendant overdrew his current account on 2nd September 2008.

Appeal to the Provincial High Court

Dissatisfied with the said judgment of the District Court, the Plaintiff had lodged an appeal with the Provincial High Court of the Western Province holden in Mount Lavinia. The position of the Plaintiff before the High Court was that the evidence that had been presented in support of the claim was sufficient to establish that the Defendant had been granted an overdraft facility which was outstanding and that the learned District Judge had erred in dismissing the action.

By its judgment delivered on 28th June 2016, the learned Judges of the High Court had held as follows:

> "*A perusal of the impugned judgment reveals that the learned District Judge has found that* ***no evidence has been made available to prove that such overdraft facility was granted to the Defendant-Respondent on 02.09.2008****. The document marked as P4 [the bank statement] is the only document which shows the arrears in the account of the Defendant-Respondent. However****, a close examination of that document does not reveal that such amount became due upon such overdraft facility granted to the Defendant on that date.*** *It appears that the learned District Judge has found that no evidence has been made available by the Plaintiff to prove that such amount was granted as overdraft facility upon a request made by the Defendant-Respondent as well and it is not clear how that amount became due from the Defendant. Once the Plaintiff pleads that it granted such overdraft facility to the Defendant on a certain date and fell in arrears,* ***the burden rests on the Plaintiff to submit sufficient evidence to substantiate such position irrespective of the fact that trial was held ex-parte****.*
>
> *In those circumstances, I am of the view that there is no sufficient material available to interfere with the findings of the learned District Judge.*" [emphasis added]

Aggrieved by the dismissal of its appeal by the High Court, the Plaintiff invoked the jurisdiction of this Court in terms of Article 128(2) of the Constitution and sought leave to appeal against the said judgment of the High Court. The Defendant failed to appear before this Court, as well, even though notices had been issued on several occasions to the Defendant through the Registrar of this Court.

Questions of law

On 24th November 2017, this Court granted the Plaintiff leave to appeal on the following Questions of Law:

"1) *Did the learned Judges of the Provincial High Court of Civil Appeal of the Western Province holden in Mount Lavinia as well as the learned District Judge of Nugegoda err in law when they failed to evaluate the evidence of the case properly?*

2) *Did the learned Judges of the Provincial High Court of Civil Appeal of the Western Province holden in Mount Lavinia as well as the learned District Judge of Nugegoda misdirect themselves when they held that sufficient evidence has not been disclosed by the Petitioner to prove the grant of the overdraft facility and the amount due in as much as the then Manageress of the Peoples Bank Maharagama in her evidence categorically stated about the same?*

3) *Did the learned Judges of the Provincial High Court of Civil Appeal of the Western Province holden in Mount Lavinia as well as the learned District Judge of Nugegoda misdirect themselves when they did not consider the fact that there is sufficient evidence to prove the Petitioner's case in the affidavit submitted to the District Court*."

The essence of the above questions of law is that there was sufficient evidence before the District Court for it to have arrived at a finding that the Defendant had obtained a temporary overdraft facility and that the said facility has not been settled in full, as pleaded by the Plaintiff, and that both the District Court and the High Court erred in law by failing to evaluate the said evidence in terms of the law.

The principal submission of the learned Counsel for the Plaintiff was that the evidence of the Manager of the Maharagama Branch of the Plaintiff that the Defendant had been permitted to overdraw his current account by a sum of Rs. 1,268,000 and that as at 1st November 2008, a sum of Rs. 565,742.56 was due and payable by the Defendant to the Plaintiff was sufficient for the District Court to have entered judgment in favour of the Plaintiff, especially since this evidence has neither been challenged nor contradicted before the District Court.

Sections 84 and 85 of the Civil Procedure Code

The starting point in considering the above questions of law is Section 84 of the Civil Procedure Code, which reads as follows:

> *"**If the defendant fails to file his answer on or before the day fixed for the filing of the answer**, or on or before the day fixed for the subsequent filing of the answer or having filed his answer, if he fails to appear on the day fixed (or the hearing of the action, **and if the court is satisfied that the defendant has been duly served with summons,** or has received due notice of the day fixed for the subsequent filing of the answer, or of the day fixed for the hearing of the action, as the case may be, and if, on the occasion of such default of the defendant, the plaintiff appears, then **the court shall proceed to hear the case ex parte forthwith**, or on such other day as the court may fix."*

Section 85(1) of the Code, which was introduced by the Civil Procedure Code Act No. 20 of 1977 and the legislative history of which has been traced in **Sirimavo Bandaranaike v Times of Ceylon Ltd** [(1995) 1 Sri LR 22], sets out the burden that must be discharged by a plaintiff once an action has been fixed to be heard *ex parte.*

Section 85(1) reads as follows:

> *"The plaintiff may place evidence before the court in support of his claim by affidavit, or by oral testimony and move for judgment, and the court, **if satisfied that the***

***plaintiff is entitled to the relief claimed by him**, either in its entirety or subject to modification, may enter such judgment in favour of the plaintiff as to it shall seem proper, and enter decree accordingly."*

In **Sirimavo Bandaranaike v Times of Ceylon Ltd** [supra], Mark Fernando, J having considered the submission on behalf of the defendant that Section 85 required the trial Judge be satisfied at least *prima facie* and that this pre-supposed a judicial determination, held as follows [at page 37]:

*"Section 85(1) requires that the trial judge should be "satisfied" that the Plaintiff is entitled to the relief claimed. The Defendant's case is that if in fact he was not satisfied, or if on the evidence he could not reasonably have been satisfied, the error was so serious as to prejudice the substantial rights of the Defendant and to occasion a failure of justice. **The question is whether entering an ex parte default judgment is a mere formality, or whether a hearing and a proper adjudication are necessary**.*

***The plain meaning of the word "satisfied" in section 85(1) is that the trial judge must reach findings on the relevant points after a process of hearing evidence and adjudication**, and that he cannot enter judgment for the plaintiff as a matter of course. It is unnecessary to rely on the Indian decisions cited by Mr. Seneviratne as I find that there are four other independent and compelling reasons for this interpretation: the immediate context of section 85(1), the basic principles of justice underlying the Code, the legislative history of this and similar provisions, and judicial decisions in regard to those provisions.*

*Section 85(2) shows that a judge may award the plaintiff less than what is claimed if in his opinion the entirety of the relief cannot be granted. Obviously such an opinion can only be reached after hearing evidence and **judicially assessing that evidence in relation to the ingredients of the Plaintiff's cause of action**. Further, sections 84, 86 and 87 all refer to the judge being "satisfied" on a variety of matters: in every instance, such satisfaction is after adjudication upon evidence. It must be presumed that the word "satisfied" occurring in several sections in the same Chapter of the Code has the same meaning.*

There is no express provision which empowers a judge to enter an ex-parte default judgment without a hearing and an adjudication on the merits. It would be contrary to the basic principles of the judicial process to interpret the word "satisfied" so as to allow such a power; there is in a democracy no unfettered, absolute, or arbitrary power, even in the judiciary.

I hold that an ex parte default judgment cannot be entered without a hearing and an adjudication." [emphasis added]

In **The Finance Company PLC v Jayakody Arachchige Don Thushara and Others** [SC Appeal No. 05/2012; SC Minutes of 26th January 2017], the plaintiff had entered into an agreement with the 1st defendant for the lease of a motor vehicle. The plaintiff had terminated the said agreement upon the failure on the part of the 1st defendant to pay the monthly rentals and interest specified therein. Having taken steps to sell the said vehicle and credit the sale proceeds against the balance due on the lease agreement, the plaintiff instituted action to recover the balance sum of money due under the said agreement. As in this case, the defendant did not file answer, the case against the defendant was fixed *ex parte* and evidence of the plaintiff was given by way of an affidavit. The learned Trial Judge had dismissed the plaintiff's action, *"primarily, on the ground that, although the Affidavit of the Plaintiff's witness stated that the vehicle had been sold for Rs.1,275,000/- and that the sale proceeds had been applied in reduction of the amount due from the Defendants Respondents, the Plaintiff has not adduced any further details regarding the alleged sale and has not produced any documents relating to the sale."*

On appeal, Prasanna Jayawardena, J held as follows:

*"**There is no doubt that**, as clearly stated in Section 85 (1) of the Civil Procedure Code, **judgment could be entered for the Plaintiff in an ex-parte trial only if the Court is satisfied that the evidence placed before Court establishes that the Plaintiff is entitled to that judgment**. This rule has been emphasized in several decisions including Sirimavo Bandaranaike vs. Times of Ceylon Ltd and Seneviratne vs Dharmaratne [(1997) 1 Sri LR 76]. Therefore, the learned Trial Judge was fully*

entitled to dismiss the Plaintiff's action in the present case, if the evidence placed before the Court at the ex-parte trial was, in fact, not sufficient to establish the Plaintiff's case.

When determining whether or not this burden of proof has been discharged in an ex parte trial, it has to be kept in mind that, ***a Plaintiff who adduces evidence at an ex parte trial is, usually, required to adduce only such evidence as is necessary to establish his case on a prima facie basis*** *by establishing the constituent elements of his Cause of Action. This is subject to the Court seeing* ***no reason to doubt the authenticity and bona fides of the evidence****."* [emphasis added]

It is therefore seen that for judgment to be entered in favour of the Plaintiff at an *ex parte* trial, it is critical that the learned Trial Judge must be satisfied on a prima facie basis that the Plaintiff is entitled to the relief claimed by him. In order to satisfy himself, the learned Trial judge must hear and consider the evidence and thereafter engage in a judicial assessment of the evidence in relation to the constituent elements of the plaintiff's cause of action. It is only after having done so, and where the learned Trial Judge is satisfied that the plaintiff has discharged that burden can the learned Trial Judge enter judgment in favour of the Plaintiff.

Temporary Overdraft facilities

I shall now consider the nature and form of an overdraft in order to determine the constituent elements thereof.

A customer who does not have sufficient funds in his account but who has an urgent or sudden requirement for money although for a limited purpose and a temporary period, may seek the assistance of his/her bank by requesting such sum of money either orally or through a written request, depending on the relationship that exists between the customer and the bank. The easiest form of making this sum of money available to the customer is by permitting the customer to overdraw his current account. The withdrawal would generally be through a cheque of the customer, with the standard terms of the bank relating to the settlement of overdrafts being applicable thereto. In most instances,

this would be a one-off overdrawing of the account and is a pure and simple temporary overdraft facility.

The essential feature of an overdraft facility is that the customer is permitted to withdraw from his current account a sum of money over and above the credit balance available in such account, or in other words to overdraw the account in spite of the account not having sufficient funds.

An overdraft facility can take many forms, and accordingly, the terms and conditions subject to which:

(a) the customer would be permitted to overdraw his current account including the rate of interest payable on the overdrawn amount; and

(b) the manner in which the overdrawn sum of money must be re-paid, including the period within which it must be paid,

would vary from one form to the other.

In **Gunawardana v Indian Overseas Bank** [(2001) 2 Sri L.R 113 at pages 119-120] Wigneswaran, J described an overdraft facility in the following manner: -

> "*overdraft facility is afforded by a bank by permitting a customer to overdraw his current account up to certain limits. The current account being operative and in force the facility too will continue to be operative until cancelled and or unless the money due to the bank is demanded by it. If the customer does not take steps to pay-off the overdrawn amount, interest will accrue on such overdrawn amount and shall continue to be a debt due to the bank until there is a repayment of the debt or cancellation of the debt. The overdraft facility itself will come to an end, as stated above, on the cancellation of the facility or when the bank demands repayment. This would be generally so unless there are special arrangements to the contrary*."

In **Bank of Ceylon v Aswedduma Tea Manufacturers (Pvt) Limited** [SC Appeal 175/2015; SC Minutes of 6th October 2017], which was cited with approval by Murdu Fernando, J in **Sampath Bank PLC v Kaluarachchi Sasitha Palitha** [SC Appeal 196/2011; SC Minutes of 9th September 2019], Anil Gooneratne, J referred with approval, two English judgments that capture the essence of a one-off overdraft facility.

The first was **Peter Royston Voller v Lloyds Bank PLC** [No. B3/99/1177; 19th October 2000] where Justice Wells of the Court of Appeal (Civil Division) held that:

> "*In my judgment, the position is very simple and well established as a matter of banking law and practice. It is this. If a current account is opened by a customer with a bank with no express agreement as to what the overdraft facility should be, then, in circumstances where the customer draws a cheque on the account which causes the account to go into overdraft, the customer, by necessary implication, requests the bank to grant the customer an overdraft of the necessary amount, on its usual terms as to interest and other charges. In deciding to honour the cheque the bank, by implication accepts the offer*."

The next was **Barclays Bank Ltd v W.J. Simms Son and Cooke (Southern) Ltd and Another** [(1980) 1 QB 699] where Goff, J held as follows:

> "*It is a basic obligation owed by a bank to its customer that it will honour on presentation cheques drawn by the customer on the bank* ***, provided that there are sufficient funds in the customer's account to meet the cheque****, or* ***the bank has agreed to provide the customer with overdraft facilities sufficient to meet the cheque****. Where the bank honours such a cheque, it acts within its mandate, with the result that the bank is entitled to debit the customer's account with the amount of the cheque, and further that the bank's payment is effective to discharge the obligation of the customer to the payee on the cheque, because the bank has paid the cheque with the authority of the customer.*
>
> *In other circumstances, the bank is under no obligation to honour its customer's cheques. If however a customer draws a cheque on the bank without funds in his*

account or agreed overdraft facilities sufficient to meet it, the cheque on presentation constitutes a request to the bank to provide overdraft facilities sufficient to meet the cheque. The bank has an option whether or not to comply with that request. If it declines to do so, it acts entirely within its rights and no legal consequences follow as between the bank and its customer. ***If however the bank pays the cheque, it accepts the request and the payment has the same legal consequences as if the payment had been made pursuant to previously agreed overdraft facilities****; the payment is made within the bank's mandate, and in particular the bank is entitled to debit the customer's account, and the bank's payment discharges the customer's obligation to the payee on the cheque*." [emphasis added]

Thus, it is clear that while each withdrawal over and above the available credit balance will be by cheque, each such withdrawal need not be accompanied by a separate written request.

<u>Permanent Overdraft facilities</u>

There may be instances where a customer faces short term cash flow mismatches which arises more frequently or are spread over a longer period of time or on a more permanent basis, but is able to repay the borrowed sum in short periods of time. Such a revolving need for cash could be addressed more effectively through an overdraft facility than a long term loan. It would generally be reflected in a formal request to the bank by the customer followed by the execution of a written agreement containing the specific terms and conditions subject to which the customer would be permitted to overdraw his current account. While such an agreement could also be temporary as well as permanent, it would, in addition to the standard terms and conditions, contain the credit limit upto which the account could be overdrawn, the period of the facility and the interest rate that is payable on the overdrawn amount. Such a facility involves more than one instance of overdrawing, and is an ongoing or revolving facility, enabling the account to be operated by the customer by withdrawals within the credit ceiling and payments being made to reduce the overdrawn balance as well as the interest that is charged at the end of the month on the balance outstanding.

The constituent elements of the cause of action

Based on the foregoing discussion and taking into consideration the facts and circumstances of this case, I would identify the following as being the constituent elements of the cause of action in this case:

1) Did the Defendant have and maintain a current account with the Plaintiff?

2) Has the Defendant made a request that he be permitted to overdraw his account?

3) Has the Plaintiff acted on the said request of the Defendant and permitted him to overdraw his account?

4) Has the Defendant settled the overdrawn amount or part thereof?

5) What is the amount outstanding to the Plaintiff from the overdrawn amount?

6) Has the Plaintiff demanded the repayment of the outstanding sum of money?

I shall now consider if the evidence led before the District Court was sufficient to establish the above constituent elements.

The first element that must be established is that the Defendant had and maintained a current account with the bank. The Plaintiff has pleaded that the Defendant opened the aforementioned current account on 15th March 2007. Annexed to the plaint and the affidavit of Chandrani Bogoda was the mandate signed by the Defendant at the time the account was opened. Hence, there is no doubt that the Defendant had and maintained current account No. 306-1002-4053-7427 at the Maharagama Branch of the Plaintiff. The first element has therefore been established.

Prior to considering the second to fifth elements, it would be convenient to consider the final element, namely, whether the bank demanded the repayment of the said sum of money. As I have already observed, by letter dated 30th July 2009, the bank had

demanded the repayment of a sum of Rs. 565,742.56. As proof of such demand having been made, the Plaintiff has annexed the registered receipt article dated 6th August 2009. There are two matters that I wish to advert to. The first is that the said letter does not state that the amount demanded has arisen out of the said overdraft facility granted to the Defendant. The second is that the plaint does not contain an averment that the Defendant failed to respond to the said letter. Be that as it may, I am satisfied that there is sufficient material to establish that the amount claimed in the plaint has been demanded and that the final element has been established.

This brings me to the second to fifth elements. In considering these elements, the first issue that arises is whether it is mandatory for the Plaintiff to have produced a written request submitted by the Defendant, or whether evidence of an oral request was sufficient.

Section 50 of the Civil Procedure Code stipulates that, "*If a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.*"

It is clear from the plaint that the Plaintiff has not based its cause of action on a written agreement, a cheque or any other document. The complaint of the Plaintiff was simply that it had permitted the Defendant to overdraw his current account on a request made by him, with the plaint being silent on whether such request was made in writing or was an oral request. Thus, Section 50 does not apply in the present instance and it was not mandatory for the Plaintiff to have produced any document.

This matter was considered in **Bank of Ceylon v Aswedduma Tea Manufacturers (Pvt) Limited** [supra] where this Court observed as follows:

> "*I do agree with the learned counsel for the Bank that the bank does not rely on Section 50 of the Civil Procedure Code, which require a litigant who relies on a document to produce the document or even annex it to the plaint. This was an arrangement between the Plaintiff Bank and the Respondent. This being an overdraft facility* ***the bank need not annex a document or the several cheques since***

there is evidence of the several bank statements placed and produced before court. *These documents i.e., the statements of account were produced in court and had been compared by witness No. 2 for the bank with the relevant ledger. This is not an action based on a cheque but on overdraft facilities.*" [emphasis added]

As a request to temporarily overdraw a current account need not be in writing, the submission of a written request with the plaint cannot be made mandatory in order to establish that the Defendant made a request to overdraw his account. Therefore, while oral evidence is sufficient to establish that the request for an overdraft was in fact made, evidence of such request in the form of the relevant ledger on which the entry relating to the withdrawal was recorded, and where available the cheque presented must be produced in order to establish that the Plaintiff acted on the said request and that the Plaintiff proceeded to honour the cheque.

While in terms of Section 59 of the Evidence Ordinance, "*All facts, except the contents of documents, may be proved by oral evidence*", Section 60 provides as follows:

"*Oral evidence must, in all cases whatever, be direct;*

that is to say-

(i) If it refers to a fact which could be seen it must be the evidence of a witness who says he saw that fact;

(ii) If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact;

(iii) If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner;

(iv) If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

… Provided also that, if oral evidence refers to the existence or conditions 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."

In **The Law of Evidence** by E.R.S.R. Coomaraswamy [1989, Volume II – page 4], the author having described Sections 59 and 60 as two cardinal rules relating to the direct testimony of witnesses, states that, "*The first important aspect of this matter is that while the general rule is that all facts may be proved by oral evidence, there is a restriction that no person giving oral evidence can describe the contents of a document, unless he produces the document itself, or he is allowed to give secondary evidence of its contents under Section 65.*"

According to paragraph 2 of the affidavit of Chandrani Bogoda signed on 26th August 2013, she is affirming to the facts contained therein on two grounds. The first is on her personal knowledge. Chandrani Bogoda does not however state if she was the Manager of the Maharagama Branch or serving in some other capacity in the said branch at about the time the Defendant was permitted to overdraw his account in September 2008, nor does she state the manner in which she acquired personal knowledge of the facts contained in the said affidavit. Therefore, the statement of Chandrani Bogoda that she had personal knowledge of the fact that the Plaintiff permitted the Defendant to overdraw his account and that the Defendant in fact did so, has not been substantiated. Chandrani Bogoda cannot give oral evidence relating to the transactions carried out by the Defendant or on any of the matters relating to the second to the fifth elements, as her evidence falls outside Section 60 of the Evidence Ordinance.

The second ground on which Chandrani Bogoda has affirmed to the matters set out in her affidavit is on the basis of having examined the Statement of Account and the documents available at the Bank [පැමිණිලිකාර බැංකුවේ ඇති ගිණුම් ප්‍රකාශන හා ලියවිලි පරීක්ෂා කිරීමෙන් ලබා ගන්නා ලද බවත්]. Chandrani Bogoda is therefore relying on documents that she had examined. Hence, while the production of the cheque by which the said sum of Rs. 1,268,000 was withdrawn would have been proof of the fact that the Defendant presented such a cheque on the date claimed by the Plaintiff and that the said cheque was honoured, it was imperative for the Plaintiff to have produced the original ledgers or

the bankers books on which the transactions relating to the Defendant's account had been maintained, in order to establish that:

(a) the bank acceded to the request made by the Defendant to overdraw his account;

(b) as a result of the cheque being honoured, the Defendant had overdrawn his account; and

(c) a sum of Rs. 565,742.56 is due and owing to the Plaintiff, as claimed by the Plaintiff, as a result of the said overdrawing.

Sections 90A and 90C of the Evidence Ordinance

While the general rule set out in Section 61 of the Evidence Ordinance is that the content of documents may be proved either by primary or secondary evidence with the document itself being primary evidence thereof – vide Section 62 – Section 64 provides that documents must be proved by primary evidence, except in the cases mentioned in the Ordinance itself. Section 65 sets out that secondary evidence, defined in Section 64, may be given of the existence, condition or contents of a document in the seven situations set out therein. This includes the situation in Section 65(6) which provides that, "*when the original is a document of which a certified copy is permitted by this Ordinance or by any other law in force in Ceylon to be given in evidence*."

It is common knowledge that until about three decades ago when electronic forms of storage of information was introduced, all banking transactions were recorded manually on ledgers, with each ledger containing details of accounts maintained by multiple customers. Having to produce the ledger or the bankers' books in Court caused inconvenience to the bank as such books were in constant use in their business. Furthermore, absence of the ledgers prevented banking transaction pertaining to other customers whose details were on the same ledger from being carried out thus inconveniencing several customers of the bank. As a response to this situation, special provisions relating to bankers books based mainly on the English Bankers Books Evidence Act, 1879 have been introduced in the form of Sections 90A – 90F.

Section 90C reads as follows:

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

Section 90A contains the definitions of a 'bankers' book' and a 'certified copy' . These are re-produced below:

> "*"Bankers' book" include ledgers, day books, cash books, account books, and all other books used in the ordinary business of a bank and includes data stored by electronic, magnetic, optical or other means in an information system in the ordinary course of business of a bank.*"

> "*"certified copy" means a copy of any entry in the books of a bank, together with a certificate written at the foot of such copy that it is a true copy of such entry; that such entry is contained in one of the ordinary books of the bank, and was made in the usual and ordinary course of business; and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title and where the bankers books consist of data stored by electronic, magnetic, optical or other means in an information system, includes a printout of such data together with an affidavit made in accordance with Section 6 of the Evidence (Special Provisions) Act, No. 14 of 1995, or such other document of certification as may be prescribed in terms of any law for the time being in force relating to the tendering of computer evidence before any court or tribunal*."

The composite effect of the above two provisions is that the ledger or bankers book itself on which the relevant entries have been recorded need not be produced, and that a copy thereof shall be *prima facie* evidence of the existence of such entries provided the copy is certified in the manner stipulated in Section 90C.

As the learned Trial Judge and the learned Judges of the High Court have stated, the Statement of Account that has been presented, both with the plaint and the affidavit, consists of only one page. I have examined the case record of the District Court and find that the above position is correct. The first entry on the Statement of Account is dated 15th April 2009 and reflects the fact that a debit balance of Rs. 579,242.56 is being carried forward from the previous page. There are five further entries with two entries relating to two deposits and the other three entries relating to a dishonoured cheque. What the Statement of Account tendered by the Plaintiff establishes is that the balance outstanding in the Defendant's current account as at 4th August 2009 is a sum of Rs. 567,242,56.

However, the entries that would reflect the fact that the Defendant was permitted to overdrew his account on 2nd September 2008 upon the presentation of a cheque or that the Defendant thereafter made payments to settle in part the said amount, as pleaded by the Plaintiff, have not been tendered by the Plaintiff, either with the plaint or with the affidavit of Chandrani Bogoda. Furthermore, there is no material to indicate that the sum of money that is prayed for arises from an overdraft facility granted to the Defendant. Therefore, Chandrani Bogoda's statement that the matters pleaded in her affidavit are based on the statements of account examined by her is not reflected in the Statement of Account that she had certified in terms of Section 90C.

In these circumstances, it is clear that the Plaintiff has failed to establish the third, fourth and fifth elements and I am therefore in agreement with the learned Judges of the High Court that the Plaintiff has failed to discharge the burden cast on it to satisfy the trial Court that it had granted the Defendant overdraft facilities and that such facilities have not been settled.

There are two important matters that I wish to advert to, prior to concluding.

Should the Trial Judge have called for a complete copy of the Statement of Account?

The first is that in **The Finance Company PLC v Jayakody Arachchige Don Thushara and Others** [supra], this Court, having considered what a trial Court should do where it is not satisfied with the evidence placed before it in an *ex-parte* trial, held as follows:

> *"Before concluding, I should mention that, if the learned Trial Judge was of the view that there was a doubt with regard to the sale of the vehicle or any other matter, he should have given the Plaintiff an opportunity to clarify such doubt by adducing additional evidence, before proceeding to deliver the judgment. The learned Trial Judge should have kept in mind the well established and salutary practice and, in fact, recognized principle of law that,* ***where the Plaintiff in an ex parte trial has adduced evidence in support of a substantial part of his case but the Trial Judge has a doubt with regard to a particular aspect of the case,*** *the Plaintiff should be given an opportunity to adduce such evidence or make the requisite clarifications, by way of an affidavit or viva voce and within a specified period of time. The ex parte judgment should be delivered only after such additional material is considered, if adduced within the allotted time.*
>
> *This rule was referred to in BRAMPY vs. PERIS [3 NLR 34 at p.36] where Lawrie A.C.J. stated "….. whatever be the evidence it must be sufficient to satisfy the Judge, who is not bound to give a decree until he is satisfied. If he is dissatisfied, he should in an order point out in what, respect the evidence already recorded is defective and then adjourn to a day named or sine, die." Browne A.J. stated [at p.37] "But in my opinion plaintiff on the occurrence of any doubt in the mind of the Judge as to his right to judgment should have opportunity given to him to dispel that doubt ere his action were finally dismissed to the absolute extinction of his claim for ever, and I cannot see that he had that opportunity here given him". In SIRIMAVO BANDARANAIKE vs. TIMES OF CEYLON LTD [at p.39], Fernando J, citing Browne A.J. stated "…. whatever the evidence, it must be sufficient to* ***satisfy*** *the judge who is not bound to give a decree until he is* ***satisfied****, if he had a doubt, he was not bound to enter judgment, but should have given the plaintiff an opportunity to dispel it".*

I am of the view that the above reasoning would apply in limited circumstances when the Plaintiff has adduced evidence in support of a substantial part of his case. To cast such an obligation in a manner that would place the onus of proving the plaintiffs' case on the trial Court would be both unfair by the learned Trial Judge and unwarranted. I have already held that the Plaintiff has failed to establish a substantial part of its case, namely that it granted the Defendant a temporary overdraft in a sum of Rs. 1,268,000 and that what is outstanding in the Defendant's account arises out of the said overdraft. The Plaintiff has failed to adduce evidence to establish three of the constituent elements of its cause of action and in such a scenario, the learned Trial Judge was under no obligation to take on the evidentiary burden of the Plaintiff, and to have called for clarifications.

In fact, in **Beebi Johara v Warusawithana** [(1998) 3 Sri LR 227 at page 231] Chief Justice G.P.S. De Silva, referring to a finding by the Court of Appeal that a Court should not sit back and say that it would give its determination only on what is placed before it, stated as follows:

> "*Finally, I wish to refer to section 134 of the Civil Procedure Code and section 165 of the Evidence Ordinance. Mr. F. C. Perera for the defendant-respondent relied on section 134 of the Civil Procedure Code in support of the view taken by the Court of Appeal. Section 134 of the Civil Procedure Code no doubt confers on the District Court the power of its own motion to summon any person as a witness to give evidence or to produce any document in his possession. Section 165 of the Evidence Ordinance confers inter alia the power on the Judge to order the production of any document or thing. These are enabling provisions intended to be cautiously and sparingly used in the interests of justice. Neither section 134 of the Civil Procedure Code nor section 165 of the Evidence Ordinance was meant to fill in the gaps in the presentation of its case by a party to the action.* ***While these provisions confer a power upon the court, they do not place a burden upon the court****; they do not detract from the adversarial nature of the proceedings before the court*."

Is the narration of the Plaintiff truthful?

The second matter that I wish to advert to is of a very serious nature and is something which has not caught the attention of either the Trial Court or the High Court. At the bottom of the Statement of Account annexed both to the plaint and the affidavit of Chandrani Bogoda is the following endorsement:

"Early balance:	*1,807,335.26*	*DR*	
Credit Trans:	*4,931,871.60*		*38*
Debit Trans:	*3,691,778.90*		*56*
Final Balance:	*567,242.56*	*DR*	
(As at 09/09/09)"			

Thus, according to the above endorsement, there appears to have been:

(a) an opening debit balance of Rs. 1,807,335,26;

(b) 38 credit transactions – i.e., deposits - totalling Rs. 4,931,871.60;

(c) 56 debit transactions – i.e., withdrawals – totalling Rs. 3,691,778.90.

None of the above credit and debit transactions save five entries to which I have already referred to, are reflected in the Statement of Account tendered to the Trial Court. Furthermore, the sum of Rs. 567,242,56 which was the amount outstanding as at 4th August 2009 is the difference between the deposits, and the aggregate of the opening balance & the withdrawals.

The above endorsement created a serious doubt in my mind with regard to the narration of the Plaintiff, as confirmed by the affidavit of Chandrani Bogoda given under oath that the Defendant was permitted to overdraw his account only once, and the bona fides of the Plaintiff in producing only one page of the Statement of Account. For that reason, the Registrar of this Court was directed to call for the original Statement of Account from the Attorney-at-Law for the Plaintiff, which was duly complied with.

Having examined the said Statement of Account consisting of four pages and certified by none other than Chandrani Bogoda in 2010, I observed the following:

(a) The Defendant's current account had a debit balance of Rs. 1,807,435.26 on 1st September 2008 – i.e., the day before the purported overdraft facility is said to have been granted. This means that the Defendant had been permitted to overdraw his account much earlier than claimed by the Plaintiff;

(b) There are two debit entries for 2nd September 2008, one for Rs. 666,234 and the other for Rs. 100,000. There is no entry to indicate that the Defendant overdrew his account in a sum of Rs. 1,268,000 on 2nd September 2008;

(c) There is no entry to indicate that the Defendant had overdrawn a sum of Rs. 1,268,000 in a single transaction or through multiple transactions at any time between 1st September 2008 and 4th August 2009;

(d) There are in fact 38 credit entries and 56 debit entries on the said Statement that have taken place between the period 1st September 2008 and 4th August 2009, as reflected in the aforementioned endorsement that appears on the Statement of Account to which I have already referred to;

(e) Although the Plaintiff claims that the account was transferred to the non-performing category on 1st November 2008 and on that date the debit balance was Rs. 565,742.56, the truth is the Defendant had continued to operate his current account until 4th August 2009 and the debit balance on 1st November 2008 was Rs. 2,626,142.56.

Thus, not only the plaint but even the affidavit of Chandrani Bogoda is replete with lies.

Conclusion

In the above circumstances, I see no merit in this appeal and would answer all three questions of law in the negative. The judgments of the District Court and the High Court are affirmed and this appeal is accordingly dismissed.

JUDGE OF THE SUPREME COURT

L.T.B. Dehideniya, J

I agree.

JUDGE OF THE SUPREME COURT

Kumudini 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 for Leave to Appeal under section 5(c) of the High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006 read with Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal 239/16
SC /HCCA/LA No. 82/2015
WP/HCCA/KAL/37/2007(F)
DC Horana Case No.6001/P

Pulukkutti Ralalage Karunaratne
Baduwila Road
Kidelpitiya.

Plaintiff-Appellant- Appellant

Vs.

1. Pulukkuttiralalage Dhanapala
Baduwila Road,Kidelpitiya.

2. Lawaris Gunathilaka
Baduwila Road,Kidelpitiya.

2A. Payagala Maha Liyanage Don
Kawanis.KidelpitiyaWelmilla
Junction, Bandaragama.

2B Yogama Widanalage Somawathie of
112/C. Saddatissa Mawatha
Kidelpitiya Welmilla Junction.

3. David Gunathilake
Baduwila Road, Kidelpitiya.

3A. Payagala Maha Liyanage Don
Kawanis, Kidelpitiya Welmilla
Junction, Bandaragama.

3B. Yogama Widanalage Somawathie of
112/C. Saddatissa Mawatha
Kidelpitiya Welmilla Junction.

4. Adlyn Gunathilake
Baduwila Road, Kidelpitiya.

4A. Yogama Widanalage Somawathie of
112/C. Saddatissa Mawatha
Kidelpitiya Welmilla Junction.

5. Pulukkuttiralalage Sirisena
Baduwila Road, Kidelpitiya.

6. Pulukkuttiralalage Thepanis alias
Daniel, Baduwila Road,
Kidelpitiya.

7. Payagala Mahaliyanage Don Victor,
Baduwila Road, Kidelpitiya .

7A. Payagala Mahaliyanage Don Nihal,
Baduwila Road, Kidelpitiya .

New Address
No. 166/D,Sri Wimalarama
Mawatha, Kidelpitiya, Welmilla
Junction.

8. Payagala Mahaliyanage Don
Hemawathie, Baduwila Road,
Kidelpitiya . Junction. Welmilla.

9. Payagala Mahaliyanage Don Gomis,
Baduwila Road, Kidelpitiya .

9A. Payagala Mahaliyanage
Hemawathie,
No. 168/B In front of the Temple
Welmilla, Kidelpitiya.

10. Payagala Maha Liyanage Don
Kavanis. Kidelpitiya, Bandaragama.

New Address
No.112/C, Saddatissa Mawatha
Kidelpitiya, Welmilla Junction.

10A. Yogama Widanalage Somawathie of
112/C. Saddatissa Mawatha
Kidelpitiya Welmilla Junction.

11. Surage David
Baduwila Road, Kidelpitiya .

12. Surage Nathoris
Baduwila Road, Kidelpitiya .

12A. Buddarage Jayanthimala Perere
No. 136, Saddatissa Mawatha
Kidelpitiya ,Welmilla Junction.

13. Surage Nomis
Baduwila Road, Kidelpitiya

13A. Amarasinghe Arachchilage
Kulawathi of No. 09, Senapura,
Kidelpitiya Welmilla Junction.

14. Hapuarachchige Charlott Nona
Kotuwegedera, Kidelpitiya,
Welmilla.

15. Us-hettige Badrawathi Perera
5/3, Kuda Edanda Road,
Waththala.

16. Ushettige Silawathi Perere
No. 38, Kuda Edanda Road,
Waththala.

17. Hettiarachchige Don Karunasena
No. 70, Helapitiwela, Ragama.

18. Pitiyage Hemarathne Perere
Kothalawala Junction, Raigama,
Bandaragama.

19. Dickson Premarathne Pererea
Wathsala Stores, Welmilla,
Kidelpitiya, in front of the Temple.

New Address
No. 163/B, In front of the Temple,
Kidelpitiya, , Welmilla Junction.

Defendants-Respondents-Respondents

Before	:	Jayantha Jayasuriya, PC, CJ
		B.P. Aluwihare, PC, J.
		S. Thurairaja, PC, J.
Counsel	:	Sunil Cooray for the Plaintiff-Appellant-Appellant.
		Philip Chandraratne for the 19th Defendant-Respondent-Respondent.
Written submissions		
filed on	:	12.06.2017 by the Plaintiff-Appellant-Appellant.
		08.08.2017 and 25.02.2022 by the 19th Defendant-Respondent-Respondent
Argued on	:	03.02.2022
Decided on	:	10.08.2022

Jayantha Jayasuriya, PC, CJ

Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as "appellant") instituted a partition action in the District Court of Horana. The corpus described in the schedule of the plaint is a land called "a portion of millagahawatta" "(millagahawatta kattiya)" which is ½ an acre in extent. According to the schedule of the plaint the said land is registered in folios B 14/344 and B 63/82 at the land registry in Panadura. The said land is further described in the plaint as a distinct portion of a larger land of eight acres. It is further pleaded that the said larger

land is possessed as several distinct divided portions. The appellant further claimed that he and several defendants were in possession of one such distinct portion, that is more fully described in the plaint.

The 19th Defendant-Respondent-Respondent, (hereinafter referred to as "19th respondent"), who is a son of the 8th Defendant-Respondent-Respondent was added as a party, on an application by the appellant after the plaint was filed. Initially appellant sought an enjoining order against him from the court while the trial was pending to prevent him from the construction he commenced in the corpus after the partition action was instituted. Thereafter, the 19th respondent in his statement of claim took up the position that he does not accept the corpus. He claimed that a portion of the larger eight acre land was never possessed as "distinct and divided portion of the larger land" at any stage, as claimed by the appellant. He further disputed the pedigree of the appellant. The 19th respondent claims his rights based on a deed executed in 1999, three years after the plaint was filed in court. Two defendants, namely the 8th and 9th defendants by this deed had conveyed interests they would accrue to the corpus from the judgment of the trial court – contingent interests - to the 19th respondent.

The 10th Defendant-Respondent-Respondent (hereinafter referred to as "10th respondent") in his initial statement of claim filed in the year 1999 pleaded his line of succession very much similar to the line of succession pleaded in the plaint subject to a few variations. However, in his amended statement of claim filed in the year 2001, while disputing the claims of the appellant, accepted the statement of claim of the 19th respondent. He also disputed the appellant's contention that the land sought to be partitioned is a divided lot from the larger 8-acre land called Millagahawatte. He further contended that the land sought to be partitioned was never possessed as a distinct divided lot.

It is pertinent to note that only three parties actively took part in the proceedings before the trial court. They were the plaintiff (appellant) and two of the defendants, namely 10th and 19th defendants (10th and 19th respondents). The trial proceeded on two admissions and twelve points of contest. One of the admissions recorded was that the preliminary plan 2266 depicts the corpus in this matter. Appellant raised four points of contest and the first three of them relate to the pedigree. The 10th respondent had not raised any points of contest but had associated with the eight points of contest raised by the 19th respondent. They relate to the pedigree and the proper

registration of the *lis pendens*. No point of contest had been raised on the identity of the corpus or whether the corpus is a distinct divided portion of the larger land. The appellant, 10th respondent, 19th respondent and one other witness had testified at the trial.

At the conclusion of the trial, the learned District Judge dismissed the action of the appellant and proceeded to declare that 7th, 10th and 19th respondents are entitled to shares as determined by him.

Being aggrieved by the said judgment, the appellant preferred an appeal to the High Court of Civil Appeal of Western Province holden at Kalutara seeking inter alia to set aside the aforesaid judgment of the District Court and grant relief as prayed for in the plaint.

The learned High Court Judges by judgment dated 28.01.2015, held that the action is liable to be dismissed for the reason that the corpus is not properly identified as the entire corpus of eight acres is not depicted in the preliminary plan marked X. Accordingly the impugned judgment of the District Court was set aside and the plaint was dismissed.

The appellant being aggrieved by the aforesaid judgment of the Civil Appellate High Court, invoked the jurisdiction of this Court and special leave was granted on the following questions:

1. Have the Learned High Court Judges erred in law in holding that parties to the action did not satisfy the corpus of the partition action in as much as all contesting parties had admitted the corpus as having been shown in the Preliminary Survey Plan (P2) [Marked and produced as 'X' at the trial].

2. Have the Learned High Court Judges erred in holding that:
   (a) "Eight acre larger land was not divided into separate lots"
   (b) "Without showing eight acre land, instituting a partition action for a small portion (1R) of such a larger land is not permitted in law"
   (c) "Therefore, it appears to this Court that the entire corpus (eight acres) is not depicted in plan X"
   (d) "The corpus is not properly identified"

3. Have the Learned High Court Judges erred in law when they failed to apply the rationale of the authorities *Girigoris Perera vs Rosalin Perera* (1952) 53 NLR 536 and / or *Marshal Perera and other vs Dona Aginis and other* (1988) 1 SLR 248 into the present case in deciding on the issues at their hands even though the said authorities were brought to the notice of the Court by the written submissions of the Petitioner.

4. Have the Learned High Court Judges erred in law and facts in holding that the land sought to be partitioned has not been identified;
    (a) Where in the instant case all contesting parties have admitted the corpus and the land sought to be partitioned has been surveyed and depicted in the preliminary survey plan and also;

    (b) Where the surveyor who carried out the preliminary survey has confirmed in his report that the land described in the plaint was the same land that he surveyed on the preliminary survey.

I will now proceed to consider questions 1,2 and 4 mentioned above together as they primarily revolves on the issue whether the corpus had been identified or not.

It is the contention of the appellant before this court, that sufficient evidence had been led in the District Court to substantiate that the corpus described in the plaint is a separate distinct portion of the larger land called Millagahawatte and the said land Millagahawatte is eight acres in extent. It was further contended that a portion of land in the extent of two roods was registered in a different folio as a separate and distinct portion from the larger land called Millagahawatte since 1938 and that all parties admitted at the trial that the land sought to be partitioned is depicted in the preliminary survey plan marked 'X'. It was further contended that the learned High Court judges erred when they held that the eight-acre larger land was not divided into separate lots. Furthermore, it was contended that the learned High Court Judges erred when they held that the partition action could not have been filed for a smaller portion of a larger land in the context of the facts peculiar to this case. It was further contended that they erred when they dismissed action on the basis that the entire corpus is not depicted in the preliminary plan. On behalf of the appellant it was submitted that there was no need to survey the larger land in preparing the

preliminary plan as no party claimed that the said larger land was jointly possessed or co-owned by the parties in the case.

In this regard it is pertinent to observe that the 10th respondent who was present at the preliminary survey had objected for surveying a portion of the eight-acre land on the basis that he is entitled to shares from the larger land. However, he along with the appellant had showed the boundaries of the portion of the land in extent one rood and four point three zero decimal perches in extent, depicted as lot no 1 in the preliminary plan 2266. It is also pertinent to observe that both 10th and 19th respondents who disputed appellant's claim that the eight acre larger land was possessed as distinct divided portions had admitted that the corpus is depicted in the preliminary plan 2266, when recording admissions.

The appellant's pedigree and his claims to the land were based on four deeds that were produced as evidence. They are, deed 1027 dated 21 December 1970 (P2), deed 1050 dated 12 January 1971 (P3), deed 3239 dated 27 July 1982 (P1) and deed 288 dated 19 August 1985 (P4).

Pedigree relied on by the 10th and 19th respondents was based on five deeds. They are deed 9952 dated 20th July 1938 (19V6), deed 1420 dated 01 May 1943 (19V7), deed 7162 dated 28 September 1954 (10V1), deed 697 dated 30 May 1992 (19V5) and deed 2443 dated 01 October 1999 (19V4).

When all these deeds are examined in the context of identifying the corpus, it is pertinent to observe that deed bearing no. 9952 executed in 1938 (19V6), deed 14230 executed in 1943 (19V7), deed 7162 executed in 1954 (10V1), deed 288 executed in 1985 (P4) and, deed 697 executed in 1992 (19V5) refer to a portion of Millagahawatte as the land in relation to which each of those deeds had been executed. The extent of such portion is described as ½ an acre in deeds 19V6, 19V7, 10V1, and 19V5. In the deed P4, the extent of the land is described as 2 roods. Therefore, in the context of the extent of the land concerned, all those deeds are similar. In relation to boundaries, Eastern and Southern boundaries are described as a by road and main road respectively. Northern and Western boundaries are described as portions of Millagahawatte. Names of the persons who are in possession of such portions are same in 19V6, 19V7, 10V1 and 19V5. However P4 gives names of different parties. When boundaries mentioned in the aforementioned deeds are compared with the boundaries of the corpus as described in the

preliminary plan marked 'X' and the schedule of the plaint, Eastern and Southern boundaries are described as by road and main road or in similar terms, in all these documents. Northern and Western boundaries are also described as portions of Millagahawatte. However, the extent of the corpus as described in the preliminary plan (x) is one rood and four point three zero perches whereas in other documents, including the plaint the extent is described as ½ an acre or two roods. It is the appellant's contention that the acquisition of a part of the land for the development of the main road is the reason for this discrepancy.

It is also important to note that the learned trial judge at no stage had held that the corpus had not been identified. The learned trial judge having examined all the evidence presented by the appellant as well as by the 19th respondent had held that a separate and distinct portion of land in extent of two roods had been in existence out of the eight-acre larger land. In contrast to the decision of the learned Civil Appellate High Court, the learned trial judge's decision to dismiss the plaint **is not** on the ground that the corpus was not identified.

When all these factors are considered together with the admission of the parties at the trial on the identity of the corpus, in my view the learned High Court judges had failed to appreciate all items of evidence and the findings of the trial court and therefore had erred when they held that the corpus had not been identified.

In view of this finding and the evidence presented relating to the identity of the corpus as described hereinbefore, three of the four questions on which special leave was granted, namely questions 1,2 and 4 should be answered in the affirmative. Therefore in my view the judgment of the Civil Appellate High Court should be set aside.

The remaining main submission of the learned counsel for the appellant before this court is that the learned trial judge erred by failing to apply the jurisprudence developed in *Girigoris Perera vs Rosalin Perera* (1952) 53 NLR 536 and / or *Marshal Perera and other vs Dona Aginis and other* (1988) 1 SLR 248 in favour of the appellant, when he dismissed the plaintiff's case. The legal question no. 3 on which this court had granted leave is formulated on this basis. However, in my view it is pertinent to examine the learned trial judge's decision to allocate shares to 7th, 10th and 19th respondents, before proceeding to examine this specific legal issue, as the learned

trial judge had accepted the pedigree of the 19th respondent having dismissed the appellant's case.

The judgment of the learned trial judge reflects that reasons for the learned trial judge's decision to dismiss the appellant's case are twofold. First, the learned trial judge had held that the plaintiff's pedigree was not proved. Second, the learned trial judge had held that the portions of Millagahawatte as described by the plaintiff and the 19th respondent do not tally and fail to correspond to each other. It was the trial judge's view that the portion of the land as reflected in the deeds presented in support of the 19th respondent, correspond to the corpus described in the plaint. The learned trial judge had therefore proceeded to allocate shares of the corpus to 7th, 10th and 19th defendants (respondents) based on the deeds marked in favour of the 10th and 19th respondents, having dismissed the plaint.

The learned trial judge had held that the undivided shares of the 7th, 8th, 9th 10th and 22nd respondents as described in the statements of claim of 10th and 19th respondents had been confirmed by evidence (19 වී 1 දරණ ලේඛනයේ සඳහන් පරිදි 19 විත්තිකරුගේ සාක්ෂිය අනුව ලිස්පෙන්ඩනය බී 63/82 හි ලියාපදිංචිව ඇත. 7, 8, 9, 10 සහ 22 විත්තිකරුවන් ගේ හිමිකම් ප්‍රකාශයන් සලකා බලා ඔවුන්ගේ නොබෙදූ අයිතිවාසිකම් සාක්ෂිවලින් තහවුරු වී ඇති හෙයින් පහත සඳහන් පරිදි නොබෙදූ කොටස් හිමි වේ.) and proceeded to allocate shares to 7th, 10th and 19th respondents.

It is trite law that a court has a duty to inquire into the title of all concerned parties before entering a decree in a partition action.

In **Golagoda v Mohideen** 40 NLR 92 at 94, the court held that;

> *"It is hardly necessary to consider the earlier authorities which have all been summarized in the case of Goonaratne v. The Bishop of Colombo (53 NLR 337). As Lyall-Grant J. said in the course of his judgment, "it is the duty of the Court before entering a decree to satisfy itself that the parties appearing before it have a title to the land". He quoted from the judgment of Bonser C. J. in Peris v. Perera (1 NLR 362), where it was laid down that the Court should not enter a decree unless it was perfectly satisfied that the persons in whose favour it makes the decree, are entitled to the*

property. The Court should not regard these actions as merely to be decided on issues raised by and between the parties, and must satisfy itself that the plaintiff has proved his

title, and he must prove his title strictly". In the Full Bench case of Mather v. Thamotheram Pillai (6 NLR 246), it was laid down that a paramount duty is cast by the Ordinance upon the District Judge to ascertain who are the actual owners of the land before entering up a decree which is good and conclusive against the world".

In **Cooray *et. al.* v Wijesuriya**, 62 NLR 158 at 160, describing the duty of the court in a partition action it was observed;

"It is unnecessary to add that the Court before entering a decree should hold a careful investigation and act only on clear proof of the title of all the parties. It will not do for a plaintiff merely to prove his title by the production of a few deeds relying on the shares which the deeds purport to convey".

The duty of a court in a partition action as described above by courts, is set out in section 25 of the Partition Law No 21 of 1977 in following terms:

"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…"

Therefore, it is an inalienable duty on the trial court to embark on a thorough inquiry before allocating any shares in a partition action.

According to the pedigree pleaded by the appellant in the trial court, the first owner of the corpus was one Bempy Appuhamy alias Alisandiri (who was a father of nine children) and the corpus was devolved on seven of his children upon his demise as two of his children had predeceased him. Thereafter, it is claimed that shares of four of those seven children of Bempy Appuhamy did devolve on the appellant through the line of succession he pleaded. Deeds relevant to those transactions were produced marked P1, P2, P3 and P4 at the trial.

However, 19th respondent contested this claim. According to the line of succession pleaded by him, the first owner of the corpus - the distinct portion of 8-acre land - was one of the daughters of Bempy Appuhamy alias Alisandiri namely Nona Silva and her spouse Charlis Silva. It is his contention that the rights of the said particular daughter and her spouse, does not devolve on the appellant. Therefore, he claims that the appellant has no rights to the corpus. It is pertinent to observe according to the line of succession set out in the pedigree pleaded by the appellant, the appellant does not derive any rights from the daughter of Bempy Appuhamy through whom the 19th respondent claims his rights. Therefore, the main dispute between the two pedigrees and the statements of claim of the appellant and the 19th respondent is on the identity of the first owner of the corpus. In this regard, it is important to note that the 19th respondent concedes that the first owner of the larger land – the 8 acre land – was Bempy Appuhamy. However he claims that the first owner of the corpus (the distinct portion of the larger land) is the daughter of said Bempy Appuhamy. To the contrary, the appellant claims it is Bempy Appuhamy who is the first owner of the corpus (the distinct portion of the larger land) too.

None of the deeds produced in court describe the manner in which the larger land (the 8 acre land) devolved on seven children of Bempy Appuhamy or on any one of them. Furthermore, there is no evidence to establish that Bempy Appuhamy transferred a distinct portion of the larger land to a particular child. The 19th respondent eventhough claims that the original owner of the corpus – the distinct portion of the larger land - is one of the daughters of the original owner of the larger land, there is no evidence to substantiate this claim. Therefore, the only inference that can be drawn is that the rights and title of the original owner of the larger land, should have been devolved on all seven children of Bempy Appuhamy in equal shares, making all seven of them co-owners upon the demise of the original owner. The appellant's line of succession is based on such proposition. The 19th respondent in his testimony admitted that the original owner of the larger land at no stage transferred his rights of the entire land or of a portion of it to any particular child. Furthermore, he admits that rights of Bempy Appuhamy should devolve on all of his children. However, it is his claim that the line of succession he pleaded to the corpus – the distinct portion of the larger land – is on the basis of possession. In

this regard, it is pertinent to note that there is neither any evidence available to establish the circumstances under which the corpus – the distinct portion of the larger land – was created or established nor any evidence to establish the exact time period in which it was established. It is trite law that possession of a distinct portion of a larger land by a single co-owner does not exclude the rights of the remaining co-owners to the distinct portion unless there is cogent evidence of ouster.

In **Githohamy *et. al.* v Karanagoda *et. al.*** 56 NLR 250 at 252-253 it was held that,

> *"The possession of a co-owner would not become adverse to the rights of the other co-owners until there is an act of ouster or something equivalent to ouster. In the absence of ouster possession of one co-owner ensures to the benefit of other co-owners. It was so held by the Privy Council in Corea v. Iseris Appuhamy [(1911) 15 N. L. R. 65]. It is true that ouster can be presumed from exclusive possession in special circumstances as was decided in the case of Tillekeratne v. Bastian [(1918) 21 N. L. R. 12.]. The special circumstance which was recognized in that case was the fact that the co-owner who claimed a prescriptive title was proved to have excavated valuable plumbago on the land during a lengthy period of time. Such excavation of plumbago during a protracted period would naturally diminish the value of the land. Therefore if the other co-owners did not protest when the land was being possessed in a manner hat its value would be considerably diminished, it is fair to presume an ouster, but if a co-owner only takes the natural produce of the trees for a long time no such presumption would arise. Sadiris and his successors in title have executed a large number of deeds for lot B. There is no evidence nor is there any reason to think that the other co-owners were aware that such documents were being executed. In Kobbekadduwa v. Seneviratne [(1951) 53 N. L. R. 354.], it was held that the mere fact that a co-owner who was in occupation of the common property purported to execute deeds for a long period on the basis that he was the sole owner, did not lead to the presumption of an ouster in the absence of evidence that the other co-owners had knowledge of the transactions".*

In **Simon Perera v Jayatunga *et. al.*** 71 NLR 338 at 339-340, Thambiah J held that;

*"The question as to whether a co-owner has prescribed to a particular lot is one of fact in each case. The rule laid down by Their Lordships of the Privy Council in Corea v. Appuhamy**[**(1911) 15 N. L. R. 65. **]** and in Brito v. Mutunayagam**[**(1918) A.C. 895, 20 N. L. R. 327.**]** that if possession is referable to a lawful title it cannot be treated as adverse, is however modified by the theory of counter presumption set out in Tillekeratne v. Bastian **[**(1918) 21 NLR 12.**]** by a Full Bench of this Court. In Tillekeratne v. Bastian (supra) Bertram C.J. succinctly stated the principle as follows (at page 24):-*

" It is, in short, a question of fact, wherever long-continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable, in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than ten years before action brought."

*In Hameedu Lebbe v. Ganitha **[**(1920) 27 N. L. R. 33.**]** it was contended that the ruling in Tillekeratne v. Bastian (supra) was inconsistent with the decision in Brito v. Mutunayagam (supra). However, in that case, the Divisional Court held that there was no inconsistency in the principles laid down in these two cases. Where a co-owner seeks to establish prescriptive title against another co-owner by reason of long and continued possession it is a question of fact depending on each case for a court to decide whether it is reasonable to presume an ouster from the exclusive possession by a co-owner for a long period of time. This principle had been applied in Rajapakse v. Hendrick Singho [(1959) 61 NLR 32].*

*The limits of the rule that possession by a co-owner is not adverse possession was defined in Cully v. Deod Taylerson **[**(1840) 11 Ad. & E. 1088 ; 9 L. J. Q. B. 288 ; 3 P.&D.539] as follows:*

" Generally speaking, one tenant-in-common cannot maintain an ejectment against another tenant-in-common, because the possession of one tenant-in-common is the

possession of the other and to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But where the claimant, tenant-in-common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there has been an ouster **. . . . . .** *and if the jury finds an ouster, then the right of the lessor of the plaintiff to an undivided share will be decided exactly in the same way as if he had brought his Ejectment for an entirety."*

This dictum was cited with approval by Viscount Cave who delivered the opinion of the Privy Council in the case of Varada Pillai v. Jeevarathnammal ***[*** *(1919) A. I. R. (P. C.) 44 at 47.****]***"

In **Angela Fernando v Deva Deepthi Fernando *et. al.*** [2006] 2 SLR 188 at 194 the Supreme Court observed that:

"*It is a common occurrence that co-owners possess specific portions of land in lieu of their undivided extents in a larger corpus. This type of possession attributable to an express or classic division of family property among the heirs is sufficient to prove an ouster provided that the division is regarded as binding by all the co-owners and not looked upon solely as an arrangement of convenience. This position was accepted and acted upon in Mailvaganam vs. Kandiah [1915 1 CWR 175] - [Obeysekem vs. Endoris [66 NLR 457] - Simon Perera vs. Jayatunga [71 NLR 338] and Nonis vs. Peththa [73 NLR 1].*

Ouster does not necessarily involve the actual application of force. The presumption of ouster is drawn in certain circumstances when exclusive possession has been so long continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time in the distant past there was in fact a denial of the rights of the other co-owners.

It has to be reiterated that the decision in Tillakeratne vs. Bastian (supra) recognizes an exception to the general rule and permits adversity of possession to be presumed in the presence of special circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period.

The presumption that possession is never considered adverse if it can be referable to a lawful title may sometimes be displaced by the counter presumption of ouster in appropriate circumstances. Nevertheless this counter presumption should not be invoked lightly. "It should be applied if, and only if, the long continued possession by a co-owner and his predecessors in interest cannot be explained by any reasonable explanation other than that at some point of time in the distant past the possession became adverse to the rights of the co-owners", (vide Abdul Majeed vs. Ummu Zaneera [61 NLR 361 at 374]."

When the above *curses curiae* is considered in the context of the claim of the 19th respondent, it is necessary to examine the nature of evidence available to establish whether the particular daughter of Bempy Appuhamy derived exclusive rights to the distinct portion of the larger land ousting all other six siblings who derived co-ownership to the larger land on the demise of their father, Bempy Appuhamy. Availability of such evidence is necessary for the 19th respondent to derive rights to the corpus through the line of succession he pleaded at trial. It is such an inquiry the learned trial judge had to embark on, when deciding the claim of the 19th respondent. One other important factor revealed through the deeds produced by the appellant is that the heirs of children of Bempy Appuhamy through whom the appellant's rights are claimed had not acknowledged the existence of distinct portion exclusively possessed by heirs of the daughter of Bempy Appuhamy whom the 19th respondent claims as the original owner of the corpus. In deed 1027 (P2) executed in 1970 and deed 1050 (P3) executed in 1971 it is undivided shares from the entire larger land of 8 acres that had been conveyed to the appellant. No specific portion of the said larger land was excluded. A fact which has a bearing in examining whether there is an act of ouster in favour of the line of succession claimed by the 19th respondent. However, the learned trial judge had proceeded to hold in favour of the 19th respondent and reject the claim of the appellant purely by examining the details of registration of the deeds that were produced as evidence. The learned trial judge had merely observed that evidence had established / confirmed the undivided rights of the 7th, 8th, 9th 10th and 22nd respondents.

It is pertinent to observe that the learned trial judge has not examined the evidence presented in court in the context of the legal principles discussed hereinbefore, when deciding to hold in favour of the 19th respondent and the two other respondents based on the line of succession the

19th respondent pleaded in court. Therefore, in my view the learned trial judge had failed to discharge the duty imposed on him by section 25 of the Partition Law. In this regard it is also important to note that the 19th respondent in his testimony had said that they do not want to partition the corpus and further claimed that it is more appropriate to allocate shares from the 8-acre land. In paragraph 8 of the statement of claim of the 19th respondent it is pleaded that he derived undivided rights from the 8-acre land and not from the ½ an acre land.

In view of my findings as discussed hereinbefore, I am of the view that the learned trial judge had erred when he decided in favour of the 19th respondent and two other respondents without taking into account all relevant factors and engaging in a full inquiry as required under section 25 of the Partition Law. Furthermore, I observe that the learned trial judge had reached two contradictory conclusions on an important issue. At one stage the learned trial judge had concluded that according to the documentary and oral evidence of the appellant, it is not possible to accept that the corpus is a separate piece of land but a part of a larger land of eight acres in extent. (පැමිණිල්ලේ ලේඛනවලින් ද සාක්ෂිවලින් ද මෙම මැන පෙන්වා ඇති ඉඩම වෙනම ඉඩමක් ලෙස සැලකීමට කරුණු නොමැත. තහවුරු වී ඇත්තේ එය අක්කර අටක විශාල ඉඩමකින් කොටසක් බවයි.) However, thereafter the learned trial judge concludes that the evidence of the 19th respondent and the evidence of the plaintiff confirms that the land in extent of two roods remained a separate portion for a long period of time (ඒ අනුව දීර්ඝ කාලීනව එකී රූඩ් දෙකක ඉඩම වෙන්ව පැවතුණු බව 19 විත්තිකරුගේ සාක්ෂියෙන් ද පැමිණිල්ලේ සාක්ෂිවලින් ද තහවුරු වේ.) Taking into account all these factors I am of the view that the judgment of the learned trial judge dated 26.03.2007 should be set aside. However, taking into account the fact that the learned trial judge erred by failing to engage in a proper inquiry, I am of the view that justice will be served by ordering a re-trial enabling a trial judge to consider all the evidence that would be presented before court by all parties afresh and enter a judgement after fully complying with all requirements including section 25 of the Partition Law.

In view of this decision I am further of the view that the legal question No. 3 should be left unanswered enabling all parties to present necessary evidence and invite the trial court to determine this matter based on the evidence presented at the re-trial.

Therefore, the judgment of the Civil Appellate High Court of Western Province holden at Kalutara dated 28th January 2015 in WP/HCCA/KAL37/2007(F) and the judgment of the District Court of Horana dated 26.03.2007 in Case No. 6001 Partition are set aside and a re-trial is ordered. The learned District Judge of the District Court of Horana is directed to expeditiously conclude proceedings in the fresh trial.

Chief Justice

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 appeal under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC APPEAL No. 239/2017
SC SPL LA No. 156/2017
CA No. 241/2013
HC Rathnapura case No. 75/2010

The Republic
Complainant

Vs.

Yahalawatte Wilbert,
Medawaththa, Palawela,
Udaniriella,
Rathnapura.
Accused

AND BETWEEN

Hon. Attorney General,
Attorney General's Department,
Colombo 12.
Complainant - Appellant

Vs.

Yahalawatte Wilbert,
Medawaththa, Palawela,

Udaniriella,
Rathnapura.
Accused - Respondent

AND NOW BETWEEN

Yahalawatte Wilbert,
Medawaththa, Palawela,
Udaniriella,
Rathnapura.
Accused - Respondent - Appellant

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.
Complainant - Appellant - Respondent

Before : **P. PADMAN SURASENA J**
JANAK DE SILVA J
ARJUNA OBEYESEKERE J

Counsel : Shanaka Ranasinghe, PC. with N. Mihindukulasuriya for the Accused - Respondent - Appellant.
Shanil Kularatne, SDSG for the Complainant - Appellant - Respondent.

Argued on : 06.04.2022

Decided on : 31.05.2022

P Padman Surasena J

The Accused - Respondent - Appellant (hereinafter sometimes referred to as the Accused) was originally indicted in the High Court of Rathnapura under section 364(2) (e) of the Penal Code for committing the offence of rape on Yamanthalage Chathurika Madhushani, a girl below 16 years of age at the time of the incident. The offence was alleged to have been committed at Palawela, Udaniriella during or around the period 01-01-2004 - 24-05-2004.

The prosecution commenced leading the evidence of the victim Chathurika Madhushani on 23-10-2013. In the course of the examination in chief, on 24-10-2013 the prosecution with the permission of Court, amended the charge to be one under section 365B (2) of the Penal Code. Thereafter, upon the amended indictment being read over and explained, the Accused had pleaded guilty to the charge under section 365B (2) of the Penal Code (as per the amended indictment). Thereafter, the Court had heard the submissions of both parties relating to the sentence to be imposed on the Accused.

After the conclusion of the submissions of the parties, the learned High Court judge by his order dated 24-10-2013, imposed on the Accused, a term of ten (10) months rigorous imprisonment and a fine of Five Hundred Rupees (Rs. 500/-) with a default sentence of one (01) week of imprisonment. The learned High Court judge had also awarded a compensation of Fifty Thousand Rupees (Rs. 50,000/-) payable to the victim with a default sentence of one (01) year imprisonment.

Being aggrieved by the above sentence, the Complainant - Appellant - Respondent (hereinafter sometimes referred to as the Attorney General), appealed to the Court of Appeal complaining that the sentence passed by the learned High Court judge is illegal and inadequate. After hearing the appeal, the Court of Appeal, by its judgment dated 09.06.2017 enhanced the sentence imposed by the learned High Court judge to a sentence of seven (07) years rigorous imprisonment and a fine of One Thousand Rupees (Rs. 1000/-) with a default sentence of six (06) months imprisonment. The Court of Appeal had affirmed the sum awarded by the High Court as compensation payable to the victim and its default sentence of one (01) year rigorous imprisonment.

Being aggrieved by the above judgment of the Court of Appeal, the Accused invoked the jurisdiction of this Court seeking to challenge the said judgment of the Court of Appeal which revised and enhanced the sentence imposed on him by the High Court. Upon supporting the special leave to appeal application relevant to this appeal, this Court on 04-12-2017 had granted special leave to appeal on the following questions of law.

1. *Did the Court of Appeal err by upholding the submission of the State that the sentence was illegal and/ or inadequate?*
2. *Was the appeal to the Court of Appeal filed in compliance with the time frame stipulated by the Code of Criminal Procedure Act No. 15 of 1979?*

Although this Court has granted special leave to appeal in respect of the above two questions of law, the learned President's Counsel who appeared for the Accused at the very commencement of the argument, informed Court that he would neither make submissions nor pursue the 2nd question of law in respect of which special leave to appeal has been granted. Therefore, I would not proceed to consider the 2nd question of law.

The main submission made by the learned President's Counsel for the Accused is the fact that the Accused was 71 years of age at the time he had pleaded guilty to the amended charge. However, it is a fact that the Accused had committed the instant offence of grave sexual abuse on the victim who was 8 years of age (at the time of committing the offence i.e., in the year 2004) (the victim was born on 06-04-1996). If the Accused was 71 years in the year 2013 as claimed by him, he would have been born in the year 1942. Therefore, the Accused would have been 62 years of age when he had committed the offence for which he had pleaded guilty.

The 62-year-old Accused was the younger brother of the victim's maternal grandfather. The Accused had 5 children who were elder to the victim. The victim used to visit the house of the Accused regularly. The age gap between the Accused and the victim is about 54 years. Thus, it is not unreasonable for anyone to expect that the Accused should have conducted himself with an attitude generally expected of an adult of his age. This is because one would reasonably expect the Accused to have a fiduciary relationship with such young girl as they are not strangers to each

other. The Accused was more than seven times elder to the victim when he had abused her. Let me now consider how the learned High Court judge had looked at this incident.

The learned High Court judge also has had no doubt that the offence committed by the Accused is a very serious one which warrants calling for a heavy punishment on him. However, he had decided to impose a sentence less serious than that prescribed by law, for the following reasons:

i. old age of the Accused,
ii. the fact that he had not engaged in any violent activity,
iii. the fact that ten years had elapsed since the date of commission of the offence,
iv. the fact that the Accused was suffering from a heart ailment,
v. the fact that the Prison authorities would have to bear expenses to look after the Accused in the Prison.

In my view, the 2nd ground above, i.e., the absence of any violent act by the Accused, in the circumstances of this case, is not a relevant fact that the learned High Court judge should have considered. This is because of the fact that it is a 08-year-old girl that the Accused had abused. Thus, obviously, there was no necessity for the Accused to engage in any violent act before he could abuse the victim. I fail to understand how that ground could be used in this case, to mitigate the sentence to be imposed on the Accused.

The 3rd ground above, in the circumstances of this case, is also not a ground that the learned High Court judge should have considered in favour of the Accused. If Courts are to seriously take into account, 'a lapse of ten years' as a common mitigatory circumstance in sentencing, such attitude would certainly not fulfil the aspirations of the common citizen of this country. They would then lose their confidence in the criminal justice system of the country. This must be averted as it will erode the Rule of Law in the country.

The Government has set up and continue to maintain the Prisons Department as a permanent department of the state. Expenses incurred in maintaining prisoners are borne by the state, for the benefit and welfare of the general public. That is an integral part of maintaining the Rule of Law in the country. It is not restricted to this country

alone, but adopted worldwide as a necessary part of any criminal justice system. In such a scenario, I am at a loss to understand as to why the learned High Court judge had given an undue consideration as to the expenses the state would incur in maintaining a prisoner. Thus, in my view, the learned High Court judge had erred when he considered the fact that the Prison authorities would have to bear expenses to look after the Accused.

The considerations pertaining to the old age of the Accused and his heart ailment, to mitigate the sentence indicate that the learned High Court judge had given an undue weight to the welfare of the Accused while disregarding the specific submission made by the learned State Counsel urging the Court to take into consideration, the seriousness of the crime and impose an adequate and suitable sentence on the Accused. Except a bear statement (just one sentence) in the submission made by the learned counsel who appeared for the Accused, I find that no acceptable material had been placed before the High Court which would have enabled the learned High Court judge to conclude that the Accused was suffering from a heart ailment. Perusal of the order made by the learned High Court judge shows that he had gone on inquiring in this regard, from the Prison officers present in Court who had not produced any document at least for the inspection by Court. In any case, our Courts have held that such ground is not decisive when deciding the quantum of the sentence to be imposed on a convicted accused.

In the case of The Attorney-General Vs. H. N. De Silva,[1] Basnayake, A.C.J. (as he then was) stated as follows:

> *"In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the*

[1] 57 NLR 121.

Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty [2] and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail. "

Sri Skanda Rajah J. while citing with approval, the above passage from Basnayake, A.C.J.'s judgment, went ahead in the case of M. Gomes (S. I. Police, Crimes) Vs. W. V. D. Leelaratna,[3] to add three more grounds which a trial judge should consider in the assessment of the sentence to be imposed on a convicted accused. Two of those three additional grounds are firstly, the nature of the loss to the victim and secondly, the profit that may accrue to the culprit in the event of non-detection. (The third additional ground is the use to which a stolen article could be put which is not relevant to the case at hand).

Thus, the consideration of the order of the High Court in the background of the principles set out in the above judgements clearly shows that the learned High Court judge had given an undue weight to the welfare of the Accused while failing to consider the other aspects which he ought to have considered. As this Court had held in The Attorney-General Vs. H. N. De Silva,[4] the age of the Accused, his previous good character are certainly matters to be taken into account but not to the exclusion of the other aspects of sentencing which are of greater importance.

[2] Rex v. Boyd (1908) 1 Cr. App. Rep. 64.
[3] 66 NLR 233.
[4] Supra.

Perusal of the judgment of the Court of Appeal shows clearly, that it has considered all relevant matters before enhancing the sentence imposed by the trial Judge. The sentence imposed by the Court of Appeal is the minimum sentence, the law has prescribed for the relevant offence. I have no basis to disagree with the said enhancement. Perusal of the judgment of the Court of Appeal shows that it had enhanced the sentence imposed by the trial Judge on the basis of its inadequacy. Thus, I answer the question of law in respect of which Special Leave to Appeal has been granted, as follows:

> The Court of Appeal has not erred by upholding the submission of the State that the sentence was inadequate.

I dismiss the appeal and direct the learned High Court judge to take prompt steps to implement the balance part of the enhanced sentence imposed on the Accused.

JUDGE OF THE SUPREME COURT

Janak De Silva 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 to the Supreme Court of the Democratic Socialist Republic of Sri Lanka under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

T. T. P. Anthony Fernando,
No. 150, Averiwatte Road,
Wattala.
Plaintiff

S.C. Appeal No.244/2014

SC/SPL/LA No. .173/2014 **Vs.**

C.A. APPEAL No. 908/99(F)

D.C. Colombo Case No. 14950/L

1. H.D. Felix Nevill Tirimanne,
1st Defendant (DECEASED)

1A. Lalani Patricia Tirimanne
No.225, Kurukulawa,
Ragama
Substituted 1A Defendant

2. P. N. Wimalaratne,
No. 150/2,
Averiwatte Road,
Wattala.
Added 2nd Defendant

AND

P. N. Wimalaratne,
No. 150/2,
Averiwatte Road,
Wattala.
Added 2nd Defendant-Appellant

Vs.

T. T. P. Anthony Fernando,
No. 150, Averiwatte Road,
Wattala.
Plaintiff-Respondent

Lalani Patricia Tirimanne
No.225, Kurukulawa,
Ragama
Substituted 1A Defendant Respondent

AND NOW BETWEEN
P. N. Wimalaratne,
No. 150/2,
Averiwatte Road,
Wattala.
Added 2nd Defendant-Appellant-Appellant

Vs.

T. T. P. Anthony Fernando,
No. 150, Averiwatte Road,
Wattala.
Plaintiff-Respondent Respondent
Lalani Patricia Tirimanne
No.225, Kurukulawa,
Ragama
Substituted 1A Defendant Respondent-Respondent

BEFORE : **JAYANTHA JAYASURIYA PC, CJ.**
MURDU N.B. FERNANDO PC, J.
ACHALA WENGAPPULI, J.

COUNSEL : Nihal Jayamanne, PC with Kaushalya Nawaratne & Mokshini Jayamanne for the Addeded 2nd Defendant-Appellant-Appellant, instructed by Sivanantham & Associates.
Manohara de Silva, PC with Vinodh Wickramasooriya for the Plaintiff-Respondent-Respondent.

ARGUED ON : 18th March, 2021.

DECIDED ON : 16th June, 2022.

ACHALA WENGAPPULI, J.

This appeal arises out of an action instituted before the District Court of Colombo by the Plaintiff-Respondent-Respondent (hereinafter referred to as "the Plaintiff"). In the said action, the Plaintiff sought to enforce an agreement for sale entered between him and the 1st Defendant-Respondent-Respondent (later substituted by Substituted 1A Defendant-Respondent-Respondent and hereinafter referred to as the "1st Defendant"). The 1st Defendant had died on 14.01.1993, even before the trial commenced, and was substituted by his wife.

In terms of the said agreement, the 1st Defendant agreed to transfer ownership of the house and property described in the schedule to the plaint, in vacant possession to the Plaintiff for a total consideration of Rs. 200,000/-. The 1st Defendant also agreed that if he failed to fulfil that undertaking during the three-month period

stipulated in the said agreement, the Plaintiff is entitled to specific performance.

The sale did not proceed, and the 1st Defendant had thereafter sold the house to the 2nd Defendant-Respondent-Respondent (hereinafter referred to as "the 2nd Defendant") before the institution of the instant action. When the 1st Defendant had taken up the position that he no longer holds title to the property in his answer, the trial Court had allowed an application by the Plaintiff to add the 2nd Defendant as a party to the action under section 18 of the Civil Procedure Code. The 2nd Defendant was thereafter added to the action.

The parties, having made several admissions, proceeded to trial after settling for 25 issues. During the trial, the Plaintiff and the 2nd Defendant gave evidence and tendered documents in support of their respective cases.

In delivering its judgment, the trial Court held that the Plaintiff is entitled to the relief of specific performance per the agreement P1 since he had fulfilled his part of obligations. Being aggrieved by the said judgment, the 2nd Defendant appealed to the Court of Appeal. The Court of Appeal, in its impugned judgment, held that the Plaintiff had chosen to affirm the contract and sue the 1st Defendant, compelling him for specific performance as it was the 1st Defendant who had acted in breach of the said agreement. In rejecting the 2nd Defendant's claim of *bona fide* purchaser for value without notice, the Court of Appeal held that he had purchased the property with the full knowledge that the Plaintiff had a legal right to seek specific performance against the 1st Defendant.

The 2nd Defendant had then sought Special Leave to Appeal against the said judgment. When this matter was supported by the learned President's Counsel for the 2nd Defendant on 17.10.2014, this Court granted Special Leave to Appeal on several questions of law, as formulated in paragraph 20(i) to 20(xviii) of his petition.

At the hearing of this appeal, the learned President's Counsel presented his contentions in the light of the evidence that had been presented before the trial Court in relation to those questions of law. In view of these questions of law and in consideration of the different areas of law involved, and for the purpose of convenience in presentation, it is proposed to group these multiple contentions that had been advanced by the 2nd Defendant in the following manner:

a. the Plaintiff is not entitled to the declaration of his entitlement to specific performance due to the reason that :–
    i. it is he who breached the contract as he had failed to tender the balance part of the consideration on due date,
    ii. it is he who made the performance of the contract impossible and rendered it unenforceable by insistence the condition of handing over the house in vacant possession, which could only be achieved by unlawfully evicting a tenant,
    iii. he had pleaded damages as an alternative remedy,
b. the Court of Appeal had acted on section 93 of the Trusts Ordinance, despite the fact that the action was founded not

on a constructive trust but upon breach of contract and in the absence of a trial issue to that effect,

c. the 2nd Defendant is a *bona fide* purchaser, who had no notice of the encumbrance upon the agreement to sell P1.

In view of the questions of law on which Special Leave to Appeal was granted and the contentions of the 2nd Defendant as well as the Plaintiff, it is clear that the core issue is whether the Plaintiff is entitled to the remedy of specific performance against the 1st Defendant, upon breach of the agreement to sell, even when the latter had transferred his title to the 2nd Defendant.

A brief reference to the evidence presented before the trial Court is helpful at this stage, in appreciating the submissions of Counsel.

The dispute between the Plaintiff and the Defendants is centred around a house property. The 1st Defendant and his sister owned two separate houses built on a rectangular strip of land in extent of about 33 perches, at *Wattala*. The house belonged to the 1st Defendant's sister was facing the public road while the house of the 1st Defendant was situated towards the rear end of the said land. A narrow strip of land, that had been left out along the North-Eastern boundary of his sister's house, provided access to the said public road, from the 1st Defendant's house.

The Plaintiff, who initially occupied the house belonged to the sister of the 1st Defendant as her tenant, had purchased it in 1986. Around the same time, the house belonged to the 1st Defendant was occupied by the 2nd Defendant as his tenant.

When the 1st Defendant had indicated that his house was for sale, the Plaintiff was keen to purchase it. The Plaintiff and the 1st Defendant had therefore entered into an agreement of sale bearing No. 65, attested

by Notary *Kandiah* on 26.04.1989 (P1). In the agreement P1, the 1st Defendant was referred to as the "Party of the First Part" and the Plaintiff was referred to as the "Party of the Second Part", respectively. The total consideration agreed was Rs. 200,000/- and the Plaintiff had paid an advance of Rs. 15,000/- to the 1st Defendant, with the undertaking that he would pay the balance consideration within "*three (3) months from the date hereof*" after obtaining a loan from a Bank or a Lending Institution. The 1st Defendant, in turn, had agreed thereupon to "*execute a valid deed of Transfer*" in favour of the Plaintiff. He also agreed to handover the Plaintiff "…*complete and quiet and peaceful vacant possession*" of the house.

Importantly, the parties also agreed to the following, in Clauses 6, 7 and 8 of the agreement:

Clause 6 – "*On payment of the said balance purchase price of RUPEES ONE HUNDRED AND EIGHTY FIVE THOUSAND (Rs. 185,000/-) and executing the said Deed of Transfer in favour of the Party of the Second Part the party of the First Part shall handover complete and quiet and peaceful vacant possession of the house and premises standing thereon bearing assessment No. 150/2, Averiwatta Road (formerly bearing assessment No. 142/1) to the Party of the Second Part.*"

Clause 7 – "*In the event of the Party of the Second Part is ready and willing to pay the balance Purchase price aforesaid as soon as obtaining the loan and the Party of the First Part is refusing and/or neglecting to execute a valid deed of Transfer in favour of the Party of the Second Part then the Party of the Second Part shall be entitled to specific performance.*"

Clause 8 – "*In the event of the Party of the Second Part failing and/or neglecting to pay the balance sum of RUPEES ONE HUNDRED AND*

EIGHTY-FIVE THOUSAND (Rs.185,000/-) as soon as he obtained a loan from a Bank or any Lending Institution, then the sum of RUPEES FIFTEEN THOUSAND (Rs. 15,000/-) paid as an advance shall be forfeited."

On 21.07.1989, the Plaintiff's Attorney wrote to the 1st Defendant that, "*we are instructed to inform you that our client is ready with the balance consideration of Rs. 185,000/- in terms of Agreement to Sell bearing No. 65 dated 26th April 1989 attested by Miss D Kandiah of Colombo, Notary Public*" (P2). The Attorney had also reminded the 1st Defendant of the condition that the "*vacant possession of the premises must be given to our client*."

In reply, the 1st Defendant, had informed the Plaintiff's Attorney in a handwritten letter on 01.08.1989 that "*I am not in a position to handover my premises on vacant possession and therefore I am not interested to sell the said premises on that condition*" (P3). He also indicated that he would return the advance payment.

The Plaintiff then informed the 1st Defendant through his Attorney on 09.08.1989 that he is not agreeable to accept the advance and that he "… *insist that the sale should take place*" (P4). This letter was replied to by the Attorney of the 1st Defendant, who conveyed to the Attorney of the Plaintiff on 17.08.1989 that "*I am instructed that your client failed to tender the balance consideration of Rs. 185,000/-, by obtaining a loan from a Lending Institution or otherwise, and that up to date your client has failed to obtain any loan for the tender of the balance consideration"* and "*that the amount paid as an advance stand forfeited in terms of the agreement*" (P5).

On 21.08.1989, the Plaintiff's Attorney had replied to the 1st Defendant's Attorney that "… *our client is ready with the balance consideration of Rs. 185,000/-. Your client was not in a position to handover*

vacant possession of the premises" and alleged that the "*default is purely on your client's part*". It was also conveyed that "*we are instructed by our client to institute legal action for specific performance as mentioned in paragraph 7 of the above agreement*" and reiterated that "*our client is still willing to go through the transaction*" (P6).

The reply to P6, the letter dated 29.08.1989 (P7), had been sent to the Attorney of the Plaintiff, this time by a different Attorney on behalf of the 1st Defendant. It is indicated in P7 that his inability to fulfil the obligation to handover vacant possession was due to the fact that his tenant, the 2nd Defendant, did not vacate the premises and therefore he is willing to return the advance payment. He also indicated his willingness to compensate the Plaintiff if he had suffered any loss.

On 01.12.1989, the 1st Defendant had executed a Deed of Transfer No. 2524 (2V1), attested by Notary Public *Zaheed*, transferring his title to the premises described in schedules to the Agreement to Sell P1, and to the plan in favour of the 2nd Defendant, upon a consideration of Rs. 250,000/-. The Plaintiff instituted the instant action on 22.03.1990 before the District Court.

The learned President's Counsel, at the hearing of this appeal, strongly contended on behalf of the 2nd Defendant that the Plaintiff had failed to establish that he had fulfilled his part of the obligations by placing evidence that he had obtained a loan and was '*ready and willing to pay*' the balance consideration to the 1st Defendant, in terms of the said agreement. Therefore, he submitted that the expression '*ready and willing to pay*' in clause 7 of the agreement is confined to the situation, where the Plaintiff had obtained a loan for the balance amount and is willing to pay that to the 1st Defendant. Learned President's Counsel

stressed that '*then and then only*' does specific performance come into play and that too, if the 1st Defendant still refuses to transfer the property.

He contended that the insistence of the fulfilment of the condition of handing over the house in vacant possession clearly indicates that the Plaintiff was willing to pay the balance only if the 1st Defendant confirms that he had made arrangements to hand over vacant possession. He therefore contended that the fulfilment of handing over the house in vacant possession has become the paramount condition that had to be fulfilled on the part of the 1st Defendant in completion of the said agreement. It was submitted that the 1st Defendant was not in a position to handover the premises in vacant possession due to no fault of his, but because of the Plaintiff, who opted not to proceed with the sale *by his not* tendering the balance consideration.

The Plaintiff instituted the instant action on the basis of breach of an agreement to sell a particular property. The main relief he seeks from Court is a declaration of his entitlement to specific performance against the 1st Defendant compelling him to execute a conveyance in the Plaintiff's favour. Hence, the underlying consideration at this stage would be, whether, in the given set of circumstances, the Plaintiff is entitled to the said relief of specific performance or not.

In determining a plaintiff's entitlement to relief to specific performance upon a breach of agreement to re-transfer of a property upon payment of a certain sum, it had been stated by *Lyall Grant* J in ***Jeremias Fernando et al v Perera et al*** (1926) 28 NLR 183 at 184 that, "*unless the Court is satisfied that the plaintiffs have fulfilled their part of the contract, so far as it is possible for them to do so, namely, by tender of the price,*

it seems obvious that it cannot order the defendants to perform their part of the contract inasmuch as the condition precedent to such performance has not been fulfilled."

Thus, in seeking specific performance of the agreement P1, the Plaintiff had to satisfy Court, that he was '*ready and willing to pay*' the balance consideration to the 1st Defendant, in terms of the said agreement, as the learned President's Counsel contends. This factor should be decided against the backdrop of the terms of the agreement and in relation to the evidence that had been presented before the trial Court.

The trial Court, having noted that the Plaintiff was to pay the balance consideration of Rs. 185,000/- within a period of three months, had thereafter arrived at the conclusion that he did fulfil his part of the obligations, as indicative from the evidence and supported by the contents of the letters marked P2 to P7. The Court of Appeal too had adopted the same view.

During his submissions, the learned President's Counsel for the 2nd Defendant submitted that a mere indication that money was ready is not sufficient and the Plaintiff was obligated to tender the balance consideration within the stipulated period, in order to fulfil his part of the obligations. In support of this, the learned President's Counsel invited the attention of Court to the evidence of Plaintiff, where it is said that he did in fact offer the balance amount of the purchase price to the 1st Defendant at the latter's residence, and contended that this factual assertion is wholly unreliable and could not be acted upon as it had been taken up by the Plaintiff for the first time during the trial. Therefore, he contended that it was the Plaintiff who had breached the

contract due to his failure to tender the balance part of the consideration within the stipulated time period. It was also contended by the learned President's Counsel that continuing the breach, the Plaintiff had even failed to deposit the balance consideration in Court, when he instituted the instant action, seeking specific performance of the agreement P1.

The learned President's Counsel for the Plaintiff, in replying to the contention advanced on behalf of the 2nd Defendant, submitted that when the Plaintiff was '*ready and willing*' to pay the balance consideration and to proceed with the transaction, it was the 1st Defendant who refused fulfilment of his part of obligation by stating that he was not interested in proceeding with the said transaction. Therefore, he contended that the Plaintiff had a right to specific performance, upon the said refusal by the 1st Defendant.

The 1st Defendant in his answer had taken up the position that the Plaintiff was not '*ready and willing*' to pay the balance consideration. Perhaps, with a view to consider this assertion, there is in fact a trial issue that had been particularly raised before the trial Court by the Plaintiff as to his readiness and willingness to pay the balance consideration. Issue No. 4 had been framed with two parts, namely issue Nos. 4(a) and 4(b). The issue No. 4(a) was in relation to whether the Plaintiff was ready and willing to pay Rs. 185,000/- to the 1st Defendant and to complete the contract at all times relevant to the agreement while issue No. 4(b) relates to whether that readiness and willingness had been communicated to the 1st Defendant by the Plaintiff. The trial Court, in its judgment, had answered both these issues in the affirmative and in favour of the Plaintiff. The Court of Appeal too was of the same view as it had stated that "*the evidence of the Plaintiff, the wordings in P1, contents of the correspondence exchanged*

between the parties very clearly show that the Plaintiff was ready and willing to perform his obligation of paying the balance sum of Rs. 185,000/- to the 1st Defendant to complete the sale."

In view of these submissions, this Court would review the body of evidence that had been presented before the trial Court, in order to ascertain whether the issue Nos. 4(a) and (b) had been correctly answered by the trial Court and affirmed by the Court of Appeal. The issue No. 4, however, does not specifically put the position of the 2nd Defendant before the trial Court as a trial issue, on the same lines as contended by the learned President's Counsel before this Court, namely that the Plaintiff did not tender the balance consideration. However, the issue whether the Plaintiff had made a valid tender is obviously caught up as an integral part within the said issue, since it called upon the trial Court to determine whether he was willing and ready to pay Rs. 185,000/- to the 1st Defendant at all times relevant to the agreement and thereby to complete the contract.

Before proceeding to consider the relevant evidence, it is necessary to consider the exact nature of the terms in relation to the payment of the balance part of the total consideration, to which the parties have agreed upon. Clause 7 of the agreement P1 reads as follows:

> *"In the event of the Party of the Second Part is ready and willing to pay the balance purchase price aforesaid as soon as obtaining the loan and the Party of the First Part is resisting and/or neglecting to execute a valid deed of transfer in favour of the Party of the Second Part then the Party of the Second Part shall be entitled to specific performance".*

The evidence of the Plaintiff is that he, having secured the balance part of the consideration within the three-month period by borrowing the same from one *Ivan*, had conveyed his willingness and readiness to the 1st Defendant, through his Attorney, in letter P2 on 21.07.1989, which stated that "… *our client is ready with the balance consideration of Rs. 185,000/-"* and sought to finalise the transaction. The Plaintiff further stated in evidence that on 25.07.1989, merely a day before the stipulated three-month period was to lapse, he had personally visited the 1st Defendant with the balance amount, only to be told that he "*would not sell*" ("**විකුනන්නෙ නැහැ**").

In the cross-examination of the Plaintiff, the 1st Defendant had challenged this assertion by suggesting to him that it was a false claim. He had further elicited from the Plaintiff that such a position was neither mentioned in any of his letters nor averred to in the plaint.

Clause 8 made it obligatory for the Plaintiff to make the balance payment "*as soon as obtaining the loan"*. It is undisputed that by P2, the Plaintiff had indicated to the 1st Defendant that he was ready with the balance consideration, well within the stipulated time period. In the absence of any reply to P2, the Plaintiff had personally visited the 1st Defendant and offered the balance consideration. But the 1st Defendant was not interested in accepting the remaining part of the consideration or to execute the transfer upon acceptance of the said consideration. The position that the 1st Defendant was not willing to proceed with the sale was communicated to the Plaintiff by the 1st Defendant by letter P3 on 01.09.1989. The said letter P3 of the 1st Defendant, written after the three-month period that had been allocated for the payment of the remaining part of the consideration was over, conveyed to the Plaintiff

that "*I am not in a position to handover my premises on vacant possession. And therefore, I am not interested to sell the said premises on that condition*."

The evidence referred to above clearly indicate two different situations. Firstly, it indicates that the Plaintiff had informed the 1st Defendant in writing that he was ready with the balance consideration and then made a failed attempt to physically tender the balance consideration. Secondly, the alleged refusal of the 1st Defendant to accept the balance consideration at the time of its physical tender. The applicable legal principles in respect of these two situations are quite different to each other, as indicated by the applicable judicial precedents. The said 1st situation in turn has two in-built components into it, which require separate consideration.

The first component of the first situation refers to the situation where the Plaintiff, by writing informs the 1st Defendant, that the balance part of the consideration is ready within the stipulated period of three months.

The case of ***Holmes v Alia Marikkar*** (1896) 1 NLR 282, relates to an action seeking specific performance of an agreement by which the parties have agreed that the defendant should be ready to hand over the document of transfer to the plaintiff's assignor, and the plaintiff's assignor should be ready to handover the price stipulated. The trial Court had dismissed the plaintiff's action that the plaintiff failed to establish a legal tender of Rs. 150/- within the stipulated time. *Withers* J had stated (at p. 286) that "*I think all that the plaintiff was bound to establish was that he required the defendant to execute the promised transfer, and that he was ready and able, on that being done, to pay the Rs. 150 to the defendant. So much I think he has established, and in my opinion, he is*

entitled to relief." In the same judgment, *Lawrie* J, having concurred with that view, had added "*within the time fixed it was the assignor's duty (if he wished to purchase) to give the defendant notice that he had the money ready, and desired the conveyance to be prepared and signed, but he was not, I think, bound to tender the money absolutely and unconditionally.*"

The question whether the money needed to be actually produced was considered in by *Soertsz* J in ***Fernando v Coomaraswamy*** (1940) 41 NLR 466. This was a case where the parties were to transfer a certain property upon payment of consideration, subsequent to the terms of settlement that had been entered in Court. When sued for specific performance upon breach of that agreement, the seller took up the position that there had not been actual tender of money as required by law.

Having quoted *Harris* from the 1908 edition of his book, '*Law of Tender*', where it is stated by the learned author (at p. 1) that '*tender is the instinctive resource of the oppressed against the exactions of the relentless*', *Soertsz* J observed that (at p. 474) "*there was no longer any question of money not being immediately available to the appellant's Attorney. In the face of all this, to hold that the money was not duly tendered would be to make the Law of Tender a horrible snare*". His Lordship held thus in view of the contents of the correspondence between the purchaser's Attorney and the seller's Attorney that "*this money is now in our office and we are in a position to pay it to your client upon his executing the appropriate conveyance.*"

More recently, in ***Premaratne v Yasawathie and Another*** (2015) 1 Sri LR 302, this Court had considered the contention advanced by the seller, upon being sued for specific performance on his breach of an

agreement to sell, that the agreed consideration was not tendered. This Court, in view of the fact that the purchaser had informed the seller by a letter that the agreed consideration was deposited with his Attorney, to call over at his office to collect same and thereupon to make the transfer, concluded that there was proper tender. The Court also noted at p. 310 that the statement '*money is ready*' is "*equal to a proper tendering of the purchase price*."

On the other end of the spectrum, there are several instances where the Courts have held that there was no proper tender of consideration. In view of the circumstances under which the alleged tender had taken place, *Lawrie* J, in his judgment of ***Babahamy v Alexander*** (1896) 2 NLR 159 at p. 159, had said "It *has been repeatedly held that a mere statement that money is ready is not sufficient*". The circumstances under which this pronouncement was made are that the purchaser had gone to see the seller to a field with his Notary but without a prior appointment. He indicated to the latter that the money was ready but neither shown nor tendered. The Court observed that the '*offer*' of money had been conditional as the purchaser had insisted that the seller signs the deed '*there and then*', leaving the latter with no opportunity to examine same. However, in ***Muhandiram et al v Salam et al*** (1947) 49 NLR 80 *Canekeratne* J was of the view (at p. 81) that the dictum of *Lawrie* J in ***Babahamy v Alexander*** (supra) that a mere statement that money is ready is not sufficient should be confined to the particular facts of that case.

The contention, that willingness by the tenant in taking the cheque book with him in visiting his landlord to pay the arrears of rent that had been accumulated for over two years was tantamount to a tender of rent, was rejected by *Basnayake* CJ in ***Razik v Esufally*** (1957)

58 NLR 469 at 471 by adopting the statement in *Harris* on *Law of Tender*, (at p. 11) that "*to constitute tender the readiness to pay must be accompanied by production of the money that is offered in satisfaction of the debt.*"

Thus, it appears from the above cited judicial precedents that the actual tendering of the purchase price in the form of cash by the purchaser was not particularly insisted on by the Courts as an absolute pre-condition to hold that there was in fact a tender of the agreed purchase price. If the attendant circumstances indicate that the purchaser's demonstration of willingness, readiness and ability to pay the purchase price, coupled with an unqualified and unconditional offer of same to the seller, it is reasonable to conclude that there was proper tender of the purchase price by the purchaser.

In relation to the instant appeal, the only difference it has with the factual position of ***Premaratne v Yasawathie and Another*** (supra) is that the letter by which the purchaser informed the vendor indicated that the agreed consideration was deposited with his Attorney, whereas in the instant appeal the Plaintiff had stated that he "*is ready with the balance consideration of Rs. 185,000/- …*".

The obligation to tender the consideration that had been agreed upon, in the absence of an agreement to that effect, is not required to be discharged as a distinct and a separate transaction, that is quite detached from the corresponding fulfilment of the obligation to transfer of title. *Canekaratne* J, in ***Muhandiram et al v Salam et al*** (1947) 49 NLR 80, at p. 81 stated that "*unless otherwise agreed delivery of the property and payment of the price are concurrent condition: the seller must be ready and willing to give possession of the property to the buyer and the buyer must be ready and willing to pay. The rule of the Roman-Dutch Law is almost similar*

to that in English Law. It is a fundamental principle that the payment of the purchase money and the delivery of the conveyance are to be simultaneous acts to be performed interchangeably." The agreement to sell in P1 had no condition included in it setting out as to the manner in which the balance consideration should be paid by the Plaintiff and the principle enunciated in ***Muhandiram et al v Salam et al*** (ibid) is therefore applicable. It is my view that the Plaintiff, in the absence of a specific clause in P1 to that effect, need not tender the balance consideration as a pre-condition for the 1st Defendant to execute the transfer. The payment of the balance consideration, the act of execution of the transfer and the symbolic act of handing over the property in vacant possession should take place simultaneously, in the absence of any arrangement to the contrary in P1.

In ***Muhandiram et al v Salam et al*** (ibid) *Canakeratne* J noted that "*… in Ceylon, delivery of the deed is sufficient for the consummation of a sale; the proper place of performance would prima facie be the place where the deed is executed by the party and attested by the Notary*." Hence, when the Plaintiff had conveyed through his Attorney that the balance consideration is ready, it is clear that there is an unconditional offer of the money for the 1st Defendant to take that money, if he did turn up at the Attorney's office to execute the transfer and by handing over the premises in vacant possession. The fact that the Plaintiff had made available the balance consideration unconditionally was not disputed by the 1st Defendant, in P3 sent as a reply to P2. In P3, he only indicates that he is not interested to sell since he could not handover the premises in vacant possession. This was the opportunity to the 1st Defendant to accuse the Plaintiff of his failure to tender the consideration within the stipulated time period.

Having contended before this Court that the Plaintiff was never '*ready and willing*' to pay the balance consideration, the 1st Defendant did not even raise that as a trial issue. During the trial, he was content with his challenge to the legality of the sale agreement on the footing that the said agreement made it a mandatory requirement to illegally evict his tenant. The Plaintiff, on the other hand, had relied on the contents of the letter P2, to substantiate his claim that he was ready and willing with the balance payment. It is stated in the letter addressed to the 1st Defendant, by the Plaintiff's Attorney, that his client "*is ready with the balance consideration of Rs. 185,000/- …*". The 1st Defendant neither cross-examined the Plaintiff on this claim in P2 nor did he challenge the assertion contained therein. It is relevant to note in this context, the Plaintiff was willing to proceed with the transaction despite the 1st Defendant's refusal, as indicated by letters P4 and P6.

In view of the above, the evidence presented before the trial Court is sufficient to establish the fact that the Plaintiff was '*ready and willing*' to tender the balance consideration within the stipulated time period in terms of the agreement P1. The position of the Plaintiff, as indicated in the letter P2 that he "*is ready with the balance consideration of Rs. 185,000/-*" could therefore certainly be equated to an instance where there is proper tender of the purchase price.

The second component of the first situation referred to above, is the assertion by the Plaintiff that he did personally make an attempt to pay and the 1st Defendant had refused to execute the transfer, when he did offer the balance consideration in cash at the latter's residence.

The truthfulness of this particular assertion made by the Plaintiff had been challenged by the 1st Defendant. The 1st Defendant suggested

that the Plaintiff had lied in Court. He also elicited that the Plaintiff had failed to mention this incident of refusal in any of his correspondence with the 1st Defendant and his plaint did not include an averment referring to such an incident.

Therefore, the Plaintiff's assertion that he made an attempt to handover the balance consideration to the 1st Defendant personally at his residence confines itself to an issue of credibility as that item of evidence had to be evaluated for its truthfulness and reliability by the trial Court. Strangely, the 1st Defendant in his written submissions to the trial Court did not dwell on this aspect of the Plaintiff's evidence, in spite of his challenge to it during cross examination. The trial Court, as the Court of first instance, had obviously accepted the Plaintiff's evidence as credible, upon utilising the priceless advantage it had in observing his demeanour and deportment.

The challenge to the Plaintiff's evidence that he physically tendered the balance consideration is mounted on the premise that the said assertion was raised belatedly and therefore lacks inconsistency. The applicable test on assessing credibility of his evidence is therefore the test of spontaneity and consistency. Since both lower Courts have accepted his evidence as credible, this Court should consider whether the impugned segment of evidence satisfies the said test on credibility.

It is already noted from the evidence that the Plaintiff, after the agreement was signed, was expected to raise the balance of Rs.185,000/- through a bank loan. He said he did apply for a loan, but since his loan was not approved in time, he borrowed the balance from one *Ivan*, a senior colleague of his. He then informed the 1st Defendant of his readiness with the balance payment by P2. In the absence of any

response, he personally visited the 1st Defendant on 25.07.1989 and offered the balance payment. But the 1st Defendant had declined to accept the balance consideration on that day and sent P3 reconfirming that he was '*not interested*' to sell the property.

The Plaintiff, during cross-examination by the 1st Defendant, conceded that either in P4 or in his plaint, no reference was made in relation to this incident on 25.07.1989. The Plaintiff, however maintained that he did inform his Attorney as to what had transpired on 25.07.1989 soon after.

In his plaint, the Plaintiff had only averred that "*the Plaintiff has at all material times was [sic] ready and willing to perform the said Agreement on his part by paying the balance sum of Rs. 185,000/- of which the Defendant has had notice*." Clearly this averment is bereft of any detail as how he brought to notice of the 1st Defendant as to his willingness and readiness to pay the balance consideration.

The question that should be decided from the above evidence is whether the Plaintiff's assertion that the 1st Defendant's refusal to accept the balance consideration on 25.07.1989 is a credible one or not, owing to its belatedness.

It is correct to say that none of the correspondence indicate that any reference to the offer of balance consideration in cash form was ever mentioned. However, it is relevant to note that the Plaintiff did not state to Court that he offered the balance consideration to the 1st Defendant at the latter's residence as a spontaneous utterance during his evidence. Perusal of the transcript indicates that he stated so only at the end of a long answer, when he was found at fault by the 1st Defendant during cross examination over his failure to indicate that he

was prepared to proceed with the transaction even with the existing tenancy.

In re-examination, the Plaintiff said that he had listed one *Ivan* as a witness and the list of witness for the Plaintiff does contain the name of *Ivan S.J. Dias* of 194, Central Road, *Mattakkuliya*. The reference to *Ivan* in the Plaintiff's evidence is only in relation to the source of his borrowing. Hence, the specific reference to *Ivan* in the evidence is not a last-minute introduction. The Plaintiff anticipated to rely on *Ivan's* evidence by listing him as a witness in support of his assertion that he borrowed Rs. 185,000/-. This factor therefore lends support to the Plaintiff's assertion that he had borrowed Rs. 185,000/- from *Ivan*. When the agreement was signed, the Plaintiff said that he had no funds in his hands to pay the balance consideration. He then obligated himself in the agreement to pay the balance consideration by applying for a bank loan to pay it within three months. The bank had apparently taken a longer time to process the loan and granted approval to the Plaintiff's application only on 20.12.1989, long past the required time period.

It is therefore reasonable to infer that the Plaintiff, being desperate to raise sufficient funds to meet his obligations, turned to his superior, seeking to borrow that amount. He was successful with *Ivan*. Then only the Plaintiff, through his Attorney, had informed the 1st Defendant in writing that he is ready with the balance consideration and to proceed with the transaction. However, there was no response from the 1st Defendant. Anxious to conclude the transaction, the Plaintiff then visited the 1st Defendant and physically offered the balance consideration, but again his tender was refused by the latter.

In assessing the credibility of the Plaintiff's assertion that he tendered the balance consideration to the 1st Defendant on 25.07.1989, by applying the test of spontaneity, it is noted that the reference to the borrowing from *Ivan* is confirmed by the letter P2, which indicated that the balance consideration was ready by 21.07.1989. The timing of letter P2 is consistent with this position. The evidence clearly points to the conclusion that the only way the Plaintiff could have secured sufficient funds to pay the balance consideration was by borrowing it from *Ivan*. Being successful with *Ivan* and therefore having sufficient funds on hand to pay the balance consideration, the claim by the Plaintiff that he physically tendered same to the 1st Defendant on 25.07.1989, with just a day left to complete the all-important three months' period as stipulated by the agreement, to my mind, is a very probable account of the version of events. His keenness to proceed with the transaction is understandable as the house and property belonged to the 1st Defendant is abutting to his own and, owing to that very reason, is more valuable to him than to any other buyer.

The assertion that the Plaintiff had sufficient funds to meet his obligation to pay the balance consideration and had in fact tendered the same to the 1st Defendant on 25.07.1989, was not stated in evidence as a mere afterthought, or as an excuse to get away from a difficult situation that arose in cross examination, which had taken him by surprise, but as a narration of an actual event that had taken place between the Parties. In the absence of a denial by the 1st Defendant, the Plaintiff's claim is clearly more probable. When viewed in these circumstances, the mere absence of a reference to the personal offering of the balance consideration on 25.07.1989, in his correspondence or in the plaint,

would not make a dent in the credibility of the evidence of the Plaintiff, warranting the total rejection of his evidence on this issue.

Furthermore, in P6, the Plaintiff alleged that it was the 1st Defendant who breached the agreement. In P7, the 1st Defendant did not refute that assertion but rather conveyed his acceptance, by agreeing to compensate the Plaintiff for any losses.

Therefore, the evidence clearly points out that the Plaintiff was ready and willing at all times to pay the balance consideration, as indicated by the letter P2 and him personally visiting the 1st Defendant and offering it on 25.07.1989. In view of these considerations, the conclusion reached by the trial Court to that effect and the affirmation by the Court of Appeal of that conclusion, are amply justified.

Having reached the above conclusion in relation to the first of the situations referred to earlier on in this judgment, i.e., whether the Plaintiff had informed the 1st Defendant in writing that he is ready with the balance consideration and then tendered the same personally, I shall now proceed to consider the second situation that is concerned with the alleged refusal of the 1st Defendant to accept the balance consideration when it was physically tendered.

Since the probabilities factor favours the acceptance of the Plaintiff's claim that he did tender the balance consideration physically to the 1st Defendant on 25.07.1989, the evidence that the latter's refusal to accept the same and to make the transfer as agreed, shifts the transaction in a different direction.

On 25.07.1989, the 1st Defendant refused to accept the balance consideration from the Plaintiff informing the latter that he does not intend to proceed with the transfer. The words attributed to the 1st

Defendant, in indicating his refusal to execute the transfer, are "**ලියන්න බැහැ**". This particular reference to 1st Defendant's verbal refusal to execute the transfer was made by the Plaintiff only during his cross examination, and that too, when he was questioned by the former as to the reason in the latter's failure to handover cash and to get the transfer executed. The 1st Defendant did not specifically challenge the truthfulness of the evidence of the Plaintiff in attributing the said utterance to him. On his part, the 1st Defendant too had conveyed a position similar to the one attributed to him by the Plaintiff, when he wrote P3 on 01.08.1989, where he indicated that he is "*not interested*" in proceeding with the transfer on fulfilment of the condition of "*vacant possession*". It is important to note that the 1st Defendant does not deny receiving P2 in time or allege that the Plaintiff had failed to tender the balance consideration within the stipulated time period. The letter P3 is dated 01.08.1989. By then the three-month period, as stipulated by the agreement P1 to complete the transaction, was effectively over.

Thus, the probable assertion of the Plaintiff that the 1st Defendant had refused to accept the balance consideration when offered on 25.07.1989 at his residence would thereby trigger in the applicability of another important legal principle on the law of tender.

This principle of law is a relevant in dealing with the submission of the learned President's Counsel for the 2nd Defendant made in relation to the failure of the Plaintiff to deposit the balance part of the consideration in Court, as a continuation of the latter's willful breach of the agreement to tender the agreed amount of balance consideration, in instituting the instant action for specific performance. It appears that no such requirement could be imposed on the Plaintiff, due to the 1st Defendant's own conduct.

In ***Appuhamy v Silva*** (1914) 17 NLR 238, *Lascelles* CJ dealing with the same question, said (at p. 240):

> *"There can, I think, be no doubt but that the defendant, by announcing his refusal to accept the money, had waived his right to have a formal legal tender. The principle of law has thus been stated in cases where tender is pleaded as an excuse for non-performance: if the debtor tells his creditor that he has come for the purpose of paying a specified amount, and the creditor says that it is too late, or is insufficient in amount, or otherwise indicates that he will not accept the money, the actual production is thereby dispensed with, and there is a good tender of the amount mentioned by the debtor. The same principle also applies where there is a contract with a condition precedent. The performance of the condition is excused where the other party has intimated that he does not intend to perform the contract. I think it is quite clear that the plaintiffs are not precluded from suing on the contract by failure to make a legal tender of the redemption money, inasmuch as the defendant by his own act in repudiating the contract had made actual tender unnecessary and meaningless."*

This statement of law was adopted and followed by *TS Fernando* J in ***Kanagammah Hoole v Natarajan*** (1961) 66 NLR 484 (at p. 488).

In applying the said principle of law on legal tender to the factual assertion of the Plaintiff that the 1st Defendant had refused to accept his tender of the balance part of the consideration, I am of the view that the said refusal would make the 1st Defendant disentitle from relying on the

failure of the Plaintiff to deposit the balance payment in Court and claim that there was no valid tender.

Continuing with the contention that the Plaintiff is not entitled to the relief of specific performance, the learned President's Counsel for the 2nd Defendant referred to the insistence by the Plaintiff to handover the house property in '*vacant possession*'. He contended that it is a condition the 1st Defendant could not fulfil, as it would amount to an illegal eviction of a tenant, whose tenancy rights were protected by the provisions of the Rent Act.

This contention presupposes that the Plaintiff, in insisting that he be given vacant possession, had in fact wanted the 2nd Defendant illegally evicted from the house property, in order to fulfil his part of the obligation.

The only Clause that dealt with a condition of vacant possession in P1 is Clause 6. The relevant part of the Clause 6 of the agreement P1 is to the effect that upon payment of the balance consideration by the Plaintiff, the 1st Defendant were to execute a deed of transfer and "… *shall handover complete and quiet and peaceful possession of the house and premises standing thereon …*". This condition only made it obligatory for the 1st Defendant to transfer title to his property and to hand over the same in vacant possession. The agreement P1 does not refer to any reservation of the 1st Defendant when he did agree to "*handover complete and quiet and peaceful possession of the house and premises*" that it would depend on the eviction of his tenant, who was in possession of the same. Therefore, no illegality could be imputed to the mere inclusion of this standard clause in the agreement P1.

It is evident from the proceedings before the trial Court that the 1st Defendant had made an unsuccessful attempt to term the agreement P1 as an agreement which cannot be enforceable as it is an illegal contract, which had been formed for the purpose of evicting a tenant, unlawfully. In the absence of any reference to an existing contract of tenancy or to an eviction of a tenant in the agreement P1, this position was rightly rejected by the trial Court, as the terms of said agreement do not stipulate such an obligation on the part of the 1st Defendant.

When the parties had agreed upon the terms of the agreement P1 on 26.04.1989, the 1st Defendant knew that the house property that he intends to sell to the Plaintiff is occupied by his tenant. Despite the said exiting contract of tenancy, the 1st Defendant had proceeded to accept an advance payment from the Plaintiff and agreed to handover the premises in vacant possession, upon the condition of making the balance payment of the consideration within a period of three months. Thus, the 1st Defendant voluntarily conceded to that condition by agreeing that he could handover his property to the Plaintiff within a period of three months. No explanation was offered by the 1st Defendant as to why he agreed to that condition in the first place, if it involves an illegal eviction of a tenant, nor was any explanation offered as to why he promised to do something he could not deliver, in a binding agreement.

It therefore appears that the 1st Defendant had, in advancing the position that he could only have fulfilled the said condition by evicting the 2nd Defendant unlawfully, made an attempt to fuse the fact of insistence of the condition of vacant possession by the Plaintiff with his own interpretation of that condition as contained in the agreement P1. However, there is obviously a legally permissible and more practical

option available to the 1st Defendant, if he was serious about fulfilling that undertaking. He could have easily negotiated with his tenant, the 2nd Defendant, to terminate the contract of tenancy voluntarily. Strangely, no such evidence before the trial Court was ever presented by the any of the Defendants, that, with a view to fulfil that particular undertaking, the 1st Defendant had made any overture to the 2nd Defendant. As to why he did not pursue this option, in order to secure vacant possession of the premises within the said three months period, is therefore remains unexplained.

The 2nd Defendant gave evidence before the trial Court. In his evidence, the 2nd Defendant did not even make a passing reference to any such negotiation he had with the 1st Defendant, during which the latter proposed the former to voluntarily terminate the contract of tenancy. In effect, the 1st Defendant, having undertaken to handover the property in vacant possession, absolutely made no attempt to fulfil that obligation. This issue will be considered fully, in dealing with another contention that had been advanced by the 2nd Defendant, stating that he is a *bona fide* purchaser without notice.

Hence, the contention that the 1st Defendant could not make the transfer, due to the insistence of the Plaintiff to have the property be handed over to him in vacant possession, is without a valid basis and accordingly cannot succeed.

It is clear from the above, that the Plaintiff had fulfilled his part of the obligations as per P1 and it was the 1st Defendant who did not wish to fulfil his part per Clause 6. This he had done by indicating to the Plaintiff that he does not wish to proceed with the transaction on 25.07.1989 and thereafter reiterated that position by sending P3 on

01.08.1989 stating that he is *'not interested'* in proceeding with the sale. When he sent P3, the three months period to fulfil the obligations undertaken by the 1st Defendant, as stipulated by the agreement P1, had already lapsed.

The act of repudiation by the 1st Defendant, in indicating to the Plaintiff that he did not wish to proceed with the sale on 25.07.1989, in law amounts to an instance of an anticipatory breach as *Weeramantry,* in his treatise on the Law of Contracts (Vol. II) at p. 879 states: "*Repudiation may, of course, take place before the time fixed for performance, and is then described as an anticipatory breach*." The learned author clarified this concept with an apt example in relation to the instant appeal as "… *a person who has promised to another a certain land before a specified date may by declaration prior to that date announce to the other that he does not propose to perform his promise …*". *Wessels' Law of Contract, 2nd Ed. [1951]* too supports this position, in describing such an act as one of the five ways in which a breach may arise. It is stated at S. 2925(2), that a breach occurs, "*where the promisor absolutely renounces his intention to perform the contract or repudiates it before the time for performance*". The statement at S. 2964 is also relevant as it states that "*a breach of contract said to occur if a party who is under an obligation to perform the contract either (1) completely fails to perform the contract or (2) fails to perform a substantial part of it. A failure to perform a contract without sufficient excuse constitutes a breach of that contract …*" Thus, the conclusion reached by the trial Court that the Plaintiff had fulfilled all of his obligations and it was the 1st Defendant who breached the contract is a well-founded one, in consideration of the available material and the applicable principles of law. I therefore concur with the conclusion reached on this particular issue by both the lower Courts.

This conclusion attracts the application of another principle of law in relation to specific performance as recognised by our Courts, as it is the Plaintiff, being the purchaser, who seeks specific performance against the seller, the 1st Defendant.

Their Lordships of the Privy Council, whilst affirming the 'admirable' judgment of ***Thaheer v Abdeen*** (1955) 57 NLR 1, by their own judgment of ***Abdeen v Thaheer*** (1958) 59 NLR 385, had quoted the following statement of *Gratiaen* J, which their Lordships 'entirely accept' (at p. 388):

> *"In this country, the right to claim specific performance of an agreement to sell immovable property is regulated by the Roman-Dutch law, and not by the English law. It is important to bear in mind a fundamental difference between the jurisdiction of a court to compel performance of contractual obligations under these two legal systems. In England, the only common law remedy available to a party complaining of a breach of an executory contract was to claim damages, but the Courts of Chancery, in developing the rules of equity, assumed and exercised jurisdiction to decree specific performance in appropriate cases. Under the Roman-Dutch law, on the other hand, the accepted view is that every party who is ready to carry out his term of the bargain prima facie enjoys a legal right to demand performance by the other party; and this right is subject only to the over-riding discretion of the Court to refuse the remedy in the interests of justice in particular cases."*

This position is also reflected in *Wessels'* at S. 3102, where it states, "*Prima facie, every party to a binding agreement who is ready to carry out his obligation under it, had a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract.*"

Since the accepted view under Roman-Dutch law is, every party who is ready to carry out his term of the bargain enjoys *prima facie* a legal right to demand specific performance against the party responsible for the breach, this Court shall now consider, in view of the said principle of law, whether the Plaintiff is entitled to demand specific performance against the 1st Defendant, in this particular instance.

It is important to note that in ***Abdeen v Thaheer*** (ibid) their Lordships have identified the entitlement of a party who had fulfilled his part of the obligations in stating that such a party "… *enjoys a legal right to demand performance by the other party*". However, their Lordships have qualified that entitlement with the insertion of the phrase "*prima facie*" in that sentence before making reference to the entitlement to the relief of specific performance. The reason to qualify the entitlement with the use of the term "*prima facie*" is evident from the following sentence that appears after the semi colon, as their Lordships further state that "… *this right is subject only to the over-riding discretion of the Court to refuse the remedy in the interests of justice in particular cases.*"

Thus, it is clear that the Plaintiff, in view of the breach by the 1st defendant, is *prima facie* entitled to demand specific performance of the 1st Defendant's obligations under the agreement to sell, even in the absence of specifying the remedy of specific performance in its Clause 7, in the event of a breach.

In this context, I think it is appropriate to deal with the contention advanced by the learned President's Counsel for the 2nd Defendant at this stage, that his client had become the owner of the house property by virtue of deed No. 2524 (2V1) on 01.12.1989, five months after the alleged *'lapse'* of the agreement to sell, P1, and therefore the Plaintiff cannot seek the relief of specific performance against the 1st Defendant, who is now admittedly not the owner of the disputed house property. In advancing the said contention, he heavily relied on the *dictum* of the judgment ***Amarashighe Appuhamy v Boteju*** (1908) 11 NLR 187, where it is stated that a "*fatal objection*" exits to the claim of a plaintiff in seeking specific performance against a seller, who subsequently transferred his rights to a 3rd party, as "*… it is no longer in the seller's power to specifically perform the agreement*."

The learned President's Counsel for the 2nd Defendant had advanced the said contention on the footing that the agreement to sell had in fact lapsed after the stipulated three months period, due to the insistence of fulfilling of an impossible condition that the house property be handed over to the Plaintiff in vacant possession. Since the fulfilment of that condition was beyond the capacity of the 1st Defendant, that the agreement had thereby became an impossible one to fulfil. Hence, when the deed of transfer 2V1 was executed, there was no contract in existence which had been kept alive by an interested party to the contract. In the absence of a contract that had been kept alive, which may have been an impediment on a proper transfer of title, the 2nd Defendant was conferred with legal title. It was also highlighted by the learned President's Counsel that the Plaintiff had instituted the instant action only on 22.03.1990, seven months since the

lapse of the said agreement and almost four months since the execution of the deed of transfer 2V1.

In relation to this contention, it is relevant to note that issue Nos. 24(a) and 24(b) were raised to the effect of, respectively, whether the 2nd Defendant had fraudulently executed the deed of transfer No. 2524, with the full knowledge of the Plaintiff's rights, and whether the said deed of transfer would convey any right, title and interest on to the 2nd Defendant. The trial Court answered issue No. 24(a) as '*not proved*' while answering issue No. 24(b) against the 2nd Defendant by stating that '*it does not*'.

The underlying rationale of the trial Court, in answering these two issues is that the 1st Defendant had no title to pass on to the 2nd Defendant, in view of the breach of the agreement P1 and application of its Clause 7. When the 2nd Defendant had proceeded with the purchase, he had full knowledge of the effect of the agreement P1 between the Plaintiff and the 1st Defendant. The Court had therefore stated that, in these circumstances, the entitlement of the 2nd Defendant is limited only to an entitlement of damages from the 1st Defendant. The Court of Appeal too had concurred with this conclusion of the trial Court on the basis that, by Clauses 5, 6 and 7 of the agreement P1, the 1st Defendant had expressly given up his right to sell the property to any 3rd party other than the Plaintiff and for that reason he had no title without any encumbrances to transfer to the 2nd Defendant in view of its Clause 7, which gave the Plaintiff the right to seek specific performance. The Court of Appeal had acted on the principle from *Wessels'*, at S. 3152, which states, "*until the contract has been performed or*

mutually cancelled or set aside by a competent Court, the bond which unites the contracting parties remains intact."

It is clear from the above that both the Courts below had proceeded to hold with the Plaintiff on the basis that the 1st Defendant had no title to pass on, when he executed the deed of transfer No. 2524 (2V1) on 01.12.1989, as the contract between them had been kept alive. Hence, it is incumbent upon this Court to consider the question of whether, despite the anticipatory breach of the Clause 7 by the 1st Defendant, the Plaintiff had kept the contract between them alive.

It is observed by *Weeramantry* (Vol. II, p. 880) following the judgments of ***The Holland Ceylon Commercial Company v Mahuthoom Pillai*** (1922) 24 NLR 152 ***Mutukaruppan Chetty v Habibhoy*** (1913) 3 CAC 100 and the statements in *Wessels'* SS. 2983-9, that the applicable principles of law in this regard are "… *recognised alike by the English and the Roman Dutch law.*"

In ***Thidoris Perera v Eliza Nona*** (1948) 50 NLR 176, *Basnayake* J (as he was then) answered the question whether a contract comes to an end by its breach with the statement referring to ***Williams on Vendor and Purchaser*** (4th Ed., Vol. II.), p. 993, stating (at p. 179) that "*I think not. The contract is not extinguished by the breach; for no one may discharge himself from his contract by breaking it; and the other party may enforce the contract after the breach.*"

His Lordship thereafter quoted from ***Anson on Contract*** (19th Ed.), where it is stated (at p. 318) that:

> "*A breach does not of itself alter the obligations, of either party under the contract; what it may do is to justify the injured*

party, if he chooses, in regarding himself as absolved or discharged from the further performance of his side of the contract. But even if he does so choose, that again does not mean that the contract itself is discharged or rescinded, if those terms are taken to imply that it is thereupon brought to an end and ceases to exist for all purposes; the contract still survives, though only, as it has been said, for the purpose of measuring the claims arising out of the breach."

His Lordship thought it fit to add that "*a contract does not come to an end until the vinculum juris established by a contract has been loosened and the parties restored to their former freedom of action*", clearly in the lines of Roman Dutch law principle, as found in *Wessels'* at S.3152, that "*The vinculum juris still remains, until brought to an end by performance, payment, mutual agreement or operation of law*."

Therefore, the anticipatory breach of Clause 7 by the 1st Defendant on 25.07.1989, by refusing to accept when the balance consideration that was tendered by the Plaintiff, left several options that were available to the latter in terms of law. But the availability of these options would in turn depend on the decision of the Plaintiff whether to accept the said breach as the end of the contract or not.

In the judgment of ***The Holland Ceylon Commercial Company v Mahuthoom Pillai*** (1922) 24 NLR 152, *Bertram* CJ at p. 156, stated that "*It is settled law, laid down in all the textbooks, that where one party to an agreement repudiates it, the other is not bound to accept the repudiation. He may attend upon his contract and hold the other party responsible and wait for the time of performance."* The 1st Defendant cannot unilaterally treat the contract as terminated. In the Privy Council judgment of ***Noorbhai v***

Karuppan Chetti (1925) 27 NLR 325, Lord *Wrenbury*, by making reference to the contents of a letter written by the buyer, stated (at p. 327) "*… if that letter can be read as a repudiation by the buyer, he as one of the parties to the contract could not avoid it of his own mere motion. The seller might either accept or reject the buyer's attempt to revoke it.*" *Wessels'* too states at S. 3068 that "*every failure to perform a contract constitutes a breach, and the immediate effect of such a breach is to give to the injured party the right to that remedy which the law provides for a failure of performance. Immediately the one party breaks the contract, the other party has the election either to compel the guilty party to perform his promise (specific performance), or to sue him for damages.*"

In clearly describing the legal effects of such a breach, *Weeramantry* states (Vol. II, p. 884), "*it is necessary also to observe that even a breach sufficient to effect a discharge does not itself discharge the contract, but merely gives the other party an option to decide whether he will treat the contract as discharged. Should he elect to do so, he may sue for damages at once without awaiting the date fixed for performance and in the case of an obligation entitling him to specific performance, he may ask for this relief.*"

Clearly the intention on the part of the Plaintiff is evident, when one peruses the contents of the letter dated 09.08.1989 (P4), which acknowledged the letter dated 01.08.1989 (P3), by which the 1st Defendant indicated he is no longer '*interested*' in proceeding with the sale and offered to refund the advance deposit. In P4, despite the 1st Defendant's refusal, the Plaintiff replied that he still insists that the sale should proceed, and he is not agreeable to accept a refund. This position is consistently maintained by the Plaintiff by his letter dated 21.08.1989 (P6). Only then, by letter dated 17.08.1989 (P5), for the first

time, the 1st Defendant takes up the position in P7 that the Plaintiff had failed to tender the balance consideration by obtaining a loan from a Lending Institution, in reply to P4.

Thus, the Plaintiff, at no point of time, had accepted the anticipatory breach of the Clause 7 by the 1st Defendant as the discharge of the obligations of the agreement to sell (P1) and had kept the said contract '*alive*' by continuing with his offer of payment of the balance consideration, well beyond the period of three months. In addition, the Plaintiff had given notice to the 1st Defendant by P6 that he would sue him for specific performance as per Clause 7. In reply by P7, the 1st Defendant offered to compensate the Plaintiff for any loss, by payment of damages. The judgment of ***Alawdeen v Holland Ceylon Commercial Company*** (1952) 54 NLR 289, *Gratiaen* J had quoted from the judgment of the House of Lords in ***Heynam v Darwins Ltd***. (1942) AC 356, where Lord *Simon* points out, "*repudiation by one party does not terminate a contract – it takes two to end it, by repudiation on the one side, and acceptance of the repudiation on the other*". In that judgment, Lord *Simon* had cited the following dictum of *Scrutton* LJ in an earlier case;

> "*(The innocent party) may, notwithstanding the so-called repudiation (by the other party) insist on holding his co-contractor to the bargain and continue to tender due performance on his part …*".

Identical situations that arose for determination in ***Alawdeen v Holland Ceylon Commercial Company*** (1952) 54 NLR 289 and ***Senanayake v Anthonisz*** (1965) 69 NLR 225, had been dealt with by adopting the same principle.

The Plaintiff before us, as I have already noted, had obviously adopted the second course of action as sanctioned by law, when he opted to sue the 1st Defendant for specific performance. The trial Court as well as the Court of Appeal, in accepting the position that there is a contract that had been kept alive between the Plaintiff and the 1st Defendant, particularly in view of the evidence of the Plaintiff that, in spite of the refusal to sell the property by the latter on 25.07.1989, he had clearly indicated his intention to proceed with the sale by being ready and willing to pay the balance consideration to the 1st Defendant. The Courts below therefore had correctly applied the applicable principles of law to the body of evidence that had been presented by the Parties on this issue and both the Courts had correctly arrived at the conclusion that the contract had been kept alive by the Plaintiff. Therefore, the contention of the 2nd Defendant that the contract had lapsed at the end of the three-month period with the failure to deliver the property in vacant possession cannot be accepted as a valid one, with the resultant position that the *vinculum juris* established by the agreement P1 has not been loosened and that the Parties have not been restored to their former freedom of action, per ***Thidoris Perera v Eliza Nona*** (supra).

Reliance on the 'fatal objection' per ***Amarashighe Appuhamy v Boteju*** (supra) in relation to the relief of specific performance, was placed by the 2nd Defendant on the basis that the instant action was instituted on 22.03.1990, whereas the transfer deed No. 2524 (2V1) was executed in his favour by the 1st Defendant on 01.12.1989, almost four months prior to the said institution of action. Therefore, the 2nd Defendant contends that even if the Court granted specific

performance against the 1st Defendant, "… *it is no longer in the seller's power to specifically perform the agreement*."

This contention is referable to trial issue No. 24(b), which had been raised in the form of whether the said deed conveys any title on the 2nd Defendant. The trial Court answered the said issue in the negative and against the 2nd Defendant. The reasoning of the trial Court in answering the said issue, as already referred to, is that the 1st Defendant had no title to transfer at the time of execution of 2V1 on 01.12.1989. That reasoning is in turn based on the premise that the 1st Defendant, having promised to sell the property to the Plaintiff, had thereafter breached that undertaking, triggering the specific performance clause. The trial Court had thereupon deduced that the invariable result of that breach would be that the property is deemed to have been sold to the Plaintiff as per the terms of the said agreement and therefore, the 1st Defendant had no title to pass on to the 2nd Defendant, when he subsequently chose to execute the deed of transfer 2V1.

It must be noted that the contention based on the judgment of ***Amarashighe Appuhamy v Boteju*** (supra) was not presented before the trial Court by either of the two Defendants but was only placed before the Court of Appeal by the 2nd Defendant when he preferred an appeal against the judgment of the trial Court.

The Court of Appeal, after agreeing with the trial Court of its reasoning that the agreement P1 had been kept alive by the Plaintiff, considered the said '*fatal objection*' to the granting of the relief of specific performance along with the question whether the 2nd Defendant is a *bona fide* purchaser without notice. The appellate Court

had concurred with the conclusion of the trial Court that the 2nd Defendant is not a *bona fide* purchaser without notice and had apparently relied on the following statement from *Dart on Vendors and Purchasers* (8th Ed., Vol. II, p. 883) in affirming the judgment of the trial Court in granting of specific performance:

> "*Equity will enforce specific performance of the contract of sale, against the vendor himself, and against all persons claiming under him by a title arising subsequently to the contract, except purchasers for valuable consideration who have paid money and taken a conveyance without notice of the original contract.*"

Since the Court of Appeal had considered the said '*fatal objection*' along with the issue whether the 2nd Defendant is a *bona fide* purchaser without notice, for the purpose of clarity, I would proceed to consider these two issues separately by devoting little more space to each of these in this judgment.

In order to identify the factual backdrop against which *Hutchinson* CJ had said that there is a '*fatal objection*' for the grant of the relief of specific performance as per the judgment of ***Amarashighe Appuhamy v Boteju*** (supra), I wish to examine the references made, as to the facts that were available before that Court.

In the said judgment, His Lordship had noted that the agreement upon which the plaintiff had sued the 1st defendant indicated that, upon payment of a further Rs. 450/- by the former to the latter, who had already accepted Rs. 50/- as an advance payment, certain land was to be transferred within four months from the date of their agreement. The

parties had further agreed that in the event of a breach of the said agreement, the 1st defendant was to pay plaintiff Rs. 100, as liquidated damages. Thereafter, the 1st defendant had mortgaged the said land to the 3rd defendant. He had also leased it to the 2nd defendant before making a transfer.

The plaintiff, having claimed that he was ready and willing to pay the balance sued the 1st defendant on breach of the said agreement and joined the 2nd and 3rd defendants in that action. He had prayed for an order of Court against the 1st defendant to execute a conveyance of the land in his favour, to award Rs. 100/- as damages and the transfer and mortgage of the 2nd and 3rd defendants be declared void and cancelled.

At the conclusion of the trial, the District Court had held that the plaintiff was not entitled to specific performance of the agreement "… *because it was now out of the first defendant's power to specifically perform it.*" *Hutchinson* CJ, affirmed the judgment of the trial Court as His Lordship held:

> *"Under this agreement, if the buyer tenders the balance of the purchase money within the four months, he is entitled to a transfer; if he does not, he forfeits his deposit, and is under no further liability. And if the seller, upon the money being tendered to him within that time, fails to execute a transfer (I do not say if he fails to execute it within the four months, but at all events if he fails altogether), he has to pay Rs. 100 as damages. The plaintiff contends that, having been ready within the four months to carry out his part of the agreement, he is entitled to specific*

> *performance of it. But a fatal objection to that claim is that it is no longer in the seller's power to specifically perform the agreement."*

Closer examination of the factual background, as referred to in the said judgment, indicates that the consideration of the grant of relief of specific performance on a breach of an agreement against the 1st defendant arose only upon being sued on an agreement by which he agreed that, in the event of any breach of the agreement to sell the specified land to the plaintiff, he must pay Rs. 100/- "*as liquidated damages*." The 2nd and 3rd defendants claimed that they were not privy to the said agreement between the plaintiff and the 1st defendant and got involved in the transaction only when the 1st defendant had subsequently mortgaged the same land to the 3rd defendant and also to the 2nd defendant by way of a secondary mortgage, before transferring title to him.

Thus, it is clear that in ***Amarashighe Appuhamy v Boteju*** (supra), the agreement upon which the plaintiff sued the 1st defendant, envisaged liquidated damages as the only remedy available to the plaintiff in the event of a breach by the latter. Thus, when the plaintiff sought an order of Court against the 1st defendant seeking a direction to execute a conveyance in the plaintiff's favour, he invited the Court to grant specific performance in its discretion, in addition to seeking liquidated damages, quantified at Rs. 100/-.

Affirming the District Judge's conclusion that the plaintiff was not entitled to specific performance of the agreement, because it was now out of the defendant's power to specifically perform it, His Lordship has held (at p. 189) that:

> *"The plaintiff contends that, having been ready within the four months to carry out his part of the agreement, he is entitled to specific performance of it. But a fatal objection to that claim is that it is no longer in the seller's power to specifically perform the agreement."*

His Lordship, in making the said statement, did not refer to any judicial precedent nor rely on the authoritative text on Roman Dutch law. Having stated thus, His Lordship had then remitted the matter back to the trial Court to determine the issue on damages, since the lower Court had decided the case only on an issue of law, relating to the question of availability of the relief of specific performance to the plaintiff.

This clearly is not the first of such judgments in which this issue was considered. There are several other judgments, where the appellate Courts have considered similar situations that arose for their determination as to the entitlement to specific performance and enforceability of that relief against a third party to whom the property subject to the contract had subsequently been sold.

Basnayake J, in ***Thidoris Perera v Eliza Nona*** (supra) made references to four of such judicial precedents and identifies that the principle of law on which the Courts have acted on, in those instances as (at p. 179):

> *"This Court has held in a number of cases* ***Carimjee Jafferjee v. Theodoris et al****. (1898) 5 Bal. 20.* ***Matthes Appuhamy v. Raymond et al.*** *(1897) 2 NLR 270.* ***Wickramanayake v. Abeywardene et al****. (1914) 17 NLR 169 at 171 and 172,* ***Fernando v. Peris*** *(1916) 19*

NLR 281, decided before the enactment of the Trusts Ordinance, that specific performance of a contract to sell a land cannot be enforced against a third party to whom the land has been sold in violation of the contract, except in the case of fraud, even though the agreement had been registered."

The earliest of these precedents, ***Matthes Appuhamy v Raymond et al.*** (supra), was decided in the previous year, to the year in which ***Carimjee Jafferjee v Theodoris et al*** (supra) was decided, and dealt with a situation where the agreement to sell a parcel of land, which stipulated that if the first defendant failed, refused, declined, or in any manner objected to sell the land as agreed, he should pay plaintiff Rs. 500/- as liquidated damages and return to him the part of the purchase money advanced. The 1st defendant, in breach of that agreement, had sold and conveyed the parcel of land to the 2nd defendant, who had notice of the said agreement. The District Judge held that as the agreement contained a stipulation that the 1st defendant should pay damages in default of performance of his part of the agreement the plaintiff could not compel the 1st defendant for specific performance and dismissed the action.

In appeal, *Bonser* CJ agreed with the said conclusion and dismissed the appeal on the basis that "*… stipulation as to damages was in the circumstances of this case intended to be a substitute for specific performance*". His Lordship then added that therefore "*… it is unnecessary to decide the question which was argued before us, whether specific performance can be granted in a case like the present, where the vendor has before action brought by an actual sale and conveyance to a third person of the thing contracted to be sold put it out of his power specifically to perform the contract*". Nonetheless, His Lordship had proceeded to state "*were it*

necessary to decide that question, I should be prepared to answer it in the negative, for I hold a strong opinion as to the inexpediency of introducing into this Island the doctrines and practice of the English Courts of Chancery with respect to specific performance, with all the subtleties and refinements as to notice which have been evolved by the ingenuity of successive generations of Judges of that Court." Lawrie J concurred with the decision to dismiss the appeal and stated that "*… the only remedy competent to the plaintiff under the contract was to exact payment of Rs. 500 as liquidated damages in addition to any special damage which he might be entitled to from circumstances unforeseen at the date of the contract. On the other hand, if the plaintiff "failed or refused" to pay the balance, the contract provided that he was not to be liable in the full sum of Rs. 3,500, but he should forfeit only the Rs. 250 already paid to the defendant."*

Hence, the plaintiff in that action was deemed not entitled to the remedy of specific performance and it is in *obiter* that *Bonser* CJ observed that he would answer the question referred to above in the negative due to the inexpediency of introducing principles adopted by English Courts of Chancery with respect to specific performance.

In the case of ***Carimjee Jafferjee v Theodoris et al*** (supra) the plaintiff averred that the 2nd to 4th defendants had pledged a land to him as a secondary mortgage. The 2nd to 4th defendants had undertaken to redeem the primary mortgage and not to transfer their title for 20 years. In another action, the plaintiff obtained a decree for costs against the 2nd to 4th defendants and when he seized the said property, the 1st defendant preferred a claim, apparently on a conveyance made in his favour by the 2nd to 4th defendants.

The plaintiff, in filing the action, claimed that the conveyance by the 2nd to 4th defendants in favour of the 1st defendant was made without consideration and in fraud or to avoid payment of debt owed to him. Therefore, he contended that the sale was of no force or avail in law as the vendors were not at liberty to sell the land at the time of its execution. He sought to have the land declared liable to be sold in satisfaction of his writ.

Browne J was of the view that "*if the agreement restraining sale was registered as affecting an encumbrance on the land or a limitation of the right to convey, his action might be held good, but if not might be open to question whether plaintiff ever had right to have it declared as he has prayed when he was not a party to the deed … or that it should not to prejudice him or … to have the partnership dissolved and to account to him for the value of the land sold.*"

It appears that in this instance, the Court decided that the plaintiff was entitled to his claim he sought, only if the partnership deed, in which the 2nd to 4th defendants have agreed not to sell, had been registered against the said land.

In the judgment of ***Fernando v Peris*** (supra), *De Sampayo* J, in determining the validity of the conclusion reached by the District Court, that a deed, by which the vendor had transferred his title to a third party in spite of an already registered agreement of sale, was void and the plaintiff was therefore entitled to specific performance, had held that "*the registration of a deed may be notice to the world of the existence of it, but I am not prepared to agree with the holding that such constructive notice of an agreement to sell ipso facto makes void a subsequent sale by the owner to a third party, and that specific performance may be claimed as against such third*

party". His Lordship further observed that "*In* ***Matthes Appuhamy v. Raymond,*** *which does not appear to have been cited or considered in* ***Carimjee Jafferjee v. Theodoris****, Bonser C.J. and Withers J. doubted whether under our law specific performance could be granted in a case where the vendor had by an actual sale and conveyance to a third person put it out of his power specifically to perform the contract."*

In the judgment of ***Wickramanayake v Abeywardene et al*** (supra) *Pereira* J, referring to the judgments of ***Matthes Appuhamy v Raymond*** and ***Amarashighe Appuhamy v Boteju*** (supra) cautiously stated that it would '*appear*' to His Lordship that "*… where one conveys land to a person which he had already agreed to convey to another, he thereby places himself beyond the power of specifically performing his agreement with the latter; but, clearly, under the Roman-Dutch law fraud vitiates every contract, and if the latter of the two deeds could be shown to be fraudulent, it would be cancelled, and the way paved for the specific performance of the former."*

Basnayake J, in ***Thidoris Perera v Eliza Nona*** (supra) also made a similar observation on the said principle of law by stating that it is "*based on a reading of Voet 19.1.14, which according to Nathan [Nathan's Common Law of South Africa, Vol. II. p. 675, sec. 840.] is not an authority for the proposition that a sale to a third-party purchaser with notice of a prior contract to sell cannot be rescinded in an action for specific performance*." There was no reference made to ***Amarashighe Appuhamy v Boteju*** (supra), however, in the judgment of ***Thidoris Perera v Eliza Nona*** (supra).

In ***Matthes Appuhamy v. Raymond et al*** *Bonser* CJ, in respect of the question whether specific performance can be granted where the vendor had, even before the action was brought, by an actual sale and

conveyance to a third person of the thing contracted to be sold thereby put it out of his power to specifically perform the contract, held that no *"… trace, however, of any such action is to be found so far as we have been able to ascertain in the writings of any of the recognized authorities on Roman-Dutch Law or in the records of this Court. For my own part I feel some difficulty in understanding on what principle a stranger to the contract could be sued in the actio empti, which is the only action competent to the purchaser for enforcing his rights under the contract."*

It is relevant to note that the judgments of ***Matthes Appuhamy v Raymond et al*** (supra), ***Wickramanayake v Abeywardene et al*** (supra) ***Fernando v Peris*** (supra) and ***Amarashighe Appuhamy v Boteju*** (supra) were concerned with the situations whether those plaintiffs, who were only entitled to claim liquidated damages in terms of the contracts upon which they had sued their respective defendants, were entitled to specific performance against such defendants after they made absolute transfers to third parties and therefore had no title remaining in them to pass on to the plaintiffs in specific performance. Their Lordships have considered availability of the remedy of specific performance apparently upon being guided by the considerations of equity as applied in English Law. In ***Appuhamy v de Silva*** (supra) *Lascelles* CJ said that specific performance is an equitable remedy, and in deciding whether this remedy should be given, the Courts in Ceylon are guided by the same principles as the Courts of Equity at home. But the Privy Council, in the judgment of ***Abdeen v Thaheer*** (supra) that had been delivered subsequent to these judgments, accepted the statement of *Gratiaen* J, that *"In this country, the right to claim specific performance of an agreement to sell immovable property is regulated by the Roman-Dutch Law, and not by the English Law."*

There is no question that the remedy of specific performance is also available in Roman Dutch law. In *Wessels' Law of Contract,* 2nd Ed [1951], Vol. II, at S. 3089, it is said that "*the first remedy for a breach of contract is an order to compel the defaulting party to carry out his contract. This is known as order for specific performance (executio in forma specifica).*"

Despite the reservations expressed by *Perera* J and *Basnayake* J, it is noted that *Wessels',* at S. 3122, states that "*the Court will not decree specific performance where it is manifest that the defendant cannot perform specifically. Hence, specific performance of a contract of purchase and sale will not be decreed where the subject matter of the sale has been disposed of to a bona fide purchaser.*"

In relation to the instant appeal, I am of the view that the factual situation presented before this Court is clearly different to the ones that had been dealt with by the series of judicial pronouncements culminating with the judgment of ***Amarashighe Appuhamy v Boteju*** (supra), referred to above on this point.

This is because, in this particular instance, the Plaintiff and the 1st Defendant have agreed that, in the event of a breach of their agreement, the former is entitled to sue the latter for specific performance compelling the sale of house property, as his only remedy stipulated in that agreement. Thus, the 1st Defendant had agreed that if he was found to have been in breach of that agreement, he could be sued by the Plaintiff, demanding specific performance of the agreement to sell.

In addition to this distinction, yet another distinguishing feature could be identified in the other judicial precedents as referred to earlier

on this point. The principle of law, as stated by *Basnayake* J, in ***Thidoris Perera v Eliza Nona*** (supra), after making references to ***Carimjee Jafferjee v Theodoris et al***, ***Matthes Appuhamy v Raymond et al***, ***Wickramanayake v Abeywardene et al*** and ***Fernando v. Peris*** is that *"specific performance of a contract to sell a land cannot be enforced against a third party to whom the land has been sold in violation of the contract, except in the case of fraud, even though the agreement had been registered"*. His Lordship's observation indicates that those judicial precedents are applicable in relation to instances where enforcement of specific performance is sought against a third party who had subsequently acquired title to the subject matter and not in relation to actions that are instituted against the seller, who is in breach of the contract. In this instance, the Plaintiff had sued the 1st Defendant, being the seller, and not the third party, the 2nd Defendant, for specific performance.

As such, the *ratio* of the judgment of the *Hutchinson* CJ in ***Amarashighe Appuhamy v Boteju*** (supra) is of no assistance in the determination of the instant appeal and is therefore distinguished.

Hence, the task of determining the instant appeal should be undertaken by this Court, whilst keeping in mind that the applicable legal principles that are relevant to the determination of the contractual obligations of the contesting parties as found in the authoritative texts on Roman Dutch law, in view of the pronouncement made in the Privy Council judgement of ***Abdeen v Thaheer*** (supra) to that effect. A relevant reference to a principle of law dealing with the issue at hand could be found in *Wessels'* at S. 1998, "*… the general proposition [is] that a condition in a contract, though not fulfilled, is taken to be fulfilled as against one of the parties to the contract where non-fulfilment has been brought about*

by want of good faith on the part of such party". This statement is followed by "*if therefore the loss of the subject matter is due to a positive act on the part of the debtor, he cannot be heard to say that he is not liable because the contract is impossible of performance*."

Since the terms creditor and debtor appear frequently in the texts that refers to contractual obligations, as in the quotation that had been reproduced above, it is important that those terms are properly described and identified. *Wessels'* describes them as follows (at S. 9): "*There are at least two persons concerned in every legal obligation, the creditor and the debtor. The creditor is the person who has the right to demand the performance and the debtor is the person from whom the performance is due.*" In the context of this appeal, since the Plaintiff is the person who demands the 1st Defendant to perform the act he had promised, therefore the 1st Defendant has become the debtor, with the Plaintiff being the creditor.

Thus, being the debtor, the act of the 1st Defendant in executing a deed of transfer of his title to the disputed house property in favour of the 2nd Defendant, especially when he had been forewarned by the Plaintiff through his Attorney that he would seek the remedy of specific performance on their agreement to sell following its breach, qualifies to be treated as "*a positive act on the part of the debtor*" which contributed to loss of the subject matter and therefore "*he cannot be heard to say that he is not liable because the contract is impossible of performance,*" since, the "*non fulfilment has been brought about by want of good faith*" by him.

Earlier on in this judgment, I have concurred with the conclusion reached by the lower Courts, that the contract between the Plaintiff

and the 1st Defendant had been kept alive by the former. Due to this factor, the *vinculum juris* established by the said contract between the Plaintiff and the 1st Defendant had not been loosened and the parties had not been restored to their former freedom of action. In these circumstances, the legal effect of the contract that had been kept alive by the Plaintiff over the ownership rights of the 1st Defendant in relation to the said agreement of sale must be considered.

It was contended on behalf of the 2nd Defendant by the learned President's Counsel that the trial Court, in answering issue Nos. 15 and 17 in the affirmative, had accepted that the 2nd Defendant is the owner of the property and therefore he must be treated as a *bona fide* purchaser, against whom specific performance could not be granted.

Since the 2nd Defendant referred to issue Nos. 15 and 17 and relied on the answers given by the trial Court in support of his contention, it is relevant to consider what those two issues are**.** Issue No. 15 had been raised by the 2nd Defendant to the effect whether ownership of the premises in suit had been transferred to him by Deed of Transfer No. 2524 of 01.12.1989. Issue No. 17 concerns the question of, if that is the case, whether the Plaintiff could institute and maintain the instant action by which he seeks specific performance of the 'purported' agreement No. 65 (P1). During trial, parties have agreed that the 2nd Defendant had become the 'owner' of the said premises by the transfer deed No. 2524 (2V1) and accordingly the trial Court had answered issue No. 16, which relates to the ownership of the premises in suit, in the affirmative and in favour of the 2nd Defendant.

Since the trial Court answered issue No. 17 also in the affirmative, the learned President's Counsel for the 2nd Defendant

contends that, having answered those issue Nos. 15 and 16 in the affirmative, it is not possible for the trial Court to answer issue No. 17 also in the affirmative, in view of the ratio of the judgment of ***Amarashighe Appuhamy v Boteju*** (supra). This contention of the 2nd Defendant demands this Court considers the same under two segments. Firstly, the finding in relation to the ownership of the 2nd Defendant, and secondly, the finding in relation to whether he is a '*bona fide purchaser*'. This is because, the Plaintiff, in his replication, had sought cancellation of the deed No. 2524 (2V1) and it appears that the trial Court had considered all three issues at the same time in its judgment. Therefore, this Court must first verify the legality of the findings of the trial Court as well as the Court of Appeal on these points, in view of the evidence presented by the respective parties and the applicable legal principles.

Perusal of the judgment of the trial Court indicates that, despite answering the issue No. 16 in the affirmative, it had concluded that the 1st Defendant had no 'ownership' remained in him for it to be transferred to the 2nd Defendant, who therefore received a 'void' or no title ("නිස් අයිතිය") by 2V1. This is because at the time of execution of the deed No. 2524 the 1st Defendant had already surrendered his ownership to the demand of specific performance by the Plaintiff. Moreover, the 2nd Defendant has had notice of the agreement to sell and had offered Rs. 50,000/- more than the agreed value between the Plaintiff and the 1st Defendant as stipulated in that agreement. The Court of Appeal affirmed this conclusion of the trial Court and added that subsequent to the search conducted in the Land Registry, the 2nd Defendant was fully aware as to the nature of the legal rights the

Plaintiff had over the house property, in respect of which he sought specific performance.

The attributes of ownership of property were clearly identified by the legal writers and the appellate Courts. In the judgment of Privy Council, ***Attorney General v Herath*** (1960) 62 NLR 145, Mr. *De Silva*, having referred to the text of *Introduction to Roman Dutch law by Lee*, 5th Ed, p. 121, also had quoted *Maasdorp (Volume II., p. 27)* in relation to attributes of ownership of property of an owner and stated that these attributes are "*comprised under three heads, namely, (1) the right of possession and the right to recover possession; (2) the right of use and enjoyment; and (3) the right of disposition.*"

When the 1st Defendant, by entering into the agreement P1, had voluntarily undertaken that "*in the event of the Party of the Second Part is ready and willing to pay the balance purchase price aforesaid as soon as obtaining the loan and the Party of the First Part is resisting and/or neglecting to execute a valid deed of Transfer in favour of the Party of the Second Part then the Party of the Second Part shall be entitled to specific performance*" and accordingly had subjected his right to the disposition of his property to the said Clause 7 of the contract P1.

Both the Plaintiff and the 1st Defendant are entitled to enter into a contract on the terms that they choose. *Wessels'* states at S. 2000 thus: "*as the terms of contract constitute a law between the parties, they are entitled by their contract to derogate from the provisions of any public law made in their favour, provided these provisions were not made as a protection to the public.*" With his agreement to the said clause in the agreement to sell, the 1st Defendant had effectively surrendered the right of disposition he had over the disputed property to the Plaintiff and, in the event of a

breach, made it subject to the discretion of the latter, who would then have to decide between the alternatives of either treating such a breach by the former as the end of the contract and sue for damages or whether to seek specific performance. The Plaintiff had unambiguously opted for the latter course of action and had in fact sued the 1st Defendant on that clause, seeking specific performance.

It is stated in the deed of transfer No. 2524 of 01.12.1989 (2V1), executed in favour of the 2nd Defendant "… *that the said Vendor has good and rightful power and lawful and absolute authority to transfer and convey the said premises in the manner aforesaid and that the same are free from all encumbrances claims caveats levies and liabilities or other disadvantages whatsoever …*".

By then, the 1st Defendant, by entering into an agreement to sell with the specific performance clause, had already surrendered his "*absolute authority to transfer and convey the said premises"* and incurred an encumbrance on his "*absolute authority to transfer*". The Plaintiff, on his part, had kept the agreement alive by not allowing the 1st Defendant to end their contract after the latter's breach of same in "… *refusing and/or neglecting to execute a valid deed of Transfer*" and obviously acted on the principle that "*a contract does not come to an end until the vinculum juris established by a contract has been loosened and the parties restored to their former freedom of action*".

In addition to the properties that are subjected to mortgages, the multiple ways in which such encumbrances on ownership could arise have been considered by the superior Courts. The applicable principles in such situations were referred to in these judicial precedents. In ***Fernando v Perera*** (1914) 17 NLR 161, the defendants agreed to sell a

property to the plaintiff and the agreement to sell contained a stipulation that the vendors should "*execute a good and valid conveyance of the said premises free from all encumbrances in favour of the purchasers…*". The plaintiff, having discovered that the defendants cannot pass valid title to the property without obtaining the leave of Court under the Entail and Settlement Ordinance No. 11 of 1876, wanted the defendants to obtain the leave of Court to sell the property, notwithstanding the *fideicommissum* with which it was burdened. The defendants repudiated all liability to execute a conveyance after the expiration of the time stipulated by the agreement. The plaintiff then instituted action, in which he sought that the defendants be ordered to execute a good and valid conveyance free from encumbrances, or in the alternative, to return of the deposit and Rs. 5,000/- damages.

Lascelles CJ held (p. 164) that, "*a good and valid conveyance means a conveyance which is effective in law for transferring the interest which the parties intended to convey, namely, the unfettered ownership. But the words free from all encumbrances greatly strengthen this construction*." His Lordship then poses the question: "*How can property which is burdened with a fideicommissum – the most troublesome of all encumbrances - be described free from encumbrance?*"

Perera J concurring with *Lascelles* CJ, stated (at p. 167) that it is expressly stipulated in the agreement sued upon that the vendors should "*execute a good and valid conveyance of the land free from all encumbrances in favour of the purchaser*", and "*… not merely that the seller was to execute a formal conveyance in accordance with legal requirements, but that he should be in a position to make a good title according to his undertaking to sell and transfer the parcel of land referred to in the deed of agreement.*"

A similar approach was adopted in ***Sulaikamummah et al v Ahamadylevvai*** (1917) 19 NLR 473 where *De Sampayo* J stated (p. 476) the term "*free from all encumbrances*" refers not merely to mortgages or charges, "*but also to all such burdens as fidei commissa, which may affect the title*". In a comparatively recent judgment, ***Mendis v Abeysinghe and another*** (1994) 2 Sri L.R. 29, *Amerasinghe* J held that a land and premises that were subject to Testamentary Action and Estate Duty to have had an encumbrance in favour of the Commissioner of Estate Duty who had the right to have the property sold for payments of Estate Duty.

Wessels' refers to a doctrine that "*if a person buys property with notice of the existence of a burden upon such property, he can be compelled to recognise the burden*" and cited a series of judgments where those principles of law had been applied in South Africa (at S. 4434, Vol. II, p. 1091).

Hence, I am of the view that the conclusion reached by the Courts below, holding that when the 1st Defendant executed deed of transfer No. 2524, he was incapable of disposing his ownership to property in favour of the 2nd Defendant, due to his own act of surrendering that right in favour of the Plaintiff by agreeing to a specific performance clause and as such, no ownership is transferred to the 2nd Defendant, is legally a correct conclusion. I would further add that, since the Courts below were of the view that the 2nd Defendant has had notice of the said specific performance clause, the doctrine that "*if a person buys property with notice of the existence of a burden upon such property, he can be compelled to recognise the burden*" is clearly applicable.

In the context of the Plaintiff's entitlement to enforce the specific performance clause against the 1st Defendant, this Court must make a

reference to another contention advanced by the learned President's Counsel for the 2nd Defendant. In support of his position that the Plaintiff is not entitled to specific performance of the agreement to sell, it was highlighted that the Plaintiff had sought damages against the 1st Defendant, as an alternative relief.

The Plaintiff had averred in his plaint that "*a cause of action has arisen to the Plaintiff to sue the Defendant for breach of contract and to enforce specific performance of the said agreement and/or to recover damages estimated at a sum of Rs. 3000,000.00 together with the advance payment of Rs. 15,000.00.*"

The applicable law on this point has succinctly been stated by *Withers* J, who delivered the principal judgment of the divisional bench in ***Matthes Appuhamy v Reymond et al*** (supra) at p. 274, as follows:

> *"Can the intending buyer compel the intending seller specifically to perform an agreement to sell a particular land if that agreement contains an express stipulation to pay damages generally, or a certain sum by way of damages in the event of the seller not conveying the land in terms of the agreement? The answer to this question seems to me to depend on the wording of the agreement and the intention of the parties as indicated by their contract.*
>
> *If the penal stipulation is intended to be merely accessory to the principal obligation, then it is surely open to the seller to exact specific performance.*
>
> *If, on the other hand, the penal stipulation is an alternative obligation, and it is intended that the party making it may break the principal obligation, but shall pay the consequent damages,*

then the other party is restricted to his right of action to recover those damages. He cannot enforce specific performance. A party who breaks a binding contract is responsible in damages, whether he specially engages to pay those damages or not.

To add a stipulation to pay damages may be of advantage to the party for whose benefit it is made, especially when a definite sum is agreed to as a measure of damages, and that sum is secured by a mortgage or otherwise.

The mere fact of such a stipulation being inserted in a contract does not necessarily imply that it was put in as an alternative obligation for the exclusive benefit of the stipulator."

This principle was acted upon in ***De Silva v Senaratne*** (1949) 50 NLR 313 by *Jayetileke* J at p. 316, who added that "*the mere fact of such a stipulation being inserted in a contract does not necessarily imply that it was put in as an alternative obligation for the exclusive benefit of the stipulator. Rather, I think, that if such a stipulation intended to be alternative and not accessory the intention should be clearly expressed or indicated.*"

In the matter before us, the Plaintiff stipulated only specific performance of the contract against the 1st Defendant in terms of their agreement P1, in the event of a breach of same by the latter. Only in the plaint did he include a prayer for damages. *Viknarajah* J said in the judgment of ***Noorulasin and Another v De Zoysa and Others*** (1989) 1 Sri LR 63 at 73 that "*the intention of the parties is clearly and expressly set out in the agreement P1.The intention is to give the option to the party ready and willing to perform his part of the contract to compel performance by the other party who is in default*"; this is as in the instant appeal, where the intention of the parties are clearly evident from the wording of the

Clause 7 of the agreement P1. Since the Plaintiff was ready and willing to perform his part of the contract, as *Jayetileke* J said in ***De Silva v Senaratne*** (supra) "*… the right to elect is rather with the plaintiff.*" In the plaint he had described his cause of action that had accrued against the 1st Defendant a as breach of contract and the enforcement of specific performance of the agreement. The agreed terms indicate that he did select specific performance over damages. The intention of the Plaintiff, as indicative in the correspondence, also points to a claim of specific performance. This view is in line with the principle of law laid down by the Privy Council in ***Abdeen v Thaheer*** (supra) that the entitlement of a party who had fulfilled his part of the obligations "*enjoys a legal right to demand performance by the other party*" and the interests of justice does not demand denial of that right to the Plaintiff.

Another contention that had been advanced by the learned President's Counsel for the 2nd Defendant is that the Plaintiff did not amend the plaint after adding him as a party to the instant action. It was submitted that the Plaintiff therefore did not seek any relief from the 2nd Defendant. It was also submitted that after the addition of the 2nd Defendant as a party on the basis that latter was the current owner of the premises in dispute, the Plaintiff cannot seek the relief of specific performance against him, as *Weeramantry* on Contracts states (at p. 161) "*… where the subject matter of a sale has been disposed of to a bona fide purchaser specific performance will not be decreed against the seller.*" The learned President's Counsel further contended that since the issue No. 24A had been answered as "*not proved*", it indicates there was no fraud committed by the 2nd Defendant in acquiring the title to the disputed premises.

Placing reliance on these contentions, the learned President's Counsel for the 2nd Defendant submitted that the judgment of the trial Court is erroneously made as it had made several orders against the 2nd Defendant, without any such relief being prayed against him and in the absence of any issues or any evidence presented in support. It was alleged that the trial Court had denied him of an opportunity of presenting a defence, thereby violating the fundamental rule of *audi alteram partem.* He further alleged that the trial Court had undertaken a voyage of discovery on its own, contrary to the principles enunciated in the judgment of ***Pathmawathie v Jayasekera*** (1997) 1 Sri LR 248.

Replying to this contention, the learned President's Counsel for the Plaintiff invited the attention of Court to the replication of the Plaintiff, where it is specifically prayed for several reliefs against the 2nd Defendant as well. Importantly, the Plaintiff had specifically prayed for a declaration of Court that the deed of transfer No. 2524 (2V1) is a nullity. Therefore, the trial Court was called upon by the Plaintiff to grant such reliefs in his favour, and the trial Court had accordingly acted well within the scope of the dispute disclosed by the pleadings and the respective cases that had been presented before it by the contesting parties.

The principle of law stated in the judgment of ***Wickramanayake v Abeywardene et al*** (1914) 17 NLR 169 is relevant and applicable in dealing with this aspect of the contention advanced by the learned President's Counsel for the 2nd Defendant.

On the question of cancellation of the Deed of Transfer (2V1), the judgment of ***Wickramanayake v Abeywardene et al*** (ibid) refers an instance where the plaintiff claims that one *Don Bastian* had agreed to

convey a certain parcel of land to him but failed to do so before his death. The 3rd and 4th defendants, being heirs of *Don Bastian,* had transferred that land to the 2nd defendant. The plaintiff therefore sought a cancellation of the said conveyance by the 3rd and 4th defendants in favour of the 2nd defendant, and as a preliminary to the first defendant, being the administrator of *Don Bastian's* estate, was ordered to execute a conveyance of the land referred to above, in his favour.

Delivering the judgment, *Pereira* J (at p. 170) stated that "… *the present case is similar to a case by A against B and C claiming that a conveyance by B in C's favour be set aside, and that B be condemned to execute a conveyance of the property thus released in favour of A in specific performance of an agreement between A and B prior to the conveyance of the land by B in favour of C* …" and held "*it is clear that no conveyance can be executed by B in favour of A until the conveyance by B in favour of C is cancelled. … Court has more than once laid down, under our law, even a fraudulent conveyance, unlike one executed by a person not competent to contract, which on that account would be null and void, is operative until it is set aside by an order of Court, and when it is set aside, the cancellation refers back to the date of the conveyance*".

Thus, in this instance the deed No. 2524 (2V1) was rightly cancelled by the trial Court before ordering the Registrar of the Court to execute a transfer in favour of the Plaintiff upon the death of the 1st Defendant halfway through the trial. Clearly, the trial Court had acted on this principle of law as referred to in ***Wickramanayake v Abeywardene et al*** (supra).

Having dealt with the contention regarding the '*fatal objection'* as referred to in the *dictum* of the judgment of ***Amarashighe Appuhamy v Boteju*** (supra) in the preceding paragraphs, let me now turn to another

question, as to whether the Courts below have erred in rejecting the defence of the 2nd Defendant that he is a *bona fide* purchaser without notice.

The learned President's Counsel for the 2nd Defendant contended before this Court that the trial Court could not have concluded that he is not a *bona fide* purchaser, when it had answered issue No. 24A as "not proved" while answering issue Nos. 15 and 16, in the affirmative. Issue No. 24A was in relation to whether the 2nd Defendant, whilst being aware of the Plaintiff's rights, could fraudulently acquire ownership upon deed No. 2524 (2V1). Issue Nos. 15 and 16 were to the effect whether the 1st Defendant had sold the property to the 2nd Defendant by virtue of deed No. 2425 and whether the 2nd Defendant had become the owner of the premises upon the said execution. He then submitted that the Court of Appeal had erroneously decided to affirm the said conclusion in its impugned judgment.

Challenging the validity of the contention of the 2nd Defendant that he is a *bona fide* purchaser without notice, the learned President's Counsel for the Plaintiff contended that the 2nd Defendant, having verified that there is an already registered agreement to sell in existence, however, did not insist on its formal cancellation by the 1st Defendant, before proceeding with the transaction of sale. In these circumstances, the learned President's Counsel submitted that the 2nd Defendant cannot plead ignorance of the said encumbrance created by the legally binding agreement on the 1st Defendant, which effectively prevented him from disposing of the said disputed premises.

The 2nd Defendant, in his answer, took up the position that he is a *bona fide* purchaser without notice but did not put that as a trial issue.

This position was raised only in his written submissions before the trial Court and taken up as a ground of appeal before the Court of Appeal. In the absence of a specific issue on this, there is no definitive finding by the trial Court on whether the 2nd Defendant is entitled to be treated as a *bona fide* purchaser or not. Only in appeal did the 2nd Defendant raise a ground of appeal whether the trial Court had erroneously considered the 2nd Defendant as not a *bona fide* purchaser for value without notice. Being constrained without a specific issue, the learned President's Counsel had sought to overcome the said deficiency by amalgamating the scope of issue Nos. 15, 16 and 24A, in formulating his contention that the 2nd Defendant is a *bona fide* purchaser without notice.

Since there is a definite finding by the Court of Appeal against the 2nd Defendant that he is not a *bona fide* purchaser without notice, and having granted leave on the issue, this Court would proceed to consider this contention.

It is interesting that *Wessels'* too states at S. 3122, that "*the Court will not decree specific performance where it is manifest that the defendant cannot perform specifically. Hence, specific performance of a contract of purchase and sale will not be decreed where the subject matter of the sale has been disposed of to a bona fide purchaser.*"

There was no dispute that the 2nd Defendant had purchased the property for consideration. Therefore, in order to succeed in the defence of a *bona fide* purchaser for consideration without notice, the 2nd Defendant should have established that he had no notice of the existing agreement to sell between the 1st Defendant and the Plaintiff. It was his burden to establish the same. Describing the effect of the defence of *bona*

fide purchaser without notice, in ***Kusumawathie et al v Weerasinghe*** (1932) 33 NLR 265, *Macdonell* CJ and in ***Coomaraswamy v Vinayagamoorthy et al*** (1945) 46 NLR 246, *Howard* CJ have quoted from ***Pilcher v Rawlins*** LR 7 Ch. App. 268 where it states:

> *"A purchaser's plea of a purchase for valuable consideration without notice is an absolute unqualified, unanswerable defence … such a purchaser, when he has once put in that plea may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the bona fides or mala fides of his purchase, and also the presence or the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgment, this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him."*

During his examination in chief, the 2nd Defendant did offer evidence of denial in relation to whether he had any notice of the agreement between the Plaintiff and the 1st Defendant over the house property that he had purchased. The 2nd Defendant, having initially maintained that he had no knowledge of that agreement, subsequently admitted with reluctance that prior to the purchase, he did conduct a 'search' in the Land Registry and found that there was a registered agreement to sell. It is his position that upon enquiry, he was advised

by his Attorney that its validity period was over ("කාල සීමාව පැනලා"), a position the 1st Defendant too had confirmed. The 2nd Defendant therefore asserts that only then did he proceed with the purchase. Thus, the 2nd Defendant admits he has had notice of the agreement but was under the impression that its validity has lapsed. In these circumstances, before I consider the question of whether the Court of Appeal correctly concluded that the 2nd Defendant has had notice of the agreement, it is helpful if the evidence relevant to the point is also referred to.

The evidence placed before the trial Court indicates that the three parties to the instant litigation, the Plaintiff and the two Defendants, were not total strangers to each other. The Plaintiff had bought the house he lived in from the sister of the 1st Defendant. The house property in dispute owned by the 1st Defendant too is located in the same land on which the house of the Plaintiff stood and had no physical demarcations or boundaries between them. The 2nd Defendant came into occupation of the house owned by the 1st Defendant as the tenant, a few years before the 1st Defendant entered into the agreement of sale with the Plaintiff. The 2nd Defendant admitted that he had known the Plaintiff well, being his immediate neighbour.

The 2nd Defendant had tendered plan No. 2452 dated 6th November 1972 prepared by Surveyor *Peiris* marked as 2V2. This plan made a subdivision of lot 2 in plan No. 1641 by the same Surveyor, equally dividing the said lot into two sub lots, each with an extent of 16 1/8 perches, depicted as Lot Nos. 2A and 2B therein. The 2nd Defendant admitted that the Plaintiff owns lot No. 2A, which had *Averiwatte* Road as its North-Western boundary and, through deed No. 2524, he had purchased lot No. 2B.

It is important to note that, in the preparation of the plan 2V2, the Surveyor had made the following remark: "*Subdivision of lot 2 into 2 lots marked 2A & 2B is done by me on Plan only, without a survey*." This indicates the purpose of the surveyor's visit to the premises that had taken place prior to when the 1st Defendant executed deed 2V1, as admitted by the 2nd Defendant. Clearly, his visit was to demarcate the boundaries on the land, as per 2V2.

Since 1972, the year in which the plan 2V2 was prepared, the 1st Defendant did not think it was necessary to physically demarcate boundaries to his property, despite the Plaintiff acquiring title from his sister to the adjacent lot 2A. Then what necessitated the 1st Defendant to obtain the services of a surveyor at that particular point of time? Clearly, it is not on the request of the Plaintiff, as if the sale had proceeded as agreed, he would have been happy to have the lots 2A and 2B forming one contiguous land. But, if lot 2B is to be purchased by the 2nd Defendant, then it is likely that he would want his land clearly demarcated and separated from the adjoining lot owned by the Plaintiff with a definite boundary.

It is clear that the Plaintiff and 1st Defendant have entered into the agreement to sell on 26.04.1989 and the transaction was to conclude within a period of three months starting from that date. The agreed consideration was Rs. 200,000/-. However, the 1st Defendant did not want to proceed with the sale, when the Plaintiff informed him that the balance consideration was ready.

What would probably have made the 1st Defendant change his mind?

The answer lies in 2V1, which indicates that the same premises was disposed of to the 2nd Defendant for a consideration of Rs. 250,000/-, a significantly higher price than to the price the Plaintiff had offered. There is no evidence that there were other prospective buyers apart from the Plaintiff and the 2nd Defendant. Therefore, it is reasonable to infer that, in order to make a counteroffer which is significantly higher in value, the 2nd Defendant should be well aware of the already agreed consideration between the Plaintiff and the 1st Defendant. Of course, the 2nd Defendant denies having had any knowledge of the contents of the agreement and relied only on the 'advice' of his Attorney that the validity of the agreement period is over. But he did not explain in his evidence, his failure to enquire from his immediate neighbour, whether the agreement had in fact lapsed. One could say that that itself is an indication as to the *bona fides* of the 2nd Defendant. If the agreement had lapsed and had no validity, as the 2nd Defendant was informed, there was no prospect of the Plaintiff being a competitive bidder and was no longer in a position to prevent the 1st Defendant from proceeding with a sale to another buyer. The 1st Defendant, who had already been informed by the Plaintiff that legal action would be instituted to enforce the specific performance clause of the agreement, had apparently concealed the probable threat of litigation from the 2nd Defendant and proceeded with the sale, obviously to frustrate the Plaintiff from seeking specific performance of the contract.

When considered in light of the above, it is more probable that the 2nd Defendant would have made his offer to the 1st Defendant, within the three-month period as stipulated in the agreement P1, and puts himself as a competitor against the Plaintiff. Since the 2nd

Defendant had made a better and a more enticing offer, it is obvious that the 1st Defendant would prefer to go for the higher price, backtracking from his already made undertaking. This is indicative from the letter by the 1st Defendant P3, written soon after the three-month period was over, informing the Plaintiff that he was not in a position to handover his premises in vacant possession and therefore he was '*not interested to sell*'. The use of the word '*interest*', instead of 'unable' is significant in the circumstances.

During the trial, the 1st Defendant sought to impute liability for the failure to perform the contract on the insistence of vacant possession by the Plaintiff. The 2nd Defendant was in possession of the premises as a tenant of the 1st Defendant. If the 2nd Defendant had no intention to move out within three months and informed his landlord of that position then, why did the 1st Defendant undertake via a written agreement, that he would deliver the premises in vacant possession within that period? It is obvious that the 1st Defendant was confident at that point of time he could deliver vacant possession within the three-month period. But some significant factor had altered the ground situation during this period, which induced the 1st Defendant to retract his own undertaking. The continuance of the 2nd Defendant's tenancy had accrued to the benefit of both the 1st and 2nd Defendants and was sought to be utilised by the 1st Defendant, in seeking to justify his breach of the agreement to sell.

The learned President's Counsel for the 2nd Defendant had relied on the answer of the trial Court to issue No. 24, which was meant to determine whether the 2nd Defendant, whilst being aware of the Plaintiff's rights, fraudulently acquired ownership upon deed No. 2524

as "not proved", to denote his client is in fact a *bona fide* purchaser without notice.

The answer of the trial Court on that particular issue is in line with the judgment of ***Wickramanayake v. Abeywardene et al*** (supra) which dealt with a similar situation where the trial Judge had held that the second defendant before him '*made a collusive purchase*' as his answer to the issue of whether the second defendant was a *bona fide* purchaser for value. This conclusion was reached by the Judge, in the absence of an issue of whether there was fraud. The appellate Court had held that "*… clearly, under the Roman-Dutch law fraud vitiates every contract, and if the latter of the two deeds could be shown to be fraudulent, it would be cancelled, and the way paved for the specific performance of the former. So that, the main question in the present case is whether deed No. 784 was executed in fraud of the plaintiff. No such issue was expressly framed*". In these circumstances Court noted that "… *mere collusion or lack of bona fides does not necessarily amount to fraud. A person may take unfair advantage of a particular situation and act accordingly, but his action may, nevertheless, not be fraudulent. Whatever is dishonourable is not necessarily dishonest in the eye of the law*". Thereupon, *Pereira* J remitted the dispute back to the District Court to try the issue framed by Court. His Lordship observed "*I think that the parties should clearly understand the issue before them and then proceed to trial thereon. I would set aside the judgment, and direct that the following issue be framed and tried in lieu of issue No. 10. Did the third and fourth defendants and the second defendant act collusively and with intent to defraud the plaintiff in the execution of deed No. 784, dated July 16, 1910?*" In the instant appeal, the issue related to fraud had been answered by the trial Court as not proved. There was no contest by the Plaintiff that the trial Court was wrong.

In dealing with the question whether the 2nd Defendant is a *bona fide* purchaser without notice, this Court takes note of the fact that the agreement to sell P2, had been duly executed in compliance of section 2 of the Prevention of Frauds Ordinance and registered properly in the correct folio. The 2nd Defendant did act under section 42 of the Registration of Documents Ordinance, and utilised its provisions, which enable "*all duplicates and copies and all books and indexes kept under this Ordinance may be searched and examined by any person claiming to be interested therein or by his attorney-at-law or agent duly authorized thereto in writing, and certified copies of or extracts from any such duplicate, copy, or book may be obtained if required.*"

The purpose of enacting these provisions was considered by the appellate Courts and, in ***Rajapaksa v Fernando*** (1918) 20 NLR 301, *Ennis* J dealt with the question of constructive notice, arising by reason of registration, and held thus (at p. 304):

> "*The object of registration is the protection of bona fide purchasers; it enables them by search to discover previous dealings with the property; and Hogg (on Deeds of Registration) page 99 enunciates the consequent rule as follows 'The rule that a person searching the register has notice of what is on the register – in Lord Redesdale's words in Bushell v. Bushell, if he searches he has notice – seems to supply the right principle on which to rest the further rule, that a person who ought to search the register must be taken as having notice of what he would find there if he did search. Facts and circumstances that might thus be discovered will then be the subject of constructive notice, and constructive notice, quite as much as actual notice, may afford evidence of fraud or want of bona fides.*"

Schneider J also held similar view and quoted the identical passage in ***De Silva v Lapaya et al*** *(1927) 29 NLR 177* at p. 184. These principles were followed in ***Kusumawathie et al v Weerasinghe*** (1932) 33 NLR 265 by *Macdonell* CJ (at p. 271) and in ***Shanmugam and Another v Thambiaiyah*** (1987) 1 Sri LR 357.

Coomaraswamy, in his book titled *The Conveyancer and Property Lawyer* Vol. I, Part 1, citing the Privy Council judgment of ***Munro v Divecott*** 1911 AC 149, states (at p. 31) "*the object of registration … to afford the public the means of knowing to whom the ownership of the land of the country belongs, what are the interests carved out of it and what are the charges upon or encumbrances affecting it, so that their owners may discharge the liabilities which ownership entails, and that those who deal with them may be protected. The objects of registration, therefore, are publicity and the avoidance of fraud*." He then imposes on the purchaser's notary (at p. 344) that he "… *must search in certain registers to discover the rights, if any to third parties which are enforceable against the land. This is an important part of examination of title because a purchaser will generally be affected with constructive notice of everything which is capable of registration and is registered, whether he searched it or not.*"

The judgment of ***Rajapaksa v Fernando*** (supra) was in relation to a registered instrument and even if the purchaser had not taken the more prudent course of action by conducting a search, the Courts have nonetheless imputed '*constructive notice*' of the instruments that have been registered in relation to the disputed property on such a purchaser. In this instance of course, the 2nd Defendant, by his own admission, did conduct a search and therefore qualifies to be considered as a person who has had actual notice of "*what is on the register*" and not mere by a constructive notice of it. When considered in this light, the

absence of a caveat, makes no difference as the 2nd Defendant was fully aware of the terms contained in agreement P1.

The question what constitutes notice in relation to a *bona fide* purchaser was considered in ***Crédit Agricole Corporation and Investment Bank v Papadimitriou*** [2015] UKPC 13 where Lord *Sumption* stated explicitly (in para 33):

> *"Whether a person claims to be a bona fide purchaser of assets without notice of a prior interest in them, or disputes a claim to make him accountable as a constructive trustee on the footing of knowing receipt, the question what constitutes notice or knowledge is the same. It is a question which has taxed judges for many years. In particular they have been much exercised by the question in what circumstances a person is under a duty to make inquiries before he can claim to be without notice of the prior interest in question. Ultimately there is little to be gained from a fine analysis of the precise turns of phrase which judges have employed in answering these questions. They are often highly sensitive to their legal and factual context. The principle is, I think clear. We are in the realm of property rights and are not concerned with an actionable duty to investigate. The hypothesis is that the claimant has established a proprietary interest in the asset, and the question is whether the defendant has established such absence of notice as entitles him to assume that there are no adverse interests. The mere possibility that such interests exist cannot be enough to warrant inquiries. There must be something which the defendant actually knows (or would actually know if he had a reasonable appreciation of the meaning of the information in*

his hands) which calls for inquiry. The rule is that the defendant in this position cannot say that there might well have been an honest explanation, if he has not made the inquiries suggested by the facts at his disposal with a view to ascertaining whether there really is. I would eschew words like "possible", which set the bar too low, or "probable" which suggest something that would justify a forensic finding of fact. If even without inquiry or explanation the transaction appears to be a proper one, then there is no justification for requiring the defendant to make inquiries. He is without notice. But if there are features of the transaction such that if left unexplained, they are indicative of wrongdoing, then an explanation must be sought before it can be assumed that there is none."

When these principles are applied to the circumstances and inferences that have been drawn from them as referred to in the preceding paragraphs, I am of the view that the 2nd Defendant, when he made the purchase of the disputed house property through 2V1 from the 1st Defendant, was well aware as to the specific performance clause it was subjected to, and his conduct referred to above in this judgment, though not termed as 'fraudulent' by the trial Court, certainly indicates of a complicity far more than to mere his collusion. In these circumstances I am inclined to concur with the conclusion reached by Court of Appeal to reject the 2nd Defendant's claim of being a *bona fide* purchaser without notice, by applying the test formulated by Lord *Sumption*, whether the 2nd Defendant "*has established such absence of notice as entitles him to assume that there are no adverse interests*" and answering the same in the negative.

At the concluding stage of this judgment, I think it is pertinent to quote a statement of *HNG Fernando* J (as he was then), from the judgment of ***Abdul Majeed v Ummu Zaneera et al*** (1959) 61 NLR 361, in which their Lordships, in three separate judgments, have enunciated several principles of law applicable in determining a claim of prescription by a co-owner against other co-owners. *Fernando* J in his judgment stated (at p. 377) that "*having regard to my own unfamiliarity with a subject which has received much critical and learned consideration from the Bench and the Bar, and in connection with which Lord Mansfield had observed "the more we read, unless we are very careful to distinguish, the more we shall be confused', I must be pardoned if, in the course of my attempt to analyse the problem which possession by co-owners presents, I emphasise too much that which should have been obvious*". This statement is applicable with equal force, if not more, to this undertaking of mine, in which I have endeavoured to decipher the appliable legal principles relating to specific performance, in the realm of Roman Dutch law jurisprudence.

However, before I part with this judgment, it is necessary to consider one last contention that had been advanced by the learned President's Counsel for the 2nd Defendant. Referring to the Court of Appeal judgment, the learned President's Counsel submitted that the parties to the instant litigation have presented their respective cases on the principles in law of contract and not on the principles of constructive trust created under section 93 of the Trusts Ordinance. The 2nd Defendant complained that the Court of Appeal had decided his appeal upon applying the provisions of section 93 of the Trust Ordinance, a position never relied upon by any of the parties to the litigation, either in their pleadings or in the issues. It was submitted that, in view of section 98 of the Trusts Ordinance, a Court cannot

decide a case on section 93 of that Ordinance, which had no application to the pleadings, the issues, the dispute presented to Court and the cause of action. Hence, the learned President's Counsel for the 2nd Defendant contended that the judgment of the Court of Appeal is liable to be set aside.

The learned President's Counsel for the Plaintiff, submitted that the reference to section 93 of the Trusts Ordinance made by the Court of Appeal was meant for the purpose of supplementing its already made decision to uphold the judgment of the trial Court, as a perusal of the said judgment, and the context in which those references are made, would reveal.

It is noted that the Court of Appeal, immediately after reproducing section 93 of the Trusts Ordinance in its impugned judgment, had proceeded to state that "*if a person agrees to sell a land, and afterwards refuses to perform his contract and then sells the land to a purchaser who has notice of the agreement, the latter will be compelled to perform the contact of his vendor*." Then the appellate Court had quoted the judgments of ***De Silva v Senaratne*** 50 NLR 313, ***Perera v Eliza Nona*** 50 NLR 176 and ***Dart on Vendors and Purchases*** (8th Ed, Vol. II p. 883) and concluded that the trial Court had "*carefully analysed all the evidence led in the case and held with the Plaintiff*" by acting on the principle it had already identified in relation to the claim of a *bona fide* purchaser for consideration without notice. The Court of Appeal therefore decided that there was no reason to interfere with the impugned judgment of the trial Court and the appeal of the 2nd Defendant was accordingly dismissed.

In its 11-page judgment, the Court of Appeal had made reference to section 93 of the Trusts Ordinance after citing the judgment of ***Silva v Salo Nona*** 32 NLR 81, where the registration of an agreement to sell was held as sufficient notice in relation to the said section. The said reference in the judgment had been made by the appellate Court, in dealing with the 2nd Defendant's position that he is a *bona fide* purchaser without notice, and thereby concurring with a similar conclusion reached by the trial Court. In rejecting the claim of a *bona fide* purchaser without notice, the appellate Court had stated "… *it is very clear that the 2nd Defendant purchased the said property with the full knowledge that the Plaintiff had a legal right to seek specific performance of P1 and have the said property transferred to him*." The appellate Court, however, made no finding as to the existence of a constructive trust in its judgment.

It is therefore evident that the reference to the judgment of ***Silva v Salo Nona*** and to section 93, had been made only after that Court had arrived at the conclusion that the 2nd Defendant has had notice of the impediment to the title of the 1st Defendant, in the form of a specific performance clause, in relation to the property he had purchased. It had earlier on concurred with the trial Court that the contract between the Plaintiff and the 1st Defendant had been kept alive since the latter's repudiation of it and therefore the 2nd Defendant had received no title through 2V1. Significantly, the Court of Appeal did not hold in favour of the Plaintiff on the basis that the 1st Defendant, in making the transfer, had retained a beneficial interest in trust on behalf of the former but simply on the application of the principle of law found in the Law of Contracts, namely, that there was a contract that had been kept alive, making the Plaintiff entitled to the relief of specific performance. Thus, it had clearly acted on the principle of law that the

vinculum juris that had been established by the said contract has not been loosened and the parties were not restored to their former freedom of action enabling the 1st Defendant to make a transfer without any encumbrances.

When considered in the light of the said sequence of presentation and the context in which those references to section 93 of the Trusts Ordinance have been made, I am inclined to agree with the submission of the learned President's Counsel for the Plaintiff that those references made by the Court of Appeal to section 93 of the Trusts Ordinance are merely to supplement the conclusion it had already reached, by correctly applying the principles in the Law of Contracts. Hence, the reference made to section 93 of the Trust Ordinance by the Court of Appeal, does not affect the validity of the already reached conclusion on the question whether the 2nd Defendant is a *bona fide* purchaser without notice.

In consideration of the reasons as set out in the preceding paragraphs of this judgment, it is my conclusion that all the questions of law on which special leave to appeal was granted by this Court, as set out in the petition of the 2nd Defendant, are answered in the negative and against the 2nd Defendant. The Court of Appeal had not erred in its determination of dismissing his appeal. Therefore, the judgments of the District Court as well as the Court of Appeal are hereby affirmed.

The appeal of the 2nd Defendant is accordingly dismissed with costs both here and below.

JUDEGE OF THE SUPREME COURT

JAYANTHA JAYASURIYA PC, CJ.

I agree.

CHIEF JUSTICE

MURDU N.B. FERNANDO PC, J.

I agree.

JUDEGE OF THE SUPREME COURT

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

In the matter of an Application for Appeal in terms of Section 754(1) of the Civil Procedure Code and read with the Provisions of the High Court of the Provinces (Special Provisions) Act No.10 of 1996

SC (CHC) No. 05/2010

HC (Civil) 237/2003

The Sampath Bank Limited
No.110, Sir James Peiris Mawatha,
Colombo 02.

PLAINTIFF

Vs

The Pay Phone Company (Pvt) Ltd.
No.367, R.A De Mel Mawatha, and
now at No.18, 5th Lane, Ratmalana.

DEFENDANT

AND NOW

The Pay Phone Company (Pvt) Ltd.
No.367, R.A De Mel Mawatha, and
now at No.18, 5th Lane, Ratmalana.

DEFENDANT-APPELLANT

Vs

The Sampath Bank Limited

No.110, Sir James Peiris Mawatha,

Colombo 02.

PLAINTIFF- RESPONDENT

BEFORE : **S. THURAIRAJA, PC, J.**
A.H.M.D. NAWAZ, J. AND
ACHALA WENGAPPULI, J.

COUNSEL : The Defendant-Appellant is absent and unrepresented
Chandaka Jayasundera, PC with Ms. Vishmi Fernando instructed by Senaka Hewawitharana for the Plaintiff-Respondent.

WRITTEN SUBMISSIONS : Defendant-Appellant on 24th November 2014

Plaintiff-Respondent on 22nd April 2015

ARGUED ON : 1st November 2021

DECIDED ON : 9th June 2022

S. THURAIRAJA, PC, J.

The Sampath Bank Limited (Plaintiff-Respondent to this action) instituted the present action against The Pay Phone Company (Pvt) Ltd. (Defendant-Appellant to this action) in the High Court of Colombo (Civil) by way of Plaint dated 17th October 2003.

The Plaintiff-Respondent sought a judgement and decree against the Defendant-Appellant to pay the Plaintiff-Respondent a sum of Rs. 3,554,729/08 and a further sum of Rs. 2,802,778/08 from 28th May 2003 up to date of judgement and pay

interest at the rate of 17% on the aforesaid amount. Secondly, they sought a judgement and decree against the Defendant-Appellant to pay the Plaintiff-Respondent a sum of Rs. 690,371/02 and a further sum of Rs.646,250/62 from 28th May 2003 up to date of judgement and to pay interest at the rate of 28% on the aforementioned aggregated amount.

Following the proceedings of the High Court, the Defendant-Appellant instituted action before this Court by Petition dated 7th September 2007 appealing against the Orders granted by the Learned High Court Judge on the 7th March 2007 which decided to proceed with the case as per Section 145 of the Civil Procedure Code, and the decision dated 24th July 2007 which entered judgement in favour of the Plaintiff-Respondent. The Defendant-Appellant further prays this Court to order trial de novo from the inception and allow Defendant-Appellant to raise defences, grant cost and other suitable remedies.

Facts

Upon the Plaintiff-Respondent filing Plaint with the reliefs prayed for as above to recover certain monies lent to the Defendant-Appellant, the Defendant-Appellant denied the claim and sought for a dismissal of the Plaint by the Plaintiff-Respondent. The parties agreed on 3 admissions and 45 issues out of which 19 issues were raised by the Plaintiff-Respondent and 26 by the Defendant-Appellant. Upon perusing the record, I find certain events regarding the parties before the Commercial High Court worth noting.

On 2nd May 2005 the Plaintiff-Respondent was not ready for the hearing as they were unable to obtain the required documents as it was a Bank Holiday. On 24th February 2006, a date was moved for further trial as the Plaintiff-Respondent's lawyer was not in the country on that day, On 26th August 2006 Plaintiff-Respondent moved for a date on a personal difficulty of the counsel. Court refixed matter for trial on 7th December and granted permission to the Plaintiff-Respondent to tender examination on chief by affidavit on 7th November.

On 7th November 2006 the Plaintiff-Respondent's first witness submitted an affidavit as Evidence in chief. When the matter was called for cross examination the counsel for the Defendant-Appellant was not prepared for the same stating the reason that it was a calling date and not a trial date. On 7th December 2006 when the Defendant-Appellant was asked to cross-examine the witness, Counsel for the Defendant-Appellant stated that he was unaware that the matter was called for trial hence is unprepared and moved for a further date. There were no representatives from the Defendant-Appellant present. The Directors of Defendant-Appellant whose signatures were in the affidavit were asked to come to court since the names were not clearly mentioned and the Attorney at Law of the Defendant-Appellant was to be present in court the next day due to a discrepancy of the address provided in her proxy. The affidavit of the first witness of the Plaintiff-Respondent was given to the Counsel of the Defendant-Appellant.

On 7th March 2007 all persons who were sent notice by court to be present were absent. The Counsel that appeared for the Defendant-Appellant, Mr. Anusha Wickramasinghe, stated his inability to act on behalf of the Defendant-Appellant as he had not received any instructions from the Defendant-Appellant and could not communicate with them. It was further submitted that he had informed Defendant-Appellant company by letter requesting them to be present in court on March 7th. The names of the Defendant-Appellant and counsel Seneviratne's names were called in court but they were absent despite having sent a letter to the address mentioned in the proxy. The witness of the Plaintiff-Respondent was present for further evidence and the Counsel for the Plaintiff-Respondent requested the court to decide as per 145 of the Civil Procedure Code, which was granted on the same date.

On 24th April 2007, Defendant-Appellant made an application to revoke the proxy, accept new proxy, set aside Order on 7th March and for permission to take up defences against Petition and Affidavit. On 26th April 2007 the Defendant-Appellant requested court not to deliver judgment until the Defendant-Appellant was permitted

to present evidence with the reasoning that he couldn't obtain services of an Attorney at Law after the Attorney at Law who appeared previously withdrew. Court rejected the application by Defendant-Appellant noting that previous Attorney at Law withdrew since he was not properly instructed, and the Director of Defendant-Appellant and Attorney at Law were not present even after being notified. The High Court Judge specially noted that the Defendant-Appellant had sufficient time and more to obtain services of an Attorney at Law. The learned Judge further noted that the Director of Defendant-Appellant had signed Proxy to be revoked, two Affidavits compared to the Petition as if signed by two different people when it was the same person, which was admitted by Director of Defendant-Appellant. The Learned Judge noted that the Defendant-Appellant was avoiding court proceedings and attempting to mislead court. In terms of the proxies the High Court judge noted the discrepancies in the revocation papers filed to revoke proxy of the Defendant-Appellant's instructing Attorney and decided not to consider such application.

On this date the learned High Court Judge mentioned that as per the affidavit, the Plaintiff-Respondent had sought permission to provide for further evidence due to certain information not having been produced and the Counsel for the Plaintiff-Respondent requested for further date to provide evidence. A reference has been made in the Journal Entries that the Plaintiff-Respondent tendered further affidavit and Court fixed matter for judgement on 7th July 2007. The Defendant-Appellant claims that these documents were not served on the Defendant-Appellant and that the Defendant-Appellant was not given an opportunity to cross-examine the Plaintiff-Respondent's Witness on the purported further affidavit.

The case was fixed for judgement on 24th July on which date the Judgement was delivered in favour of Plaintiff-Respondent.

On 18th July 2007, the Defendant-Appellant filed revocation of previous proxy with written consent of the previous Attorney at Law and the Defendant-Appellant, and filed new proxy of Mr. Ruwan Rodrigo, Attorney at Law and they moved to accept the

same. On 24th July, on the date judgement was pronounced, the Plaintiff-Respondent was directed to file Objections against application by Defendant-Appellant for revocation of proxy and appointment of new Attorney at Law on 3rd September 2007. Subsequently no order was made regarding the revocation of proxy.

At this juncture it is important to note that the Defendant-Appellant has followed a similar pattern in proceedings of this Court.

In terms of conduct pertaining to Attorneys at law, it is apparent by the above facts that Counsel had withdrawn due to the failure of the client to instruct them sufficiently. Further, the Defendant-Appellant had failed to procure services of an Attorney at law when the Proxy of the previous Attorney at Law was revoked, albeit having had sufficient time to do so. In the present Court, the Defendant-Appellant revoked appointment of Mr. Ruwan Rodrigo, Attorney at Law in 2012. The proxy for appointment of Attorneys of Paul Ratnayake Associates was filed in February 2013 and revoked in September 2015. Thereafter, Mrs. R.A Lanka R. Dharmasiri, Attorney at Law was appointed by proxy on 8th October 2015 and revocation of proxy was received by this Court on 2nd August 2018. There have not been any proxies filed subsequently and the Defendant-Appellant has since been absent and unrepresented.

Notices sent on numerous occasions have returned undelivered stating reasons as that no such company exists at that address, and that the Defendant-Appellant has left the place. This Court has noted on the 13th October 2020 that the Defendant-Appellant is not diligently prosecuting the case and fixed this matter for argument even in the absence of the Defendant-Appellant. On the date of argument, the Defendant-Appellant was absent and unrepresented despite the attempts of this Court to serve notice, all of which have returned undelivered. I have perused the record and observe that the behaviour of the Defendant-Appellant does not appear to be isolated incidents but rather a pattern of behaviour.

As the events before both the High Court and the present Court have been established, I find it pertinent to address the grounds of appeal and prayer for appeal as pleaded before this Court by the Defendant-Appellant

Relief Prayed for by the Defendant-Appellant

The Defendant-Appellant in the Petition has urged the grounds of appeal as:

a) The said judgment is contrary to law and evidence transpired in the said matter
b) The said judgment is contrary to the principles of natural justice wherein the Appellant had not been afforded an opportunity to purge default
c) The said judgment is totally inconsistent with the applicable legal principles and procedures specially the provisions of the Civil Procedure Code
d) The said Judgment is contrary to legal precedents created by our Superior Court in similar circumstances and,
e) The said judgment had been entered contrary to the evidence transpired in the Case and without affording the Appellant an opportunity to defend itself in a meaningful manner.

However, I find that the above grounds lack specificity and have been left purposefully vague. Despite allegations that the judgment is contrary to principles of Natural Justice, there has been no elaboration as to the manner in which such a violation has occurred. Despite urging this Court that the judgment is inconsistent with relevant legal principles, the Civil Procedure Code, legal precedents, the grounds nor the Petition in itself specifies which principles, which provisions of the Civil Procedure Code or which cases establishing precedent the Defendant-Appellant refers to.

The Defendant-Appellant prays:

a) To set aside and/or vacate and/or vary the judgment dated 24 July 2007 in the Commercial High Court Case No: 273/2003 (i)
b) To set aside the Order of Learned High Court Judge dated 7th March 2007 by fixing the matter for judgment in terms of section 145 of the Civil Procedure

Code and permit the Appellant to defend the case by cross-examination notice and leading evidence of the defence.

c) In the alternative direct the Learned High Court Judge to conduct an inquiry into Appellant's application to purge default in terms of Section 839 of the Civil Procedure Code or

d) In the alternative direct the Learned High Court Judge to commence and conduct a trial de novo

And to grant cost and such other further reliefs as to the Court shall meet.

As such any specificity can only be found in the prayer for relief as to which provisions of the Civil Procedure Code the Defendant-Appellant relies on.

Section 145 of the Civil procedure Code states as follows:

> *"If any party to an action, to whom time has been granted, fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the action, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the action forthwith."*

As clearly enumerated above, the Defendant-Appellant had been granted sufficient opportunity which they have failed to utilize, resulting in a justified exercise of this provision by the High Court Judge. As such, there are no circumstances leading to the granting of any specific relief as prayed for by the Defendant-Appellant.

The Defendant-Appellant prays for the High Court Judge to be directed to exercise the powers under Section 839 of the Civil Procedure Code which states:

> *"Nothing in this Ordinance shall be inherent deemed to limit or otherwise affect the powers of court save inherent power of the court to make such orders as may be necessary for the ends of justice or to* ***prevent abuse of the process of the court****."*
>
> *(Emphasis Added)*

This Court recognizes that it is indeed possible to exercise powers under this provision for the High Court to allow Defendant-Appellant to purge default. However, it must be necessary for the ends of justice or to prevent abuse of the process of the court. Indeed, in the present instance, allowing for this application would have been for the High Court Judge to do the contrary in facilitating the abuse of process of the court by the Defendant-Appellant in light of their conduct before both the High Court in itself, as well as in the Supreme Court.

Despite praying for an opportunity to purge default, The Defendant-Appellant has not mentioned the relevant provisions of the Civil Procedure Code for the same nor discussed them at any point in the Petition or Written Submissions before this Court. As such, I believe that since this application urges such an opportunity to purge default, it is pertinent to emphasise Section 86(2) which states:

> *"Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes application to and thereafter satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper."*

As per the above, it was incumbent upon the Defendant-Appellant to satisfy the court that they had reasonable grounds for such default. Despite the Application having been made for the same, the Defendant-Appellant had no such reasonable grounds that would result in the court setting aside the decision to proceed as per Section 145 of the Civil Procedure Code. I believe that given the circumstances of failure to appear before the said court, it is reasonable for the court not to allow purging of default, which would only have led to further delay in proceedings.

Additionally, despite the Defendant-Appellant attempting to vaguely invoke the powers of the court under Section 839 as above, I must emphasize that such exercise of powers is discretionary. A Court has to be cautious in exercising such powers and must only do so in circumstances that warrant the same. Contrary to the request of the Defendant-Appellant, I find that refusal to exercise inherent powers in a manner prayed for by the Defendant-Appellant is indeed in the interest of preventing abuse of process of court.

In terms of existing precedent in similar circumstances which the Defendant-Appellant avers to almost in the passing, I find that existing precedent does not do any favours to the Defendant-Appellant.

In the case of **David Appuhamy V. Yassassi Thero (1987) 1 SLR 253,** it was stated that:

> *"An ex parte order made in default of appearance of a party will not be vacated if the affected party fails to give a valid excuse for his default."*

In further interpreting the above provisions, the case of **Sanicoch Group of Companies v. Kala Traders (Pvt) Ltd (2016) BLR 44** considered the standard set by the above as follows:

> *"The above section requires the Defendant to satisfy court that the Defendant had reasonable grounds for such default. To state very briefly is that, the Defendant party need to satisfy court which would mean, to meet the expectations or desires, to be accepted by as adequate in the circumstances. What should or would be adequate needs to be only reasonable grounds. It is well known according to case law that inquires on application to set aside an ex-parte decree is not regulated by any specific provision of the Civil Procedure Code but such inquiries must be conducted consistent with rules of Natural Justice and the requirement of fairness"*

As such, the burden was upon the Defendant-Appellant to prove circumstances justifying the Court exercising the above provisions, especially that of Section 839. The case of **Sanicoch Group of Companies v. Kala Traders (Pvt) Ltd** refers to **De Fonseka Vs. Dharmawardena (1994) 3 SLR 49** in the Court of Appeal where it was considered

> *"Section 839 of the Civil Procedure Code recognises the inherent power of the Court to make an order as may be necessary for the ends of justice. There is no error or illegality that has caused any prejudice to the substantive rights of the parties."*

In light of the same, based on the circumstances outlined above, with special attention to the conduct of the Defendant-Appellant themselves, I do not find that the refusal to exercise the inherent powers of the court under the abovementioned sections amounts to any miscarriage of justice.

It appears that the decision by the High Court Judge on the 7th March 2007 was necessary in order to avoid any further delay and the appeal to the same does not have any merit. In any case, the Petition has only been filed on the 20th of September 2007. This application is time barred as a period of over six months, a duration much later than the appealable period, has elapsed since this Order by the learned High Court Judge. As such this ground of appeal fails on its own merits

Pertaining to the appeal against the final order on 24th July 2007, for the purpose of completeness, I perused the facts of this case and the final order, and I do not find any illegality or irregularity in following the procedure. Under the circumstances I find the Order of the Trial Judge is not void due to any unjudicial conduct as alleged by the Defendant-Appellant.

As such the Defendant-Appellant has not succeeded in adducing sufficient valid reasoning before either court to warrant vacating the decree by the previous court. As the Defendant-Appellant has not prayed for any further specific relief, In the interest

of discouraging abuse of Judicial process by parties, I find that the decisions of the High Court are justified in these circumstances.

Based on the above facts and circumstances and considering all matters outlined in the Petition and Written Submissions by the parties, I dismiss this application with cost. In addition to the above cost, I order Sum of Rupees Five Hundred Thousand to be paid by the Defendant-Appellant as punitive cost, the money to be deposited at the Commercial High Court of Colombo.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, 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

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In the matter of an application in term of Chapter LVIII and Section 754(1) of the Civil Procedure Code reading with the provisions of the High Court of Provinces (Special Provisions) Act No 10 of 1996.

Case No. SC/CHC/Appeal 33/2013

HC (Civil) 476/2010/MR

Sri Lanka Savings Bank Ltd

No: 110, D.S. Senanayake Mawatha

Colombo 08

Plaintiff

Vs.

1. Good Value Importers (pvt) Ltd

   536, R.A.De Mel Mawatha

   Colombo 04

2.Good Value Distributors (pvt) Ltd

   104/11, Grandpas Road

   Colombo 14

Defendants

And now between

Sri Lanka Savings Bank Ltd

No: 110, D.S. Senanayake Mawatha

Colombo 08

Plaintiff-Appellant

Vs.

1. Good Value Importers (pvt) Ltd

   No: 536, R.A.De Mel Mawatha

   Colombo 04

2. Good Value Distributors (pvt) Ltd

No: 104/11, Grandpass Road

Colombo 14

Defendant-Respondents

Before: L. T. B. Dehideniya, J.

Murdu N. B. Fernando, PC, J.

S. Thurairaja, PC, J.

Counsels: Kamal Dissanayake with Sureni Amaratunga instructed by Ms. Mayomi Ranawaka for the Plaintiff-Appellant

S. P. Sriskantha with Prasanna Sriskantha & shown Tissera for the Defendant-Respondents

Argued on: 30.01.2019

Decided on: 05.12.2022

L. T. B. Dehideniya, J.

This is an appeal from a judgment of the Commercial High Court. The Plaintiff-Appellant (hereinafter sometimes called and referred as the Appellant) instituted action in the Commercial High Court to recover a loan granted by the Appellant's predecessor the Pramuka Saving and Development Bank to the 1st Defendant- Respondent (hereinafter sometimes called and referred as the 1st Respondent). The 2nd Defendant- Respondent (hereinafter sometimes called and referred as the 2st Respondent) was the guarantor. The Respondents filled answer denying liability and raised several objections, namely, that the Cause of Action is prescribed, there is no privity of contract and the Appellant has no *locus standi*.

The Appellant has called two witnesses to prove his case. The documents marked P1 to P16 were marked and produced through the said witnesses subject to proof. The Respondents at the close of the Appellant's case objected to all the documents other than P1 and P3 and requested proof of other documents. After cross examining these two witnesses, the Respondent decided not to call any evidence on their behalf.

The Appellant's case is that the 1st Respondent has obtained a loan from the Appellant's predecessor Pramuka Saving and Development Bank and failed to repay the loan. The Appellant tendered the documents in relation to this loan transaction. Documents marked P4, P5, P6 and P7 are the agreements and the offer letters. The document marked P8 is a certified copy of the relevant entries maintained in the computer of the Pramuka Savings and Development Bank as customer loan account transactions. It has been certified by the Acting General Manager as a true copy of the relevant entries appearing in the books/data of Pramuka Savings and Development Bank and the said entries were made in usual, ordinary course of business. P10 is the letter of demand, P12 and P13 are the 2nd Respondent's undertaking to indemnify the bank. The Appellant did not call any witness to prove the said documents.

The Counsel for the Appellant in his submissions has taken up two arguments; firstly that the Respondents have not denied these documents in their answer and secondly that the agreements were signed by the Respondents and the certified copies of the bankers' book need not to be proved under Section 90 (C) of the Evidence Ordinance.

The learned High Court Judge after trial dismissed the Appellant's action on the basis that the Appellant had failed to prove the fact that the Respondents are in arrears of payment.

The learned High Court Judge in his judgment held that the Appellant, though he marked the documents subject to proof, has failed to prove the documents. In his judgment he has considered the agreements signed by the Appellant and the Respondents. The High Court Judge has observed that the 1st Respondent has entered in to an agreement and obtained the said loan, but was of the view that the date of granting the loan is not established. The learned High Court Judge has come to the said finding based on the loan agreement and other documents in relation to the said loan. Therefore, even though the Judge was of the view that those documents are not proved, he considered the documents and had come to that finding. Even if those documents are proved it is the only observation that the court can come to.

However I will consider whether the Respondents have admitted the averments in the plaint. At the commencement of the trial, parties have recorded only two admissions. Those are the 7th paragraph of the plaint and the jurisdiction of the court. All the other matters were put in issue by the Appellant himself. These issues were not raised by the court but were raised by the parties with consent. After raising the said issues at the commencement of the trial, the Appellant cannot change his position in appeal and argue that the Respondents have admitted the facts.

On the other hand Respondents have admitted only paragraph 7 of the plaint. They have denied the knowledge of paragraph 2, 3, 4, 5 and 8 of the plaint. Except paragraph 7 the Respondent bestowed the burden of proof on the plaintiff. Further the Respondents in their answer referring to paragraphs 2, 3, 4, 5, 8, 9, 10, 11, 13, 14 (i) to (v), 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 (a) to (e), 29, 30, 31, 32, 33, and 34 (in paragraph 4 and 5 of the answer) said in Sinhalese letters "..යන ඡේද වල සඳහන් කරුණු ආලාපනය කර සිටින අතර ඒවා ඔප්පු කිරීමේ භාරය තරයේම පැමිණිලිකරු වෙත පවරා සිටී".

The Respondent in his answer paragraph 4 and 5 specifically referring to several paragraphs of the plaint had averred that the Appellant should prove those averments.

In Charles & Caters Sinhala-English Dictionary, the word "ආලාපනය" is explained as "Speaking to, talking with, addressing". If this explanation is applied to the words used in the answer, it does not give any sense. Therefore, the court has to consider the balance portion of paragraph 4 and 5 of the answer where the Respondents have put the burden of proof on the Appellant. When the answer is considered as whole, it appears that the Respondents are not admitting any averments other than paragraph 7 of the plaint. Therefore court cannot consider that the Respondent have admitted the plaint. Therefore, the Appellant cannot base his case on the footing that Respondents have admitted the plaint.

The Appellant based his case on P8, the certified copy of the ledger/data. This document was marked subject to proof. Even at the closure of the Appellant's evidence, the Respondent objected to this document on basis that it was not proved. The counsel for the Appellant submits that it is not necessary to prove the certified copy of the Bankers' books. Under section 90C of the Evidence Ordinance, the Counsel argue that the certified copies of bankers' books need not to be proved.

Section 90C reads thus:

90C. Subject to the provisions of this Chapter, a certified copy of any entry in a banker' book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions, and accounts therein recorded in every case where, and to the same extent as the original entry itself is now by law admissible, but not further or otherwise.

This section applies subject to the provisions of the chapter stated therein. Section 90A of the Ordinance interprets the bankers' books and the certified copies in the following manner.

90A. In this Chapter, unless there is something repugnant in the subject or context -

"bank" and "banker" mean -

(i) any company carrying on the business of bankers,

(ii) any partnership or individual to whose books the provisions of this Chapter shall have been extended as hereinafter provided,

(iii) any savings bank, post office savings bank, or money order office;

"bankers' books" include ledgers, day books, cash books, account books, and all other books used in the ordinary business of a bank.

"certified copy" means a copy of any entry in the books of a bank, together with a certificate written at the foot of such copy that it is a true copy of such entry ; that such entry is contained in one of ***the ordinary books of the bank****, and was made in the* ***usual and ordinary course of business*** *; and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title.*

"company" means a company registered under the enactments relating to companies from time to time in force in Ceylon, or in Burma, India or Pakistan, or under any Acts of Parliament of the United Kingdom, or incorporated by an Act of the Legislature of Ceylon, Burma, India, Pakistan or the United Kingdom, or by Royal Charter or Letters Patent.(Emphasis added)

Under section 90 (C) of the Evidence Ordinance a certified copy of the Banker's books can be admitted as evidence. E. R. S. R. Coomaraswamy in 'Law of Evidence Volume I' at page 160

says that even the loose sheets obtained from the computer can be considered as Banker's books.

> *"Bankers Books include ledger, day books, cash books, account books, and all other books used in the ordinary business of a bank. The Editors of Halsbury's Statutes of England submit that loose sheets, whether produced by a computer or not may be within this definition. "*

In the present case the P8 was obtained from the computer data where the transactions were recorded. Under this section copy of transactions done in the *normal cause of business* can be accepted as prima facie evidence without proof. Whether the Pramuka Saving and Development Bank was functioning in the *normal cause of business* is a matter in issue.

The functions of the Pramuka Saving and Development Bank were questioned before this court in the case of **Benedict and the Others vs. Monetary Board of Central Bank of Sri Lanka and Others (Pramuka Bank case) [2003] 3 Sri. L. R 69**. In this case several acts of mismanagements and financial irregularities of the Pramuka Savings and Development Bank were brought to the notice of the court. It was observed by his lordship Sri Pavan J. (as he was then), that the 2nd Respondent in the said case has revealed the following matters in the statutory examination held by the 4th Respondent that,

> *The second Respondent in his affidavit dated 10th February 2003 states that the following matters came to light during the course of the statutory examination held in 1999/2000 by the fourth Respondent:-*
>
> *71(a) That the bank was engaged in an unsound and improper financial practice whereby interest recovered by granting fresh loans to convert non-performing loans into performing loans after the balance sheet date had been wrongfully accounted as income for the bank.*
>
> *b) That the bank had fictitiously inflated its profit for the accounting year 1999 and thereby showed a profit of Rs.8.3 million when in fact the bank has suffered a loss of Rs.16.5 million for that year.*
>
> *c) The bank had been able to avoid making the required provisioning and thereby violated the directions issued by the Central Bank on this matter.*

Accordingly, the first Respondent after considering the report submitted by the fourth Respondent formed an opinion that the bank was engaged in certain irregular transactions so as to distort the true financial condition of the bank, directed the fourth Respondent to issue a direction in terms of Sec. 76K of the said Act. Thus, the fourth Respondent issued an order on the bank on 9th December 1999 (1R8) directing it to cease the unsound and improper financial practice of recovering interest after the balance sheet date and showing them as income for the bank.

It appears that the fourth Respondent carried out a second statutory examination into the activities of the bank as at 30th September 2001. The affidavit of the second Respondent shows that the following matters revealed at the said examination.

a) That the bank had continued with the imprudent activities highlighted in the previous examination by resorting to different irregular and complex practices and thereby circumventing the directions given by the first Respondent.

b) The bank had resorted to other unusual and questionable transactions and violated several prudential requirements.

c) That the financial condition of the bank was further deteriorating.

d) That several provisions of the Banking Act had been violated.

The mode of transactions and the accuracy of those transactions have been questioned before this court. Under these circumstances whether the court can consider the transactions recorded in the computer were transactions done during the normal cause of business is questionable.

According to the Appellant's witnesses the Central Bank ceased the operation of the Pramuka Saving and Development Bank in 1992. After some inquiries and discussions the Central Bank had vested the banking business of Pramuka Savings and Development Bank with the Appellant bank in 1997. The learned High Court Judge questions accuracy of the entries in the computer under these circumstances. I see no reason to find fault with the learned High Court Judge's observation.

If the Appellant fails to prove the balance in arrears that has to be recovered from the Respondent, the Appellant cannot succeed in this case.

The Respondent has taken up an objection that the Appellant does not have *locus standi* and there is no privity of contract. In the present case the loan was granted by the predecessor of the Appellant bank. The Central Bank of Sri Lanka by a vesting order vested all operations of the said Pramuka Savings and Development Bank with the Appellant bank. Therefore the Appellant bank has the *locus standi* as the successor of the said Pramuka Bank and since the banking business is vested with Appellant, the Respondent cannot say that there is no privity of contract.

As I discussed earlier the learned High Court Judge's finding that the Appellant had failed to prove his case is unquestionable.

I dismiss the appeal without cost.

Judge of the Supreme Court

Murdu N. B. Fernando, PC, J.

I agree

Judge of the Supreme Court

S. Thurairaja, PC, J.

I agree

Judge of the Supreme Court

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

In the matter of an application for Contempt of Court under and in terms of Article 105(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Contempt 06/18
[SC RULE 03/19]

Ranjan Ramanayake
No. A5, Housing Scheme for Members of Parliament, Madiwela,
Sri-Jayawardenapura-Kotte.
Respondent

Before: Buwaneka Aluwihare, PC. J
L.T.B Dehideniya, J
E.A.G.R Amarasekara, J

Counsel: Anura Maddegoda PC, with Ashan Fernando, Ms. Nadeesha Kannangara and Saumya Wijesinghe instructed by Sandun Gamage for the Respondent

Madhawa Tennekoon DSG, with Sahanya Naranpanawa SC for the Hon. Attorney General

Inquiry on:	25.03.2022
Written submissions;	23.05.2022
Decided on:	07.06.2022

Aluwihare PC, J

Proceedings were initiated against the Respondent, Ranjan Ramanayake [hereinafter referred to as the Respondent] in terms of Article 105(3) of the Constitution and a Rule was issued in terms of the said Article, calling upon the Respondent to show cause as to why he should not be punished for the offence of contempt of court.

The Rule was read out to the Respondent on 30th July 2019 to which the Respondent pleaded not guilty.

When this matter was taken up for inquiry on 5-03-2022, the learned president's counsel for the Respondent intimated to the court that the Respondent wish to withdraw the earlier plea of not guilty and that he wishes to plead guilty to the Rule.

The court questioned the Respondent in person and he affirmed that he wishes to withdraw his earlier plea of not guilty and to plead guilty to the Rule. Questioned by the court, the Respondent said that he took this decision on his own volition.

Accordingly, the plea of guilt was recorded and the court proceeded to convict the Respondent for the offence of contempt of court.

It is alleged that the Respondent whilst taking part in a television programme titled "Wada Pitiya" telecast over the channel "Derana", made the following utterance in reference to a case pending before the Supreme Court;

“” ඒ 3 (three) බෙන්ච් අධිකරණයෙන් වාරණ නියෝගයක් දාලා තියෙනවා. දැන් ආරංචියක් තියෙනවා ඒක 5ට යනවා, 5ට ගියත් තුනක් මෙහෙට දෙකක් එහෙට හින්ද තීන්දුවේ වෙනසක් නොවේවි ය කියා.....”

The respondent in making the said utterance had said that according to a source, the matter would be referred to a bench of five judges and the decision would be a divided one, three judges holding a particular view and the other two a different view, clearly implying that the issues in the case had already been determined by the judges, even before the case had been heard.

It was pointed out on behalf of the Respondent that the utterance was speculative, based on the ‘information’ the Respondent had received [“ආරංචියක් තියෙනවා”] and not a view entertained by him.

Despite the statement, in essence, being one of speculation, still it clearly conveys the message that the judges had made up their minds, even before the case had been heard, as to what the determination of the court ought to be. Creating such an impression in the minds of the public, would undoubtedly, have an adverse effect on the credibility of the institution and more so on the trust the public reposes in the administration of justice.

As such this court is of the view that this matter should be visited with utmost seriousness, particularly considering the fact that the statement was made without any basis whatsoever.

We observe that every citizen of this country has a duty to protect the integrity of the system of administration of justice. Any erosion of public trust in the system can have serious consequences for the well-being of society.

Pleading in mitigation it was submitted on behalf of the Respondent that in the course of the television programme in question, the Respondent expressed that he has a positive impression of the Supreme Court, particularly after the Chief Justice said in his speech [at the ceremonial sitting to welcome him] that the people have a right to

criticise the judgements of the Supreme Court. It was the contention of the learned President's Counsel that the statement made by the Respondent relating to the Supreme Court must be considered in its entirety to appreciate the context in which it was made and that he did not intend to insult or to bring the Supreme Court into disrepute.

The learned President's Counsel invited court, in deciding the sentence to be imposed, to consider the fact that the Respondent has made a tremendous contribution to the film industry of this country and due to his acting skills, the Respondent had won several coveted awards such as Sarasaviya, Slim Nielsen, Signis Salutation and Derana Awards.

It was also pointed out that the Respondent is a vocal, social and a political activist who has been the voice of the voiceless people and a leading campaigner against social injustice. The learned President's Counsel also invited the court to consider the fact that, without proceeding to an inquiry, the Respondent expressed an unqualified plea of guilt to the Rule and in his own word expressed remorse and regret over the words he uttered in reference to the Supreme Court.

Thus, it was submitted, that the Court should show magnanimity, and the learned Counsel cited the case of **In Re Prashant Bhushan and another Contempt Petition (CRL)** No.1 of 2020 where the Supreme Court of India taking into account that the utterances were made bona fide and the subsequent expression of regret, imposed a nominal punishment by imposing a fine of Rs. 1/- on the contemnor.

In this matter, the Respondent, having pleaded guilty to the Rule [offence of Contempt of Court] , has expressed penitence, remorse and deep regret regarding the impugned statement. We have also considered the other mitigatory factors urged before this court on behalf of the Respondent.

Accordingly, we impose a sentence of 2 years imprisonment on the Respondent. Acting, however, in terms of Section 303 of the Code of Criminal procedure Act No.

15 of 1979 [as amended] the sentence imposed on the Respondent is suspended for a period of five years with effect from today.

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B. DEHIDENIYA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE E.A.G.R. AMARASEKARA

I agree

JUDGE OF THE SUPREME COURT

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

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

SC (FR) Application No: 4/2017

K. M. R. Perera,
51/1, Northpole Residencies,
Apartment 5/1, Peter's Lane,
Dehiwala.

PETITIONER

vs.

1) Dharmadasa Dissanayake,
Chairman.

1A) Justice Jagath Balapatabendi,
Chairman.

2) A.W.A. Salam.

2A) Hussain Ismail.

2B) Indrani Sugathadasa.

3) D. Shirantha Wijayatilake.

3A) Prathap Ramanujam.

3B) Dr. T.R.C. Ruberu.

4) V. Jegarajasingam.

4A) Ahamed Mohammed Saleem.

5) Santi Nihal Seneviratne.

5A) Sudarma Karunaratne.

5B) Leelasena Liyanagama.

6) S. Rannuge.

6A) Dian Gomes.

7) D.L. Mendis.

7A) Dilith Jayaweera.

8) Sarath Jayatilake.

8A) G.S.A. De Silva.

2^{nd}, 2A, 2B, 3^{rd}, 3A, 3B, 4^{th}, 4A, 5^{th}, 5A, 5B, 6^{th}, 6A, 7^{th}, 7A, 8^{th} & 8A Respondents are members of the Public Service Commission.

9) H.M.G. Seneviratne.

9A) M.A.B. Senaratne.

9B) Daya Senarath,
Secretary.

1^{st}, 1A, 2^{nd}, 2A, 2B, 3^{rd}, 3A, 3B, 4^{th}, 4A, 5^{th}, 5A, 5B, 6^{th}, 6A, 7^{th}, 7A, 8^{th}, 8A, 9^{th}, 9A & 9B, Respondents are at
Public Service Commission,
No 177, Nawala Road, Narahenpita.

10) K.S.C. Dissanayake,
Director General,
Overseas Administration Division.

10A) M.K. Pathmanathan,
Additional Director General.

10B) Sumith Dissanayake,
Director General,

Human Resources and Mission Management.

11) Esala Weerakoon.

11A) Ravinatha Ariyasinghe.

11B) Admiral Jayanath Colombage, Secretary.

10th, 10A, 10B, 11th, 11A & 11B Respondents are at Ministry of Foreign Affairs, The Republic Building, Colombo 1.

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

RESPONDENTS

Before: **E.A.G.R. Amarasekara, J**
Achala Wengappuli, J
Arjuna Obeyesekere, J

Counsel: Uditha Egalahewa, P.C., with Ranga Dayananda for the Petitioner

Nirmalan Wigneswaran, Deputy Solicitor General for the Respondents

Argued on: 26th July 2021

Decided on: 21st January 2022

Arjuna Obeyesekere, J.

In this application, the Petitioner, who is an Officer of the Sri Lanka Foreign Service is alleging *inter alia* that the Respondents have violated the Petitioner's fundamental right to equality before the law and the equal protection of the law enshrined in Article 12(1) of the Constitution and the freedom to engage in a lawful occupation guaranteed by Article 14(1)(g) of the Constitution.

Soon after the filing of this application, but prior to it being supported, the Public Service Commission had taken a further decision with regard to the Petitioner which prompted the Petitioner to file SC (FR) Application No. 55/2017 in February 2017, complaining of the said decision as well and alleging *inter alia* that the Respondents have violated the Petitioner's fundamental rights enshrined in Articles 12(1) and Article 14(1)(g) of the Constitution.

On 6th November 2019, this Court granted the Petitioner leave to proceed in both applications in relation to the infringement of the aforementioned Articles of the Constitution. As the complaint of the Petitioner set out in this Application is subsumed in SC (FR) Application No. 55/2017, the said application was fixed for argument, with this application being mentioned together with the said application. When this matter was taken up for argument on 26th July 2021, the learned President's Counsel for the Petitioner and the learned Deputy Solicitor General for the Respondents informed this Court that the parties in this application would abide by the judgment that would be delivered by this Court in SC (FR) Application No. 55/2017.

By its judgment delivered today, this Court, for reasons set out therein, has dismissed SC (FR) Application No. 55/2017, without costs. Accordingly, this application too shall stand dismissed, without costs.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, 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 under and in terms of Article 126 of the Constitution.

F. A. Azeez
660/22, Main Street
Matale

Petitioner

SC [FR] Application No. 06/2011

Vs.

1. H. M. Gunasekera
Secretary, Ministry of Education &
Higher Education, Isurupaya
Battaramulla

1A Upali Marasinghe
Secretary, Ministry of Education &
Higher Education, Isurupaya
Battaramulla

1B W. M. Bandusena
Secretary, Ministry of Education &

Higher Education, Isurupaya
Battaramulla

1C Sunil Hettiarachchi
Secretary, Ministry of Education &
Higher Education, Isurupaya
Battaramulla

1D N. H. M. Chitrananda
Secretary, Ministry of Education &
Higher Education, Isurupaya
Battaramulla

2. M. S. Premawansa
Secretary, Ministry of Education
Central Provincial Council
Gatambe, Peradeniya

2A P. B. Wijeratne
Secretary, Ministry of Education
Central Provincial Council
Pallekelle, Kundasale

2B R. M. P. S. Ratnayake
Secretary, Ministry of Education
Central Provincial Council
Pallekelle, Kundasale

2C Gamini Rajaratne
Secretary, Ministry of Education
Central Provincial Council
Pallekelle, Kundasale

3. H. M. Wijesiri Herath
Provincial Director of Education
Department of Education
Central Province, Kandy

3A E. P. T. K. Ekanayake
Provincial Director of Education
Department of Education
Central Province, Kandy

4. A. H. M. H. A. Herath
Zonal Director of Education
Zonal Education office
Galewala

4A A. L. M. Zarudeen
Zonal Director of Education
Zonal Education office
Galewala

4B T. N. Hettiarachchi
Zonal Director of Education
Zonal Education office
Galewala

5. Secretary
Public Service Commission
Carl will Place, Colombo 3

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

7. Auditor General
Auditor General's Department
Independence Square, Colombo 7

Respondents

Before : Buwaneka Aluwihare, PC., J
Achala Wengappuli J
Arjuna Obeyesekere J

Counsel: Thilini Vidanagamage instructed by Faris and Associates for the Petitioner
Yuresha De Silva, SSC for the Hon. Attorney General

Argued on: 27th January 2022

Decided on: 09th August 2022

Judgement

Aluwihare PC., J,

The Petitioner in the present application was granted leave to proceed for the alleged infringement of her fundamental rights guaranteed under Article 12(1) of the Constitution in respect of the administrative action taken to revoke her appointment to Class III of the Sri Lanka Education Administrative Service (hereinafter referred to as the SLEAS).

The Petitioner had applied for an appointment to Class III of the SLEAS, and had sat for the Limited Competitive Examination held in 1995. Based on the marks she had obtained at this examination, the Petitioner had been appointed to Class III of the SLEAS with effect from 4th January 1999, by the Education Service Committee of the Public Service Commission, by letter dated 4th December 1998 (P1).

Following this appointment, the Petitioner had assumed duties as an Assistant Director of Education in the Zonal Education Office of Galewala, with effect from 24th February 1999. In addition to the aforementioned duties the Petitioner had been required to cover the duties of an Assistant Director of Education of the Pallepola Division with effect from 1st May 2009.

The Petitioner states that she learnt that a letter dated 19th August 2009 (P9) had been sent by the then Zonal Director of Education (4th Respondent) to the then Provincial Director of Education (3rd Respondent), stating that the Petitioner's appointment to Class III of the SLEAS had been cancelled.

According to the letter (P9), there had been another letter dated 13th March 2000 (1R3), issued by the then Secretary of the Education Service Committee of the Public Service Commission, cancelling the Petitioner's appointment, a copy of which the Petitioner claims, was not given despite her several queries (vide communications marked P10[a]-P10[d]).

By letter dated 23rd August 2009 (P13), the 3rd Respondent had informed the 4th Respondent that consequent to the cancellation of the Petitioner's appointment to the SLEAS (Class III), she should be placed in her former salary scale. Thereafter, by letter dated 1st September 2009 (P14), the 4th Respondent had informed the Petitioner that her appointment to Grade III of the SLEAS had been cancelled by letter dated 13th March 2000 (IR3) and that she had been reverted back to the Teachers' Service with effect from 4th January 1999.

The Petitioner had been placed in Grade 1 of the Sri Lanka Teachers' Service with effect from 1st February 2003 subject to a new salary scale, by letter dated 16th September 2009 (P12[a] -[b]).

Thereafter, by letter dated 22nd September 2009 (P15), the Auditor- General had informed the 3rd Respondent to furnish information regarding the Petitioner, as she had been paid the salary of a Class III Officer of the SLEAS despite the revocation of her appointment. The Zonal Education Office had directed the Petitioner to furnish information on the matter, to which the Petitioner had responded by letter dated 30th September 2009 stating that she had been correctly paid for the services she had rendered as an officer of the SLEAS.

Aggrieved by the said cancellation of her appointment, the Petitioner had filed a complaint with the Human Rights Commission (HRC) on 10th October 2009 (P11), the receipt of which was acknowledged by the HRC by letter dated 11th November 2009 (P11[a]). The Petitioner states that she was summoned by the HRC for an inquiry as evinced by the summons for the inquiries held on 7th May 2010 (P11[b]) and 28th September 2010 (P17). The Petitioner, however, states that no recommendation or decision has been delivered by the HRC, to date.

The Petitioner contends that the decision to cancel her appointment to the SLEAS and to revert her back to the Teachers' Service, as well the recovery of the amount claimed to have been an overpayment constitutes an infringement of the Petitioner's rights guaranteed under and in terms of Article 12(1) of the Constitution.

The learned Senior State Counsel for the Respondents raised two preliminary objections. Namely, that the application is time barred and that in any event the

appointment was cancelled in deference to the order made by this Court, on 29th October 1999, in cases bearing Nos. SC/FR No. 129/1999, 130/1999 and 131/1999

Article 126(2) of the Constitution stipulates that a person who alleges that any of his fundamental rights or language rights has or is about to be infringed by executive or administrative action must within one month of the occurrence thereof file a petition in this Court praying for relief or redress in respect of such infringement.

The learned Senior State Counsel argued that the application is time-barred as the impugned documents marked P12, P14 and P15 had been issued on 16th September 2009, 1st September 2009 and 22nd September 2009 respectively, while the amended Petition was tendered on 13th May 2011 and the original Petition was tendered on 10th January 2011, which is more than one year since the Petitioner's fundamental rights under Article 12 (1) were allegedly infringed.

Although this Court has time and again had held that Article 126(2) should be treated as a mandatory provision, an exception to this rule can be found in the Human Rights Commission of Sri Lanka Act No. 21 of 1996.

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 to the Commission,* ***within one month*** *of the alleged infringement or imminent infringement of a fundaments right by executive or administrative action,* ***the period within which the inquiry 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.*" (Emphasis added).

The provisions of Section 13 (1) of the Human Rights Commission Act stipulate that if a complaint is made to the HRC within one month of the alleged infringement, then the period during which an inquiry is pending before the HRC shall not be taken into account in computing the period of one month within which

an application may be made to the Supreme Court in terms of Article 126 (2) of the Constitution.

The Petitioner has lodged a complaint with the Human Rights Commission on 10th October 2009 [P11], the receipt of which was acknowledged by the HRC by P11[a]. Copies of the summons for the inquiries held on 7th May 2010 [P11[b]] and 28th September 2010 [P17] have been submitted to the Court as evidence of its pendency. It is the position of the Respondents that the Petitioner has failed to adduce any material reflecting the present position of the inquiry, in order to invoke the exception of time bar on the basis that a complaint had been made to the HRC within one month of the alleged infringement in terms of Section 14 of the Act.

Having regard to the provisions of Section 13 (1) of the Human Rights Commission Act No. 21 of 1996, time ceases to run for the purpose of computing the one-month period stipulated in Article 126(2) of the Constitution, thus, we hold that this application is not time barred.

<u>The cancellation of the Petitioner's appointment to Class III of the SLEAS</u>

The Petitioner contends that the decision to cancel her appointment to the SLEAS and to revert her back to the Teachers' Service contained in the letters marked P12(a) and (b) is illegal and/or unreasonable and/or discriminatory in law.

The Respondents, however, maintain that the steps which resulted in the Petitioner's appointment to Class III of the SLEAS being revoked and the Petitioner being reverted back to the Sri Lanka Teachers' Service as well as the steps to recover the over-payment based on a query of the Auditor-General, were taken in deference to the order made by this Court, on 29th October 1999, in the cases bearing Nos. SC/FR No. 129/1999, 130/1999 and 131/1999.

The Petitioners in the cases referred to in the preceding paragraph, had applied for an appointment to Class III-General Cadre, of the SLEAS on the basis of the Gazette notification bearing No. 832 dated 10th June 1994 and had sat for the Limited Competitive Examination held in March 1995.

Paragraph 16 of the Gazette [referred to above] provides the scheme of selection which states that appointments would be given on the basis of the National Ethnic Ratio. However, appointments had been made on the basis of the language in which the candidates had sat for the examination.

Since recruitment was enforced contrary to the Gazette, the three Petitioners [in those cases] had filed fundamental rights applications for the violation of their rights guaranteed under Articles 12 (1) and (2) of the Constitution. In all three cases the Court held that there was a violation of Article 12 (1), and proceeded to quash the appointments made by the Education Service Committee of the Public Service Commission and ordered that the appointments be made in accordance with the National Ethnic Ratio which had been criteria published as the basis of selection in paragraph 16 of the Gazette.

The Respondents state that in deference to this order, those who were given appointments to Class III of the SLEAS including the Petitioner, had been informed that the said appointments were cancelled as evinced by the letter dated 13th March 2000 (IR3).

The cancellation of the said appointments has also been referred to in the Judgement of case No. SC/FR No. 451/2003. The Court had *inter alia* observed that;

"*In compliance with that judgement the appointments that had been given were revoked by letter dated 13th March 2000 and new letters had been issued dated 29th March 2000…..*"

The Petitioner contends that she was not a party to any of the Fundamental Rights Applications consequent to which the impugned SLEAS appointments had been cancelled.

Despite the Petitioner's assertion that she was not a party to the proceedings of the aforementioned cases, the Petitioner's name figures in the list of candidates who were originally recruited with effect from 4th January 1999, and whose appointments were subsequently quashed by the order made by this Court on 29th October 2000. (*Vide;* the list of the officers appointed to SLEAS Class III with effect

from 4th January 1999 which were submitted to court in SC/FR No.129/1999, on behalf of the Acting Secretary of the Education Service Committee of the Public Service Commission by motion dated 12th May 1999).

Furthermore, the Petitioner's name cannot be found in the list of candidates appointed on the basis of the National Ethnic Ratio, in terms of the order made on 29th October 1999, which was submitted to the Court in the aforementioned fundamental rights cases, by Motion dated 31st July 2000.

Since the Petitioner falls within the group of candidates whose appointment to Class III of the SLEAS had been quashed by the Court order dated 29th October 1999, the consequential steps taken by the Respondents to revoke the Petitioner's appointment to Class III of the SLEAS, and to reappoint her to the Teachers' Service do not amount to an arbitrary exercise of power which would violate the Petitioner's rights guaranteed under Article 12 (1) of the Constitution.

Recovery of excess payments

The Petitioner asserts that there is no justification whatsoever to recover the amount claimed to have been an overpayment in the letter marked P15.

Following the cancellation of the Petitioner's appointment to Class III of the SLEAS, the Auditor-General (7th Respondent) by letter dated 22nd September 2009 (P15) requested information from the 3rd Respondent with respect to the Petitioner, citing the fact that despite the revocation of the Petitioner's appointment by letter dated 13th March 2000 (1R3), the Petitioner had been receiving the salary and travelling allowances of a Class III Officer of the SLEAS.

The Petitioner denies having received the letter the letter dated 13th March 2000, and states that she became aware of its contents only when the letter was filed in Court by the State by way of motion dated 21st February 2012.

Thus, it was contended on behalf the Petitioner, that no reasonable inference can be drawn to establish her knowledge of the cancellation of her appointment [by the letter dated 13th March 2000], as she had performed her duties as a Class III officer of the SLEAS, her salary had been duly paid and she was granted promotions and salary increments.

Despite the cancellation of the Petitioner's appointment to Class III of the SLEAS by IR3, she had only been officially notified of the said cancellation and her reappointment to the Teachers' Service, by letter dated 1st September 2009 (P14). Up to that point, the Petitioner had been performing her duties as an officer of the SLEAS. This is further evinced by the fact that she has furnished information from the database of the Public Service Commission in 2009 [P5(e)]. She had been given a covering appointment as the Director of Education in charge of the Pallepola Division in addition to her regular functions with effect from 1st May 2009 (P8), and her salary increments for the year 2007 too had been approved (P7).

Although, by operation of law, the Petitioner had to revert back to the Teachers' Service, the fact remains that she served and performed duties entrusted to her as an officer of the SLEAS until she was formally notified that her appointment to the SLEAS had been cancelled and that she had been reverted back to the Teachers' Service, by letter dated 1st September 2009 (P14).

Although this application should be dismissed for the reasons set out above, we wish to note that under Article 126 (4) of the Constitution, this Court is vested with extensive power to grant relief or make such directions where deemed necessary in the exercise of its just and equitable jurisdiction in instances where the jurisdiction of this court is invoked in terms of Articles 126 (2) of the Constitution.

Referring to articles 17 and 126 of the Constitution, his Lordship Wanasundera J, in the case of **Jayanetti V. The Land Reform Commission** (1984) 2 S. L.R. 172, observed; *"These provisions vest this Court with sole and exclusive jurisdiction to hear and determine any question relating to an infringement of fundamental rights by executive or administrative action.* ***We are empowered after such inquiries, as we consider necessary, to grant such relief or make such direction in the case as we may deem just and equitable.*** *This is an extensive jurisdiction and it carries*

with it all implied powers that are necessary give effect and expression to our jurisdiction. We would include within our jurisdiction, inter alia, the power to make interim orders and to add persons without whose presence questions in issue cannot be completely and effectually decided. In fact, our present decision in no way widens the ambit of Article 126 but seeks to articulate its real scope and to make the remedy more effective." [emphasis added]

As referred to earlier the Petitioner has enjoyed the promotion granted to her due to no fault of hers. Even though the relevant authorities had full knowledge of the fact that the promotions granted in 1999 were not in conformity with the law by the year 2000, no steps were taken to revert the Petitioner to the position she held before the promotion was granted. Not only were her services retained as a SLEAS officer of class III, but had granted her salary increments and furthermore entrusted her with covering duties of the Zonal Director of Education [P 19]. Thus, it appears that the Petitioner, clearly had been treated as a SLEAS officer of Class III by the authorities up to August 2009. As such, we do not see any justification in the demand made by the 7th Respondent [P15] to the 3rd Respondent to recover a sum of Rs. 1917464.03 from the Petitioner, on the basis that the said amount was an excess payment that the Petitioner had been paid, with her salary and other emoluments.

It appears from the documents filed along with the motion dated 19.02.2018, [X1, X3] that the 3rd Respondent had taken steps to recover certain sums of money from the Petitioner, presumably, on the basis of the overpayment aforesaid. It is not possible, however, for this court to ascertain the exact amount recovered from the Petitioner from the material available in this case.

Accordingly, I consider it appropriate to make the following direction;

The 2nd and 3rd Respondents or their successors are directed to take steps forthwith to have the amount recovered from the Petitioner, as an overpayment of salary that was paid to the Petitioner during the period she served as a Class III SLEAS officer, paid back to the Petitioner.

Subject to the above direction, this application is dismissed.

In the circumstances of the case, I order no costs.

Application dismissed

JUDGE OF THE SUPREME COURT

JUSTICE ACHALA WENGAPPULI

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 in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) 13/2019

Wijesundara Mudiyanselage Naveen Nayantha
Bandara Wijesundara,
No. 296/19C,
Shanthi Mawatha,
High Level Road,
Colombo 06.

PETITIONER

-Vs-

1. D. N. R. Sirirwardena,
Registrar General of Companies,
The Department of the Registrar of Companies
Sri Lanka,
No. 400,
D. R. Wijewardena Mawatha,
Colombo 10.

1(a). Sanjeewa Dissanayake,
Registrar General of Companies,
The Department of the Registrar of Companies
Sri Lanka,

No. 400,
D. R. Wijewardena Mawatha,
Colombo 10.

2. Baqian Law Group Lanka (Pvt) Ltd,
No. 11,
Station Road,
Bambalapitiya,
Colombo 04.

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

RESPONDENTS

4. Kalinga N. Indatissa,
President's Counsel,
The President,
The Bar Association of Sri Lanka
No. 153,
Mihindu Mawatha,
Colombo 12.
And also, of
No. 20,
1st Lane,
Epitamulla Road,
Pitakotte.

4(a). Saliya K.M. Pieris, PC,
The President,

The Bar Association of Sri Lanka,
No. 153,
Mihindu Mawatha,
Colombo 12.
And also of
No. 79/3,
Kuruppu Road,
Colombo 08.

5. W. J. Shavindra Fernando,
President's Counsel,
Deputy President
Bar Association of Sri Lanka,
No. 153,
Mihindu Mawatha,
Colombo 12.
And also, of
No. 4/3,
Sri Sumangala Mawatha,
Ratmalana.

5(a). Anura B. Meddegoda, PC,
Deputy President,
Bar Association of Sri Lanka,
No. 153,
Mihindu Mawatha,
Colombo 12.
And also of
No.195/21,
Royal Court,

Koswatta Road,
Nawala.

6. Kaushalya Nawaratne,
Attorney-at-Law,
Secretary,
Bar Association of Sri Lanka,
No. 153,
Mihindu Mawatha,
Colombo 12.
And also, of
No. 8B,
1st Lane,
Pagoda Road,
Nugegoda.

6(a). Rajeev Amarasuriya,
Attorney-at-Law,
Secretary,
Bar Association of Sri Lanka,
No. 153,
Mihindu Mawatha,
Colombo 12.
And also of
No.8/2,
Coniston Place,
Colombo 07.

7. A. W. Nalin Chandika De Silva,

Attorney-at-Law,
Treasurer,
Bar Association of Sri Lanka,
No. 153,
Mihindu Mawatha,
Colombo 12.
And also, of
No. 321/ 15a,
Rankethyaya Road,
Makola South,
Makola.

7(a). T. Rajindh Perera,
Attorney-at-Law,
Treasurer,
Bar Association of Sri Lanka,
No. 153,
Mihindu Mawatha,
Colombo 12.
And also of
No.457/14A,
Nawala Road,
Rajagiriya

8. V. De Livera Tennekoon,
Attorney-at-Law,
Assistant Secretary,
Bar Association of Sri Lanka,
No. 153,
Mihindu Mawatha,

Colombo 12.
And also, of
No. 74/5,
Jaya Road,
Udahamulla,
Nugegoda.

8(a). T.M.S. Pasindu Silva,
Attorney-at-Law,
Assistant Secretary,
Bar Association of Sri Lanka,
No. 153,
Mihindu Mawatha,
Colombo 12.
And also of
No.6/1,
Watarappola Road,
Mount Lavinia.
ADDED RESPONDENTS

Before : **VIJITH K. MALALGODA PC J**

L. T. B. DEHIDENIYA J

P. PADMAN SURASENA J

Counsel : Nayantha Wijesundara appears in person for the Petitioner.

Dr. Sunil Abeyratne with Mihiri Kudakolowa and Buddhika Alagiyawanna for the 2nd Respondent.

Chanaka de Silva PC with Dilrukshi Paul, Sachintha Kahandage, Sewwandi Karalliadde on the instructions of NW Associates for the 4th - 8th Added Respondents.

Sanjay Rajaratnam PC Acting SG with Sureka Ahmed SC Nayomi Kahawita SC and Yuresha de Silva SSC for the 1st and 3rd Respondents.

Argued on : 06-02-2020, 08-11-2021 and 02-12-2021

Decided on : 18-10-2022

P Padman Surasena J

The Petitioner is an Attorney-at-Law who seeks to challenge in this application, *inter alia*, the executive and administrative action/ decision of the 1st Respondent (Registrar General of Companies) to incorporate the 2nd Respondent as a limited liability company by the name of Baqian Law Group Lanka (Pvt) Ltd. for an unlawful purpose and his failure to investigate the said Baqian Law Group Lanka (Pvt) Ltd. in terms of Section 173(1)(b) (i) and / or (ii) of the Companies Act No. 07 of 2007.

The 2nd Respondent, Baqian Law Group Lanka (Pvt) Ltd. (hereinafter sometimes referred to as Baqian Law Group) has been incorporated on 19th November 2018 as a limited liability company having its name as 'Baqian Law Group Lanka (Pvt) Ltd.' It bears company registration No. PV00206486. The Petitioner has produced a copy of the application submitted by Baqian Law Group for its incorporation, marked **P 2**. The 1st Respondent has admitted the same.[1]

The Primary Objective of Baqian Law Group stated in its Articles of Association is as follows:

[1] Vide Paragraph 7 of the affidavit dated 18-03-2019 filed by the 1st Respondent.

"To carry on the business of providing investment advisory services and consultations. The company will not engage in retail trade in Sri Lanka."

The Petitioner has produced a copy of the said Articles of Association marked **P 3**.

It is the position of the Petitioner that Baqian Law Group would provide, *inter alia*, legal professional services in Sri Lanka and it has stated so in the documents produced marked **P 4** and **P 5** which are copies of online editions of newspaper articles.

It is in those circumstances that the Petitioner complains that the action of the 1st Respondent in incorporating Baqian Law Group and his subsequent failure to act in terms of section 173(1)(b) (i) and/or (ii) of the Companies Act No. 07 of 2007 have infringed the Petitioner's fundamental rights guaranteed under Articles 12(1), 12(2) and 14(1)(g) of the Constitution.

This Court on 31st January 2019, having heard the submissions of the Petitioner, the learned counsel for the Baqian Law Group and the learned Senior Additional Solicitor General who appeared for the 1st and 3rd Respondents, has granted:

i. Leave to Proceed in respect of the alleged violations of Articles 12(1) and 14(g) of the Constitution, and;
ii. an interim order restraining the Baqian Law Group from engaging in any legal professional work within the Democratic Socialist Republic of Sri Lanka until the Court finally determines this matter.

Thereafter, then office bearers holding the posts of President, Deputy President, Secretary, Treasurer and Assistant Secretary of the Bar Association of Sri Lanka (hereinafter referred to as the BASL) filed the motion dated 10th September 2019 along with the petition and the affidavits seeking permission for intervention into this application as parties. Court having considered the said application, by its order dated 19th September 2019, had permitted the then office bearers holding the posts of President, Deputy President, Secretary, Treasurer and Assistant Secretary of BASL to intervene in this

application. They were added to the caption respectively as 4th, 5th, 6th, 7th and 8th Respondents.

Court commenced the argument of this case on 06th February 2020. As the Petitioner did not conclude his submissions on that day, Court fixed the case to be resumed, for 19th March 2020. However, with the outbreak of Covid 19 pandemic in the country, resumption of the argument of the case did not happen on the scheduled date.

Thereafter, it was on 08th November 2021 that the Court could resume the argument and the 1st Respondent, the Registrar of Companies and the office bearers of the BASL had changed by that time.

Accordingly, the Petitioner by motion dated 23rd November 2021 pleaded for the 1st Respondent to be substituted by 1(a) Respondent which court permitted. Further the Added Respondents by motion dated 30th November 2021 applied for the persons who had succeeded as office bearers to the posts of President, Deputy President, Secretary, Treasurer and Assistant Secretary of the BASL to be added to the caption. Consequently the court had permitted the substitution of the persons who succeeded to the posts held by their predecessors. Thus, those who had become the President, Deputy President, Secretary, Treasurer and Assistant Secretary of the BASL were added to the caption as 4(a), 5(a), 6(a),7(a) and 8(a) respectively.

In essence, the arguments advanced in this case by the Petitioner as well as the BASL can be summarized as follows.

1) The main objective of Baqian Law Group which the 1st Respondent has incorporated under the Companies Act No. 07 of 2007 as a limited liability company, is to provide legal professional services in Sri Lanka.
2) According to the law in Sri Lanka it is only a natural person who should be an Attorney-at-Law who can provide the legal professional services in Sri Lanka.
3) In the above circumstances, the 1st Respondent has acted in violation of the law of the country when he incorporated Baqian Law Group as a limited liability company under the Companies Act No. 07 of 2007.

4) The 1st Respondent has also acted in violation of the law of the country by failing to act in terms of section 173(1)(b) (i) and/or (ii) of the Companies Act No. 07 of 2007.
5) The Petitioner is therefore denied the equal protection of law guaranteed by Article 12(1) and 14(g) of the Constitution.

Let me commence the discourse relevant to the final decision of this case, with the argument No. 02 above.

According to Article 4 (c) of the Constitution the Sovereignty of the People includes the judicial power of the People which shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by law.

Article 105 (1) of the Constitution states that subject to the provisions of the Constitution, the institutions for the administration of justice which protect, vindicate and enforce the rights of the People shall be the Supreme Court, the Court of Appeal, the High Court and such other Courts of First Instance, tribunals or such institutions as Parliament may from time to time ordain and establish.

Article 105 (2) of the Constitution states that all courts, tribunals and institutions created and established by existing written law for the administration of justice and for the adjudication and settlement of industrial and other disputes, other than the Supreme Court, shall be deemed to be courts, tribunals and institutions created and established by Parliament and that the Parliament may replace or abolish, or amend the powers, duties, jurisdiction and procedure of, such courts, tribunals and institutions.

The first piece of legislation passed by the Parliament soon after the promulgation of the 1978 Constitution was the Judicature Act No. 02 of 1978. As the administration of justice in any civilized society cannot be effectively implemented without lawyers, the legislature in its wisdom, through the Judicature Act, established the legal profession. Thus, there is no dispute that the legal profession is a *sine qua non* for the due administration of justice in this country and for that matter in any civilized society. The said profession is essential for the maintenance of the Rule of Law and maintenance of law and order and its due

existence is of paramount importance to the organized functioning of the society which is primarily the basis for the smooth functioning of the country as a whole. Therefore, the community must always have competent lawyers, for it is then only that the citizens can assert and vindicate their rights created and guaranteed by law and claim that the due administration of justice and the Rule of Law prevails in the country.

The above requirement for the well-being of the people has been put in place by Parliament through section 40 (1) of the Judicature Act which provides that '*the Supreme Court may in accordance with rules for the time being in force admit and enroll as attorneys-at-law, persons of good repute and of competent knowledge and ability'*. That was an important and necessary step taken by Parliament to facilitate the administration of justice by all courts, tribunals and institutions created and established by existing written law referred to in Article 105 of the Constitution. Indeed, section 41 of the Judicature Act which has clearly set out the right of representation, has further shed light on the above mechanism established for implementing the administration of justice in the country. It is as follows;

Section 41 of the Judicature Act (Right of Representation)

> *" (1) Every attorney-at-law shall be entitled to assist and advise clients and to appear, plead or act in every court or other institution established by law for the administration of justice and every person who is a party to or has or claims to have the right to be heard in any proceeding in any such court or other such institution shall be entitled to be represented by an attorney-at-law.*
>
> *(2) Every person who is a party to any proceeding before any person or tribunal exercising quasi-judicial powers and every person who has or claims to have the right to be heard before any such person or tribunal shall unless otherwise expressly provided by law be entitled to be represented by an attorney-at-law."*

As in any other profession, the legislature in its wisdom, through section 42 of the Judicature Act has also put in place, a mechanism of regulating the legal profession and

vested the powers therefore in the hands of the Supreme Court. It would be relevant at this stage to reproduce that section.

Section 42 of the Judicature Act (Refusal to admit, suspension and removal of attorney-at-law)

> *" (1) The Supreme Court shall have the power to refuse to admit and enroll any person applying to be so admitted and enrolled as an attorney-at-law and shall if required to do so by the applicant, assign and declare in open court the reasons for such refusal.*
>
> *(2) Every person admitted and enrolled as an attorney-at-law who shall be guilty of any deceit, malpractice, crime or offence may be suspended from practice or removed from office by any three Judges of the Supreme Court sitting together.*
>
> *(3) Before any such attorney-at-law shall be suspended or removed as hereinbefore provided a notice containing a copy of the charge or charges against him and calling upon him to show cause within a reasonable time why he should not be suspended or removed, as the case may be, shall be personally served on him. If, however, personal service cannot be effected, the Supreme Court shall order such substituted service as it may deem fit:*
>
> *Provided however that every such attorney-at-law may be suspended by any Judge of the Supreme Court on such cause as aforesaid pending the final decision of the Supreme Court.*
>
> *(4) It shall be the duty of the presiding officer of any court or other tribunal administering justice before which any attorney-at-law is found guilty of any crime or offence which may be prescribed to forthwith report such fact to the Supreme Court which may if it thinks fit suspend such attorney-at-law from practice pending the final determination of any appeal from such finding of guilty or a proceeding under subsection (3) whichever is later."*

It is pertinent at this stage to observe that section 43 of the Judicature Act has specifically recognized the importance and necessity of the role played by the Bar Association of Sri

Lanka in maintaining the professional discipline of its members. Section 43 (1) which is reproduced below would be self-explanatory in that regard.

> "*Where the Chief Justice or any Judge of the Supreme Court considers it expedient or necessary for the purpose of enabling the Court to determine whether or not proceedings should be taken for the suspension from practice or the removal from office of any attorney-at-law, the Chief Justice or any other Judge of the Supreme Court may by order direct that a preliminary inquiry into any alleged misconduct of such attorney-at-law shall be held by a disciplinary committee of the Bar Association of Sri Lanka constituted in accordance with the succeeding provisions of this Act.*"

Very existence of the above provision is sufficient to explain why this Court had rightly permitted the BASL to intervene into this case as Intervenient Petitioners.

Article 136 (1) (g) of the Constitution is yet another further step taken by the legislature in the Constitution itself to charge the Supreme Court with the power to make rules in respect of the admission, enrolment, suspension and removal of Attorneys-at-Law. The said article is as follows.

> *"(1)Subject to the provisions of the Constitution and of any law the Chief Justice with any three judges of the Supreme Court nominated by him, may, from time to time, make rules regulating generally the practice and procedure of the Court including –*
>
> *…*
>
> *(g)the admission, enrolment, suspension and removal of attorneys-at-law and the rules of conduct and etiquette for such attorneys-at-law"*

The Supreme Court under the powers vested in it by virtue of the above article has formulated the Supreme Court Rules 1978 which was published in the Gazette Extraordinary No. 9/10 dated 8th November 1978. Reproduction of Rules 67, 68, 69 & 70 thereof would be relevant for the purposes of this case. They are as follows:

Rules 67, 68, 69 & 70 of Supreme Court Rules 1978 published in the Gazette Extraordinary No. 9/10 dated 08th November 1978.

" *67. Every person who intends to apply for admission as an Attorney-at-law shall, not less than six weeks before he shall so apply, give notice of such intention to the Registrar of the Supreme Court and to the Registrar of the Council of Legal Education or of such other governing body as may at the time be established for the purpose, of supervising and controlling the legal education of students desirous to qualify themselves as Attorneys-at-law and shall cause his name and place of abode to be posted up at the Registry of the Supreme Court and shall also cause notice of his intended application to be published once at least in the Gazette of the Republic of Sri Lanka and in any Sinhala, Tamil or English daily newspaper published in Colombo.*

68. Every application shall be in the form of a petition to the Supreme Court to which shall be annexed-

a) the certificates issued to him by the Ceylon Law College or by under the authority of such other governing body as aforesaid in proof of his having passed the various examinations prescribed for the admission of Advocates or Proctors or Attorneys-at-law or of his having been exempted from the whole or any part of any such examination by reason of his having passed an equivalent or higher examination in law of a recognized University or other educational institution;

b) an affidavit that the applicant is the identical person mentioned in such certificates and that he has attained the age of twenty-one years;

c) a certificate from the Attorney-at-law whose chambers he has attended that he duly attended his chambers and that he practically understands the details of the practice of an Attorney-at-law;

d) a certificate from the Principal of the Ceylon Law College or of such other governing body, as afore-said that he has successfully completed any practical training course as may be prescribed: provided that in the case of a person who was registered as a student before January 1, 1974, the certificates given under the Rules of the Council in force at that time shall be accepted for the purpose of this Rule; and

e) certificate from two or more Attorneys-at-law of at least seven years' standing that the applicant is a person of good repute and that there is no impede mentor objection to his enrolment as an Attorney-at -law.

69. The Supreme Court shall thereupon direct the Registrar to inquire and report whether the applicant is of good repute and whether there exists any impediment or objection to his enrolment as an Attorney-at-law, and upon such report the Supreme Court shall either direct the applicant to be sworn or affirmed and admitted and enrolled or make such other order as it may deem proper.

70. No person who has not been duly admitted and enrolled as an Attorney-at-law or who has been suspended from practice or removed from office after having been so admitted and enrolled shall be allowed to assist and advise clients or to appear, plead or act for or on behalf of clients in any Court or other institution established by law for the administration of Justice."

All of the above provisions of law are on the primary basis that only an individual as opposed to a corporate personality who can be duly admitted and enrolled as an Attorney-at-Law. Thus, it is beyond any doubt that in this country, only a natural person can provide the professional services expected from an Attorney-at-Law and it is not possible for a company to provide the professional services of an Attorney-at-Law.

Moreover, in the process of the hearing, the submission of the learned counsel for all parties revealed that all the parties have agreed to record the following admissions.[2]

" *1) Only natural persons are permitted to engage in the practice of law in the Democratic Social Republic of Sri Lanka.*

2) The 2nd Respondent shall not engage in any activity constituting the practice of law as contemplated in rule 70 of the Supreme Court Rules 1978 to vit "to assist and advise clients or to plead or act for on behalf of clients in any court or other institution established by law for the administration of justice."

3) The 2nd Respondent admits the documents produced marked ***P 4*** *and* ***P 5*** *attached to the Petition dated 16/01/2019.* "

The 2nd Respondent has admitted that the "Baqian Law Group Lanka (Pvt) Ltd." has been incorporated as a company under Companies Act of Sri Lanka.[3] Further, the 1st Respondent too has confirmed it.[4]

It follows from the above conclusion that Baqian Law Group, which is registered as a company, cannot lawfully provide the professional services of an Attorney-at-Law in Sri Lanka under its governing laws . This is quite obvious as the Supreme Court admits and enrolls only natural persons as Attorneys-at-Law for it is only then that it can exercise disciplinary control over such Attorneys-at-Law in terms of the aforementioned provisions of the Judicature Act.

According to the 2nd Respondent on the authorization of the Chairman of Baqian Law Group Zhao Yao, a lawyer attached to Baqian Law Group Zhejiang Yunnan has submitted to this Court the affidavit dated 27th March 2019. The said letter of authorization has been produced marked **X**.

The position of Baqian Law Group is that it will not carry out the functions of Attorneys-at-Law of this country who can represent and appear on behalf of clients in litigation in

[2] Vide journal entry dated 02-12-2021 in the docket.
[3] Vide Paragraph 12 of the statement of objections dated 27-03-2019 filed by the 2nd Respondent.
[4] Vide Paragraph 7 of the affidavit dated 18-03-2019 filed by the 1st Respondent.

any Court or other institution established by law for the administration of justice. However, Baqian Law Group has taken up the position that *"there is no restriction in carrying out to assist or to advice or to appear, plead for interested parties who are involved in Alternate Dispute Resolutions such as Arbitration under the Arbitration Act No. 11 of 1995, Mediation and Negotiation and Intellectual Property Act 2003*." [5]

Thus, it is the stated position of Baqian Law Group in the instant proceedings that it was incorporated as a company under the Companies Act of Sri Lanka with the primary objective to carry on the business of providing investment advisory services and consultations without engaging in retail trade in Sri Lanka and activities that are identified as restricted areas of business. Baqian Law Group has specifically denied that it has any intention or made any attempt to engage or enter into legal practice of Attorneys-at-Law of the Supreme Court of Sri Lanka who are involved in legal profession of the Republic to assist and advise clients or to appear, plead or act for or on behalf of clients in any Court or other institution established by law for the administration of justice.[6] Further, the purpose of its incorporation according to paragraph 10 of the affidavit of Zhejiang Yunnan, is to provide investment advisory services and consultation for Baqian Law Group's Chinese investor clients in Sri Lanka.[7] Baqian Law Group has stated that this was necessary due to the existence of a language barrier which prevent them from understanding the differences of legal systems between China and Sri Lanka. It has not specified the exact area of the business activities it would engage in, within Sri Lanka but has been content only to have stated the above as its objective and the reason therefore as the failure on the part of the Chinese investors to understand the differences of legal systems between China and Sri Lanka. According to Baqian Law Group, if it does not get opportunity to assist its clients in Sri Lanka through its secretarial services mainly providing investment advice, there will be a serious threats caused to some Chinese investors in Sri Lanka and also to the Sri Lankan economy.[8]

[5] Vide paragraph 13 of the affidavit of Zhejiang Yunnan.
[6] Vide paragraph 14 of the affidavit of Zhejiang Yunnan.
[7] Vide paragraph 10 of the affidavit of Zhejiang Yunnan.
[8] Vide paragraph 15 of the affidavit of Zhejiang Yunnan.

Thus, it would be necessary for me at this stage, to determine whether Baqian Law Group as claimed by it, neither has any intention nor made any attempt to engage or enter into the legal practice of Attorneys-at-Law of the Supreme Court of Sri Lanka.

The sole affidavit presented to this Court on behalf of the 2nd Respondent has been affirmed on the 27th of March 2019 by one Zhejiang Yunnan who claims to be a lawyer of Baqian Law Group Lanka (Pvt) Ltd. of the Peoples Republic of China. The said affirmant has affirmed to the factual positions contained therein from his personal knowledge, the documents available to him and the instructions given to him by and on behalf of the 2nd Respondent. According to the said affidavit, the affirmant has been given the letter of authorization produced marked **X** by the Chairman of the 2nd Respondent to enable him to present the said affidavit. The said affirmant has also annexed a copy of his/her passport marked **Y** and annexed to the said affidavit.

I observe that the letter of authorization given by the Chairman of the 2nd Respondent produced marked **X** has only authorized one Li Leiqi to sign the affidavit and the legal documents pertaining to the instant case on behalf of the 2nd Respondent. The copy of the passport produced marked **Y** is that of Li. Leiqi. However, it is a matter of grave importance and concern to me that the affidavit dated 27th March 2019 has neither been affirmed nor has been submitted by Li Leiqi. The affidavit dated 27th March 2019 has been submitted by Zhejiang Yunnan who has not been given any authority to sign affidavits or produce documents by the 2nd Respondent company. Thus, I hold that the affirmant Zhejiang Yunnan is a person who does not have any connection to this case and hence has no locus standi to present the affidavit dated 27th March 2019. For the above reasons, I reject the affidavit affirmed on 27th March 2019 by Zhejiang Yunnan.

The above conclusion results in a situation where there is no evidence to substantiate aforementioned factual positions taken up on behalf of the 2nd Respondent. Thus, in view of my decision to reject the affidavit, I hold that the 2nd respondent has failed to substantiate any of the aforementioned positions it had taken up in this case.

Let me now consider the position taken up by BASL. Mr. Chanaka de Silva PC who represented BASL, submitted that the operations, the 2nd Respondent had planned to launch in this country directly falls within the ambit of legal services, which is conventionally procured through legal professionals regulated under the laws of Sri Lanka. It was the submission made by BASL that this Court would not be able to regulate the manner in which the 2nd Respondent would provide legal services in this country as contemplated by Article 136 (1) (g) of the Constitution since this Court has not admitted and enrolled the 2nd Respondent as an Attorney-at-Law under the governing laws in Sri Lanka. It is the argument of the BASL that the above situation has resulted in placing the Attorneys-at-Law who are regulated by the Supreme Court of Sri Lanka in a disadvantaged and discriminated position. It is also the BASL's position that such a situation would prejudice the rights of the members of the public at large, who may obtain the purported services advertised, represented or held out as being provided by the 2nd Respondent, thereby denying them the equal protection of the law guaranteed to all persons in terms of Article 12 (1) of the Constitution.

In order to evaluate the above arguments, it would be necessary for me to first determine the nature and extent of legal practice permitted by law for Attorneys-at-Law of the Supreme Court of Sri Lanka.

Authorities are hardly necessary, to understand that the practice of an Attorney-at-Law in this country is not limited to mere appearances as an Attorney-at-Law in Courts. Indeed, once an Attorney-at-Law is admitted and enrolled, as per the aforementioned provisions of the Judicature Act, such Attorney-at-Law shall be entitled to assist and advise clients and to appear, plead or act in every court or other institution established by law for the administration of justice. Furthermore, and every person who is a party to or has or claims to have the right to be heard in any proceeding in any such court or other such institution, shall be entitled to be represented by an Attorney-at-Law.

It is common knowledge that a large, if not a greater work, of Attorneys-at-Law today happens out of court. The practice of law is not limited to the conduct of cases in courts. Starting with the drafting of pleadings, they also inevitably have to render their

professional services in advising their clients, drafting agreements, conveyancing, preparation of numerous other documents, participating in legal formalities such as negotiations or other kind of proceedings taking place outside the courtroom. All of those activities would need proper legal skills and have been recognized from time immemorial, as part of the practice any Attorney-at-Law may engage. Indeed, it is a matter of fact that there are many lawyers who confine themselves to what is commonly known as "Chamber Practice" which means that such lawyers would hardly go and appear in Courts but are actively engaged in other events which are at various stages in the run up to vindication of the citizens' rights. Only some of them would end up in litigations before Courts. These activities and the connected services thereto, rendered by such Attorneys-at-Law too require competence and involve the use of legal knowledge and skill. Thus, the practice of such Attorneys-at-Law does come under the purview of a practice of an Attorney-at-Law.

Attorneys-at-Law are officers of Court. Their right to practice law attaches to them only in their individual capacity. Their right to practice dies with them. It cannot be made the subject of a business sheltered under a veil of a corporation which does not die like a human being. Moreover, this Court too does not issue such licenses for corporations to practice as Attorneys-at-Law.

The practice of law by an Attorney-at-Law is a privilege extended to them upon their satisfying threefold requirements: be persons of good repute; be persons having competent knowledge; and be persons having ability. This is in addition to the requirement of having achieved the qualifications specified by the Supreme Court Rules. It is primarily for upholding the Rule of Law and to safeguard the general public that the law has required that no other person shall engage in such practice. Another important factor in that regard is the ability and power of Supreme Court to supervise and exercise disciplinary control over the Attorneys-at-Law it admits and enrolls. That is because, once enrolled and admitted as lawyers, they are bound by a high code of professional ethics which have been formulated by the Supreme Court in the form of Rules. One has to bear in mind that this is a measure taken by the legislature for the well-being and protection

of public and not either to the advantage of lawyers or to the disadvantage of non-lawyers. Thus, in my view, holding that a layman who prepares legal papers or furnishes other services of a legal nature is not practicing law when such services are incidental and closely connected to those permitted to be exercised by Attorneys-at-Law would surely defeat the mischief, the legislature had sought to suppress and would completely ignore the public welfare and the protection afforded to the general public by law. I am unable to subscribe to that kind of interpretation.

Let me now turn to the documents produced marked **P 4** and **P 5** which are copies of online editions of newspaper articles. The following excerpts from **P 4** must be noted.

> *"For the first time a Chinese law firm, Baqian Law Group, has selected Sri Lanka to open their regional office for the South Asian region.*
>
> *…*
>
> *"Due to this Baqian Law Group is keen to extend our foot print in Sri Lanka to look after legal matters and also providing a basic support for the development of strategic development arising not only in Sri Lanka but in the entire region. We will open our office in Colombo next week and would have for Chinese lawyers along with a legal team from Sri Lanka."*
>
> *Established in 1992 in Kunmin, China the law firm is looking to open more officers in Sri Lanka and in Asia.*
>
> *Attorney at Law and Sri Lanka consultant for Baqian Law Group Sri Lanka, Sunil Abeyratne said that the legal systems in both China and Sri Lanka have major differences and they hope to provide advice and consultancy services for Chinese companies in Sri Lanka. "Sri Lanka is also in the process of drafting several new legislatures on ICT and electronic money transfer and other areas and we will provide our expertise for in these areas." "*

Contents of **P 5** may also be noted and is as follows:

" *Addressing the language barrier and misunderstandings in connection to the time-consuming legal processes faced by Chinese investors in Sri Lanka, Yunnan Baqian Law Group of China opened Baqian Law Group Lanka (Pvt.) Ltd in Colombo to act as a catalyst to fast track the processing and communication between the investor and relevant local authorities. The firm was officially launched at an opening ceremony at the Hilton, Colombo on Monday.*

With the extensive promotion of the 'One Belt One Road' initiative, Chinese companies are seeking to invest in overseas markets, which is inseparable from strong legal guarantees.

Baqian Law Group Lanka (Pvt.) Ltd was developed with the aim to provide professional, comprehensive, timely and efficient overseas legal services to domestic and foreign enterprises.

Relying on the geographical advantages of the law firm and exquisite overseas legal services, combined with the extensive local legal service experience, Baqian integrates high-quality resources from all walks of life in domestic and abroad to build a legal service bridge for mutual benefit.

The establishment of Baqian Law Group Lanka (Pvt.) Ltd is believed to enhance the brand competitiveness and influence of China's international legal services, practice legal diplomacy, and demonstrate the value of lawyers.

The services provided by Baqian Law Group Lanka (Pvt.) Ltd are: notarial services, legal due diligence, international trade remedies, undertaking for the establishment of various types of enterprises and institutions, advising on investment architecture and corporate governance architecture, assist clients in handling anti-monopoly review in domestic and overseas, intellectual property disputes, assist clients to complete the acquisition and delivery, dispute resolution related to investment, real estate and construction, advising on operations, taxation and financial compliance, transaction structure design document drafting, review and support of transaction negotiation, assist on

government approvals, filing, registration, exemption and related procedures, legal services for the construction of direct investment projects, assist on project financing, legal opinions and advising in selecting and coordinating financial advisers and other service agents.

Yunnan Baqian Law Firm is one of the Sino-Global legal Alliance (SGLA) members rooted in Yunnan, serving China and its business covers South Asian and Southeast Asia. With nearly 200 lawyers and administrative staff, Baqian can provide customers with comprehensive domestic and international legal services and solutions. The law firm strives to provide quality and efficient legal services to each client with the joint efforts of the whole team.

After 20 years of inheritance and 10 years of brand honing, Baqian has grown into one of China's leading law firms. Today, in the field of commercial legal services, dispute resolution, government and State-owned enterprise legal services, and in the legal services of South Asia and Southeast Asia, Baqian has been at the leading position among Chinese law firms. … "

Thus, the contents of those documents (**P 4** and **P 5**) which are admitted by the 2nd Respondent, have established the fact that the 2nd Respondent is a law firm in which Chinese lawyers would work along with a legal team from Sri Lanka, to provide *'quality and efficient legal services'* in Sri Lanka.

As no person who has not been duly admitted and enrolled as an Attorney-at-law shall be allowed to assist and advise clients or to appear, plead or act for or on behalf of clients in any Court or other institution established by law for the administration of Justice,[9] Baqian Law Group is debarred from engaging or entering into any operation coming within the purview of a legal practice of Attorneys-at-Law of this country.

In the above circumstances, and for the foregoing reasons, I hold that the 1st Respondent has acted in violation of the law of the country when he had incorporated Baqian Law

[9] Rule 70 of Supreme Court Rules 1978 published in the Gazette Extraordinary No. 9/10 dated 08-11-1978.

Group as a limited liability company under the Companies Act No. 07 of 2007 as its primary objective is illegal. The said action has denied the Petitioner and the Added Respondents, the equal protection of law guaranteed to them by Article 12(1) and their freedom to engage in their lawful profession, guaranteed to them by Article 14(1)(g) of the Constitution. I also hold that only natural persons (practicing the profession as individuals and practicing the profession in partnerships) are permitted to engage in the practice of law in the Democratic Socialist Republic of Sri Lanka. Thus, I hold that the 2nd Respondent is not entitled in law to engage in any legal professional work within the Democratic Socialist Republic of Sri Lanka as per the primary objectives stated in its Articles of Association (**P 3**) and the documents produced marked **P 4** and **P 5**. I direct the 1st Respondent to take all necessary steps according to law to give effect to the above conclusions.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda PC J

I agree,

JUDGE OF THE SUPREME COURT

L. T. B. Dehideniya J

I agree,

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution

01. Paalawa Rankoth Gedara Kenudi Dilandi
02. Peramuna Kankanamge Achala Dilrukshi

all of,

No. H2/4, National Housing Scheme,

(Commonly known as Chithra Lane Flats),

Chithra Lane, Colombo 05.

Petitioners

SC /FR/ Application No. 13/2020

Vs,

01. Sandamali Aviruppola,
The Principal, Visakha Vidyalaya,
No. 133, Vajira Road, Colombo -05.

02. Kalani Sooriyapperuma,
The Deputy Principal,
Administration,
Visakha Vidyalaya,
No. 133, Vajira Road, Colombo -05.

03. Sumudu Weerasinghe,
The Deputy Principal,
Education and Development,
Visakha Vidyalaya,
No. 133, Vajira Road, Colombo -05.

04. Jeevana Ariyarathna,
The Deputy Principal,
Co-Curricular and Extra Curricular,
Visakha Vidyalaya,
No. 133, Vajira Road, Colombo -05.

05. Ranjith Chandrasekara,
Director of National Schools
Ministry of Education,
Isurupaya, Baththaramulla.

06. N.H.M. Chithrananda,
Secretary, Ministry of Education,
Isurupaya, Baththaramulla.

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

Respondents

Before: **Justice Vijith K. Malalgoda PC,**
Justice P. Padman Surasena,
Justice A. L. Shiran Gooneratne,

Counsel: Thishya Weragoda with Stefania Perera and Niluka Dissanayake, for the Petitioners
Rajiv Goonetilleke DSG with Navodi De Soyza SC for the Respondents

Argued on: 25.05.2022
Judgment on: 29.09.2022

Vijith K. Malalgoda PC J

The 1st Petitioner Paalawa Rankoth Gedara Kenudi Dilandi and her mother, 2nd Petitioner Peramuna Kankanamge Achala Dilrukshi had come before this Court alleging the violation of the fundamental rights guaranteed under Article 12 (1) of the Constitution of 1st Petitioner by denying the admission to Grade 1 of Visakha Vidyalaya for the academic year 2020.

As revealed before this Court, the 2nd Petitioner being the mother of the minor, the 1st Petitioner, applied for admission to grade one of Visakha Vidyalaya, under the category, children of residents in close proximity to the school as laid down in clause 7.2 of the circular No. 29/2019 which governed the school admission to grade one for the year 2020.

Under clause 7.1 (i) of the said circular, 50% of the total number of vacancies were allocated to the children belonging to the said category and the requirement that need to establish the child's residence and allocation of mark based on the documents produced by the applicant is identified under clause 7.2 of the circular. Under clause 7.2 the applicant needs to reside at the premises and that has to be established by documents. The circular has further provided for a site inspection under clause 9.3.3 in order to establish the physical presence.

The circular had provided three ways, an applicant could establish the residence by documents and maximum of 20 marks out of 50 marks were allocated for the main documents in proof of residency of the parents (clause 7.2.1). another 5 marks were allocated under clause 7.2.1.2 for the additional documents in proof of the residence of the parents making total of 25 marks out of 50 marks. The balance 25 marks were allocated for the electoral registration of the parents.

The balance 50 marks were given for the proximity to school from the place of residence of the applicant and under clause 7.2.4 of the circular, 5 marks were to be deducted to each school comes within the distance between the residence of the applicant and the school applied for, which has a primary section where the child could gain admission.

The Petitioners grievance before this Court was based on the allocation of marks under clause 7.2.1 of the circular, for the main documents the 2nd Petitioner had submitted in establishing their residence. In the said circumstances it is not necessary to consider at length the allocation of marks under other clauses of the circular.

Under the provisions of clause 7.2.1, two types of documents could be used in establishing the residence namely, main documents and additional documents. Following documents were identified as the main documents under clause 7.2.1.1.

7.2.1.1 Main documents in proof of residence

a. Title Deeds
b. Bimsaviya Certificates
c. Gift Deeds
d. Deemana Pathra (දීමනා පත්‍ර)
e. Government Grants
f. Deeds issued under Buddhist Temporalities Ordinance and certificates issued by Viharadhipathi's certified by Commission General of Buddhist Affairs
g. Declaration deeds with proof of extracts for more than 10 years
h. Agreements for Houses purchased on instalment basis and payment receipts

According to the provisions of the said clause, the main document is in the name of the applicant or the spouse, he or she is entitled to get maximum of 20 marks in proof of the residency. However, the main document is in the name of the father or mother of the applicant or spouse, the applicant will get only 15 marks. In order to get full marks for the proof of residence, the main document should be 5 years old.

In addition to the Main document holders, the circular has further provided for applicants who are lessees, tenants (maximum of 10 marks), applicants with proof of occupancy in a state land for more than 10 years certified by the Municipality Commissioner or the Divisional Secretary. (5 marks), applicants who does not possess a certificate referred to above but has proof of occupancy with other acceptable documents (4 marks) and applicants who has proof of occupancy more than 6 years but does not prosses any of the above documents but has proof of occupancy (maximum of 4 documents) by Electricity or Water bills, Tax receipts, Birth Certificates (0.5 marks for each documents).

As revealed before us the 2nd Petitioner had attended the interview for the admission of the 1st Petitioner to Visakha Vidyalaya under the category of residence in close proximity on 18th September 2019 with required documents.

At the interview the Petitioner was allocated 55 marks whereas the cut-off mark, as learnt by the Petitioner subsequently was 62.40 marks. The Petitioner was provided with a copy of the allocation of marks at the conclusion of the said interview and according to the said mark sheet she had been allocated marks as follows,

Main document in proof of Residence	05
Additional Document in proof of Residence	05
Registration in the Electoral Register	25
Proximity to school	20
	55

Being dissatisfied with the said decision, specially with regard to the allocation of 05 marks to the Main Document in proof of the Residence, the Petitioner had submitted an appeal under clause 10.1 of the said circular and was summoned for the appeal inquiry on 24th December 2019.

The Petitioner had not received any favourable response even after the Appeal Inquiry and therefore decided to come before the Supreme Court challenging the decision to grant only 05 marks for Main Document in proof of Residency, whereas the Petitioner is entitled to receive 20 marks under Clause 7.2.1.1 (f) in the said category.

The Petitioner had received full marks for additional documents (05 marks) and Registration in the electoral register (25 marks), she had also received 20 marks for the proximity deducting 30 marks for 6 schools situated between the school and house of the Petitioner but the Petitioner had not challenged the allocation of the said 20 marks for proximity.

As already referred to in this judgment, the Petitioners only challenge was the granting of 05 marks to the main document in proof of Residency and in this regard, she had submitted the following;

a) That the Petitioner was a resident at No. 127/19 Chithra Lane, prior to the construction of low-income flats at Chithra Lane. The said premise was acquired for the purpose of constructing the above flats and thereafter she was allocated the house bearing No. S4/H/2/4 from the said scheme in November 2001
b) The Petitioner had entered into a sales agreement on 28th November 2001 with the Urban Development Authority with regard to the above premises (P9a)
c) In the said agreement the Petitioner had agreed to pay in instalment basis a sum of Rs. 530000/- in 720 equal instalments.
d) In the said agreement, Urban Development Authority had agreed to issue a Title deed in the name of the Petitioner when she made the full payment either in instalment basis or as a full payment

e) It is also agreed between the two parties that the Petitioner is entitled to possess the premises from the date of signing the said agreement and it is the duty of the Petitioner to maintain the premises and make all payments such as taxes, water and electricity bills.

f) By letter dated 26.05.2011 and 12.06.2019 National Housing Development Authority the management agency, had confirmed the ownership of the Petitioner to the premises baring No. S4/H/2/4 at Chithra Lane Housing scheme and legality of the agreement that was signed between the Petitioner and Urban Development Authority. (P10a) and (P10b)

Whilst submitting the above, the Petitioner had taken up the position that the agreement, she had produced mark P-9(a) fulfils all the requirements that need to be fulfilled under Clause 7.1.1 (f) and therefore refusing to accept P-9(a) under the above clause and allocate 05 marks was arbitrary and in violation of her fundamental rights guaranteed under Article 12 (1) of the Constitution.

The petitioner had further challenged the decision of the Respondents to grant 05 marks to P-9(a) the document she produced in proof of her residency. As already referred to by me, there is Provision under circular to grant 05 marks to a main document, if it appears that the document produced is only the proof of occupancy in a state land for more than 10 years certified by the Municipal Commission or by the Divisional Secretary. It was the position taken by the Petitioner that she never submitted a document issued either by the Municipal Commissioner or by the Divisional Secretary but what was produced is an agreement signed between the Urban Development Authority and the Petitioner agreeing to sell /purchase a housing unit on instalment basis from the Chithra Lane Housing Scheme.

Whilst admitting that the Petitioner had submitted an application to admit her child to Visakha Vidyalaya for the academic year 2020 under the category of Children of Residents in close proximity, the Respondents had taken up the position that allocating 05 marks to the main document in proof of Residence, was made strictly according to the provisions of the School Admission Circular No. 29/2019.

In this regard the Respondents have taken up the position that,

a) P-9 (a) is not a Registered sale and purchase agreement

b) The Petitioner was in occupation of a state land, and when the said state land was developed by the state a “housing unit” had been given to the Petitioner on “Punasthapana Padanama”

c) In the circumstances the petitioner was only entitled to get 05 marks on the basis of having been in occupation of a state land for a period more than 10 years.

The Respondents have submitted the copies of the document maintained by the interview panel marked R2. According to the said document, the interview panel had first granted 20 marks to the main document submitted in proof of Residence by the Petitioner and entered in the marksheet, "ඉල්ලුම්කාරියගේ නමින් ගෙවීමේ පදනම මත නාගරික සංවර්ධන අධිකාරිය සමඟ එළඹ ඇති ගිවිසුමක් 2001/11/28 දින සිට පවතී. ගෙවීම් කිරීමට අදාල ලදුපත් ද ඉදිරිපත් කර ඇත." but cut the said entry and the marks given and given 05 marks to the Petitioner, but failed to enter the basis under which the said 05 marks were given.

When considering the argument raised in favour of granting 05 marks to the Petitioner along with the copy of the original marksheet produced before us, it appears that 05 marks could only be given to a main document if the said document is certified either by the municipal Commissioner or by the Divisional Secretary stating that the person concerned is in occupation of a State Land for more than 10 years. In the instant case I can't find a certificate issued by any of the officers referred to in the circular but what is produced is an agreement signed between the Urban Development Authority and the Petitioner supported by payment receipts.

The Respondents tried to justify the above decision by referring to the basis on which the allocation of the Housing Unit was made to the effect "පුනස්ථාපන පදනම" but I see no merit in the said argument. According to P-10 b the allocation of Housing Unit bearing No. S4/H/2/4 was made on "පුනස්ථාපන පදනම" but it does not mean that there was only an exchange of a house that had taken place in the year 2001. From the material that is before us, it is clear that the decision to allocate a house to the petitioner was made since she had earlier possessed a house bearing No. 127/19 in Chithra Lane, but after the said allocation was made, she had to enter into an agreement to purchase the said house for sum of Rs. 530000/- and also agreed to pay the said sum in 720 equal instalments. In these circumstances it is clear that the document produced marked P-9a, the document on which the Petitioner relied as the main document in proof of her residence, is an agreement signed between the Urban Development Authority and the Petitioner to purchase the house bearing No. S4/H/2/4 by the Petitioner.

During the arguments before us, it was further revealed that, the Petitioner could have obtained the Transfer Deed from the National Housing Development Authority, if she was able to make the full payment, instead of paying it in instalments, but the Petitioner was unable make the full payment due to financial constraints. In those circumstances it was submitted on behalf of the Petitioner that her financial status has deprived the opportunity of admitting the 2nd Petitioner to Visakha Vidyalaya, even

after fulfilling all the requirements, due to an arbitrary decision by the interview panel and the appeal board of Visakha Vidyalaya.

As already referred to by me, Chitra Lane Housing scheme is constructed as a low-income scheme and therefore the allotees were permitted to pay the perche price in 720 equal instalments.

This was a concession granted by the state to a law income family and can that facility be considered against the Petitioner when deciding the validity of the agreement signed between the two parties under the school admission circular 29/2019.

When the Petitioner initially supported this matter before this court, this court having considered the material placed, decided to grant leave to proceed for the alleged violation of Article 12 (1) of the Constitution.

Article 12 (1) of the Constitution refers to equality and states as follows;

> "All persons are equal before the law and are entitled to the equal protection of the law"

In the case pf ***T.G. Samadi Suharshana Ferdinandis and Another V. Mrs. S. S. K. Aviruppola and Others SC FR 117/2011,*** SC Minute 25.06.2012, the question of equality before law was discussed by Shirani Bandaranayake CJ as follows;

> "The Constitutional provision guarantees the concept of equality before law which has been recognized as a dynamic concept with many facets within the concept itself.
>
> However, this concept does not mean that all persons in a society are always equal, as such a mechanical concept may create unnecessary injustice in a society. The true meaning of the concept therefore is that equals should not be treated as unequal's and similarly unequal should not be treated as equals"

As already observed in this judgment Clause 7.2.1.1 (f) of the School Admission Circular 29/2019, "Agreements for houses purchased on instalment basis and payment receipts" are identified as main documents in proof of residence and if it is proved, the person who submits such document is entitled to obtain full marks, i.e., 20 marks.

The Petitioner in addition to the agreement that was signed between the Petitioner and the Urban Development Authority (P-9a) had provided further proof to establish the nature of the said document mark P-10(a) and P-10(b). In the absence of any challenge to the said documents by the Respondents as

fresh documents, I presume that those material were available before the interview board when the Petitioner appeared before them.

P-10 (a) which was issued in the year 2011 confirmed the ownership of the Petitioner and stated that,

a) The house bearing No. S4/H/2/4 at Chithra Lane Housing Scheme was transferred to the Petitioner for occupation on a sales agreement
b) If the balance payment is paid in full National Housing Development Authority is prepared to issue a title deed
c) The sales agreement signed on 28.11.2001, is a legally binding document

P-10(b) which was issued in 2019 had also confirmed the above position and the Respondent when justifying the decision to grant 05 marks for main documents, had made use of the 2nd paragraph of the said letter and submitted that the Petitioner was an illegal occupant of a state land which was subsequently used to construct the housing scheme and therefore, she was only entitled to obtain 05 marks under the circular.

However, P-10 (b) does not refer to the above facts but it only confirms that the basis for the allocation was her prior occupation at house No. 127/19 which premises was also used to construct the housing scheme. The most important paragraphs of the said letter to the effect that the National Housing Development Authority is prepared to transfer the premises to the Petitioner if she makes the full payment and she is the lawful owner to the premises No. S4/H/2/4 was overlooked by the Respondents when making the said submission.

In the absence of a specific requirement for the registration of the agreement in the circular, the Respondent made an attempt to establish that the registration made under the Prevention of Frauds Ordinance is a must, when accepting a document of this nature at the interview. I am not inclined to go into detail of this argument since that might create unnecessary issues when accepting documents at the interviews but only state that the requirement under the circular is to submit the “Agreement for the house purchased on instalment basis and payment receipts” and nothing else.

When the Petitioner had submitted those with additional proof to the said document, I see no reason for the interview panel or the appeal board to refuse granting full marks to the said document.

Urban Development Authority and the National Housing Development Authority are statutory bodies established under statute and are empowered to implement the state policy on housing and urban

development. When these entities entered into an agreement in fulfilling its functions vested by the statute, can those documents be rejected, merely for the reason that the said document is not registered agreement, in the absence of any allegation of fraud or forgery. On the other hand, there was no doubt as to the genuineness of the said documents and the authority of the National Housing Development Authority and Urban Development Authority to enter into such agreement under the terms referred to in the agreement.

As already referred to in this judgment National Housing Development Authority was willing to transfer the property to the Petitioner, if full payment was made, but we must not forget the fact that these are low-income houses and therefore the payment is divided into 760 equal instalments for the convince of the allotee. There is no doubt that the Second Petitioner is one such allotee and she cannot be deprived of her right to admit her child to Visakha Vidyalaya for the reason that the National Housing Development Authority and Urban Development Authority had permitted her to pay the purchase price in 760 equal instalments in consideration of her financial status.

In the said circumstances I am not inclined to accept the argument advanced on behalf of the Respondents, that the Petitioner is not entitled to obtain full marks i.e., 20 marks for the document she submitted in proof of her residence.

As revealed before court the Petitioner had obtained 55 marks at the interview with 05 marks allocated for the proof of the main document. If she is given full marks for the main document, her marks will increase to 70, which is 7.60 marks above cutoff mark and would be eligible to gain admission to Visakha Vidyalaya.

As already referred to in this judgment the Respondent's position before this court was, that granting 05 marks to P9a, the main document the Petitioner submitted at the interview was in accordance with the school admission Circular 29/2019. This position is clear from the 5th paragraph of the affidavit of the Present Principle of Visakha Vidyalaya that was filed before this court along with motion dated 27th April 2022.

After the arguments were concluded, both parties were permitted to file written submissions and the written submission that was tendered on behalf of the Petitioner along with motion dated 10th June 2022 had referred to the above position taken by the Respondents in paragraph 5 of the written submission as;

5. it is submitted that,

a) in paragraph 6 of the statement of objections of the 1st Respondent states the following; "I state that in terms of paragraph 7.2.1.1. of the relevant admission marks are given for document's in proof of residence. The Petitioners do not prosses a Registered Deed or a lease nor Registered Sale and Purchase Agreement"
b) due to this reason the 1st Respondent awarded only 05 marks on the residential proof of the application of the 1st Petitioner
and had only responded to the above position taken up by the Respondent.

However, on behalf of the Respondents, the written submission was tendered at the Registry along with motion dated 17th June 2022 and in the said written submission the Respondents have submitted that, (page 5)

> "At the hearing it was submitted on behalf of the Respondents that when this matter was referred to the Secretary to the Ministry of Education for a decision, he had taken the view that the Petitioners documents could be given further 05 marks (i.e., 10 marks instead of 05) treating it as a rent purchase document where by it would be considered a rental document since the Petitioners are not yet the owners of the premises."

and a copy of the letter dated 08.04.2022 addressed to the Hon. Attorney General with a Copy to principle Visakha Vidyalaya was annexed to the written submission marked 'X'

On behalf of the Respondents, it was further submitted in the written submission that, (page 6)

> "Even after considering the decision of the Secretary, Ministry of Education to grant a further 05 marks to the Petitioners, they would be entitled to 60 marks and still below the cut off mark of 62.4 for admission to the school."

As already referred by me, the position taken by the Respondents when filing objections and at the argument before this Court was the justification of granting 05 marks at the interview but the new position now submitted in the written submission was never taken up before this Court by the Respondents.

The letter that was produced along with the written submission marked 'X' was written by the Secretary, Ministry of Education on 08th April 2022 addressed to the Hon. Attorney General with a copy to the Principle Visakha Vidyalaya, and as observed by this court, the affidavit of the 1st Respondent was tendered to the Registry along with a motion dated 27th April 2022. The affidavit of the 1st Respondent was affirmed before a Justice of Peace on the 25th April 2022.

If the letter marked 'X' was issued by the Secretary on 8th April, with specific instruction to the 1st Respondent "please reassess the mark of the Petitioner accordingly" the 1st Respondent cannot take-up a different position before this Court on 25th April 2022. However, this court is not bound to act on any material that was not submitted and/or available at the argument stage and therefore not prepared to accept or to act on the letter marked 'X' and the submissions made with regard to the said document.

In Clause 7.2.1.1 (f) agreements for houses purchased on instalment basis and payment receipts had been clearly identified as a main document in proof of residence but lease agreement and documents relating to Government quarters to which 10 marks to be allocated, had been separately identified. The Petitioner had never submitted a Lease or Rent agreement before the interview board for the Secretary, Ministry of Education to issue the ruling as per 'X' to the principle.

The requirement under clause 7.2.1.1 of the circular **(P-2) (a)(i)** is the proof that the applicant has agreed to purchase the house he occupies on installment basis. In the special circumstances of this case, and in view of the documentary proof adduced by the Petitioner and not denied by the Respondents, this Court is satisfied that the Petitioners have proved the fact that they have agreed to purchase the house on the said basis as per P 9 (a).

When considering the totality of the evidence placed before this Court, I hold that the 1st Petitioner is entitled to obtain full marks to the document produce marked as 9A, the main document in proof of the Residence of the Petitioner. The 1st Petitioner is therefore entitled to get 70 marks at the interview making the 1st Petitioner eligible to gain admission to grade one of Visakha Vidyalaya Colombo 05 under the category of "Children of Residences in close proximity to the school" thus the Petitioners have established that their fundamental rights guaranteed under Article 12 (1) of the Constitution had been infringed by the Respondents.

Whilst confirming that the Petitioner's Fundamental Rights guaranteed under Article 12(1) of the Constitution had been infringed by the above conduct of the Respondents, I direct the 1st Respondent

to take steps to admit the 1st Petitioner namely Paalawa Rankoth Gedara Kenudi Dilandi to Grade One or to the appropriate grade of Visakha Vidyalaya. I make nor order with regard to costs.

Application allowed.

Judge of the Supreme Court

Justice P. Padman Surasena,

I agree,

Judge of the Supreme Court

Justice A. L. Shiran Gooneratne,

I agree,

Judge of the Supreme Court

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

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

K.P.K.L.P. Maduwanthi,
No. 75/A, MC Road,
Matale.

Presently at:
Quarters of Divisional Secretary,
No. 107/3, Scout Land,
Matale

Petitioner

S.C.(F.R.) Application No: 23/2021 **Vs.**

1. S.M.G.K. Perera,
   District Secretary,
   District Secretariat,
   Matale.

2. Hon. Justice Jagath Balapatabendi,
   Chairman

3. Mrs. Indrani Sugathadasa,
   Member

4. Mr. V. Shivagnanasothy,
   Member

5. Dr. T.R.C. Ruberu,
   Member

6. Mr. Ahamod Lebbe Mohamed Saleem,
   Member

7. Mr. Leelasena Liyanagama,
   Member

8. Mr. Dian Gomes,
   Member

9. Mr. Dilith Jayaweera,
   Member

10. Mr. W.H. Piyadasa,
    Member

    2nd to 10th Respondents:
    All of:
    Public Service Commission,
    No. 1200/9, Rajamalwatta Road,
    Battaramulla.

11. The Secretary,
    Public Service Commission,
    No. 1200/9, Rajamalwatta Road,
    Battaramulla.

12. General Kamal Guneratne,
    Secretary to the Ministry of Defense, Home Affairs and Disaster Management,
    Nilamedura, Elvitigala Mawatha,
    Colombo 05.

12(A). Hon. N.H.M. Chithrananda,
    Secretary to the State Ministry of Home Affairs,
    Nilamedura, Elivitigala Mawatha,
    Colombo 05.

13. J.J. Rathnasiri,
    Secretary,
    Ministry of Public Services, Provincial Councils and Local Government,
    Independence Square,
    Colombo 07.

14. Additional Secretary (Internal Administration),
Ministry of Public Services, Provincial Councils and Local Government,
Independence Square,
Colombo 07.

15. Piyal Jayasuriya,
Divisional Secretary (Attending to Duties),
Divisional Secretariat,
Dambulla.

16. 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:

Dr. Romesh De Silva P.C. with Shantha Jayawardena and Charaka Jayaratne for the Petitioner

Ms. Nayomi Kahawita State Counsel for the 1st to 3rd, 5th to 12A and 16th Respondents

Written Submissions tendered on:

27.08.2021 and 28.06.2021 by the Petitioner

21.04.2021 by the Respondents

Argued on: 20.07.2021

Decided on: 18.11.2022

Janak De Silva, J.

The Petitioner is impugning the transfer order dated 05.01.2021 (P27) by which she was transferred to the Internal Administration Section of the Ministry of Public Services, Provincial Councils and Local Government. Furthermore, she seeks a direction on the 1st to 14th Respondents to appoint her as the Divisional Secretary of Dambulla or as the Divisional Secretary of any other area within the Central Province. Court has granted leave to proceed under Articles 12(1) and 14(1)(g) of the Constitution.

The Petitioner joined the public service on 02.10.2006 as a Grade III officer of the Sri Lanka Administrative Service (SLAS) after successfully passing an open competitive examination. She was promoted to SLAS Grade II effective 02.10.2016 and thereafter to SLAS Grade I effective 03.10.2016. Whilst the Petitioner was serving as the Assistant Divisional Secretary of Akurana, she was appointed to "attend to duties" in the post of Divisional Secretary of Matale with effect from 01.01.2014. Thereafter, consequent to her being promoted to Grade 1 of SLAS, the Public Service Commission (PSC) by letter dated 11.07.2017 (P7) appointed the Petitioner to the Post of Divisional Secretary of Matale, with effect from 03.10.2016.

By January 1, 2020, the Petitioner had completed six years as Divisional Secretary of Matale. According to the Transfer Scheme of SLAS contained in Public Administration Circular No. 18/2019 dated 08.07.2019 (P11), the maximum period an officer can serve in one Divisional Secretariat division is 6 years. Therefore, by transfer request dated 05.08.2019 (P12), the Petitioner requested an annual transfer for the year 2020, indicating her preferences as Divisional Secretarial divisions of Dambulla, Ukuwela and

Gangawatakorale. The Petitioner's application for an annual transfer had been recommended by the 1st Respondent, the District Secretary of Matale, to the Secretary to the Ministry of Public Administration and Secretary to the Ministry of Home Affairs.

The PSC has delegated the power vested with it regarding Annual Transfers of Divisional Secretaries to the Secretary to the Ministry of the Minister in charge of the subject of Home Affairs (11R1). On 30 November 2019, the Secretary of the Ministry of Public Administration, Home Affairs, Provincial Councils and Local Government had issued Annual Transfer Orders of 2020 (P13). According to item No.051 of the said Transfer Order, the then Divisional Secretary of Dambulla, namely, Ms. Abhaya Lakshmi Hewapathirana, had been transferred to the Department of Immigration and Emigration and the Petitioner had been transferred as the Divisional Secretary of Dambulla. However, by notice dated 20.01.2020 (P14) published on the official website of the PSC, the above Order of Transfer No. 051 had been differed for a period of one year by the Ministry of Public Administration. Parties are not at variance of the factual matrix set out above. Before examining the disputed factual matters between the parties, it is convenient to set out the grounds on which the Petitioner is impugning P27. They are:

(i) There is no exigency of service in the Internal Administration Section of the Ministry of Public Services, Provincial Councils and Local Government (referred to by the Petitioner as "purported pool").

(ii) There is no provision in law, to maintain a 'pool' of public officers without assigning any duties.

(iii) The original transfer by the PSC to Dambulla Divisional Secretariat has not been cancelled by the PSC. The PSC confirmed the Petitioner's annual transfer to Dambulla in terms of the Annual Transfer Scheme P11, as such the Petitioner had a legitimate expectation to be transferred to the Divisional Secretariat Dambulla.

(iv) The PSC has not granted the approval to transfer the Petitioner to the said purported pool.

(v) Transfer is in violation of the PSC Rules.

(vi) The impugned purported transfer contained in P27 and P28, has been made in violation of P11 (Annual Transfer Circular).

(vii) Transfer is tainted with malice (collusion between the 1st Respondent and Petitioner's allegedly estranged husband).

Legitimate Expectation

It was submitted on behalf of the Petitioner that her transfer by P27 has been made in violation of the Annual Transfer Circular (P11) and in violation of her legitimate expectation to be transferred to the post of Divisional Secretary, Dambulla as that transfer had not been cancelled by the PSC.

It appears that Ms. Abhaya Lakshmi Hewapathirana had appealed to the PSC against the decision to defer the Transfer Order No. 051 for a period of one year (11R3). After reviewing her appeal, the PSC granted her, by order of February 17, 2020 [P15(b)], the transfer to the Department of Immigration and Emigration.

The Petitioner claims that she too appealed against the order of deferment of Transfer Order No. 051 to the PSC. To support that position, the Petitioner submitted a letter dated 02.03.2020 [P15(a)]. However, I observe that this letter is dated 02.03.2020 whereas the order of cancellation of the deferment of Ms. Abhaya Lakshmi Hewapathirana [P15(b)] was issued on 17.02.2020, 14 days prior to the alleged appeal made by the Petitioner. Moreover, it is clear that only the name of the said Ms. Abhaya Lakshmi Hewapathirana is listed in the order dated 17.02.2020 [P15(b)]. Furthermore, the 11th Respondent (Secretary of the PSC) categorically denies that the Petitioner appealed to the PSC against the deferral of transfer order No. 051 prior to the order of cancellation of the deferment of Ms. Abhaya Lakshmi Hewapathirana. According to the 11th Respondent, the Petitioner appealed to the PSC regarding the 2020 annual transfers only by her letters dated 24.02.2020, 27.02.2020, 28.02.2020 and 02.03.2020 [P15(a)].

It is contended by the Petitioner that following order dated 17.02.2020 [P15(b)] of the PSC, she had by letter dated 26.02.2020 (P16) requested the 1st Respondent to take steps to release her from the Divisional Secretariat of Matale. However, she claims that although Ms. Abhaya Lakshmi Hewapathirana had been released from the post of the Divisional Secretary of Dambulla, no steps had been taken to release her from the post of Divisional Secretary of Matale.

It appears that the 12th Respondent had by letter dated 10.03.2020 (12R4) informed the Secretary, PSC that there is an inquiry pending in the Dambulla Divisional Secretariat regarding the purchase of a land for the business purposes of the husband of the Petitioner. As such, the 12th Respondent did not recommend that the Petitioner be appointed as Divisional Secretary, Dambulla in view of the conflict of interest. It was

recommended that the 15th Respondent be appointed to attend to the duties as Divisional Secretary, Dambulla.

Subsequently, the 15th Respondent had been appointed to "attend to duties" in the post of Divisional Secretary of Dambulla by the Secretary to the Ministry of Public Administration, Home Affairs, Provincial Councils and Local Government with effect from 27.02.2020 P(19) based on the recommendation of the 1st Respondent. This letter has been copied to the Secretary, PSC.

Moreover, it is clear that the PSC was aware that the Petitioner was not being sent to Dambulla as Divisional Secretary. This becomes clearer upon an examination of letter dated 10.07.2020 (12R5) sent by the Secretary, PSC to the 12th Respondent, copied to the Petitioner, in reply to his letter dated 10.03.2020 (12R4). The PSC had requested the 12th Respondent to expeditiously conduct the inquiry pending in the Dambulla Divisional Secretariat regarding the purchase of a land for the business purposes of the husband of the Petitioner and submit the results to the PSC. This matter is corroborated by the contents of letter dated 20.08.2020 [Marked A10 and Annexed to 1R1] sent by the Secretary, PSC wherein it is stated that further steps on the transfer of the Petitioner will be considered upon the PSC receiving the report on the investigations being conducted within the Dambulla Divisional Secretariat.

Accordingly, I conclude that the PSC only approved the transfer of Ms. Abhaya Lakshmi Hewapathirana to the Department of Immigration and Emigration. There is no order from the PSC directing that the Petitioner be transferred as the Divisional Secretary, Dambulla.

At this stage, it is relevant to examine the conclusions of the investigations into the Dambulla land transaction which have been submitted to the Court. Prima facie, the findings provide cogent evidence of an act of misconduct on the part of the Petitioner in relation to a state land situated at Dambulla over which her husband has a business interest.

Evidence of this transpired after an article had been published in the Lankadeepa News Paper on or about 07.06.2018, titled "මාතලේ ප්‍රා: ලේකම්වරියගේ සැමියා රත්මල්කට්ටුව වැවේ හෝටල් හදනවා" (12R1). As a result, a preliminary investigation into the content of the newspaper article was opened on 13.08.2018 by the Ministry of the Home Affairs and concluded on 09.11.2020. During the investigation, it became apparent that the Petitioner's husband had built 4 cottages on state land in Lake Rathmalkattuwa in Dambulla.

Documentation regarding the following transactions was provided by the Respondents to support this disclosure. The original owner of the land in question was a Hettiaarachchige Lucas Appuhamy who had obtained the land through 'Jaya Bhoomi' Land Grant No. මධ්‍යම/දඹු/1097. Then said Hettiaarachchige Lucas Appuhamy had transferred the land to a Mudiyansela Gedara Dhammika Piyawathie Manike by deed No. 8646 dated 04.01.2009 and attested by Jayampathi Ratnadiwakara Notary Public.

Subsequently, the Petitioner's husband, Angoda Welegedara Siril Jayaweera, obtained a special power of attorney in relation to the land through a well-executed process. Based on the evidence before the Court, the Petitioner was actively involved in this process. It began with the Petitioner transferring property belonging to her situated in the Divisional

Secretariat Division of Yakkamulla, in the District of Galle to the said Mudiyansela Gedara Dhammika Piyawathie Manike by deed of transfer No. 71 dated 14.12.2016 attested by K.G.A. Ranasinghe Notary Public (Annexure A1 of 1R1). Thereafter, the said Mudiyansela Gedara Dhammika Piyawathie Manike had transferred the land on which the chalets were constructed to Kalahe Paadikoralage Jayaratne, the brother of the Petitioner, by deed of transfer No. 812 dated 10.07.2017 attested by G.M.U.G. Indika Seneviratne Notary Public (Annexure A1 of 1R1). The said Kalahe Paadikoralage Jayaratne by special power of attorney No. 815 dated 13.07.2017 attested by G.M.U.G. Indika Seneviratne Notary Public, had transferred all rights and powers over the said land to Angoda Welegedara Siril Jayaweera, the allegedly estranged husband of the Petitioner (Annexure A4 of 1R1).

Within a few days thereafter, the Petitioner was able to regain the property she had transferred to Mudiyansela Gedara Dhammika Piyawathie Manike by deed of transfer No. 71 dated 14.12.2016 attested by K.G.A. Ranasinghe Notary Public, through deed of transfer No. 91 dated 25.07.2017 attested by the same Notary Public (Annexure A3 of 1R1).

The 1st Respondent in his affidavit avers that according to the legal provisions governing transfer of state lands, the approval of the Divisional Secretary needs to be obtained in order to transfer the land to a third party. To obtain this approval, the transferor must have ownership of another land. The 1st Respondent avers that the Petitioner had shrewdly manipulated the legal provisions by transferring her property to the said Mudiyansela Gedara Dhammika Piyawathie Manike prior to the execution of the said Deed of Transfer No. 812 in order to obtain the approval of the Divisional Secretary of Dambulla for the transfer.

In response to these allegations, the Petitioner states that the transaction in question was in good faith and had been approved by the Divisional Secretary of Dambulla. Other than this bare assertion, the Petitioner has not explained the circumstances under which she transferred her property to Mudiyansela Gedara Dhammika Piyawathie Manike, the reason for the said Piyawathie Menike thereafter to transfer the state land to the brother of the Petitioner and the reasons for her brother thereafter to give a Power of Attorney over the said land to her husband and finally why soon thereafter the said Piyawathie Manike re-transferred the land given by the Petitioner to her.

Instead of responding to these serious allegations, the Petitioner has produced along with the counter objections tape recordings allegedly containing conversations between her husband and the 1st Respondent. A transcription of the alleged conversations was also provided.

However, the Court is not prepared to proceed with this evidence on several grounds. According to the Petitioner, the 1st Respondent acted maliciously against her while she and her husband were separated and the husband was colluding with the 1st Respondent. The question then is how she could get so-called recordings of telephone conversations between them.

In any event, the question of proper custody is important in the circumstances of the case. In my opinion, the Court should observe the fundamental rules of evidence in exercising its jurisdiction over fundamental rights. Furthermore, this tape recording was not produced with the petition providing an opportunity for the 1st Respondent to respond. Counter-objections should not be used to present evidence that was available with the

Petitioner and, had it been produced with the petition, would have given the Respondents an opportunity to respond. This is an application of the *Audi alteram partem* rule on which the procedural rules of this Court are firmly built.

Upon an examination of the factual matters pertaining to the transaction relating to the State land at Dambulla, I am of the view that the circumstances fully justify the action taken to prevent the Petitioner from assuming duties as Divisional Secretary, Dambulla. To allow that to happen would have created an obvious conflict of interest. In this context, it is interesting to observe that the Petitioner had, in specifying three stations for her annual transfer (P12), named Dambulla and Ukuwela which are situated outside the Kandy District, as her first and second choices although admittedly her two children, aged 12 and 13, are schooling in Kandy.

Accordingly, I reject the contention that the transfer of the Petitioner by P27 is in violation of the Annual Transfer Circular (P11) and in violation of her legitimate expectation to be transferred to the post of Divisional Secretary, Dambulla on the basis that it had been approved by the PSC.

Malice

In the alternative, the Petitioner contended that the impugned transfer is marred by malice and animosity, as the 1st Respondent and the Petitioner's allegedly estranged spouse acted in collusion. It was submitted that the 1st Respondent developed an animosity due to the Petitioner taking steps to open the access road to Buddhist College, Maligatenna, Matale which was closed by the 1st Respondent. The Petitioner has cited a few instances reflecting the subsequent malicious acts of the 1st Respondent such as

verbal abuse and threats at meetings held at the Divisional Secretariat and at Buddhist College, Maligatenna, Matale. Another instance is where the 1st Respondent directed the Petitioner to submit medical records of her aunt in order to approve a personal leave that she had obtained on 21.09.2020 (P26). The failure of the 1st Respondent to release the Petitioner from Matale to assume duties in Dambulla is also cited as another example.

However, as fully explained earlier, the Respondents have placed cogent prima facie evidence before Court of an act of misconduct on the part of the Petitioner in relation to the state land in Dambulla. Hence the failure to allow the Petitioner to assume duties as Divisional Secretary of Dambulla is justified on grounds independent of malice and the failure to allow the Petitioner to assume duties in such post is not a malicious act on the part of the 1st Respondent.

That leaves the question of malice to be examined in relation to the transfer of the Petitioner to the Internal Administration Section of the Ministry of Public Services, Provincial Councils and Local Government.

According to the Respondents, this transfer was intended to facilitate an investigation into further alleged misconduct by the Petitioner while she was Divisional Secretary of Matale. These acts are outlined in letter dated 11.10.2020 (1R1). No doubt the Petitioner has sought to provide explanations to some of these allegations unlike her bare denial of the allegation relating the land transaction in Dambulla. Nevertheless, it is not for the Court to render a definitive decision on the veracity of these allegations. It is a matter for the proposed investigation. For the purposes of the determination of this application, it suffices to state that some of these allegations are forging the signature of the husband

in a letter sent to the PSC, providing false information to senior public officers, failure to give effect to lawful orders of the immediate supervising officer which are serious in nature.

In all the foregoing circumstances, I am unable to hold that the 1st Respondent acted maliciously in recommending an immediate transfer of the Petitioner out of the district on a temporary basis until the conclusion of the relevant investigations. The decision taken to transfer her on exigencies of service to the Internal Administration Section of the Ministry of Public Services, Provincial Councils and Local Government is justified as more fully discussed below.

Exigency of Service

The transfer of the Petitioner by P27 has been done on exigency of services. It is contended that there cannot be any exigency of service inasmuch the Petitioner has been transferred to the Internal Administrative Section of the Ministry of Public Services, Provincial Councils and Local Government or the "pool" as referred to by her where she is without any work.

Procedural Rule 218-III of the Public Service Commission Procedural Rules reads:

> *218. A Public Officer may be transferred on exigencies of service by the Appointing Authority for any one of the following reasons:*
>
> *(iii) Where it is found, due to administrative reasons, that the retention of an officer in his present station is not suitable.*

The request to transfer the Petitioner was made to facilitate an investigation into alleged misconduct. The conduct of such an investigation is part of the administrative functions of the Public Service. Therefore, in my opinion, the transfer of the Petitioner by P27 is in accordance with the Public Service Commission Rules.

In any event, I observe that in recommending the transfer of the Petitioner, the Secretary to the Ministry of Internal Security, Home Affairs and Disaster Management (12th Respondent) had recommended that it be done in terms of Procedural Rule 222-III of the Public Service Commission Procedural Rules which reads:

> *222. The Appointing Authority may transfer a Public Officer on disciplinary grounds, in the following instances, even without prior notice. The Appointing Authority shall convey the reasons in writing to the officer concerned:*
>
> *(iii) Where it is found on matters revealed either before the beginning, or in the course of an investigation or on existing circumstances that the retention of a Public Officer in his post or station may obstruct the conduct of a preliminary investigation.*

Hence, in any event, the Public Service Commission Procedural Rules provided for the transfer of the Petitioner in the circumstances of this matter.

It is an established principle that as long as an authority has the power to do a thing, it does not matter if he purports to do it by reference to a wrong provision of law, and the order can always be justified by reference to the correct provision of law empowering the authority making the order to make such order. [See ***L. C. H. Peiris v. The Commissioner***

of Inland Revenue **(65 N.L.R. 457),** ***Kumaranatunga v. Samarasinghe and Others*** **(1983) 2 Sri.L.R. 63*, Edirisuriya v. Navaratnam and Others* (1985) 1 Sri.L.R. 100, *Seneviratne and Others v. Urban Council, Kegalle and Others* [(2001) 3 Sri.L.R. 105]**

Accordingly, I hold that the transfer of the Petitioner is not in violation of the procedural rules on the ground urged by the Petitioner.

PSC Approval

The Petitioner contends that the PSC has not granted approval to transfer the Petitioner to what is referred to by the Petitioner as the 'pool'.

The 1st Respondent had, by letter dated 11.10.2020 (1R1), informed the 12th Respondent of several acts of alleged misconduct of the Petitioner, and recommended that action be taken to investigate those matters. It was also recommended that the Petitioner be temporarily transferred out of the district on exigencies of service to prevent any impediment to the investigations. In response, the 12th Respondent, by letter dated 29.10.2020 (12R6), informed the Additional Secretary (Home Affairs) that a charge sheet involving charges coming under the First Schedule of Chapter XLVIII of the Establishments Code is to be served on the Petitioner in relation to item 1 in letter dated 11.10.2020 (1R1). Further it was stated that the other charges set out in letter dated 11.10.2020 (1R1) are of a very serious nature and that the Petitioner should be immediately transferred to the pool of the Ministry of Public Administration subject to covering approval of the PSC as retaining her in the present post will be an impediment to the investigation. The request was made in terms of Procedural Rule 222(iii).

Accordingly, the Additional Secretary (Home Affairs) by letter dated 03.11.2020 (12R7) requested the Secretary, Ministry of Public Services, Provincial Councils and Local Government to immediately transfer the said transfer subject to covering approval of the PSC. This request was also made in terms of Procedural Rule 222(iii). It is only thereafter that the Secretary, Ministry of Public Services, Provincial Councils and Local Government had sent the impugned letter dated 05.01.2021 (P27) transferring the Petitioner to the Internal Administration Section of the Ministry of Public Services, Provincial Councils and Local Government. The transfer had been made subject to the covering approval of the PSC and the letter had been copied to the 11th Respondent, Secretary of the PSC. It is stated that the transfer is being made on exigencies of service although the request was made under Procedural Rule 222(iii).

No material has been placed before Court on whether the PSC gave its approval or not for the impugned transfer. The affidavit filed by the 11th Respondent does not shed any light on this matter, other than that the PSC received the request for approval. It may well be that the PSC did not have sufficient time to review the request given that the Petitioner invoked the jurisdiction of Court on 03.02.2021.

Nevertheless, Court is not inclined to hold that the fundamental rights of the Petitioner guaranteed under Articles 12(1) and 14(1)(g) of the Constitution has been violated due to the transfer being made subject to the covering approval of the PSC as there is evidence that the covering approval was in fact sought and that the PSC had failed to take a decision on the request until the jurisdiction of this Court was invoked.

In any event, it is trite law that a person invoking the fundamental rights jurisdiction of this Court must act with uberima fides and make a full disclosure of all material facts [See ***Liyanage & Another v Ratnasiri - Divisional Secretary, Gampaha & Others*** (**2013) 1 Sri.L.R. 6,** ***Jayasinghe v The National Institute of Fisheries and Nautical Engineering (NIFNE) and others*** **(2002) 1 Sri L.R. 277**]. The application is liable to be dismissed where a party fails to do so. In paragraph 22 of her petition, the Petitioner denies that her husband has a business in Dambulla, which is incorrect. This a material fact to her application to be posted as Divisional Secretary of Dambulla. Hence, this application is liable to be dismissed in limine.

Furthermore, the Court is exercising its just and equitable jurisdiction under Article 126(4) of the Constitution. It is an established maxim that *he who comes into equity must come with clean hands*. This doctrine has nothing to do with the general conduct of a party. The misconduct which is condemned should form part of the transaction which is the subject of the dispute. Where the conduct of a party to the litigation is unmeritorious in relation to the transaction forming the subject matter of the litigation, a Court exercising equitable jurisdiction is entitled to refuse any relief to such party [See ***Gascoigne v. Gasscoigne*** **(1918) 1 K.B. 223,** ***Tinker v. Tinker*** **(1970) 1 All ER 540**]. In this application, the Petitioner has sought a direction that she be appointed as Divisional Secretary of Dambulla. Her unmeritorious conduct in relation to the land in Dambulla suffices for Court to refuse any relief. Hence, I am of the view that the Petitioner is not entitled any relief.

For all the foregoing reasons, I dismiss this application.

Before parting with this judgment, I am compelled to observe that the conduct of the Petitioner in relation to the land transaction in Dambulla is an imminently suitable matter to be considered by the Commission to Investigate Allegations of Bribery or Corruption. The just and equitable jurisdiction this Court exercises in terms of Article 126(4) of the Constitution to make suitable directions is not contingent on making an affirmative finding that the fundamental rights of the Petitioner are infringed [See ***Noble Resources International Pte Limited v. Hon. Ranjith Siyambalapitiya, Minister of Power and Renewable Energy and Others,*** **S.C. (F/R) Application No. 394/2015, S.C.M. 24.06.2016**]. The jurisdiction extends to making all necessary orders to uphold the rule of law. Bribery or corruption in the public sector is a cancer destroying public confidence in the system of governance. It must be eliminated by enforcing the rule of law in which this Court has an imperative role to play. Court cannot turn a blind eye where prima facie material involving an act of corruption relating to the land transaction in Dambulla has been placed before it. Therefore, I direct the Registrar of the Supreme Court to send a certified copy of this judgment along with a complete set of the pleadings in this application to the Director-General of the Commission to Investigate Allegations of Bribery or Corruption by name expeditiously. In fact, a complaint has already been lodged with the Commission by the Secretary, Ministry of Public Administration, Home Affairs and Provincial Councils & Local Government on 26.06.2020 (12R1).

For the avoidance of doubt, the findings made on the transaction relating to land in Dambulla has been made on the material placed before Court by all parties. Any future inquiry or investigation into this matter must consider all evidence that the parties may adduce.

Application dismissed.

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

1. Balachandra Arachchige Don Nuwan Chathuranga Padmasiri,
   Sub Inspector
   Criminal Investigation Department
   P.O. Box 534, Colombo 01
2. Koskola Waththage Harsha Lakmal Kumara,
   Sub Inspector,
   Criminal Investigation Department,
   P.O. Box 534, Colombo 01.
3. Munasingha Arachchige Sajitha Chathusanka Bandara Karunathilaka,
   Sub Inspector,
   Police Station, Peliyagoda.

   Petitioners

SC/FR/46/2021

Vs.

1. C. D. Wickramaratne
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.
2. Jagath Balapatabendi,
   Chairman
3. Indrani Sugathadasa,
   Member

4. V. Shivagnanasothy,
   Member
5. T. R. C. Ruberu,
   Member
6. Ahamod Lebbe Mohamed Saleem,
   Member
7. Leelasena Liyanagama,
   Member
8. Dian Gomes,
   Member
9. Dilith Jayaweera,
   Member
10. W. H. Piyadasa,
    Member
    All of the members of the Public Service Commission of Sri Lanka, No. 1200/9, Rajamalwatta Road, Battaramulla.
11. K. R. Saranga Perera,
    Head of Division
    (Recruitment and Promotion Scheme Preparation Division)
    Police Headquarters
    Colombo 01
12. Wajira Gunawardena
    Director (Civil Administration)
    Sri Lanka Administration Division
    Police Headquarters
    Colombo 01
13. The Attorney-General,
    Attorney-General's Department.
    Respondents

Before: E. A. G. R. Amarasekara, J.
Kumudini Wickremasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Manohara de Silva, P.C., with Nadeeshani Lankatilleka for the Petitioners.
Rajiv Goonetilleke, D.S.G., with Sureka Ahmed, S.C., for the Respondents.

Argued on: 15.12.2021

Written submissions:
by the Petitioners on 25.10.2021 and 24.01.2022
by the Respondents on 16.11.2021 and 21.01.2022

Decided on: 23.11.2022

Mahinda Samayawardhena, J.

Introduction

Two fundamental rights applications were filed by 164 Sub Inspectors of Police, making the Inspector General of Police (IGP) and the members of the Public Service Commission (PSC) respondents, alleging violation of fundamental rights guaranteed under Articles 12(1) and 14(1)(g) of the Constitution by the adoption of the Scheme of Recruitment (SOR) marked P7 for promotion from the rank of Sub Inspector (SI) to the rank of Inspector of Police (IP). Upon completion of the pleadings, the two applications were consolidated and heard together and the parties have agreed to abide by a single judgment. Hence this judgment will be binding on the parties in the connected case – SC/FR/55/2021.

Promotions in the police force is a complex and complicated issue. There is no policy in place on promotions and various schemes have been

adopted on an *ad hoc* basis from time to time to address the grievances of police officers as they arise. Unless and until a sound promotion policy is formulated taking into account the views of all stakeholders, this will be a recurring issue. The intensity of the issue is understood by looking at the schemes of promotion adopted in the recent past, as set out by the petitioners in the petition. A number of fundamental rights applications are pending before this Court on police promotions.

In the year 2010, as seen from P4, all Sub Inspectors who had completed eight years of service as at 08.02.2010 in the rank of SI were promoted to the rank of IP across the board, subject only to them having an unblemished record during the five years immediately preceding the date of promotion. This scheme was adopted to redress the frustration of senior officers due to stagnation in service; it only took into account seniority and there was no interview.

Thereafter, in the year 2016, as seen from P5, a different scheme was adopted for promotion from the post of SI to IP of officers who had completed 10 years of service in the rank of SI as at 31.05.2016; seniority and merit were both considered and there was a structured interview.

Subsequent to this, in the year 2020, once again in order to redress the frustration of senior officers due to stagnation in service, all Sub Inspectors who had completed eight years of service as at 31.12.2018 (provided salary increments had been earned), were promoted to the rank of IP despite not having the requisite qualifications set out in P5. This time, the number of years of service was reduced from 10 to eight and the structured interview was also dispensed with.

Then comes the scheme of recruitment in question adopted in 2020 marked P7, which provides for 4 categories of promotion:

CATEGORY	PERCENTAGE
Seniority	50%
Limited Competitive Examination	25%
Merit	25%
Special promotion	½ of the merit category (equal to12.5% of the total number of promotions)

As crystalised in the post-argument written submissions, the petitioners have three main grievances *vis-à-vis* P7:

(a) seniority has not been given due recognition
(b) awarding marks on good entries at the interview is discriminatory
(c) the category of special promotion is arbitrary

Before I consider these in detail, let me address the preliminary objection raised by learned Deputy Solicitor General (DSG) for the respondents regarding the maintainability of this application on time bar.

Time bar objection

The case record bears out that the Court has granted leave to proceed after hearing both learned President's Counsel for the petitioners and learned DSG for the respondents. It is in the objections filed by way of an affidavit of the 1st respondent IGP that the time bar objection is taken.

The time bar objection shall be taken at the earliest possible opportunity; otherwise it is deemed to have been waived. In terms of Article 134(1) of the Constitution read with Rule 44(6) of the Supreme Court Rules 1990, the Attorney General has the right of audience at the time of supporting the application for leave to proceed. Nevertheless, the fact remains that at that stage the Attorney General is ill-equipped to present the respondents' case completely, due to want of time and paucity of instructions. The Attorney General gets the first opportunity to present his case fully in the objections filed by way of an affidavit in terms of Rule

45(6) of the Supreme Court Rules 1990 after the granting of leave to proceed. Therefore taking up the time bar objection for the first time in the affidavit is permissible but that objection cannot be taken for the first time at the argument or in the written submissions. (*Ranaweera v. Sub Inspector Wilson Siriwardena* [2008] 1 Sri LR 260 at 272)

The impugned SOR marked P7 was approved by the PSC on 22.10.2020 and signed by the secretary to the PSC on 04.12.2020 (1R5A). According to the petitioners, P7 was not conveyed to them through their superiors as was usually done in the past. This is undisputed. The petitioners state that on or about 05.02.2021, they became aware of P7 by word of mouth and thereafter found P7 on the Police Department website. This application was filed by the petitioners on 25.02.2021. The IGP in his affidavit states that P7 was published on the official website of the Police Department on 12.01.2021 and since the petitioners have not invoked the fundamental rights jurisdiction of this Court within one month from the date of publication of P7 (i.e. within one month of the infringement complained of), the application is liable to be dismissed *in limine* in terms of Article 126(2) of the Constitution. The petitioners do not accept that publication on the website was done on 12.01.2021. There is no other item of evidence to corroborate the date of publication apart from the *ipse dixit* of the IGP. I will accept both positions: the IGP's position that the website publication was done on 12.01.2021 and the petitioners' position that they visited the website on or around 05.02.2021. Then have the petitioners filed this application within time?

Article 126(2) of the Constitution states that "*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." The strict literal interpretation of this Article is that the time limit of one month set out in Article 126(2) is not open to interpretation and non-compliance warrants automatic dismissal of the application *in limine* without going into the merits of the complaint. In exercising the extraordinary and exclusive jurisdiction conferred upon this Court to protect the fundamental rights of the people, this Court, whilst emphatically emphasising that the time limit of one month is mandatory and shall be complied with, has nevertheless relaxed the rigidity of the time tag in appropriate cases by adopting a liberal as opposed to a literal interpretation of Article 126(2). This is predominantly done by the adoption of the maxim *lex non cogit ad impossibilia*: the law does not expect a man to do the impossible. Hence, it is accepted that the period of one month begins to run not from the date of violation of the right but from the date of becoming aware of the violation of the right or from the time of being in a position to take effective steps to come before the Supreme Court. The test to be applied is objective, not subjective.

By way of analogy, in terms of section 10 of the Prescription Ordinance, an action for a declaration that a notarially executed deed is null and void is prescribed within three years of the date of execution of the deed (*Ranasinghe v. De Silva* (1976) 78 NLR 500). Nonetheless, if the plaintiff seeks cancellation of a notarially executed deed upon concealed fraud, the three-year period begins to run not from the date of the execution of the deed but from the time of the discovery of the fraud, or from the time the party defrauded might by due diligence have come to know of it (*Kirthisinghe v. Perera* (1922) 23 NLR 279).

In *Edirisuriya v. Navaratnam* [1985] 1 Sri LR 100 at 105-106, Ranasinghe J. (later C.J.) with the agreement of Sharvananda C.J. citing *Vadivel*

Mahenthiran v. AG (SC/68/1980, SC Minutes of 05.08.1980) and *Hewakuruppu v. G.A. de Silva, Tea Commissioner* (SC/118/84, SC Minutes of 10.11.1984) held that although the time limit of one month set out in Article 126(2) is mandatory, yet, in a fit case, the Court would entertain an application made outside the limit of one month, provided an adequate excuse for the delay could be adduced; and if the petitioner had been held incommunicado, the principle *lex non cogit ad impossibilia* would be applicable. This dictum was cited with approval in several later decisions including *Ranaweera v. Sub Inspector Wilson Siriwardena* [2008] 1 Sri LR 260 at 271.

In *Siriwardena v. Brigadier Rodrigo* [1986] 1 Sri LR 384 at 387, this Court held:

> *The period of one month specified in Sub-Article (2) of Article 126 of the Constitution would ordinarily begin to run from the very date the executive or administrative act, which is said to constitute the infringement, or the imminent infringement as the case may be, of the Fundamental Right relied on, was in fact committed. Where, however, a petitioner establishes that he became aware of such infringement, or the imminent infringement, not on the very day the act complained of was so committed, but only subsequently on a later date, then, in such a case, the said period of one month will be computed only from the date on which such petitioner did in fact become aware of such infringement and was in a position to take effective steps to come before this Court.*

In *Dayaratne and others v. National Savings Bank and others* [2002] 3 Sri LR 116, the time bar objection (on the basis that interviews for promotions had been held and decisions taken more than one month before the application was filed) was rejected and the Court held that time began to run against the petitioners only when the names of the

promotees were announced. This indicates that the awareness of the petitioners is crucial when computing the one-month time bar.

In *Gamaethige v. Siriwardena* [1988] 1 Sri LR 384 at 401, M.D.H. Fernando J. acknowledged that this Court not only has discretion but also a duty to entertain a fundamental rights application filed out of time, depending on the unique facts and circumstances of the case.

> *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 months after the petitioner ceased to be subject to such restraint. The question whether there is a similar discretion where the petitioner's failure to apply in time is on account of the act of a third party, or some natural or man-made disaster, would have to be considered in an appropriate case when it arises.*

At page 402, M.D.H. Fernando J. recapitulated the law as follows:

> *Three principles are thus discernible in regard to the operation of the time limit prescribed by Article 126(2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (e.g. of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when both infringement and knowledge exist (Siriwardena v. Rodrigo [1986] 1 Sri LR 384, 387). The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation*

> *of the time limit. While the time limit is mandatory, in exceptional cases, on the application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time.*

In *Sriyani De Soyza and others v. Chairman of the Public Service Commission* (SC/FR/206/2008, SC Minutes of 09.12.2016), Prasanna Jayawardena J. stated:

> *However, this Court has consistently recognized the fact that, the duty entrusted to this Court by the Constitution to give relief to and protect a person whose Fundamental Rights have been infringed by executive or administrative action, requires Article 126(2) of the Constitution to be interpreted and applied in a manner which takes into account the reality of the facts and circumstances which found the application. This Court has recognized that it would fail to fulfill its guardianship if the time limit of one month is applied by rote and the Court remains blind to facts and circumstances which have denied a Petitioner of an opportunity to invoke the jurisdiction of Court earlier.*

Sharvananda C.J. in *Mutuweeran v. The State* (5 Sri Skantha's Law Reports 126 at 130) stated, "*Because the remedy under Article 126 is thus guaranteed by the Constitution, a duty is imposed upon the Supreme Court to protect fundamental rights and ensure their vindication. Hence Article 126(2) should be given a generous and purposive construction. The one month prescribed by Article 126(2) for making an application for relief by a person for infraction of his fundamental right applies to the case of the applicant having free access to his lawyer and to the Supreme Court.*" In that case, the petitioner had been in detention from the date of his arrest on 28.07.1986 up to the time of filing the petition on 03.10.1986.

Sharvananda C.J. at page 129 adopted the following criteria in deciding the time limit: "*In my view, Article 126(2) postulates a person whose freedom of movement is not fettered by being kept in custody or detention, who has free access to the Supreme Court to apply for relief under Article 126 of the Constitution.*"

In *Azath Salley v. Colombo Municipal Council and others* [2009] 1 Sri LR 365 at 384, Bandaranayake J. (later C.J.) remarked:

> *Considering the provisions contained in the Constitution dealing with the fundamental rights jurisdiction and the applicability of Article 126(2) read with Article 3,4(d) and 17, it is apparent that Article 126(2) should be interpreted broadly and expansively. Where a person therefore complains that there is transgressing the law or it is about to transgress, which would offend the petitioner and several others, such a petitioner should be allowed to bring the matter to the attention of this Court to vindicate the rule of law and to take measures to stop the said unlawful conduct. Such action would be for the betterment of the general public and the very reason for the institution of such action may be in the interest of the general public.*

On the facts and circumstances of this case, I take the view that the application of the petitioners in the instant case is not barred by time in view of the position taken up by the petitioners (which I have no reason to refuse) that they became aware of the violation on 05.02.2021.

Infringement of Article 12

The main complaint of the petitioners is that they have been denied the equal protection of the law guaranteed by Article 12(1) under which "*All persons are equal before the law and are entitled to the equal protection of the law*".

Seniority category

The petitioners contend that when they joined as Sub Inspectors in 2013, the 2010 scheme had been in place and therefore they had a legitimate expectation of being promoted to the rank of IP upon completion of eight years of service. This argument is unacceptable as that scheme was adopted on a provisional basis to address the frustration of senior officers due to stagnation in service. Such a temporary solution as against an established practice cannot found the basis for legitimate expectation.

Promotion is an important part of any institution. No institution can run effectively and efficiently if seniority is the sole criterion for promotion, disregarding merit. This is not undervaluing seniority. Seniority should be given due recognition but it should not be the only criterion because seniority and competency do not always go hand in hand. If the principles of meritocracy are given due place, there will be a sense of accomplishment and fulfilment. It will encourage innovations and increase productivity, which will in turn positively affect the steady growth of the institution. But favouritism should not play a role in promotion. There shall be a promotion policy. The weightage given to seniority *vis-à-vis* merit may vary. A right balance should be struck when considering merit and seniority.

In P7, under the merit category, it is mandatory that officers should have five years' experience as Sub Inspectors. Under the seniority category it is eight years. This goes to show that under the merit category, seniority has not been disregarded.

M.D.H. Fernando J. in *Perera v. Cyril Ranatunga, Secretary Defence and others* [1993] 1 Sri LR 39 at 43 observes:

> *The plain meaning of "merit" is the quality of deserving well, excellence, or worth; it is derived from the Latin "mereri", meaning to*

> *earn, or to deserve. In my opinion, "merit" must be considered in relation to the individual officer, as well as the requirements of the post to which he seeks promotion. In relation to the individual officer, there is a negative and a positive aspect: whether there is demerit, e.g. incompetence and poor performance in his present post, and whether there is "positive" merit, such as a high degree of competence and excellent performance. It would also be legitimate to consider the suitability of the officer for the post, having regard to the aptitudes and skills required for the efficient discharge of the functions of that post, and the service to be rendered. By way of example, an officer who has performed well at a "desk" job, involving little contact with the public, may lack the qualities required for a post in the "field", or involving constant contact with the public, whereas a junior officer whose performance was only average at the "desk" job, may have all the aptitudes and skills required for duties in the field, or involving the public. To ignore the requirements of the post and the needs of the public would be to permit the unrestricted application of the "Peter principle" — that in a hierarchy a person will continue to be promoted until he reaches a level at which he is quite incompetent. "Merit" thus has many facets, and the relative importance or weight to be attached to each of these facets, and to merit in relation to seniority, would vary with the post and its functions, duties and responsibilities.*

The petitioners cited *Perera v. Cyril Ranatunga* to advance their argument on the importance of seniority and that due weightage not being placed on seniority constitutes a violation of the right to equality. It should be noted that in the said case, only 15% of weightage was placed on seniority in a seniority and merit based promotion scheme applicable to the second lowest rung of service. The Court found that due weightage had not been given to seniority because it was in relation to a rank at the bottom of the

hierarchy. In the case of *Dharmaratne and another v. Sri Lanka Export Development Board and 13 others* [1995] 2 Sri LR 324 at 337, M.D.H. Fernando J. observed "*The weightage for seniority must depend on the nature of the post: the greater its responsibilities, the more the justification for giving greater weightage for factors relevant to merit and ability, and performance.*"

In *State of Mysore and another v. Syed Mahmood and others* (1968 AIR 1113 at 1115), the Supreme Court of India observed:

> *Where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted.*

When considering the hierarchy in the police field, the post of IP is a senior position with greater responsibility as opposed to the post of sergeant. Police posts (as opposed to police stations) are manned mostly by Sub Inspectors. The weightage apportioned to seniority has changed from time to time and, if I may recap, in 2010 it was 100% and eight years of service, in 2016 it was 70% and 10 years of service, and since P7 in 2020 it is 50% and eight years of service. The petitioners did not mount a challenge when the quota for seniority was reduced in 2016 from 100% to 70% and the years of service was increased from eight to 10, but complain when it was reduced from 70% to 50% and the years of service from 10 to eight. There is no justification for this. At the time the petitioners filed these two applications, none of them had completed eight years of service and therefore they could not have applied for promotion on the basis of seniority. In any event, the petitioners themselves admit that there are only about 700 cadre vacancies in the rank of IP and therefore it is unlikely that they will fall within the 50% soon after completion of eight years as there are other officers senior to them.

At the argument, learned President's Counsel for the petitioners submitted that although the petitioners completed their eight years of service on 15.03.2021 and thereby qualified to apply for promotion on seniority basis on 15.03.2021, in X2 dated 05.04.2021, the IGP has arbitrarily fixed the date of completing eight years of service as 31.12.2020 and not from the date of calling for applications (which according to learned President's Counsel is 05.04.2021), in violation of clause 10.2.4.3 at page 24 of P7. I am unable to accept this argument. RTM-121 marked X2 has been signed by the IGP on 05.04.2021 and that date cannot be construed as the date of calling for applications for promotion on seniority basis. X2 also states that completed applications should be handed over to the Senior Deputy Inspector General of Police before 4.00 pm on 01.05.2021. Is it then possible to argue that the last date of calling for applications is 01.05.2021? What X2 states is that eight years of service must be completed by 31.12.2020 and therefore 31.12.2020 should be considered as the point of calculation of the eight years. This is neither arbitrary nor a deviation from the established practice to deliberately prevent the petitioners from being promoted under the seniority category as submitted by the petitioners in their counter affidavit; for instance, P6 is dated 19.02.2020 but the completion of 10 years of service is fixed at 31.12.2018.

There is no disregard of or injustice to the seniority category under the impugned SOR.

Limited Competitive Examination category and Merit category

In order to apply under the limited competitive examination category or the merit category, a SI must have threshold qualifications as set out in paragraphs 10.1.3 and 10.1.4 found at pages 19-21 of P7, which include five years of active service as a SI. There is also a competitive exam for those who apply for the limited competitive examination category. There

is a structured interview for both categories where marks are allocated as follows:

Additional educational qualifications	10 marks
Excellent performances Special appreciations Good entries	25 marks (total) 10 marks 15 marks
Sports	10 marks
Courses (education)	15 marks
Professional competency	20 marks
Medals	10 marks
Interview evaluation	10 marks

Of the sub-categories that fall under the structured interview, the petitioners' only complaint is in respect of the 15 marks allocated for "good entries".

There are two divisions in the Sri Lanka Police, namely the functional division and the territorial division. Broadly speaking, officers in the functional division do administrative work and those in the territorial division do field work. The petitioners in their counter affidavit list out the following as falling under the functional division.

DIG/PHQ	=	*DIG/Police Headquarters*
DIG/PMSD	=	*DIG/Prime Minister Security Division*
DIG/SPR	=	*DIG/Special Protection Range*
D/Civil Admin	=	*Director/Civil Administration*
CA/SLP	=	*Chief Accountant/Sri Lanka Police*
DIG/LOG	=	*DIG/Logistics Range*

DIG/T & C	=	*DIG/Transport & Communication Range*
DIG/R & T	=	*DIG/Recruitment and Training Range*
DIG/Welfare	=	*DIG/Welfare and Medical Service Range*
ED/NPA	=	*Executive Director/National Police Academy*
DIG/Crimes	=	*DIG/Crimes Range*
DIG/PNB	=	*DIG/Police Narcotics Bureau*
DIG/ CP & EP	=	*DIG/Community Police & Environment Protection Range*
DIG/Marine & Tourists	=	*DIG/Marine & Tourists Police Range*
DIG/TR & RS	=	*DIG/Traffic Management and Road Safety Range*
DIG/FFHQ	=	*DIG/Field Force Headquarters*
DIG/R & Tech	=	*DIG/Research & Technology Range*
DIG/Staff	=	*Staff DIG to IG Police*
DIG/Spe.Branch	=	*DIG/Special Branch Range*
DIG/Legal	=	*DIG/Legal Range*
DIG/CID	=	*DIG/Criminal Investigation Department*
DIG/HRM	=	*DIG/Human Resources Management Range*
DIG/Media	=	*DIG/Police Media Range*

COMM/STF	=	*Commandant/Special Task Force*

The petitioners in their counter affidavit say:

> *We state that officers serving under the functional division cannot earn marks nor are they given an opportunity to earn marks allocated for good entries. We state that if 15 marks are given for an officer for a successful investigation carried out while serving in a police station, similarly, marks must be given to those officers serving in the functional division for the work that they do which mostly involves administrative work. A scheme of recruitment should allocate marks in such a way that it gives an opportunity to all those falling under the scheme to earn the said marks.*

Learned DSG in the post-argument written submissions states that the 3rd petitioner in this application and the 70th to 162nd petitioners in SC/FR/55/2021 are serving in the territorial division and therefore this is not an issue common to all the petitioners.

There are 162 petitioners in SC/FR/55/2021. Learned President's Counsel for the petitioners in his post-argument written submissions states that there are 38 petitioners who cannot earn marks for "good entries" because of the nature of their duties. This to my mind means that except for those 38, the others are able to obtain the said marks because they are serving in the territorial division. There are 3 petitioners in this application (SC/FR/46/2021). Of them, the 3rd petitioner is serving in the territorial division. It is clear that the alleged issue is not common to all the petitioners nor to all the prospective applicants, as there are about 700 cadre vacancies in the rank of Inspector of Police.

The petitioners argue that the officers serving in the functional division can neither earn nor are they given an opportunity to earn the marks allocated for good entries. I cannot agree.

It is true that the marks awarded under 2.2.1 to 2.2.4 in P7 for entries pertaining to crime, vice, traffic and open warrants can be earned by an officer serving in a police station (under the territorial division). This does not mean that the officers serving in the territorial division automatically get these good entries. They need to earn the marks; they have to make raids, detect crimes, execute warrants etc. There are inherent risks involved in these activities. If the work that they do is more onerous, they should rightly be in a position to obtain more marks for such tasks.

A scheme could have a criterion under which only a particular division could score marks. However, there should be a mechanism by which others in the same group could also score marks under a particular category so that the scheme of recruitment though seemingly unequal in criteria is just and reasonable in application and effect. The petitioners claim that a total of 15 marks awarded for good entries are denied to them because of the nature of the job of the functional division. The question is whether there is a comparable criterion whereby the aggrieved petitioners could also score 15 marks. When I consider the list of positions that fall under the functional division, as stated by the petitioners in their counter affidavit and quoted by me above, it seems to me that the officers in the functional division are in a better position than those in the territorial division to earn marks for good entries allocated under 2.2.5 and 2.2.6. Take for instance "*2.2.5 – Special activities conducted during the course of duties including community police, traffic or narcotic prevention activities*". According to the petitioners themselves, the Police Narcotics Bureau, Community Police and Environment Protection Range, Traffic Management and Road Safety Range come

under the functional division. Then who is in a better position to engage in special activities such as conducting awareness programmes to earn marks? Marks under 2.2.6 can be earned by any officer irrespective of the division. It may be noted that even under the earlier scheme P5 where 70 marks were allocated for seniority, out of 30 marks, five marks were allocated for good entries. This is not an altogether new feature designed to discriminate against officers in the functional division in favour of those in the territorial division.

The petitioners have also alleged that they had no knowledge at the time of appointment that those involved in crime detection and investigation would be offered more marks. It is true that ideally the scheme of recruitment should be announced beforehand so that officers are aware of what is expected of them in the future. However, it should also be admitted that the schemes of recruitment or promotion have constantly changed in line with emerging needs. It cannot be predicted. Placing a burden on the respondents to announce the exact scheme that would be in place in 10 years or so maybe unreasonable.

In *Wasantha Disanayake and others v. Secretary, Ministry of Public Administration and Home Affairs and others* [2015] 1 Sri LR 362 at 367 Sripavan C.J. stated:

> *A scheme of recruitment once formulated is not good forever; it is perfectly within the competence of the appropriate authority to change it, rechange it, adjust it and re-adjust it according to the compulsions of changing circumstances. The Court cannot give directions as to how the Public Service Commission should function except to state the obligation not to act arbitrarily and to treat employees who are similarly situated equally. Once the Public Service Commission lays down a scheme, it has to follow it uniformly. Having laid down a definite scheme of promotion, the*

Public Service Commission cannot follow the irrational method of pick and choose.

It may also be relevant to note that under 2.2.2 and 2.2.3, one must have 25 entries to earn one mark whereas under 2.2.5 one can earn three marks and under 2.2.6 one can earn one mark for each two entries.

More importantly, officers in the functional division are in a more favourable position to earn marks for education, as their duties are largely confined to office hours with time off during the evenings, weekends and holidays to pursue higher studies, whereas officers in the territorial division (e.g. an officer in the crime or traffic branch) have to work practically round the clock in rotation all seven days of the week and can hardly find the time to do so. In practical terms, officers who are in the territorial division and wish to pursue higher studies shift to the functional division. That is common to any department or discipline. The IGP in his affidavit states that officers are entitled to get transfers to the functional division or territorial division according to their preference upon completion of three years in the police force.

To start with, in practical terms, the duties of officers in the functional division allow them more of an opportunity to apply under the limited competitive examination category for which 25% of vacancies has been set apart.

Under the structural interview in P7, if I may highlight some features: under paragraph 1, 10 marks have been allocated for additional academic qualifications such as degrees and diplomas; under paragraph 4, 15 marks for courses; under paragraph 5.4, seven marks for computer literacy. For these items alone, an officer in the functional division, having had more time due to the nature of his employment to dedicate to higher studies, could earn 32 marks as against the 15 marks an officer

in the territorial division could earn on good entries. Moreover, good entries die a natural death upon promotion whereas academic qualifications do not. It seems that the new scheme is more advantageous to the officers in the functional division than in the territorial division.

I reject the submission made on behalf of the petitioners in the post-argument written submissions that "*the petitioners have no way of being promoted to the rank of IP under the seniority category, based on the competitive examination or based on merit*" and that the petitioners have been treated unfairly and unreasonably in violation of Article 12 of the Constitution.

In *Samarasinghe v. The Bank of Ceylon* [1978-79-80] 1 Sri LR 221 it was held:

> *Although employees may be integrated into one class, ie. Sub-Managers, the employees can in the matter of promotion be classified again into two different classes on the basis of any intelligible differentia, as for example educational qualifications, which has a nexus with the object of classification, namely, efficiency in the post to which promotion is to be made. Accordingly, the differential made by the Bank in promotion from the grade of Sub-Manager to Assistant Manager was not unconstitutional.*

There can be a classification for the purpose of promotion, and this will not amount to discrimination. Though officers in both the territorial division and the functional division are all Sub Inspectors, the nature of their work differs and accordingly the manner in which they may obtain marks to attain a promotion also differ. What is required is that the scheme of recruitment should not have a discriminatory effect on any group of officers without reasonable justification. I find no such discrimination in P7.

Special promotion

Special promotions come under the merit category. Of the 25% of vacancies set apart for the merit category, ½ is allocated to special promotions. In other words, 12.5% of the total cadre vacancies is dedicated to special promotions. Paragraph 10.1.5 at pages 22-23 of P7 provides for this. As this allocation is subject to heavy controversy and for better understanding of this provision, let me reproduce this paragraph in full.

10.1.5 විශේෂ උසස් කිරීම

10.1.5.1 සපුරාලිය යුතු සුදුසුකම්:

i. උප පොලිස් පරීක්ෂක තනතුරේ පත්වීම ස්ථිර කර තිබීම

ii. විශේෂ උසස්වීම කමිටුම මගින් විශේෂ උසස්වීම සඳහා සුදුසු **බවට <u>නිර්දේශ කර තිබීම</u>**

<u>හෝ</u>

iii. **<u>පොලිස්පතිගේ මතය අනුව</u>** යම් විශේෂ අවස්ථාවක දී **<u>තම විශ්වාසය අනුව</u>** විශේෂ උසස්වීම් සඳහා සුදුසු යැයි **<u>නිරණය කර තිබීම</u>**

සටහන: ඉහත පරිදි විශේෂ උසස්වීමක් නිලධාරයාගේ ආධුනික කාලය තුල ලබාදුන් අවස්ථාවකදී නිලධරයා තනතුරේ පිහිටුවිය යුත්තේ ඔහුගේ සේවය ස්ථිර කල දින සිටය.

10.1.5.2. විශේෂ උසස් කිරීමේ කමිටුව: පහත සංයුතියෙන් යුක්ත විශේෂ උසස්වීම කමිටුවක් විය යුතුය.

i. පරිපාලන කටයුතු භාර, ජ්‍යෙෂ්ඨ නියෝජ්‍ය පොලිස්පතිවරයා

ii. මානව සම්පත් කළමනාකාර විෂය භාර ජ්‍යෙෂ්ඨතම නිලධරයා

iii. නීති කටයුතු භාර ජ්‍යෙෂ්ඨතම නිලධරයා

සටහන: පරිපාලන කටයුතු භාර, ජ්‍යෙෂ්ඨ නියෝජ්‍ය පොලිස්පතිවරයා යටතේ ඉහත අංක (ii) හා (iii) විෂයන් තිබුණද, එම විෂයන් භාර ජ්‍යෙෂ්ඨතම නිලධරයා මෙම කමිටුවට ඇතුළත් විය යුතුය.

10.1.5.2.1. විශේෂ උසස් කිරීමේ කමිටුව පත් කරන බලධාරියා: ජාතික පොලිස්

කොමිෂන් සභාව විසින් බලය පවරන ලද පොලිස්පති

10.1.5.3. උසස් කිරීමේ ක්‍රමය:

i. ස්ථානභාර නිලධාරීන්, දිස්ත්‍රික් භාර නිලධාරීන්, කොට්ඨාස භාර නිලධාරීන්, දිසා භාර නිලධාරීන් හෝ පළාත් භාර ජ්‍යෙෂ්ඨ නියෝජ්‍ය පොලිස්පතිවරුන් විසින් පොලිස් සේවාවේ උන්නතිය වෙනුවෙන් හෝ පුරවැසියන්ගේ ආරක්ෂාව සැලසීම නීතිය හා සාමය පවත්වාගෙන යාම වෙනුවෙන් අති විශිෂ්ඨ වූ දක්ෂතා දක්වන ලද නිලධරයකුට විශේෂ උසස්වීම් ලබාදීම සුදුසුයැයි රේඛීය විධානයන්ට යටත්ව පොලිස්පති වෙත නිර්දේශ කළ හැකිය.

ii. පොලිස්පති විසින් උසස් කිරීම් ක්‍රමවේදයන් ක්‍රියාත්මක කරනු ලබන අවස්ථාවන් හීදි විශේෂ උසස්වීම් ලබාදීම සඳහා ඉහත පරිදි විශේෂ උසස්වීම් කමිටුව පත් කිරීම සඳහා කටයුතු කර, ලැබී ඇති නිර්දේශ කමිටුව වෙත යොමු කළ යුතුය.

iii. ඒ සඳහා පත් කරනු ලැබූ කමිටුවක් මඟින් විශේෂ උසස්වීම් නිර්දේශ කරනු ලබන අතර, කුසලතා පදනම යටතේ ඇති පුරප්පාඩු වලින් උපරිම 50% ක ප්‍රමාණයක් **<u>පොලිස්පතිගේ අභිමතය</u>** පරිදි ලබාදිය හැකිය.

iv. විශේෂ උසස් වීමේ කමිටුව විසින් උසස් කිරීම සඳහා සුදුසු යැයි තීරණය කරනු ලබන නිලධරයන් පිළිබඳ **<u>නිර්දේශ</u>** පොලිස්පති වෙත ඉදිරිපත් කිරීමෙන් පසු පොලිස්පති විසින් විශේෂ උසස්වීම් ලබාදෙනු ඇත.

v. එසේ වුව ද, **<u>පොලිස්පතිගේ මතය</u>** අනුව යම් විශේෂ අවස්ථාවක දී **<u>තම විශ්වාසය අනුව</u>** සුදුසු යැයි තීරණය කරනු ලබන නිලධරයකුට විශේෂ උසස්වීම ලබාදිය හැකිය.

සටහන: විශේෂ උසස්වීම ලබාදීමේ දී එසේ ලබාදීමට තීරණය කරනු ලබන හේතු යම් අධිකරණයක දී හෝ වෙනත් අධිකාරියක් විසින් ප්‍රශ්න කරනු ලැබුවහොත් ඉදිරිපත් කිරීම සඳහා එම නිලධරයාගේ පුද්ගලික ගොනුවට ලිඛිතව ඇතුලත් කළ යුතුය.

Learned President's Counsel for the petitioners strenuously submits that the unqualified discretion given to the IGP under this category is arbitrary

and discriminatory and therefore clearly violates Article 12(1) of the Constitution.

Learned DSG, drawing attention to Rule 44(1) and also to Rule 30 of the Supreme Court Rules 1990, submits that the petitioners did not refer to the power of the IGP to grant special promotions in the petition or even in their written submissions filed prior to the argument as a cause for complaint and thereby denied the IGP an opportunity to meet this argument in his objections filed by way of an affidavit.

Whilst strongly relying on the judgment of S.N. Silva C.J. in *Jayasinghe v. The National Institute of Fisheries and Nautical Engineering (NIFNE) and others* [2004] 1 Sri LR 230, learned DSG submits that this Court should not entertain such a new position taken up for the first time at the argument stage. *Jayasinghe's* judgment has no direct bearing to solve the issue at hand. It was an extreme case where a petitioner in a fundamental rights application filed a petition which was unmistakably not only lengthy, verbose and prolix but also slanderous, abusive of the character of the respondents, false and baseless. Although the petition contained as many as 113 paragraphs, the petition did not contain an averment as to the manner in which the petitioner's complaint (interdiction) infringed his fundamental right guaranteed by Article 12(1) of the Constitution. It is in that context that the Supreme Court referred to Rule 44(1)(a) and sections 40(d) and 46(2)(a) and (b) of the Civil Procedure Code. It is not an authority to say that in a fundamental rights application, a petitioner cannot raise at the argument a new matter that has not been expressly pleaded in the petition. There is no complaint in the instant case that the petition is lengthy and prolix or contains averments which are scandalous or false.

It is also significant to note that the new matter raised arises out of the same impugned document P7, not out of a new document introduced for

the first time at the argument. The two cases are, therefore, incomparable.

It is undisputed that the fundamental rights declared and recognised in our Constitution are based on the Universal Declaration of Human Rights. If there is a *prima facie* case of a violation of fundamental rights, can the Supreme Court turn a blind eye to it on the basis that it has not been expressly pleaded in the original application? I think not.

A fair reading of Part IV of the Supreme Court Rules 1991 in the proper context does not lend support to such a restrictive view. Rule 44(7) enables any person in indigent circumstances to invoke this jurisdiction without formalities. If the Supreme Court decides to entertain such an informal complaint, such person is afforded legal aid for the effective presentation of his case – *vide Sumanadasa and 205 others v. Attorney General* [2006] 3 Sri LR 202 at 205.

It is significant to note that Article 17 found in the fundamental rights chapter of the Constitution recognises as a fundamental right the entitlement of every person to apply to the Supreme Court under Article 126 when there is an infringement or imminent infringement by executive or administrative action of a fundamental right to which such person is entitled.

In terms of Article 126(1) of the Constitution, the Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right declared and recognised by Chapter III of the Constitution. It is the constitutional duty of the Supreme Court not to frustrate or diminish fundamental rights jurisdiction by self-imposed fetters but rather to cherish, respect, secure and advance fundamental rights.

The *SVASTI* of the Constitution whilst recognising the Constitution as the "*SUPREME LAW*" of the Republic *inter alia* assures "*to all Peoples… FUNDAMENTAL HUMAN RIGHTS…as the intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of SRI LANKA*".

Article 3 of the Constitution states that "*In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise*." Article 3 ties sovereignty to *inter alia* fundamental rights and makes sovereignty inalienable. This is a unique feature in our Constitution.

The traditional meaning of sovereignty is the power or supreme authority of the State. But under our Constitution sovereignty is not the power or supreme authority of the State but the power or supreme authority of the People, as sovereignty is in the People. How the legislative power, executive power and judicial power of the People shall be exercised is set out in Article 4(a), (b) and (c) of the Constitution.

Article 4(d) states "*the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided*". The restrictions are contained in Articles 14A(2) and 15. According to Article 83, Articles 1, 2, 3, 6, 7, 8, 9, 10, 11, 30(2) and 62(2) are entrenched Articles that cannot be restricted (except by two-thirds majority in Parliament and the approval of the People at a Referendum).

What is meant by "*all the organs of government*" referred to in Article 4(d)? The three organs of government are the Legislature, Executive and Judiciary. Therefore it is the constitutional duty of all Courts including the Supreme Court to respect, secure and advance fundamental rights

and not to abridge, restrict or deny them except to the extent such rights have been abridged, restricted or denied by the Constitution itself. This is further reinforced under chapter XVI of the Constitution dealing with "The Supreme Court" where it states in Article 118(b) that "*The Supreme Court of the Republic of Sri Lanka shall be the highest and final superior Court of record in the Republic and shall subject to the provisions of the Constitution exercise jurisdiction for the protection of fundamental rights*", not merely for the enforcement of fundamental rights.

In *Edirisuriya v. Navaratnam and others* [1985] 1 Sri LR 100 at 106, Ranasinghe J. (later C.J.) declared:

> *Article 126 (1) of the Constitution has conferred upon this Court sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right declared and recognized by Chapter 3 of the Constitution. The right to invoke such jurisdiction by an aggrieved person is set out in Article 17, which has been given the status of a fundamental right itself. Article 4(d) of the Constitution has ordained that the fundamental rights which are declared and recognized by the Constitution should be respected, secured and advanced by all the organs of government and should not be abridged, restricted or denied save in the manner and to the extent provided by the Constitution itself. A solemn and sacred duty has been imposed by the Constitution upon this Court, as the highest Court of the Republic, to safeguard the fundamental rights which have been assured by the Constitution to the citizens of the Republic as part of their intangible heritage. It, therefore, behoves this Court to see that the full and free exercise of such rights is not impeded by any flimsy and unrealistic considerations.*

In *Sumanadasa and 205 others v. Attorney General* (*supra*), complaints (not formal fundamental rights applications) were addressed to the Supreme Court by 206 persons held in remand custody upon orders made by Magistrates in respect of offences punishable in terms of section 45 of the Immigration and Emigration Act, alleging infringement of their fundamental rights guaranteed by Article 13(2) of the Constitution resulting from continuous detention without any recourse to a remedy until the conclusion of their trials. S.N. Silva C.J. whilst holding that Article 13(2) had been violated, at page 212 observed:

> *The Court has to consider the ambit of the fundamental right guaranteed by Article 13(2) and the relief, if any, to be granted to the Petitioners in the absence of a procedure established by law to adjudicate on their continued detention.*
>
> *In this context we note that in terms of Article 118(b) of the Constitution this Court is vested with jurisdiction" for the protection of fundamental rights". The word "Protection" is wider than the word "enforcement". It is incumbent on this Court to make such orders as are necessary to ensure that the fundamental rights guaranteed by the Constitution are adequately protected and safeguarded.*
>
> *Fundamental rights forms part of the sovereignty of the People and Article 4(d) of the Constitution being a basic provision on which the structure of our Constitution is founded, requires that fundamental rights be "respected, secured and advanced by all organs of government and shall not be abridged, restricted or denied save in the manner and to the extent hereinafter provided."*
>
> *Hence the rights guaranteed to the Petitioners in terms of Article 13(2) should be secured and advanced by this Court and not be abridged, restricted or denied. Any such abridgment, restriction or*

denial has to be based only on specific provisions of the Constitution itself.

Ganeshanantham v. Vivienne Goonewardene and three others [1984] 1 Sri LR 319 at 330-331, Samarakoon C.J. emphasised the importance of giving purposive interpretation to Article 126(2). There is no necessity to name in the petition exactly the state officer by whom the petitioner's fundamental right or rights were violated. The unlawful act gives the Court jurisdiction to entertain the petition and to make a suitable declaration. The inquiry is not limited to the person named in the petition.

> *The jurisdiction granted to this Court by Article 126 of the Constitution concerns fundamental rights and language rights declared by Chapters III and IV of the Constitution. In exercising this jurisdiction the Court has to make a dual finding, viz.,*
>
> *(1) Whether there is an infringement or threatened infringement of a fundamental right, and*
> *(2) Whether such infringement or threat is by executive or administrative action.*
>
> *If the answer to the first is in the negative the second does not arise for consideration. If the answer to the first is in the affirmative then the question arises as to whether the act complained of constitutes executive or administrative action. It may not always be possible for the petitioner to allege in his petition that the act was that of a particular officer of State. His name may not be known to the petitioner, and he may only be able to identify him by other means. For example in the course of the inquiry he may be able to establish that it was a police officer of a named Police Station. This Court would then have jurisdiction to act in terms of Article 126. On*

the other hand it may be that in the course of the inquiry it transpires (as happened in the instant case), and it is established to the satisfaction of the Court, that the infringement was by a State Officer other than the one named in the petition. This Court would still have the power to act in terms of Article 126. The jurisdiction of this Court does not depend on the fact that a particular officer is mentioned by name nor is it confined to the person named. The unlawful act gives the Court jurisdiction to entertain the petition and to make a declaration accordingly. The fact that it was committed by an Officer of State empowers the Court to grant a remedy. The provisions of Article 126(2) do not limit the inquiry to the person named in the petition. Such a limitation is apparent in the provisions of Article 126(3) where the inquiry is confined to the party named in the application for a writ in respect of whom the Court of Appeal makes the reference. Article 4(d) of the Constitution enjoins all organs of Government to respect, secure and advance the fundamental rights declared and recognized by the Constitution. This Court being a component part of the judiciary, which is one of the organs of Government, must necessarily obey such command. It will be a travesty of justice if, having found as a fact that a fundamental right has been infringed or is threatened to be infringed, it yet dismisses the petition because it is established that the act was not that of the Officer of State named in the petition but that of another State Officer, such as a subordinate of his. The provisions of Article 126(2) cannot be confined in that way. This Court has been given power to grant relief as it may deem just and equitable – a power stated in the widest possible terms. It will be neither just nor equitable to deny relief in such a case. Counsel for the Petitioner referred to the provisions of Rule 65 and called in aid its terms to buttress his argument. Rule 65 merely states that the Petitioner shall name the person who he alleges has committed the unlawful act. This by no

> *means exhausts the avenues available to a petitioner. As I have stated earlier it does not provide for a situation where the petitioner is unable to name the Officer of State who commits the act. Furthermore Rule 65 concerns procedure and like most rules cannot detract from the powers of Article 126. I therefore reject the contention raised in issues A1 and 2 by Counsel for the petitioner.*

In *Centre for Environmental Justice (Guarantee Limited) and others v. Hon. Mahinda Rajapaksha and others* (SC/FR/109/2021, SC Minutes of 01.12.2021), it was observed that the procedural defects of fundamental rights applications should not shackle the constitutional duty of the Court to examine the allegations of the petitioner stated therein. In this case, on behalf of the respondents, the Attorney General objected the original petition being amended on three grounds: non-joinder of parties, time-bar and the amended petition being filed to cure the defects in the original petition which were brought to the notice of Court on behalf of the respondents. Rejecting these objections, Janak de Silva J. observed:

> *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.*

This constitutional duty resting on the Supreme Court has been reiterated in a spate of Supreme Court judgments including *Sriyani Silva v. Iddamalgoda, OIC, Police Station, Paiyagala* [2003] 2 Sri LR 63, *Piyasena v. Attorney General and others* [2007] 2 Sri LR 117, *Azath Salley v. Colombo Municipal Council* (*supra*).

The Supreme Court has been conferred with wide powers to grant relief in a fundamental rights application. Article 126(4) empowers the Supreme Court "*to grant such relief or make such directions as it may deem just and equitable*" depending on the facts and circumstances of each individual case. The three components may be highlighted for emphasis: (a) grant relief or (b) make declarations (c) as the Court may deem just and equitable. The Supreme Court exercises equitable jurisdiction in fundamental rights applications. Hence this Court in appropriate cases can overlook high-flown technical objections, such as the one raised here, in the interest of justice.

Although the petitioners have not challenged the special promotion scheme in the petition, this matter was raised at the argument and the learned DSG was given an opportunity to reply in the post-argument written submissions. Let me quote the stand of the IGP on this issue of special promotions as reflected in the written submissions:

> *54. Without Prejudice to the above, it is submitted on behalf of the Respondents that in terms of the Scheme of Recruitment marked P7 officers are promoted to the rank of Inspector of Police under three categories. The said categories are 50% on seniority, 25% on merit and the balance 25% through a competitive examination.*
>
> *55. Of the 25% that is allocated for the merit category; half of the said 25%, that is a total of 12.5% of the total number of promotions, are allocated for special promotions. Special promotions are granted*

on the recommendations of the Committee. The said Committee is appointed by the IGP with the approval of appointing authority.

56. *It is respectfully stated that the Scheme of Recruitment does not provide for a blanket 12.5% to be given special promotions, instead it stipulates that a maximum of 12.5% can be granted special promotions.*

57. *Furthermore, it is pertinent to note that although clause 10.1.5.1 provides that the IGP may grant special promotions when he is of the belief that an officer is eligible to be thus promoted, the Note at page 18 of the Scheme of Recruitment specifically provides that in a particular year only a maximum of 10 special promotions can be given under this category.*

58. *Thus it is evident that the role of the Committee is not redundant as contended by the Petitioners as appointments have to be recommended by the Committee.*

According to paragraph 10.1.5.1, the eligibility criteria for special promotion is confirmation in the post of SI, recommendation by the Special Promotion Committee for promotion (විශේෂ උසස්වීම කමිටුම මගින් විශේෂ උසස්වීම සඳහා සුදුසු බවට නිර්දේශ කර තිබීම) or (හෝ) the decision of the IGP for promotion which is based on the IGP's opinion of/trust in that officer (පොලිස්පතිගේ මතය අනුව යම් විශේෂ අවස්ථාවක දී තම විශ්වාසය අනුව විශේෂ උසස්වීම් සඳහා සුදුසු යැයි තීරණය කර තිබීම). The coordinating conjunction "or" here is significant: the IGP can act upon the recommendations of the Special Promotions Committee or he can wholly give effect to his unilateral decision based on his personal opinion/trust regarding certain officers. It may also be relevant to note that apart from the IGP having the authority to fill all the vacancies under the special promotion category on his own, he is also not duty bound to accept the recommendations of the Special Promotions

Committee. The Special Promotions Committee only makes recommendations to the IGP but the final decision is taken by the IGP himself and not the Committee. In explaining the parameters of the powers of the IGP in the special promotion scheme, in addition to giving due recognition to his "opinion" (පොලිස්පතිගේ මතය) and "trust" (තම විශ්වාසය අනුව), the word "discretion" (පොලිස්පතිගේ අභිමතය) has also been used in paragraph 10.1.5.3.iii. These are all subjective. The use of the words "opinion", "trust" and "discretion" interchangeably makes it clear that the intention of the framers of this SOR is to give unfettered discretion to the IGP to decide on this special promotion category. Learned President's Counsel for the petitioners submits that such a provision has been incorporated in P7 to accommodate the directions and requests of the powers that be. Where there is a Special Promotion Committee established to recommend persons for promotion under the special promotion category, it is questionable as to why the IGP has also been vested with such discretion to give special promotion. There are no principles, rules or guidelines stipulated under which he should exercise his discretion.

Such unfettered discretion given to the IGP cannot be justified by adding a "Note" after paragraph 10.1.2 of P7 (at page 18 of P7) to say that the reasons for such decisions shall be included in the personal file of the particular officer to be submitted to Court or to any other authority in the event such decisions are challenged.

In *United States v. Wunderlich* (342 U.S. 98 (1951)) at page 156 Justice Douglas stated:

> *Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times,*

> *his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.*

I accept that as the head of the police force, the IGP should possess powers to take decisions for the greater benefit of the police force, but he cannot have unabridged discretion. He can be the Chairman of the Special Promotions Committee and his independent opinion in relation to special promotions can be discussed at the Committee and collective decisions can be taken. If there is no unanimity, the majority decision should prevail. This is the common practice adopted by every responsible institution, including in the promotion of judicial officers.

In *Munasinghe v. Vandergert* [2008] 2 Sri LR 223 at 232, Bandaranayake J. (later C.J.) observed:

> *Considering the present day administrative functions, there is no doubt that it is necessary to confer authority on administrative officers to be used at their discretion. Nevertheless, such discretionary authority cannot be absolute or unfettered as such would be arbitrary and discriminatory, which would negate the equal protection guaranteed in terms of Article 12(1) of the Constitution.*

Article 12(1) of the Constitution ensures protection from arbitrariness and discrimination by executive or administrative action. The objective of Article 12(1) of the Constitution therefore is to ensure equal treatment. In *Ariyawansa and others v. The People's Bank and others* [2006] 2 Sri LR 145 at 152 Bandaranayake J. stated:

> *The concepts of negation of arbitrariness and unreasonableness are embodied in the right to equality as it has been decided that any action or law which is arbitrary or unreasonable violates equality.*

In the determination of this Court in *The Special Goods and Services Tax Bill* (SC/SD/1-9/2022, page 36), it was held:

> *absolute and unfettered discretion being vested in an officer of the Executive is a recipe for (i) unreasonable and arbitrary decision-making, (ii) abuse of power, (iii) corruption, and (iv) the roadway to depredation of the Rule of Law. On all such accounts, it results in an infringement of Article 12(1) of the Constitution which guarantees equal protection of the law.*

In *Royappa v. State of Tamil Nadu and another* (1974 AIR 555 at 583) Bhagwati J. observed:

> *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 positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14, and if it affects any matter relating to public employment, it is also violative of Art. 16. Arts. 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.*

In *Ramana Dayaram Shetty v. The International Airport Authority of India and others* (1979 AIR 1628 at 1638) Bhagwati J. stated:

> *The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any particular case or cases, the action of*

> *the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.*

In *Ajay Hasia v. Khalid Mujib* (1981 AIR 487 at 499), after considering the concept of reasonableness and its applicability, Bhagwati J. stated, "*the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.*"

In *Jaisinghani v. Union of India and others* (1967 AIR 1427 at 1434) Ramaswami J. observed:

> *[T]he absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey - "Law of the Constitution" - Tenth Edn., Introduction cx). "Law has reached its finest moments", stated Douglas, J. United States v. Wunderlich, (1951) 342 US 98 "when it has freed man from the unlimited discretion of some ruler... Where discretion is absolute, man has always suffered". It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes, (1770) 4 Burr 2528 at p. 2539 "means sound discretion guided by law. It*

> *must be governed by rule, not by humour: it must not be arbitrary, vague and fanciful."*

As observed by Amerasinghe J. in *Perera and nine others v. Monetary Board of the Central Bank of Sri Lanka and twenty-two others* [1994] 1 Sri LR 152 at 166:

> *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 thoroughgoing 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.*

In *Wijerathna v. Sri Lanka Ports Authority and others* (SC/FR/256/2017, SC Minutes of 11.12.2020), Kodagoda J., whilst holding that the petitioner's fundamental right under Article 12(1) had been violated by the failure to appoint him to a particular post, observed:

> *In my view, principally, schemes for the selection, appointment and promotion of persons for employment positions should contain mechanisms enabling the selection of the most suitable person for the relevant position, whilst embodying the principle of equality. The objective sought to be achieved by doing so, is the imposition of compulsion on persons in authority who are empowered to take decisions relating to selections, appointments, recruitment and promotions, to arrive at objective and reasonable decisions, and thereby securing protection against arbitrary decision-making. While conferring discretionary authority on elected and appointed higher officials is necessary, it is equally necessary to ensure that, such discretion is exercised for the purpose for which discretionary*

> *authority has been conferred, and not for the purpose of giving effect to personal objectives which are inconsistent with equality and influenced by irrational and subjective criteria. In all probability, the conferment of unregulated discretionary power would result in violations of the rule of law, and arbitrary, unreasonable and capricious decision-making, and should therefore be avoided at all cost.*

I take the view that the special promotion provision contained in paragraph 10.1.5 of P7 (at pages 22-23 of P7) insofar as the powers of the IGP are concerned is absolute, unfettered and arbitrary. Arbitrariness in the decision-making process violates Article 12(1), which guarantees equal protection of the law. Hence I hold that the fundamental right of the petitioners guaranteed by Article 12(1) of the Constitution is violated to that extent by P7 and I further declare that the special promotion provision in P7 is a nullity. I direct that the 1st to 10th respondents (the IGP and the members of the Public Service Commission) revisit that section of P7 and revise it in order to protect the fundamental rights of the petitioners.

Infringement of Article 14(1)(g)

The petitioners complain of the violation of Article 14(1)(g) of the Constitution, which states: "*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*". This is not an entrenched provision. It is subject to Article 15(5), 15(7) and 15(8):

> *15(5) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(g) shall be subject to such restrictions as may be prescribed by law in the interests of national economy or in relation to –*

(a) the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise and the licensing and disciplinary control of the person entitled to such fundamental right; and

(b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise.

15(7) The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as 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 of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.

15(8) The exercise and operation of the fundamental rights declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them.

The right to a profession/occupation of one's choice goes hand in hand with the corresponding duty of every person in Sri Lanka to work

conscientiously in his chosen occupation, as articulated in Article 28 of the Constitution.

In *Vasudewa Nanayakkara v. Choksy, Minister of Finance and others* (SC/FR/209/2007, SC Minutes of 13.10.2009) Bandaranayake J. (later C.J.), quoting the pronouncement of Lord Denning in *Nagle v. Feilden and others* ([1966] 1 All E.R. 689 at page 694) that "*…a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property. Just as the courts will intervene to protect his rights of property, so they will also intervene to protect his right to work*", proceeded to hold:

> *It is therefore the paramount duty of Courts to ensure that a citizen's right to work is protected. The right to employment being a fundamental right guaranteed by the Constitution, it would be the duty of the Court to exercise their authority in the interest of the individual citizen and of the general public to safeguard that right.*

Where the state is the employer, the violation of Article 14(1)(g) has been found in instances such as the arbitrary discontinuation of employment (*Nimal Bandara v. National Gem and Jewellery Authority* (SC/FR/118/2013, SC Minutes of 13.12.2017) and the arbitrary suspension of an appointment (*Sisira Senanayake v. Land Reform Commission* SC/FR/190/2016, SC Minutes of 15.02.2017).

The equivalent to Article 14(1)(g) of our Constitution is Article 19(1)(g) of the Indian Constitution, which states: "*All citizens shall have the right to practise any profession, or to carry on any occupation, trade or business.*"

The Supreme Court of India has held that where an administrative, executive or non-legislative body has been vested with uncontrolled discretion that would negatively impact the fundamental right to practice

any profession, occupation, trade or business, a finding of the violation of such right can be made.

In *Municipal Corporation of the City of Ahmedabad and others v. Jan Mohammed Usmanbhai and another* (1986 AIR 1205) at page 1210 R.B. Misra, J. observed:

> *Where the law providing for grant of a licence or permit confers a discretion upon an administrative authority regulated by rules or principles, express or implied, and exerciseable in consonance with the rules of natural justice, it will be presumed to impose a reasonable restriction. Where, however, power is entrusted to an administrative agency to grant or withhold a permit or licence in its uncontrolled discretion the law ex facie infringes the fundamental right under Art. 19(1)(g).*

In *Liberty Cinema v. The Commissioner, Corporation of Calcutta and another* (1959 AIR Cal 45) D.N. Sinha, J. at page 53 stated:

> *In my opinion, it is now firmly established that an uncontrolled and arbitrary power without any restriction whatsoever cannot be granted to the executive or a non-legislative body, if it is possible by the exercise of such power to affect the rights guaranteed to a citizen to carry on trade or business.*

In *Elmore Perera v. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries* [1985] 1 Sri LR 285, the contention of the petitioner was that his compulsory retirement from government service amounted to a violation of his fundamental rights guaranteed under Article 12 and 14(1)(g) of the Constitution to engage in his profession as a surveyor. By majority decision, the Supreme Court held that a violation of Article 12(1) had not been established. Thereafter Sharvananda C.J. stating that "*Counsel for the petitioner correctly did not*

press the ground that the action of the respondents had infringed the petitioner's fundamental right of freedom to engage in any lawful occupation, as provided by Article 14(1)(g)" expressed the following opinion *obiter* at pages 323-324:

> *The right of the petitioner to carry on the occupation of surveyor is not, in any manner, affected by his compulsory retirement from government service. The right to pursue a profession or to carry on an occupation is not the same thing as the right to work in a particular post under a contract of employment. If the services of a worker are terminated wrongfully, it will be open to him to pursue his rights and remedies in proper proceedings in a competent court or tribunal. But the discontinuance of his job or employment in which he is for the time being engaged does not by itself infringe his fundamental right to carry on an occupation or profession which is guaranteed by Article 14(1)(g) of the Constitution. It is not possible to say that the right of the petitioner to carry on an occupation has, in this case been violated. It would be open to him, though undoubtedly it will not be easy, to find other avenues of employment as a Surveyor. Article 14(1)(g) recognises a general right in every citizen to do work of a particular kind and of his choice. It does not confer the right to hold a particular job or to occupy a particular post of one's choice. The compulsory retirement complained of, may at the highest affect his particular employment, but it does not affect his right to work as a Surveyor. The case would have been different if he had been struck off the roll of his profession or occupation and thus disabled from practising that profession.*

In *Syed Khalid Rizvi and ors. v. Union of India and ors.* (1992 Supp (3) SCR 180 at 214), Ramaswamy J. stated:

> *No employee has a right to promotion but he has only right to be considered for promotion according to rules. Chances of promotion are not conditions of service and are defeasible. Take an illustration that the Promotion Regulations envisage maintaining integrity and good record by Dy. S.P. of State Police Service as eligibility condition for inclusion in the select list for recruitment by promotion to Indian Police Service. Inclusion and approval of the name in the select list by the U.P.S.C, after considering the objections if any by the Central Govt. is also a condition precedent. Suppose if 'B', is far junior to 'A' in State Services and 'B' was found more meritorious and suitable and was put in a select list of 1980 and accordingly 'B' was appointed to the Indian Police Service after following the procedure. 'A' was thereby superseded by 'B'. Two years later 'A' was found fit and suitable in 1984 and was accordingly appointed according to rules. Can 'A' thereafter say that 'B' being far junior to him in State Service, 'A' should become senior to 'B' in the Indian Police Service. The answer is obviously no because 'B' had stolen a march over 'A' and became senior to 'A'. Here maintaining integrity and good record are conditions of recruitment and seniority is an incidence of service.*

The right to engage in a lawful profession is infringed if that right is "unlawfully obstructed". *Vide Mrs. W.M.K. De Silva v. Chairman, Ceylon Fertilizer Corporation* [1989] 2 Sri LR 393 at 407-408.

In *Siriwardena and another v. Inspector, Police Station, Ambalangoda* (SC/FR/242/2010, SC Minutes of 30.04.2021), the petitioners who are Attorneys-at-Law went to the Ambalangoda police station as part of their professional duties to assist a client of the 1st petitioner in a matter involving the custody of a child. The petitioners contended that the 1st respondent, an Inspector of Police, and the 2nd respondent, a Sub-Inspector of Police, verbally abused, threatened, humiliated and

intimidated the petitioners, even after having been informed that they were Attorneys-at-Law, and the 2nd respondent degraded the petitioners in front of members of the public by *inter alia* casting aspersions on the legal profession, causing severe embarrassment and humiliation to the petitioners. The petitioners filed an application before the Supreme Court alleging violation of their fundamental rights guaranteed under Articles 11, 12(1) and 14(1)(g) of the Constitution. The Supreme Court held that the respondents violated the fundamental rights of the petitioners guaranteed by the said Articles. Article 14(1)(g) was held to have been violated by the interference with their freedom to engage in their lawful occupation. Thurairaja J. declared:

> *It is my view that the treatment meted out to the Petitioners by the 1st and 2nd Respondents 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.*

If we are to respect, secure, advance and protect the fundamental right of citizens to engage in a lawful profession, we need to give a purposive interpretation to Article 14(1)(g) and not a restrictive interpretation that would directly or indirectly abridge, restrict or deny such right. The right to engage in a lawful profession should be understood as the right to effectively engage in a lawful profession. Although a promotion is not a right *per se* of an employee, the unjustifiable denial of consideration for promotion (by virtue of the conferment of unabridged discretion on the IGP) adversely affects the petitioners' right to effectively engage in their lawful employment, in violation of Article 14(1)(g).

I hold that the special promotion provision contained in paragraph 10.1.5 of P7 (at pages 22-23 of P7) insofar as the powers or discretion of the IGP are concerned also violates the fundamental right of the petitioners guaranteed by Article 14(1)(g) of the Constitution.

Doctrine of Severability

The next question is whether, when an impugned administrative decision challenged in a fundamental rights application contains provisions that are violative of fundamental rights and those that are not, the Court can separate the good from the bad and declare only the bad part invalid leaving the good part intact. This is permissible.

I concur with the view of De Silva J. expressed in *Ranatunga v. Commissioner General of Agrarian Development* (CA/WRIT/180/2017, CA Minutes of 17.07.2019):

> *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. In Regina v. Secretary of State for Transport ex parte Greater London Council [1985] 3 WLR 574 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.*
>
> *However, such severance of the ultra vires part from the intra vires part is subject to qualifications. If the bad can be cleanly severed from the good, the court will quash the bad part only and leave the good standing (Agricultural, Horticultural and Forestry*

> *Industry Training Board v. Ayelsbury Mushrooms Ltd. (1972) WLR 190). In R. v. North Hertfordshire District Council ex parte Cobbold [1985] 3 All ER 486] it was 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.*

In the case of *Siva Sithamparam v. National Paper Corporation and others* [2003] 3 Sri LR 164, Jayasinghe J. held "*Unless the invalid part is inextricably interconnected with the valid the court is entitled to set aside or disregard the invalid part having the rest intact, it is appropriate to sever what is invalid if the character of what remains is unaffected.*"

Similarly in *Pure Beverages Company Executive Officers Association v. Commissioner of Labour* [2001] 2 Sri LR 258 at 271 Yapa J. stated:

> *Further Wade and Forsyth Administrative Law Seventh Edition Page 329 states as follows. "An administrative Act may be partially good and partially bad. It often happens that a tribunal or authority makes a proper order but adds some direction or condition which is beyond its powers. If the bad can be cleanly severed from the good, the Court will quash the bad part only and leave the good standing." Vide also Agricultural, Horticultural and Forestry Industry Training Board Vs. Aylesbury Mushrooms Ltd. Therefore in relation to the decision of the Commissioner dated 24.09.1997 it is clearly possible to sever the good from the bad. Hence the decision of the Commissioner which had been wrongly made, so as to apply to the*

four affected members of the Petitioner Association could be quashed allowing the decision made by the Commissioner in respect of the other employees belonging to the other two trade unions intact.

Conclusion

For the aforesaid reasons, I hold that the seniority category, limited examination category and merit category stipulated in P7 are not violative of Article 12(1) and Article 14(1)(g) of the Constitution; but, under the special promotion category comprising 12.5% of the total vacancies, the discretionary power granted to the 1st respondent IGP is violative of the fundamental rights of the petitioners guaranteed by Article 12(1) and Article 14(1)(g) of the Constitution. The application is partly allowed. Let the parties bear their own costs.

Judge of the Supreme Court

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

Judge of the Supreme Court

Kumuduni 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 Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No: 55/2017

K. M. R. Perera,
51/1, Northpole Residencies,
Apartment 5/1, Peter's Lane,
Dehiwala.

PETITIONER

vs.

1) Dharmadasa Dissanayake, Chairman.

1A) Justice Jagath Balapatabendi, Chairman.

2) A.W.A. Salam.

2A) Hussain Ismail.

2B) Indrani Sugathadasa.

3) D. Shirantha Wijayatilake.

3A) Prathap Ramanujam.

3B) Dr. T.R.C. Ruberu.

4) V. Jegarajasingam.

4A) Ahamed Mohammed Saleem.

5) Santi Nihal Seneviratne.

5A) Sudarma Karunaratne.

5B) Leelasena Liyanagama.

6) S. Rannuge.

6A) Dian Gomes.

7) D.L. Mendis.

7A) Dilith Jayaweera.

8) Sarath Jayatilake.

8A) G.S.A. De Silva.

2nd, 2A, 2B, 3rd, 3A, 3B, 4th, 4A, 5th, 5A, 5B, 6th, 6A, 7th, 7A, 8th & 8A Respondents are members of the Public Service Commission.

9) H.M.G. Seneviratne.

9A) M.A.B. Senaratne.

9B) Daya Senarath,
Secretary.

1st, 1A, 2nd, 2A, 2B, 3rd, 3A, 3B, 4th, 4A, 5th, 5A, 5B, 6th, 6A, 7th, 7A, 8th, 8A, 9th, 9A & 9B Respondents are at
Public Service Commission,
No. 1200/9, Rajamalwatte Road, Battaramulla.

10) K.S.C. Dissanayake,
Director General,
Overseas Administration Division.

10A) M.K. Pathmanathan,
Additional Director General.

10B) Sumith Dissanayake,
Director General,
Human Resources and Mission Management,
Ministry of Foreign Affairs.

11) Esala Weerakoon.

11A) Ravinatha Ariyasinghe.

11B) Admiral Jayanath Colombage,
Secretary.

10th, 10A, 10B, 11th, 11A & 11B Respondents
are at Ministry of Foreign Affairs,
The Republic Building, Colombo 1.

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

RESPONDENTS

Before: **E.A.G.R. Amarasekara, J**
Achala Wengappuli, J
Arjuna Obeyesekere, J

Counsel: Uditha Egalahewa, P.C., with Ranga Dayananda for the Petitioner

Nirmalan Wigneswaran, Deputy Solicitor General for the Respondents

Argued on: 26th July 2021

Written Submissions: Tendered on behalf of the Petitioner on 16th August 2021

Tendered on behalf of the Respondents on 19th August 2021

Decided on: 21st January 2022

Arjuna Obeyesekere, J

The Petitioner, who is an Officer of the Sri Lanka Foreign Service [the Foreign Service], filed Fundamental Rights Application No. 4/2017 in January 2017 alleging *inter alia* that the Respondents have violated the Petitioner's fundamental right to equality before the law and the equal protection of the law enshrined in Article 12(1) of the Constitution and the freedom to engage in a lawful occupation guaranteed by Article 14(1)(g) of the Constitution.

Soon after the said application was filed, but prior to the said application being supported, the Public Service Commission had taken a further decision with regard to the Petitioner which prompted the Petitioner to file this application in February 2017, complaining of the said decision as well, and alleging *inter alia* that the Respondents have violated the Petitioner's fundamental rights enshrined in Articles 12(1) and Article 14(1)(g) of the Constitution.

On 6th November 2019, this Court granted the Petitioner leave to proceed in both applications in relation to the infringement of the aforementioned Articles of the Constitution. However, as the complaint of the Petitioner set out in SC (FR) Application No. 4/2017 is subsumed in this application, the Petitioner pursued this application, while the first application was mentioned together with this application. When this matter was taken up for argument on 26th July 2021, the learned President's Counsel for the Petitioner and the learned Deputy Solicitor General for the Respondents informed this Court that the parties in SC (FR) Application No. 4/2017 would abide by this judgment.

The facts of this application very briefly are as follows.

Having successfully completed the Open Competitive Examination held to recruit persons to the Foreign Service, the Petitioner was appointed to Grade III of the Foreign Service on 10th July 1998 by letter dated 30th June 1998 marked '**P5**'. The said appointment was permanent and the Petitioner was required to undergo a probationary period of three years.

The Service Minute that was applicable to the Petitioner at the time he joined the Foreign Service was the '*Sri Lanka Foreign Service Minute of 1994*', marked '**P3**'. This Service Minute was replaced by the '*Sri Lanka Foreign Service Minute of 2001*' marked '**P4**'. It is admitted by the Petitioner that in terms of Paragraph 4 of Section 3 of '**P3**', the Petitioner was required to undergo a probationary period of three years, which requirement had been reiterated in his letter of appointment '**P5**'. It is also admitted that in terms of '**P3**', the Petitioner's confirmation in service at the end of the probationary period was subject to the Petitioner achieving the following:

a) Successfully completing the First Efficiency Bar Examination;

b) Obtaining the required level of proficiency in a foreign language assigned to the Petitioner by the Secretary, Ministry of Foreign Affairs;

c) Obtaining the required level of proficiency in the Tamil language.

The issues that arise for the determination of this Court relate to the First Efficiency Bar Examination. While it is common ground that the Petitioner successfully completed the First Efficiency Bar Examination and that the Petitioner has been confirmed in service, the parties are at variance with regard to the following matters:

a) The number of opportunities (attempts) that are available to the Petitioner to complete the First Efficiency Bar Examination;

b) Whether the Petitioner completed the First Efficiency Bar Examination within the time period specified in the Service Minutes '**P3**' and/or '**P4**'.

As noted earlier, the Petitioner had joined the Foreign Service on 10th July 1998. In terms of '**P3**', the Petitioner was required to successfully complete the First Efficiency Bar Examination during his three-year period of probation, which is by 10th July 2001. Although '**P3**' does not specify the frequency with which the said examination must be conducted – i.e., annually, bi-annually etc. – it is the position of the Respondents that the

said examination was held once a year, thus affording an Officer in the Foreign Service three opportunities during his/her probationary period to complete the said examination.

The Petitioner states that even though the first examination that was held after he joined the Foreign Service was in October 1998, the closing date for the submission of applications to sit for the said examination had lapsed by the time the Petitioner joined the Foreign Service, and hence, the said examination cannot be considered as an opportunity that was available to the Petitioner. This position has been accepted by the Respondents.

The Petitioner states that he applied and sat for the examination held in July 1999, where he passed five of the six subjects. It is common ground that this was the first attempt of the Petitioner at the First Efficiency Bar Examination.

Even though the next examination was held in July – August 2000, the Petitioner states that he did not apply for the said examination due to pressure of work. The learned President's Counsel for the Petitioner submitted that as the Petitioner did not even apply to sit for the said examination, the examination held in 2000 cannot be counted as his second opportunity. This position, which I will advert to later in this judgment, has been challenged by the learned Deputy Solicitor General for the Respondents on the basis that even though the Petitioner may not have applied for the examination, that should still be counted as his second opportunity to sit for the First Efficiency Bar Examination.

As already noted, '**P3**' was replaced by '**P4**' and was effective from 1st January 2001. Paragraph 2.1 of Part I of '**P4**' specified that '**P4**' shall apply to all members of the Foreign Service. Paragraph 3.6 of Part II of '**P4**' specifically provided that the First Efficiency Bar Examination shall be held twice in each calendar year, as opposed to once each year, as submitted by the Respondents, when the previous Service Minute '**P3**' was in operation. Although in terms of '**P4**' the period of probation continued to be three years, the First Efficiency Bar Examination was to be completed in two years. Accordingly, an Officer who had joined the Foreign Service after 1st January 2001 had four examination opportunities

to complete the First Efficiency Bar, but was required to do so within two years of joining the Foreign Service.

The Petitioner admits that he sat for the First Efficiency Bar Examinations that were held in August 2001 as well as in July 2002, but that he was unsuccessful on both occasions. It is the position of the Respondents that, for reasons that I shall advert to later, the Petitioner had time until July 2002, which translates into four examination opportunities, to complete the said Examination. The Petitioner had successfully completed the First Efficiency Bar Examination at his next sitting of the examination held in December 2003, which, according to the Respondents, was the fifth opportunity that was available to the Petitioner to complete the said Examination. Thus, it was the position of the Respondents that the Petitioner did not complete the First Efficiency Bar Examination, either (a) within the period of probation of three years, as extended, or (b) within the four opportunities that the Respondents claim were available to the Petitioner, with the introduction of '**P4**'.

It would perhaps be pertinent to address at this stage the consequences that flow from the failure by a Public Officer to complete an Efficiency Bar Examination within the time period stipulated in the relevant service minute.

Section 11:9 of Chapter II of the Establishments Code reads as follows:

> "*When an Officer fails to qualify for confirmation at the proper time, that is, within the initial period of probation,* ***for reasons beyond his control****, his period of probation may be extended by a reasonable period to enable him to qualify. If the officer qualifies within that extended period, he will be confirmed as from that the date of his appointment on probation.* ***He will not lose in salary*** *or seniority.*"

Section 11:10:1 of Chapter II of the Establishments Code, however, provides as follows:

> "*If an Officer fails to qualify for confirmation at the proper time, that is within the initial period of probation,* ***for reasons within his control****, but qualifies for confirmation during an extension of the period of probation granted to him in terms of sub-section 11:7 then –*

the increment falling due after the expiry of the initial period of probation will be deferred *by the length of time taken in excess of the initial period allowed to him to qualify.*"

Thus, a distinction has been drawn between the failure to qualify for confirmation for reasons beyond the control of an officer, and reasons within the control of an officer.

Section 15:4:1 of Chapter II provides further as follows:

"*If for any special reason an officer is granted, with the approval of the Director of Establishments, an extension of time in which to pass an Efficiency Bar examination, he may be allowed to draw increments (above the Efficiency Bar) during such extension of time allowed. If he does not pass the Efficiency Bar examination during the extension allowed, the increment that falls due after the expiry of that extension will be deferred by a period of time equal to the time in excess of the extension allowed to pass the Efficiency Bar Examination."*

Upon the Petitioner successfully completing the First Efficiency Bar Examination in December 2003, the Secretary, Ministry of Foreign Affairs, by a letter dated 2nd November 2004 marked '**P7b**', had informed the Public Service Commission that the Petitioner had completed the First Efficiency Bar Examination on 12th December 2003, and taking into consideration the fact that the time period to complete the said examination lapsed on 10th July 2002, had sought the approval of the Public Service Commission to extend the probationary period of the Petitioner from 10th July 2002 to 12th December 2003 under **Section 11:10** of Chapter II of the Establishments Code and to confirm the Petitioner in service with effect from 10th July 1998.

By its reply dated 30th November 2004, the Public Service Commission, while drawing attention to its previous letter dated 16th June 2004, had stated as follows:

"නිලධාරීන්ට පත්වීම් දින සිට පවත්වන අනුගාමී විභාග හතරක් මගින් කාර්යක්ෂමතා කඩඉම සමත්වීමට අවසර ලබා දීමට හා එම කාලය තුලදී පරිවාස කාලය ආයතන සංග්‍රහයේ II පරිච්ඡේදයේ 11:9 වගන්තිය යටතේ දිර්ඝ කිරීමටත් අනුගාමී විභාග හතරෙන් එහා 11:10 වගන්තිය යටතේ දිර්ඝ කිරීමටත්ය. ඉන් අදහස් කරන්නේ පත්වීම් දින සිට අනුගාමී වසර හතරක් තුල කාර්යක්ෂමතා කඩඉම සමත්වීම නොවෙන බව අවධාරනය කරමි."

Thus, the Public Service Commission made its position clear that the Petitioner had four consecutive examination opportunities to complete the First Efficiency Bar Examination but that it does not mean the Petitioner had a period of four years to complete the said examination. The Public Service Commission specified further that the completion of the First Efficiency Bar Examination within four consecutive opportunities was within Section 11:9 and that any further attempts at the examination would attract the provisions of Section 11:10.

By letter dated 6th December 2004, the Secretary, Ministry of Foreign Affairs had informed the Public Service Commission as follows:

"1998 වර්ෂයේ පැවැත්වූ විභාගය සඳහා අයදුම් පත් කැඳවීමේ අවසාන දිනය 1998 මැයි මාසයේ වූ බැවින් ඒ වනවිට සේවයට බැඳී නොසිටි පෙරේරා මහතාට එම විභාගයට ඉල්ලුම් කිරීමට නොහැකි විය. **එනිසා ඔහුගේ පත්වීම් දිනයට පසු පැවති අනුගාමී විභාග හතර ලෙස සැලකිය හැක්කේ 1999, 2000, 2001 හා 2002 යන වර්ෂයන්හි පැවැත්වූ විභාග වේ**. පෙරේරා මහතා 2002 වර්ෂයේ ජූලි මස පැවැත්වූ විභාගයෙන්ද සමත් නොවූ බැවින් ඔහුගේ පරිවාස කාලය 2001.07.10 දින සිට 2002.07.28 දින දක්වා ආයතන සංග්‍රහයේ II පරිච්ඡේදයේ 11:9 වගන්තිය යටතේද 2002.07.29 දින සිට 2003.12.12 දින දක්වා 11:10 වගන්තිය යටතේද දිර්ඝ කොට ඔහු 1998.07.10 දින සිට තනතුරේ ස්ථිර කිරීම මින් නිර්දේෂ කරමි."

Thus, the recommendation of the Ministry of Foreign Affairs was as follows:

(a) The period until July 2002 be treated under Section 11:9 as the Petitioner's fourth attempt at the examination was in July 2002;

(b) The period from July 2002 to December 2003 be treated under Section 11:10.

The consequence of the above recommendation, as provided by Section 11:10, was that the increment falling due after July 2002 was deferred until December 2003, or in other words, the Petitioner would not be entitled to any salary increments for the period of July 2002 – December 2003.

Accordingly, the Public Service Commission, by letter dated 7th April 2005, had informed the Secretary, Ministry of Foreign Affairs that the probationary period of the Petitioner has been extended as follows:

(a) Period between 10th July 2001 and 7th June 2002 – under Section 11:9;

(b) Period between 8th June 2002 and 12th December 2003 – under Section 11:10.

By letter dated 15th April 2005 marked '**P7c**', the Secretary, Ministry of Foreign Affairs has informed the Petitioner of the above position. '**P7c**' reads as follows:

> "රාජ්‍ය සේවා කොමිෂන් සභාවේ ලේකම්ගේ අංක ඒ/6/14/93(1) – 2004 හා 2005 අප්‍රේල් 07 දිනැති ලිපිය අනුව ඔබගේ පරිවාස කාලය 2001.07.10 දින සිට 2002.06.07 දින දක්වා ආයතන සංග්‍රහයේ II පරිච්ඡේදයේ 11:9 වගන්තිය යටතේද, 2002.06.08 දින සිට 2003.12.12 දින දක්වා ආයතන සංග්‍රහයේ II පරිච්ඡේදයේ 11:10 වගන්තය යටතේද දිර්ඝ කර ඔබ 1998.07.10 දින සිට ශ්‍රී ලංකා විදේශ සේවයේ III ශ්‍රේණියේ තනතුරෙහි ස්ථිර කර ඇති බව දන්වනු කැමැත්තෙමි.
>
> ඒ අනුව 2002.07.10 දිනට නියමිත ඔබගේ වැටුප් වර්ධකය 2003.12.12 දින දක්වා විලම්බනය වන බවද, ඔබගේ අනාගත වැටුප් වැඩිවීමේ දිනය දෙසැම්බර 12 දින වන බවද වැඩිදුරටත් දන්වමි."

In their Statement of Objections, the Respondents have stated to this Court that the reference to 7th June 2002 (*07.06.2002*) should be amended to read as 6th July 2002 (*06.07.2002*), with the latter date being the commencement date of the examination held in July 2002. Similarly, it has been pointed out that the examination held in December 2003 had commenced on 2nd December 2003 and hence, the relevant date should be 2nd December and not 12th December 2003. I must observe that the above change in the dates reflects the provisions of Section 1:14 of Chapter II of the Establishments Code, in terms of which, "*the effective date of passing an examination for purposes of confirmation, promotion and/or on an Efficiency Bar will be the commencing date of that*

examination at which the officer completes the examination." The above amendments to the letter dated 7th April 2005 have been conveyed by the Public Service Commission to the Secretary, Ministry of Foreign Affairs by its letter dated 22nd May 2020 marked '**R4**'.

The Petitioner was therefore aware as far back as April 2005, that the Public Service Commission had decided to treat the period between 8th June 2002 and 12th December 2003 as a period for which the Petitioner would not be entitled to any salary increments and the reasons for such decision. The Petitioner does not appear to have had any issue with the reasons adduced in '**P7c**' or the previous correspondence that I have referred to, and had not challenged the aforementioned decision of the Public Service Commission, thereby bringing the issue to a closure.

The process that culminated with '**P21**' which contains the decision that has given rise to this application, commenced with the following letter dated 4th May 2016 marked '**P12**' sent by the Public Service Commission to the Ministry of Foreign Affairs:

"කාර්යක්ෂමතා කඩඉම් සහන ලබා දීම - ධම්මිකා සේමසංහ මෙනවිය

02. කාර්යක්ෂමතා කඩඉම් පරීක්ෂණය නියමිත පරිදි නොපැවැත්වීම නිසා ඇතිවන පරිපාලනමය ගැටලු සම්බන්ධයෙන් පහත සඳහන් සහන ලබා දීමට රාජ්‍ය සේවා කොමිෂන් සභාව විසින් තීරණ ගෙන ඇති බව එහි නියමය පරිදි කාරුණිකව දන්වා සිටිමි:

(I) අංක 1168/17 හා 2001.01.24 දිනැතිව ශ්‍රී ලංකා ප්‍රජාතාන්ත්‍රවාදී ජනරජයේ අතිවිශේෂ ගැසට් පත්‍රයේ පළ කරන ලද ශ්‍රී ලංකා විදේශ සේවා ව්‍යවස්ථාව යටතේ ශ්‍රී ලංකා විදේශ සේවයේ 111 ශ්‍රේණියට බඳවා ගන්නා ලද නිලධාරීන් සඳහා **පළමු කාර්‍යක්ෂමතා කඩඉම** සම්පූර්ණ කිරීම සඳහා අනුයාත විභාග අවස්ථා හයක් ලබා දීමටත්

(II) අංක 1168/17 හා 2001.01.24 දිනැතිව ශ්‍රී ලංකා ප්‍රජාතාන්ත්‍රවාදී ජනරජයේ අතිවිශේෂ ගැසට් පත්‍රයේ පළ කරන ලද ශ්‍රී ලංකා විදේශ සේවා ව්‍යවස්ථාව යටතේ ශ්‍රී ලංකා විදේශ සේවයට බඳවා ගන්නා ලද නිළධාරීන් සඳහා දෙවන කාර්‍යක්ෂමතා කඩඉම සම්පූර්ණ කිරීමට අනුයාත විභාග අවස්ථා 12ක් දක්වා සහන කාලයක් ලබා දීමටත්

(III) ඉහත 02(I) හා 02(II) යටතේ සහන ලබා දිය හැකි නමුත් පෙර අවස්තාවන් වලදී රාජ්‍ය සේවා කොමිෂන් සභාව විසින් එලෙස සහන කාල ලබා නොදුන් ශ්‍රී ලංකා විදේශ සේවයේ නිලධාරීන් සිටී නම් එම නිලධාරීන් පිලිබඳ තොරතුරු රාජ්‍ය සේවා කොමිෂන් සභාව වෙත ඉදිරිපත් කරන ලෙස ඔබට දැන්වීමටත්"

It is important that '**P12**' is read and understood in its proper context, as it forms the basis of this application.

It is clear from '**P12**' that even though its caption refers to Ms. Dhammika Semasinghe who had joined the Foreign Service when '**P3**' was in operation, that '**P12**' is applicable only to those who joined the Foreign Service after the introduction of the 2001 Service Minute '**P4**'. It is equally clear from Paragraph 2(III) of '**P12**' that the Public Service Commission called for details of only those who joined under '**P4**' and where relief had been previously refused.

As I have already observed, under the Service Minute of 2001 '**P4**', there was a specific requirement that the First Efficiency Bar Examination must be held twice a year and that an Officer must complete the First Efficiency Bar Examination in two years, thus affording an Officer four attempts at the examination.

As submitted by the Respondents, the First Efficiency Bar Examination was held only once a year in 2001, 2002, 2003 and 2005, while no examination was held in 2004 and 2006. Thus, even though those who had joined the Foreign Service after January 2001 under the 2001 Service Minute had four attempts in two years, in actual fact, the fourth examination had been held only in February 2005, as opposed to it being held by end 2002, as required by '**P4**'.

The requirement to complete the First Efficiency Bar in two years was extended to three years in 2007, thus affording an Officer who had joined the Foreign Service after the introduction of '**P4**' six opportunities to complete the First Efficiency Bar Examination. Hence, the reference to six examination opportunities in Paragraph 2(I) of '**P12**'.

In view of the fact that the requirement to complete the First Efficiency Bar Examination had been extended to three years, and since the failure to hold the examination bi-annually was an event beyond the control of the Officer concerned and therefore came

within Section 11:9 of the Establishments Code, the Public Service Commission had decided by '**P12**' to afford the Officers referred to therein – i.e., those who joined the Foreign Service after January 2001 – six attempts at the First Efficiency Bar Examination, prior to applying the provisions of Section 11:10 to such an Officer.

Even though the Petitioner had joined the Foreign Service prior to January 2001, he sought the concessions offered in '**P12**' – i.e., that he too be permitted six attempts to complete the First Efficiency Bar Examination. If the request of the Petitioner was acceded to, Section 11:9 would apply to the entire period from 6th July 2002 to 2nd December 2003, and the Petitioner would have been entitled for his salary increments without a break.

The Ministry of Foreign Affairs did a 180° turn and, contrary to the recommendation that it had made in 2005 that I have discussed earlier, recommended to the Public Service Commission by its letter dated 20th May 2016 marked '**P14**' the above request of the Petitioner. After a series of correspondence with the Ministry of Foreign Affairs, the Public Service Commission, by its letter dated 5th December 2016 marked '**P21**' had informed the Petitioner as follows:

> "ශ්‍රී ලංකා විදේශ සේවයේ පළමු කාර්යක්ෂමතා කඩඉම සම්පූර්ණ කිරීම සඳහා 2001.07.10 දින සිට 2002.07.06 දින දක්වා සහන කාලයක් ඔබට ලබා දීමට රාජ්‍ය සේවා කොමිෂන් සභාව විසින් තීරණය කර ඇති බව රාජ්‍ය සේවා කොමිෂන් සභාවේ අංක PSC/APP/4/70/2015 හා 2016.11.22 දිනැති ලිපිය මගින් දන්වා ඇති බව කාරුණිකව දැනුම් දෙමි."

Thus, the Public Service Commission had reiterated its decision taken in 2005 to grant the Petitioner a concession until 6th July 2002 to complete the First Efficiency Bar Examination. It was the contention of the learned Deputy Solicitor General that in arriving at the above decision, the Public Service Commission has proceeded on the basis that the Petitioner had four opportunities to complete the First Efficiency Bar Examination and that the failure on the part of the Petitioner to complete the First Efficiency Bar Examination before 10th July 2001 (i.e. three years from the date of joining the Foreign Service) was due to two examinations not being held in 2001, an event which the Public Service Commission has recognized as being beyond the control of the Petitioner. For that

reason, the Public Service Commission had decided that the Petitioner was entitled to an extension of time until 6th July 2002, which was:

(a) The commencement date of the second examination that should have been held in 2001; and

(b) The fourth attempt by the Petitioner at the First Efficiency Bar Examination.

The Public Service Commission had however rejected the request of the Petitioner for an extension of time until 2nd December 2003. The consequence of the rejection of the Petitioner's request is that the Petitioner is not entitled to any salary increments for the period 6th July 2002 to 2nd December 2003.

'**P21**' was therefore a confirmation of the aforementioned recommendation made by the Ministry of Foreign Affairs by its letter dated 6th December 2004 and a reiteration of the decision of the Public Service Commission dated 7th April 2005, which had been conveyed to the Petitioner by '**P7c**' dated 15th April 2005.

Dissatisfied by '**P21**', the Petitioner filed this application seeking inter *alia* the following relief:

a) A declaration that the fundamental rights of the Petitioner guaranteed under Articles 12(1) and 14(1)(g) of the Constitution have been infringed by the Respondents;

b) A declaration that the decision of the Public Service Commission contained in '**P21**' by which the Public Service Commission agreed to grant the Petitioner a concessionary period only until 6th July 2002, is null and void;

c) A direction that the Petitioner be paid his salary increments from 10th July 2001.

The Petitioner had also sought a declaration that the decision of the Public Service Commission contained in '**P24**' by which the Public Service Commission agreed to grant the Petitioner a concessionary period until April 2007 to complete the Second Efficiency Bar Examination and the Foreign Language requirement is null and void. However, at the hearing of this application, the learned President's Counsel for the Petitioner submitted that pursuant to the filing of this application, the Petitioner has been granted relief in respect of the aforementioned language requirements referred to in '**P24**' and that the only outstanding issue pertains to the decision of the Public Service Commission in '**P21**' with regard to the date on which the Petitioner is deemed to have completed the First Efficiency Bar Examination.

Article 12(1) of the Constitution guarantees that "*All persons are equal before the law and are entitled to the equal protection of the law*." In terms of Article 14(1)(g), "*Every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise*."

In **Karunathilaka and Another vs Jayalath de Silva and Others** [2003 (1) Sri LR 35] Shirani Bandaranayake, J (as she then was) 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*."

In **Wickremasinghe vs Ceylon Petroleum Corporation and Others** [2001 (2) Sri LR 409], Chief Justice Sarath Silva, having considered whether the decision of the Ceylon Petroleum Corporation to terminate the lease agreement that it had with the Petitioner was arbitrary in the context of the said decision being unreasonable, stated as follows:

"The question of reasonableness of the impugned action has to be judged in the aforesaid state of facts. The claim of each party appears to have merit when looked at from the particular standpoint of that party. But, reasonableness, particularly as the basic component of the guarantee of equality, has to be judged on an objective basis which stands above the competing claims of parties.

The protection of equality is primarily in respect of law, taken in its widest sense and, extends to executive or administrative action referable to the exercise of power vested in the Government, a minister, public officer or an agency of the Government. However, the Court has to be cautious to ensure that the application of the guarantee of equality does not finally produce iniquitous consequences. A useful safeguard in this respect would be the application of a basic standard or its elements, wherever applicable. The principal element in the basic standard as stated above is reasonableness as opposed to being arbitrary. In respect of legislation where the question would be looked more in the abstract, one would look at the class of persons affected by the law in relation to those left out. In respect of executive or administrative action one would look at the person who is alleging the infringement and the extent to which such person is affected or would be affected. But, the test once again is one of being reasonable and not arbitrary. Of particular significance to the facts of this case, the question arises as to the perspective or standpoint from which such reasonableness should be judged. It certainly cannot be judged only from a subjective basis of hardship to one and benefit to the other. Executive or administrative action may bring in its wake hardship to some, such as deprivation of property through acquisition, taxes, disciplinary action and loss of employment. At the same time it can bring benefits to others, such as employment, subsidies, rebates, admission to universities, schools and housing facilities. It necessarily follows that reasonableness should be judged from an objective basis.

When applied to the sphere of the executive or the administration the second element of the basic standard would require that the impugned action, is based on discernible grounds that have a fair and substantial relation to the object of the legislation in terms of which the action is taken or the manifest object of the power

that is vested with the particular authority.

Therefore, when both elements of the basic standard are applied it requires that the executive or administrative action in question be reasonable and based on discernible grounds that are fairly and substantially related to the object of the legislation in terms of which the action is taken or the manifest object of the power that is vested with the particular authority. The requirements of both elements merge. If the action at issue is based on discernible grounds that are fairly and substantially related to the object of the legislation or the manifest object of the power that is vested in the authority, it would ordinarily follow that the action is reasonable. The requirement to be reasonable as opposed to arbitrary would in this context pertain to the process of ascertaining and evaluating these grounds in the light of the extent of discretion vested in the authority."

Thus, a determination by this Court that the right to equality guaranteed to the Petitioner by Article 12(1) has been violated would have to be preceded by a finding that the aforementioned decision of the Public Service Commission is unreasonable and unfair and is therefore arbitrary.

The learned President's Counsel for the Petitioner presented three arguments before this Court, in support of his submission that the Petitioner completed the First Efficiency Bar within the time period specified in the Service Minutes. He submitted that in such circumstances, the aforementioned decision of the Public Service Commission to withhold the salary increments of the Petitioner from 6th July 2002 to 2nd December 2003 is arbitrary, irrational and unreasonable and is therefore a violation of the fundamental rights of the Petitioner guaranteed by Articles 12(1) and 14(1)(g).

Each of the said arguments are referrable to the criteria set out in the Service Minutes '**P3**' and '**P4**' relating to the confirmation of a public servant. In **W.P.S. Wijerathna vs Sri Lanka Ports Authority and Others** [SC (FR) Application No. 256/2017; SC Minutes 11th December 2020], Yasantha Kodagoda, P.C., J, having considered the application of the

principle of equality enshrined in Article 12(1) in the context of appointments and promotions in the Public Service, held as follows:

> "*Particularly in the public sector, it would be necessary to develop, have in place, and enforce schemes of appointment and promotion which are compatible with the concepts of equality, for the purpose of (a) providing an environment in which the objectives of the organization are given effect in an efficient manner, (b) ensuring meritocracy, (c) preventing arbitrary and unreasonable decision making and nepotism, (d) preserving effective administration, (e) preventing abuse, (f) preventing corruption, (g) ensuring transparency, (h) maintaining the morale of the workforce, and (i) ensuring that the public has confidence in such public institutions. Once such schemes are promulgated, it is equally important and necessary to ensure that, they are enforced correctly, comprehensively, uniformly, consistently and objectively. Recruitment and appointment of persons to positions in the public sector cannot be left to be decided according to the whims and fancies of persons in authority. . .*
>
> *It would thus be seen that arbitrariness and unreasonableness in decision-making in selections, appointments and promotions particularly in public sector institutions is inconsistent with the concept of equality. In fact, as pointed out repeatedly by numerous erudite judges, 'arbitrariness is the anathema of equality'. In India's former Chief Justice Bhagwati's words, 'equality and arbitrariness are sworn enemies'.*
>
> *In my view, principally, schemes for the selection, appointment and promotion of persons for employment positions should contain mechanisms enabling the selection of the most suitable person for the relevant position, whilst embodying the principle of equality. The objective sought to be achieved by doing so, is the imposition of compulsion on persons in authority who are empowered to take decisions relating to selections, appointments, recruitment and promotions, to arrive at objective and reasonable decisions, and thereby securing protection against arbitrary decision-making*."

The first argument of the learned President's Counsel for the Petitioner is that in terms of '**P4**', the Petitioner had six opportunities to complete the First Efficiency Bar Examination, and that the Petitioner did so on his fifth opportunity. The basis of this argument is that what should be applied to the Petitioner is the Service Minute '**P4**', which provides that examinations shall be held twice a year, and which, when read together with (a) the amendment introduced in 2007 that a period of three years is available to complete the First Efficiency Bar Examination and (b) '**P12**', means that the Petitioner had six opportunities at the said Examination.

The position of the Public Service Commission is that:

(a) What applies to the Petitioner is a combination of the provisions of '**P3**' and '**P4**'; and

(b) The Petitioner had only four opportunities to complete the First Efficiency Bar Examination, if he was to avoid the consequence set out in Section 11:10.

It was submitted by the learned Deputy Solicitor General that the Petitioner joined the Foreign Service in 1998 at a time when '**P3**' was in operation and that on the basis that the First Efficiency Bar Examination had to be completed within the three-year probationary period, he had three opportunities to complete the First Efficiency Bar Examination. He submitted further that the examinations held in July 1999, which the Petitioner passed partially, and the Examination held in July - August 2000, for which the Petitioner did not apply, must be counted as two opportunities. The examination that was scheduled to be held in 2001 therefore was the last opportunity that the Petitioner had of completing the First Efficiency Bar Examination under '**P3**'. Thus, as at 31st December 2000, the Petitioner had one more opportunity left to complete the First Efficiency Bar.

The requirement introduced by '**P4**' on 1st January 2001 that the examination shall be held twice a year accrued to the advantage of the Petitioner. Having one more year remaining as at 1st January 2001 to complete the First Efficiency Bar Examination translated into two examination opportunities with the introduction of '**P4**'. The Petitioner now had two examination opportunities in terms of '**P4**' to complete the First

Efficiency Bar, as opposed to one opportunity under '**P3**'. It is on this basis that the Public Service Commission had decided that the Petitioner had four opportunities to complete the First Efficiency Bar Examination. It must be noted that the requirement in '**P4**' that the First Efficiency Bar Examination must be completed in two years had not been applied to the Petitioner and that this period remained as three years, as stipulated by '**P3**'.

It is agreed between the parties that the First Efficiency Bar Examination was held only once in 2001. Thus, the Examination held in July 2002 has been considered as the second examination that should have been held in 2001. It was the submission of the learned Deputy Solicitor General that the Petitioner utilised the two opportunities that were available with the introduction of '**P4**', when he sat for the examination in August 2001 and July 2002. As the Petitioner was unsuccessful at both examinations, it was submitted that the Petitioner had failed to complete the First Efficiency Bar Examination within the four opportunities that were available to him – i.e., at the examinations held in 1999, 2000, 2001 and 2002.

It is admitted that the Petitioner successfully completed the First Efficiency Bar Examination held in December 2003. However, according to the Respondents, this is outside the period and the examination opportunities permitted in terms of '**P3**' and '**P4**', with the result that the period of service between 6th July 2002 and 2nd December 2003 has not been taken into consideration in the calculation of the service period of the Petitioner for purposes of salary increments. This was the basis on which the Public Service Commission limited the concession in terms of Section 11:9 of Chapter II of the Establishments Code until 6th July 2002.

The issue that arises for the determination of this Court from the first argument advanced on behalf of the Petitioner is whether the Petitioner had six examination opportunities in terms of '**P4**' or whether the decision of the Public Service Commission to combine the period under '**P3**' with a pro-rated adjustment of the examination opportunities available under '**P4**' is irrational, unreasonable and arbitrary.

In my view, the Petitioner does not have six attempts at the First Efficiency Bar Examination on the basis of two examinations per year for each year of probation, for the reason that, that privilege was only afforded to those who joined the Foreign Service under the 2001 Service Minute '**P4**'. The Petitioner, having joined the Foreign Service when '**P3**' was in operation, cannot seek benefits that were afforded to those who joined subsequently under '**P4**'. This would amount to the Petitioner having the best of both worlds in that while retaining the benefit of having passed a majority of subjects at an examination conducted when '**P3**' was in operation, the Petitioner would also have the benefit of having six additional examination opportunities that were available to those who joined after '**P4**' came into operation. To grant the Petitioner six additional examination opportunities under '**P4**' would have resulted in the Public Service Commission acting contrary to the objectives set out in the said Service Minute and applying the provisions of '**P3**' indiscriminately. Furthermore, this would be unfair by those who joined when '**P3**' was in operation and who completed their examinations as required by '**P3**'. The Petitioner cannot claim parity of status with those who joined the Foreign Service with him but who passed their examinations in terms of '**P3**'.

The Respondents have afforded the Petitioner the benefit of two examination opportunities in terms of '**P4**' for the remaining period of his period of probation – i.e., for the year 2001. As I have observed, the Petitioner was required to successfully complete the examination at least by the second examination held for 2001. The fact of the matter is that only one examination was held in 2001, thus affording the Petitioner an opportunity of sitting for the examination in July 2002, without facing the consequence of Section 11:10. Had the Petitioner passed the examination held in July 2002, the provisions of Section 11:9 would have applied to the Petitioner and he would have been entitled to his salary increments from that date. The fact remains that the Petitioner failed the exam held in July 2002. He finally passed the examination held in December 2003, which was his fifth opportunity at the said examination. The Petitioner must therefore face the consequence set out in Section 11:10 and the Petitioner would therefore not be entitled to any salary increments for the period between 6th July 2002 – 2nd December 2003.

In these circumstances, I am of the view that the decision of the Public Service Commission that the Petitioner was required to complete the First Efficiency Bar Examination in four attempts – i.e., two opportunities under '**P3**' and two opportunities under '**P4**' – if he was to avoid the provisions of Section 11:10 being applied to him, or in other words, the decision of the Public Service Commission to aggregate the number of examination opportunities available under '**P4**' with the examination opportunities that that were available when '**P3**' was applicable, on a *pro rata* basis, is a fair and reasonable decision and is not arbitrary.

This brings me to the second argument of the learned President's Counsel for the Petitioner, which is that even if the position of the Public Service Commission that the Petitioner had only four opportunities to complete the examination is accepted, the Petitioner completed the First Efficiency Bar Examination on his fourth attempt. This argument is premised on the basis that (a) the Petitioner only sat for the examination held in July 1999, August 2001, July 2002 and December 2003, and (b) the failure to apply for the examination held in July 2000 cannot be counted as an attempt.

The issue that arises for the determination of this Court from this argument is whether the decision of the Public Service Commission to treat the examination held in July 2000 as one opportunity, even though the Petitioner did not apply to sit for the said examination, is arbitrary and unreasonable. Before I proceed to consider the said argument, it would be useful to consider the rationale for requiring a Public Officer to complete the Efficiency Bar examinations in order to be confirmed in service as well as to obtain consequential promotions.

In terms of Section 11:1 of Chapter II of the Establishments Code, "*every appointment to a Permanent post will be on probation for a period of three years*", thus providing an appointee the opportunity of *learning work and being tested for his suitability for permanent retention.* Section 11:2 goes onto state that, "*Appointment on probation implies that the officer may, before confirmation, count on being admitted to the permanent establishment if he carries out the obligations imposed by his letter of*

appointment and proves by conduct and efficient service, his suitability for permanent retention in the Public Service." While Section 11:2:3 provides that, "*A Head of Department should ensure that an officer on probation is confirmed on completion of the period of probation or his period of probation is extended or the probationary appointment is terminated,*" in terms of Section 11:7, "*If the Officer is not judged as fit and qualified for confirmation in all respects, either his appointment should be terminated or the period of probation … should be further extended by the appointing authority subject to Section 11:9 or 11:10…*". Section 15:1 of Chapter II provides that, "*Promotion over an Efficiency Bar will be governed by the Scheme of Recruitment for the post, grade or service.*"

An objective mode of judging the competency of an Officer during probation is through the Efficiency Bar Examinations that are conducted periodically. Where there is a requirement in the Service Minute that an Officer must pass the First Efficiency Bar Examination within the probationary period, it is the responsibility of such Officer to act diligently and apply for and sit the said examination. Not applying for an examination, or having applied but not sitting for an examination citing pressure of work, is not acceptable and only goes to demonstrate a lack of diligence on the part of that Officer in complying with the requirements and achieving the objectives of the relevant Service.

While a Public Servant who cannot pass the Efficiency Bar examinations cannot demand that he/she be confirmed in service and/or be promoted, an Officer cannot circumvent the requirement to pass an Efficiency Bar within the period specified in the Service Minute by refraining from applying to sit for the examination. In fact, Section 11:10 is a merciful alternative to termination of service arising from the failure to pass the Efficiency Bar Examination within the time periods specified in the Service Minute.

It must be remembered that it is the task of the Foreign Ministry to coordinate and carry out the foreign policy of the Government of Sri Lanka. It is the members of the Foreign Service who are attached to the Ministry in Colombo and the missions abroad who are entrusted with the task of promoting, projecting and protecting Sri Lanka's national interests internationally. It is in order to achieve this objective and thereby discharge their

professional duties efficiently and effectively that an Officer of the Foreign Service is required to pass the subjects of Elementary Constitutional Law and International Law, Diplomatic Practice, International Affairs, Foreign Ministry Regulations, Sri Lankan History and Geography and Finance, as part of the First Efficiency Bar Examination.

I can at this stage only reiterate what was held by this Court in **W.P.S. Wijerathna vs Sri Lanka Ports Authority and Others** [*supra*] that schemes of recruitment, confirmation, promotion etc. set out in Service Minutes reflect the objectives that are sought to be achieved from a particular Service and that "*Once such schemes are promulgated, it is equally important and necessary to ensure that, they are enforced correctly, comprehensively, uniformly, consistently and objectively*".

In **Damayanthi Namalee Haupe Liyanage Madawalagama vs H.P.S. Somasiri, Director General of Irrigation and Others** [*SC (FR) Application No. 317/2010; SC Minutes 26th March 2012*], Chief Justice Shirani Bandaranayake has observed as follows:

> "*Therefore it is clearly evident that when an officer does not complete the relevant Efficiency Bar Examination within the given time frame, the next increment would be deferred by the period of time corresponding to the period of delay. This action cannot be regarded as a violation of petitioner's fundamental right guaranteed in terms of Article 12(1) of the Constitution*."

In the above circumstances, I am of the view that an Officer cannot refrain from applying to sit for the examination citing pressure of work and thereby extend the period that is available to complete the First Efficiency Bar. If an officer does so, he or she must face the consequences set out in Section 11:10. Thus, I am of the view that the decision of the Ministry of Foreign Affairs in 2004, as well as the decision of the Public Service Commission, both in 2005 as well as in 2016 that the failure to apply and/or sit the examination in 2000 should be counted as one opportunity is fair and reasonable and is in accordance with the objective that is sought to be achieved through the said requirement stipulated in the Service Minutes '**P3**' and '**P4**'.

I shall now consider the final argument of the learned President's Counsel for the Petitioner. He submitted that '**P12**' was issued by the Public Service Commission pursuant to a decision taken with regard to Ms. Dhammika Semasinghe, another Officer of the Foreign Service who had joined when '**P3**' was in operation. He submitted further that the Public Service Commission had decided otherwise with regard to the Second Efficiency Bar Examination of Ms. Semasinghe and that the Public Service Commission had treated the Petitioner differently, thereby violating the equality provisions contained in Article 12(1). While it may be true that '**P12**' was issued pursuant to a decision taken with regard to Ms. Semasinghe, it must be stressed that the contents of '**P12**' clearly provide that it applies in respect of those who had joined the Foreign Service under '**P4**'.

In order to address this argument, it would be necessary to briefly refer to the factual circumstances relating to Ms. Semasinghe. It is admitted by the parties that Ms. Semasinghe joined the Foreign Service on 18th April 1996 and that in terms of the Service Minute '**P3**' that prevailed during that time, she was required to complete the Second Efficiency Bar examination within seven years of her first appointment – i.e., by 18th April 2003.

Ms. Semasinghe had passed the First Efficiency Bar Examination by October 1998. She had also passed two subjects of the Second Efficiency Bar Examination held in August 1997 and a further three subjects at the examination held in October 1998. Ms. Semasinghe had not applied to sit for the examinations held in 1999 and 2000. As at 31st December 2000, a period of four and half years had lapsed out of the seven years available under '**P3**' to complete the Second Efficiency Bar Examination, leaving Ms. Semasinghe with a period of two and half years and three examination opportunities to complete the Second Efficiency Bar. With the introduction of '**P4**' on 1st January 2001, examinations were required to be held bi-annually. Ms. Semasinghe therefore had a further five opportunities to pass the said examination, as opposed to three opportunities that she would have had, if a new service minute had not been introduced.

According to the Respondents, details relating to the Second Efficiency Bar Examination relating to Ms. Semasinghe after the introduction of '**P4**' are as follows:

2001	Has not applied for the examination.
2002	Failed the examination.
2003	Has not applied for the examination.
2004	Examination has not been held.
2005	Has not applied for the examination.
2006	Examination has not been held.
2007	Although applied, the examination paper had not reached Washington, DC on time.
2008	Examination has not been held.
2009	Passed the examination held in May 2009.

It is clear from the above table that as only one examination had been held in 2001, the examination held in 2002 has been considered as the second examination that should have been held in 2001. Similarly, the examinations held in 2003 and 2005 have been considered as the two examinations that should have been held in 2002. The Public Service Commission had treated her attempt at the examination held in 2009 as having been completed in April 2007, when she failed to sit for the examination for a reason beyond her control – i.e., due to the examination papers not reaching Washington, DC on time. Thus, Ms. Semasinghe had completed the Second Efficiency Bar Examination on her fifth attempt, and therefore within the seven-year period, as permitted by '**P4**'. On the basis that the fifth examination after '**P4**' was introduced should be the examination held in December 2003, the Public Service Commission had accordingly granted her a concession from 2nd December 2003 to 27th April 2007 in terms of Section 11:9 of the Establishments Code.

It is thus clear that the Public Service Commission had treated the Petitioner and Ms. Semasinghe in the same manner – i.e., the period under the Service Minute '**P3**' had been taken into account in the calculation of the total opportunities available to complete the Efficiency Bar examination. In other words, there has been a pro-rated adjustment of the

period available to sit for the relevant examination under '**P4**' in respect of the Petitioner as well as in respect of Ms. Semasinghe, as they already had a period of service at the time '**P4**' was introduced. Furthermore, the Public Service Commission had treated the failure of Ms. Semasinghe to apply for the examinations held in 2001, 2003 and 2005 as opportunities that were available to her, similar to that of the Petitioner. Thus, I cannot agree with the final argument of the learned President's Counsel for the Petitioner.

There is one other matter that I must advert to. In 2014, the Public Service Commission issued Circular No. 1/2014 marked '**P10**' setting out the concessions that were being granted in respect of Efficiency Bar examinations. The relevant portions of '**P10**' are re-produced below:

> "කාර්යක්ෂමතා කඩඉම් විභාග සම්බන්දයෙන් සහන ලබාදීම
>
> රාජ්‍ය සේවයේ තනතුරකට සේවයකට පත් කරනු ලබන යම් නිලධාරියෙකු පත්වීම් දින සිට වසර 03ක් ඇතුලත පලමු කාර්යක්ෂමතා කඩඉම් පරීක්ෂණය සමත් විය යුතු අතර
>
> එසේ වුවද කාර්යක්ෂමතා කඩඉම් පරීක්ෂණය නියමිත පරිදි නොපැවැත්වීම නිසා ඇතිවන පරිපාලනමය ගැටලු සම්බන්ධයෙන් පහත සඳහන් සහනය ලබා දීමට රාජ්‍ය සේවා කොමිෂන් සභාව තීරණය කර ඇත.
>
> 'නියමිත පරිදි විභාග නොපැවැත්වීම මත කාර්යක්ෂමතා කඩඉම් විභාග සම්පූර්ණ කිරීමට නොහැකි වූ නිලධාරින්ගේ ජ්‍යෙෂ්ඨත්වයට හානි නොවන පරිදි ස්වකිය පත්වීම් උසස්වීම් දිනයේ සිට පවත්වනු ලබන අනුගාමී විභාග හතරක් මගින් පලමු දෙවන කාර්යක්ෂමතා කඩඉම් පරීක්ෂණය සමත්වීමට නිලධාරියෙකුට පුලුවන."

Although the Petitioner has complained that the benefit of '**P10**' was not afforded to him, it is clear from the aforementioned facts that the Petitioner has been afforded four opportunities to pass the First Efficiency Bar Examination, prior to applying the provisions of Section 11:10 to the Petitioner.

In the aforesaid circumstances, 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, and the Petitioner's fundamental right to engage in a lawful occupation

guaranteed by Article 14(1)(g), have not been infringed by the Respondents. The application of the Petitioner is therefore dismissed. I make no order with regard to costs.

As agreed by the learned President's Counsel for the Petitioner and the learned Deputy Solicitor General for the Respondents, the parties in SC (FR) Application No. 4/2017 will be bound by this judgment. The said application shall accordingly stand dismissed, without costs.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, 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 under and in terms of Articles 17 and 126 of the Constitution

Mr. M.N.M. Nafees
54/3, Haskampola,
Siyambalagaskotuwa.

Petitioner

SC /FR/ Application No. 56/2018

Vs,

1. Hon. Lakshman Kiriella MP
   The Minister of Higher Education,
   No. 18, Ward Place, Colombo 07.

1A. Hon. Kabir Hashim MP
   The Minister of Higher Education,
   No. 18, Ward Place, Colombo 07.

Substituted 1A Respondent

1B. Wijeydasa Rajapakshe MP
   The Minister of Higher Education,
   No. 18, Ward Place, Colombo 07.

Substituted 1B Respondent

1C. Hon Bandula Gunawardena MP
   The Minister of Higher Education and
   Cultural Affairs,
   No. 18, Ward Place, Colombo 07.

Substituted 1C Respondent

1D. Hon. Prof. G.L. Peris
The Minister of Higher Education,
No. 18, Ward Place, Colombo 07.

Substituted 1D Respondent

1E. Hon. Dinesh Gunawardena MP
The Minister of Higher Education,
The Ministry of Higher Education,
No. 18, Ward Place, Colombo 07.

Substituted 1D Respondent

2. University Grants Commission
No. 20, Ward Place, Colombo 07.

3. Prof. Mohan de. Silva,
The Chairman,
University Grants Commission,
No. 20, Ward Place, Colombo 07.

3A. Prof. Sampath Amarathunga
The Chairman,
University Grants Commission,
No. 20, Ward Place, Colombo 07.

Substituted 3A Respondent

4. Prof. P.S.M. Gunarathne
Vice Chairman,
University Grants Commission,
No. 20, Ward Place, Colombo 07.

4A. Prof. Janitha A. Liyanage
Vice Chairman,
University Grants Commission,
No. 20, Ward Place, Colombo 07.

Substituted 4A Respondent

5. Prof. Malik Ranasinghe
The Member,
University Grants Commission,
No. 20, Ward Place, Colombo 07.

5A. Prof. Kollupitiye Mahinda
Sangharakhitha Thero
The Member,
University Grants Commission,
No. 20, Ward Place, Colombo 07.

Substituted 5A Respondent

6. Dr. Wickrema Weerasooriya
The Member,
University Grants Commission,
No. 20, Ward Place, Colombo 07

6A. Senior Prof. A.K.W. Jayawardane
The Member,
University Grants Commission,
No. 20, Ward Place, Colombo 07.

Substituted 6A Respondent

7. Prof. Hemantha Senanayake
   The Member,
   University Grants Commission,
   No. 20, Ward Place, Colombo 07.

7A. Prof. Premakumara de. Silva
   The Member,
   University Grants Commission,
   No. 20, Ward Place, Colombo 07.

Substituted 7A Respondent

8. Dr. Ruviaz Haneefa
   The Member,
   University Grants Commission,
   No. 20, Ward Place, Colombo 07.

8A. Mr. Palitha Kumarasinghe
   The Member,
   University Grants Commission,
   No. 20, Ward Place, Colombo 07.

Substituted 8A Respondent

9. Prof. R. Kumaravadivel
   The Member,
   University Grants Commission,
   No. 20, Ward Place, Colombo 07.

9A. Prof. Mrs. Vasanthy Arasarathnam
   The Member,
   University Grants Commission,
   No. 20, Ward Place, Colombo 07.

Substituted 9A Respondent

10. Mr. P.K.G. Harischandra
The Treasury Representative
University Grants Commission,
No. 20, Ward Place, Colombo 07.

10A. Mr. A.R.H.W.A. Kumarasiri
The Treasury Representative
University Grants Commission,
No. 20, Ward Place, Colombo 07.

Substituted 10A Respondent

11. Dr. Priyantha Premakumara
The Secretary to the Commission
University Grants Commission,
No. 20, Ward Place,
Colombo 07.

12. Mrs. Shalika Ariyarathne
Senior Assistant Secretary for Secretary
University Grants Commission,
No. 20, Ward Place, Colombo 07.

12A.Mrs. C. Gunawardena
Senior Assistant Secretary for Secretary
University Grants Commission,
No. 20, Ward Place, Colombo 07.

Substituted 12A Respondent

13. Mr. B. Sanath Poojitha
The Commissioner General of Examinations
Department of Examinations,
Pelawatta, Battaramulla.

14. Mrs. P.K.S. Dhammika de. Silva
    Assistant Examination Commissioner (Inquiry)
    Department of Examinations,
    Pelawatta, Battaramulla.

15. Mr. M.M. Nawash
    Former Principle,
    A/ Kahatagasdigiliya MMV, Kahatagasdigiliya.

16. Mr. S.A.M. Sahabdeen
    The Principle,
    A/ Kahatagasdigiliya MMV, Kahatagasdigiliya.

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

Respondents

Before: **Justice Vijith K. Malalgoda PC**
Justice Yasantha Kodagoda PC
Justice Mahinda Samayawardhena

Counsel: Rushdhie Habeeb with Rizwan Uwais, Sachini Wickramasinghe and Shahla Rafeek instructed by Thakshila Serasinghe for the Petitioner

Indika Demuni De Silva, PC, SG, with I. Randeny, SC, for the 1E, 13th, 14th and 17th Respondents

Kuvera De Zoysa, PC with Nilantha Kumarage for the 2nd to 12th Respondents

Written Submissions On:	**By the Petitioner**	**: 30.07.2021**
	1E, 13th ,14th,17th Respondents	**: 13.07.2021**
	2nd to 12th Respondents	**: 12.10.2021**
Further Written Submissions On:	**By the Petitioner**	**: 22.04.2022**
	2nd to 12th Respondents	**: 02.06.2022**

Argued on : 08.12.2021, 15.03.2022 and 24.03.2022

Judgment on : 29.09.2022

Vijith K. Malalgoda PC J

Petitioner to the instant application namely Muhammdu Nawfer Muhammad Nafees had complained the violation of his fundamental rights guaranteed under Article 12 (1) and 12 (2) of the Constitution by not allowing the Petitioner to submit his application to the University Admission for the Academic year 2017/2018 based on the results in General Certificate of Education (hereinafter referred to as G.C.E.) Advance Level 2017. The Petitioner had further sought relief in order to gain admission to the University based on results he obtained in G.C.E. (Advance Level) for the year 2017.

According to the Petitioner, he sat for his G.C.E. (Ordinary Level) Examination in Tamil medium from Ku/Giri/ Madeena National School in the year 2013. He obtained seven "A" Passes and one "B" pass in the said examination. Even though the Petitioner is silent as to whether he commenced following G.C.E (Advance Level) Classes in the same school, he has taken up the position that he left Ku/Giri/ Madeena National School on 7th August 2014 and got admitted to A/ Kahatagasdigiliya Muslim Maha Vidyalaya (hereinafter referred to as A/ Kahatagasdigiliya MMV) to follow G.C.E (Advance Level) Classes in Physical Science stream.

According to the Petitioner, his sister was studying in the medical faculty of the Rajarata University in Anuradhapura and that was one reason for his family to move into Anuradhapura. Since the Petitioner was registered as a Tamil medium student even at the G.C.E. (Ordinary Level) Examination, the availability of good tuition classes in Tamil medium at Vauniya which is a closer destination to

Anuradhapura was another reason for the Petitioner's Family to temporarily moved into Anuradhapura.

The Petitioner followed G.C.E. (Advance Level) Classes at A/ Kahatagasdigiliya MMV in Tamil medium and sat for his G.C.E. (Advance Level) Examination in August 2016 as a school candidate.

In order the establish his school candidature from A/ Kahatagasdigiliya MMV Petitioner relied upon the school leaving certificate (P-11) official statement of the General Information Technology Examination for the year 2015 as a school candidate (P-5) and the results of the Individual and Group Projects which were submitted as a school candidate for the G.C.E. (Advance Level) Examination in 2016. (P-8)

The results of the said examination were released in January 2017, but the Petitioner's result was withheld and by letter dated 06.01.2017, Department of Examinations informed the Petitioner to be present for an inquiry on 14.02.2017 at the Department of Examinations Pelawatta.

The Petitioner was also summoned for another inquiry by the Provincial Department of Education North Central Province by letter dated 10.01.2017.

As submitted by the Petitioner, he appeared before the inquiry officers in both the above inquiries and made a statement at the inquiry held in the Provincial Department of Education. The 4th Respondent who conducted the inquiry at the Department of Examinations, after the inquiry informed the Petitioner that his results would be released without the District Rank.

Petitioner was informed of his results as 1A and 2Cs' and letter issued with the printed results sheet dated 27.04.2017 with the following results.

1. Combined Mathematics - A pass
2. Physics - Credit pass
3. Chemistry - Credit pass

In the meantime, Petitioner applied for the University admission for the academic year 2016/2017 based on the above results and secured admission for the Physical Science stream at Sri Jayawardenapura as well as Peradeniya Universities (P 10A- 10B)

Since the Petitioner was not interested in following the Physical Science stream and was only interested in following Engineering stream, he did not register at any of the above Universities, but

decided to sit for the G.C.E. (Advance Level) Examination once again. As the Petitioner had already left A/ Kahatagasdigiliya MMV after sitting for G.C.E. (Advance Level) Examination, decided to sit for the G.C.E. (Advance Level) Examination 2017 as a private candidate from the Kurunegala District.

The Petitioner had obtained 1A (Distinction pass) and 2Bs' (Very Good Passes) with 1.6985 Average "Z" score and passed the above examination obtaining 122nd place in the District Rank and 1389th in the Island Rank.

The University Grants Commission (hereinafter referred to as U.G.C) had called for online applications for University Admission for the academic year 2017/2018 from the eligible candidates who sat for G.C.E (Advance Level) Examination in 2017. The said notice was published somewhere around 5th January 2018 and the closing date for applications was 2nd February 2018.

Somewhere around the 9th January the Petitioner logged the website of the U.G.C. to apply for the University Admissions for the academic year 2017/2018 based on his results 2017, but when the Petitioner entered his basic information such as the National Identity Card Number, Index Number etc. an error massage appeared indicating that the Petitioner is not eligible for University Admission under Clause 1.7 of the Admission Handbook.

As understood by the Petitioner, Clause 1.7 of Handbook referred to the categories of students do not qualify for University Admission as internal students and since the Petitioner does not fall under any category referred to in the said Clause, the Petitioner visited the U.G.C on 10th January to inquire the reasons for the error massage received by him.

When the Petitioner visited the U.G.C. and met the 12th Respondent, he learnt that there was an issue with regard to his first attempt in 2016, whether he attended A/ Kahatagasdigiliya MMV throughout the academic year or not, and the Petitioner was asked to submit a show cause letter immediately. Even though the Petitioner was not prepared to reply any allegation, he drafted a letter in Tamil Language and handed over it to the 12th Respondent. (P-17)

The Petitioner has once again forwarded an appeal to the U.G.C on 15.01.2018 (P-18) but he was not informed of any decision by the U.G.C.

In the said circumstances the Petitioner filed the instant application for alleged violations of his Fundamental Rights guaranteed under Article 12 (1) and 12 (2) of the Constitution. This Court having

considered the material placed before it, had granted leave to proceed for the alleged violation under Article 12 (1) on 3rd April 2018.

As observed by this court, the Respondents before Court belongs to two categories and the Petitioner even though had not sought any relief from one set of Respondents including the 13th and the 14th Respondents, had claimed relief from the other set of Respondents including the U.G.C., its members and some officials.

U.G.C. is established under the University Act 1978 and is responsible under the said Act for the Planning and coordination of University education, allocation of fund to Higher Education Institutions, Maintenance of academic standards and regulations of admission of students to the Higher Education Institutions, but has no role to play with the affairs of schools and conducting G.C.E. (Advance Level) Examination. U.G.C. takes over only, once a student express interest in applying to a University based on the results obtained at the G.C.E. (Advance Level) Examination and upon submission of the required information and the documentation.

The 13th and 14th Respondents, namely the Commissioner General of Examinations and the Assistant Examination Commissioner (Inquiry) were represented by the Hon. Attorney General before this Court. The other Respondents namely the 2nd to the 12th Respondents were represented by the President's Counsel. When considering the material placed by both parties, it appears that the examination process which was the base for the University selection was not challenged before Court but some aspect of the selection criteria which is based on the University selection guideline for undergraduate courses 2017-2018 (hereinafter referred to as admission guideline 2017-2018) was questioned before this Court. However, the Petitioner had not challenged the provisions with regard to the selection criteria based on the 'Z' score obtained by the candidates, identified in the Admission Guidelines 2017-2018.

In order to understand, the grievance complained by the Petitioner and its existence, it is necessary to identify the factual matrix as explained by the Respondents before this Court.

As submitted by the 13th Respondent, he wrote to the Provincial Director of Education North Central Province in January 2017 requesting information with regard to the candidates who sat for the G.C.E. (Advance Level) Examination 2016 fraudulently from the North Central Province. This letter was sent as a formality prior to the release of the Examination Results. (13R1) In response to the above request Provincial Director of Education North Central Province submitted, a list of 22 students who sat for

the G.C.E. (Advance Level) Examination 2016 from A/ Kahatagasdigiliya MMV and informed that it was revealed from an inquiry conducted by the said Department, that the above candidates were not residents of Anuradhapura District and sat for the above examination in violation of the Education Department Circular 2008/17. (13R2) The name of the Petitioner, his National Identify Card Number and the Index Number appeared in place 12 of the said letter.

Subsequent to the receipt of the said letter, the candidates whose names appeared in the letter including the Petitioner were summoned for an inquiry at the Examinations Department. All the candidates except one, appeared before the Examinations Department and their statements were recorded. After the said inquiry it was decided to release the results of those who appeared before the Examinations Department without their District Rank (including the Petitioner's results) and the said decision was communicated to the U.G.C. by letter dated 19.06.2017. (13R5)

Similar steps were taken with regard to the candidates who sat for the said examination fraudulently from several other Districts and altogether 80 names were forwarded to the U.G.C. by the Examinations Department.

By letter dated 07.07.2017 U.G.C. had informed the 13th Respondent that, out of 80 names provided, only 28 had applied for University Entrance 2016/2017, and a request was made to provide information with regard to any fraudulent activities by any such candidate when siting for the G.C.E. (Advance Level) Examination 2016-2017.

The following information was provided with regard to the Petitioner by the U.G.C. in the said letter,

විභාග අංකය	නම	දිස්ත්‍රික්කය	Z අගය	තේරී ඇති පාඨමාලාව
2993058	**මුහම්මඩ් නව්ෆර් මොහොමඩ් නෆීස්**	**අනුරාධපුර**	**1.2541**	**භෞතික විද්‍යාව**

විශ්ව විද්‍යාලය	පාසලේ සිටි කාලය	විදුහල්පතිගේ නම
ශ්‍රී ජයවර්ධනපුර	10/08/2014 - 31/07/2016	**S.A.M. සහබ්ඩීන්**

Based on the above request, the 13th Respondent had written to the relevant authorities to provide him with necessary information to be submitted to U.G.C. and by letter dated 26.07.2017 Provincial Director of Educations North Central Province submitted the following information with regard to the Petitioner. (13R8B)

03. ඇමුණුම අංක 01 හි සඳහන් මුහම්මද් නව්ෆර් මුහම්මද් නෆීස් ශිෂ්‍යාගේ සහ ඔහුගේ පියා වන සාහුල් හමීඩ් මොහමඩ් නවුෆර් මහතාගේ ප්‍රකාශය අනුව ඔවුන්ගේ ස්ථිර පදිංචිය කුරුණෑගල දිස්ත්‍රික්කයේ 54/3, හස්කම්පොල, සියඹලාගස්කොටුව වේ. ඔවුන් අනුරාධපුර දිස්ත්‍රික්කයේ ස්ථිර පදිංචිව නොසිටි බවත් කහටගස්දිගිලිය විදුහල අසල නිවසක තාවකාලිකව නැවතී සිට පාසල් ගිය බවත් ප්‍රකාශ කර ඇත. අ.පො.ස. (සා.පෙළ) විභාගයට 2013 වර්ෂයේ සියඹලාගස්කොටුව කුරු/ගිරි/ මදීනා ජාතික පාසලෙන් පෙනී සිට ඇත. ශිෂ්‍ය කාර්‍ය දර්ශකයට අනුව 2014.08.07 පාසලෙන් ඉවත්වූ බව සටහන් කර ඇති අතර කහටගස්දිගිලිය මුස්ලිම් විදුහලේ 2014 වර්ෂයට අදාල ඇතුලත් වීමේ ලේඛනයට නම ඇතුලත් කර නොතිබිණි. පසුව 2009 වර්ෂයට අදාල ඇතුලත් වීමේ ලේඛනයට නම ඇතුලත් කර තිබිණි. පැමිණීම තහවුරු කිරීම සඳහා ඇති එකම ලේඛනය පාසලේ පැමිණීමේ සහතිකය වන අතර ගණිත අංශයට අදාල 2014/15 පැමිණීමේ ලේඛනයේ නම සඳහන්ව ඇති අතර 2016 පෙබරවාරි 01 දින සිට 2016 මැයි 31 දක්වා පැමිණීම ලකුණු කර ඇත. අධ්‍යාපන අමාත්‍යාංශ චක්‍රලේඛ 17/2008 ට අනුව පිට පළාත් වලින් අ.පො.ස. (සා.පෙළ) විභාගයට පෙනී සිටි සිසුන් දුෂ්කර දිස්ත්‍රික්ක වල උසස් පෙළ පන්ති සඳහා ඇතුලත් කිරීමේ දී පළාත් අධ්‍යාපන අධ්‍යක්ෂකගේ අනුමැතිය හෝ 6 වන ඡේදය සඳහා සුදුසුකම් සම්පූර්ණ කර නොතිබුණි. එමෙන්ම පැමිණීමේ ලේඛන එකම පෑනකින් එකම දිනක පැමිණීම ලකුණු කළ බවට අනාවරණය කරගෙන ඇත.

The above information was provided to the U.G.C. by the 13th Respondent but the U.G.C. was not happy with the information provided (with regard to all candidates) in order to identify the district for University admission of each candidate and requested confirmation with regard to the period each candidate had studied in the district in question. The following information was provided with regard to the Petitioner by the U.G.C. (13R 9A and B)

විභාග අංකය	නම	විශ්ව විද්‍යාල ප්‍රවේශ දිස්ත්‍රික්කය	Z අගය
2993058	මුහම්මඩ් නව්ෆර් මොහොමඩ් නෆීස්	අනුරාධපුරය	1.**2541**

පාසලේ සිටි කාලය	විදුහල්පතිගේ නම
10/08/2014 -31/07/2016	**S.A.M. සහබ්ඩීන්**

When the said information requested by the U.G.C. was conveyed to the Provincial Director of Education Anuradhapura by the 13th Respondent, to following information was provided by him through letter dated 28.08.2017.

"අ/කහටගස්දිගිලිය මුස්ලිම් මහා විද්‍යාලයේ පවත්වාගෙන ගිය පැමිණීමේ ලේඛන අනුව පහත නම් සඳහන් සිසුන් පාසල් පැමිණි කාල සීමාව ඇතුලත් තොරතුරු මේ සමඟ ඉදිරිපත් කරමි.

1. **මුහම්මඩ් නව්ෆර් මොහොමඩ් නෆීස් - 2016.02.01- 2016.05.31**

2. .....

අධ්‍යාපන අමාත්‍යාංශ ලේඛම්ගේ අංක 17/2008 චක්‍ර ලේඛය උල්ලංගනය කරමින් මෙම සිසුන් පාසලට ඇතුලත්කරගෙන ඇති බවත් පැමිණීමේ ලේඛන ලකුණු කිරීම එකම දිනක පසුව සිදු කල බවට කරුණු අනාවරණය වන බවත් සිසුන්ගේ ප්‍රකාශ වලට අනුව පැමිණීමේ ලේඛනයේ සඳහන් පරිදි සිසුන් පාසල් පැමිණ නොමැති බවත් අනාවරණය වී ඇති බව වැඩි දුරටත් කාරුණිකව දන්වා සිටිමි."

by letter dated 21.09.2017 (13R11) the U.G.C. had sought the following clarification from the 13th Respondent.

"මීට අමතරව, අතිරේක පළාත් කලාප අධ්‍යාපන අධ්‍යක්ෂක (පාලන හා පුහුණු) විසින් එවන ලද ලැයිස්තුවෙහි නම් සඳහන් කර තිබූ පහත සඳහන් සිසුන් පස්දෙනා ගේ පාසලට ඇතුලත්ව සිටි කාලය වෙනුවට එවුන් පාසලට පැමිණි කාලය පමණක් සඳහන් කර තිබූ බවද දක්නට ලැබුණි.

පාසැල: අනුරාධපුර/කහටගස්දිගිලිය මුස්ලිම් මහා විද්‍යාලය කහටගස්දිගිලිය

විභාග අංකය	නම	විශ්ව විද්‍යාල ප්‍රවේශ දිස්ත්‍රික්කය	පාසලේ සිටි කාලය
1. 2993058	මුහම්මඩ් නව්ෆර් මොහොමඩ් නෆීස්	අනුරාධපුරය	10/08/2014 -31/07/2016
2.			

එහෙයින් එම සිසුන් පස් දෙනාගේ පාසැල් කාලය පිළිබඳව පහත සඳහන් තොරතුරු පැහැදිලිව දක්වා එවන මෙන් කාරුණිකව ඉල්ලා සිටිමි.

1. මෙම සිසුන් පස් දෙනා පාසැලට පැමිණි කාලය ඔවුන් පාසැලට ඇතුලත්ව සිටි කාලය සේ සැලකිය හැකිද?
2. නොඑසේනම් පාසැල් වාර්ථාවල සඳහන් පරිදි මෙම සිසුන් පස් දෙනා පාසැලට ඇතුලත්ව සිටි කාලය පැහැදිලිව සඳහන් කර එවන මෙන් කාරුණිකව ඉල්ලා සිටිමි."

By letter dated 25.10.2017 (13R12) 13th Respondent forwarded the reply he received from the Provincial Director of Education North Central Province (13R12A) to the effect,

"සිසුන් පස් දෙනා පාසැලට පැමිණි කාලය ඔවුන් පාසැලට ඇතුලත්ව සිටි කාලය සේ සැලකිය හැකිබව කාරුණිකව දන්වා සිටිමි."

I will pause the discussion with regard to Factual Metrix at this point and would like to get back to the position already taken up by the Petitioner with regard to the material submitted by the 13th Respondent.

As revealed from the material submitted by the 13th Respondent, as a formality he called for material with regard to any fraudulent activities taken place at provincial level prior to the release of G.C.E. (Advance Level) Examination 2016 and he was informed of the fraudulent activities that had taken

place at A/ Kahatagasdigiliya MMV by the Provincial Education Authorities. The said investigation with regard to 22 students who sat for the above examination from A/ Kahatagasdigiliya MMV and the involvement of the Principal of the said school had already commenced by that time. This position is confirmed by the Petitioner and according to him one reason for him to leave A/ Kahatagasdigiliya MMV and get back to Kurunegala was an inquiry conducted by the Education Authorities where his statement was also recorded

However, the Petitioner was silent on the progress of the investigation carried out by the Education Authorities in the North Central Province except for the reference that it was one reason for him to get back to Kurunegala, but it appears that the Petitioner had not divulge the events that took place for him to go back to the Kurunegala District, where the "Z" score for the admission of the Engineering Faculty is very high compared to the Anuradhapura District.

The 2nd to the 12th Respondents had in fact raised three preliminary objections to the effect,

a) The Petitioner has not come to court with clean hands
b) The Petitioner has deliberately suppressed and/or misrepresented material facts to court
c) The Petitioner lacks *uberima fides*,

which I will consider at a subsequent stage of this judgment. It is further observed that the Petitioner had neither made the relevant Education Authorities Respondent before this Court nor prayed any relief from them.

13th Respondent without suspending the results until the conclusion of the said inquiry, had an inquiry on his own and decided to release the results subject to the condition that No District rank would release to the student, but informed the said position to the U.G.C.

While the said process as already referred to by me in this judgment, was in progress the Petitioner,

a) made his application for University Admission for academic year 2016-2017
b) moved to Kurunegala and sit for the G.C.E. (Advance Level) Examination 2017 for the second time as a private candidate

Since no decision had been taken by the U.G.C. with regard to the Petitioner by that time, his application made to the U.G.C. for University Admission 2016/2017 was processed and was first selected to Jayawardenapura University and later to the Peradeniya University to follow

undergraduate studies in Physical Science stream, but the Petitioner without registering to anyone of those Universities, decided to sit for the G.C.E. (Advance Level) Examination once again from Kurunegala District.

The Petitioner had not challenged the procedure identified under the guidelines introduce for University Admission 2016-2017 or 2017-2018, but had prayed for the implementation of the guidelines for the year 2017-2018 and admit him to the Engineering stream for the academic year 2017-2018 based on his results/ "Z" score in G.C.E. (Advance Level) Examination 2017 from the Kurunegala District. He further submitted that he had not acted in contravention of the guidelines 2016-2017 specially Clause 1.7 when he applied for University Admissions 2016-2017.

On behalf of the 2nd to the 12th Respondents, the 3rd Respondent had filed an affidavit before this court. In the affidavit the 3rd Respondent had explained the events that took place subsequent the receipt of an application for University Admission for the academic year 2016-2017 from the Petitioner. According to the 3rd Respondent the Petitioner who possessed the basic qualification based on the results of the G.C.E. (Advance Level) Examination 2016 to apply for University Admission 2016-2017, had submitted an online application.

According to the said application the Petitioner had sat for the G.C.E. (Advance Level) Examination 2016 from A/Kahatagasdigiliya MMV and was qualified for University Admission from the Anuradhapura District. According to the information provided in the said application, his date of admission to A/Kahatagasdigiliya MMV was 10.08.2014.

As per the criteria set out in Clause 1.5 of the University Admission Handbook for the academic year 2016-2017, the Petitioner was considered for University Admission from the District of Anuradhapura as he had studied for more than one year during the three years-period considered for the determination of the District.

The said criteria is referred to under Clause 1.5 as follows,

1.5 Criteria for determination of the District of the candidate for University admission

> In order to decide the District of a candidate for University Admission, the candidate must provide evidence of enrolment in school for a period last three years. For this purpose, the head of the school concerned should certify, on the basis of school records, the accuracy of the information provided by the candidate.

> The three years period is calculated backwards from the last date of the month, which is the month immediately preceding the month in which the candidate sat for Advanced Level Examination to qualify for University Admission. For example, if the Advanced Level Examination is held in August, the three years is calculated backwards form 31st July of that year.
>
> The District of the school at which the candidate studied more than one year during this period, will be considered as the District of the candidate for University Admission.
>
> ……
>
> ……
>
> If the school period of the candidate is less than one year or candidate has not enrolled in any school for Advance Level during that period, the District where the permanent place of residence of the candidate is located is the District considered for University Admission…….

Accordingly, the Petitioner got selected for the course of study in Physical Science at University of Sri Jayawardenapura under the normal intake and at University of Peradeniya under filling of vacancies from Anuradhapura District.

While the said process to identify the student's intake 2016-2017 was in progress, U.G.C. had received a list of 80 students who had been identified as students who produced false information at the G.C.E. (Advance Level) Examination 2016 from the 13th Respondent. Among the 80 students it had been observed that 20 students had sat for the G.C.E. (Advance Level) Examination 2016 from A/Kahatagasdigiliya MMV and the Petitioner was one of them. When checked with its records for the University Admissions 2016, it was revealed that only 28 students have submitted applications for University entrance 2016-2017 but no immediate steps were taken with regard to those applicants, and requested more information with regard to those students from the 13th Respondent. The 3rd Respondent confirms the documents that had been produced by the 13th Respondent marked 13R6, 13R8, 8A and 8B, 13R9B, 13R10C and takes up the position that U.G.C. had requested confirmation with regard to the period the 5 students who applied for University Admission 2016-2017 from A/ Kahatagasdigiliya MMV, studied at the said school, since the report submitted by the

Education Authorities in North Central Province through the 13th Respondent had only referred to the attendance of the said students. (13R11)

By letter dated 25th October 2017 the 13th Respondent has submitted the reply he received from the Education Authorities of the North Central Province by letter dated 19th October 2017. (13R12 and 12A) In the said letter the Provincial Director of Education North Central Province on whose directive the investigation was carried out with regard to the alleged fraud that has taken place at A/Kahatagasdigiliya MMV, had confirmed that the period the five students had attended the school should be the period the said students had studied at the said school.

According to 13R 10C and 13R 11 the Petitioner had attended A/Kahatagasdigiliya MMV only between 01.02.2016- 31.05.2016 which is a period less than 1 year, but according to the application tendered by the Petitioner for University Admissions 2016-2017 based on his results 2016, his date of admission to A/Kahatagasdigiliya MMV was 10.08. 2014 and was attending the said school until the G.C.E. (Advance Level) Examination in year 2016 and thereafter left the school on 30.08.2016 which is confirmed by the school leaving certificate produced marked P-11.

In these circumstances the 2nd to the 12th Respondents took up the position that the Petitioner was guilty of submitting false information when applying for University Admission 2016/2017 under Clause 1.7 (9) of the University Admission Guidelines and therefore U.G.C. had decided to call for his explanation from the Petitioner and a show cause latter dated 13th December 2017 was issued to the Petitioner with a deadline to be replied on or before 27th December 2017. (R-11)

Since the Petitioner had failed to respond to the show cause letter within the period given, the U.G.C. at its commission meeting 978 dated 04th January 2018 decided the following;

i. Cancel the selection of the Petitioner to causes of study of the Universities for the academic year 2016/2017
ii. Cancel application for University Admission of the Petitioner for the academic year 2016/2017
iii. Not to accept the Petitioner's application for University Admission in future academic years.

Once again, the Petitioner is silent on the receipt of the show cause letter but had taken up the position that he had visited twice to U.G.C. and submitted two appeals. During the argument before

us, the Respondents challenged the validity of the two-letters relied by the Petitioner and questioned whether the explanation given to the U.G.C. on 10.01.2018 and his appeal dated 15.01.2018 could be considered as a reply to the show cause letter sent by the U.G.C.

However. The petitioner when visited the U.G.C. had taken up the position that he could not respond to the U.G.C. letter since it was received late, but until his attempt to log into the U.G.C. web site was failed, he had not taken any interest either to reply the show cause letter by post or to visit U.G.C. as he did on 10.01.2018.

Even though the letter he submitted to U.G.C. on the 10th and the appeal he had submitted the U.G.C. on 15.01.2018 does not refer to the show cause letter sent by U.G.C, it appears that the U.G.C. had taken note of the position taken up the Petitioner in those letters.

As already referred to by me, U.G.C had already taken a decision with regard to the Petitioner by 10th January 2017 but, subsequent to the two visits by the Petitioner, the U.G.C. had sought further clarification with regard to the position taken by the Petitioner, from the 13th Respondent.

In the two letters submitted to U.G.C, the Petitioner had heavily relied on the leaving certificate issued to him by Principle of A/Kahatagasdigiliya MMV and had taken up the position that both, the Education Authorities in North Central Province as well as the 13th Respondent had accepted his position and in fact the 13th Respondent decided to release his results of the G.C.E. (Advance Level) Examination 2016.

As revealed before us the U.G.C. had once again decided to sought clarification from the relevant authorities and wrote to the 13th Respondent and requested the following clarification from him. (13R13)

“කෙසේ වෙතත්, ඉහත තීරණය ස්ථිර වීමට ප්‍රථමයෙන් මුහමඩ් නවුෆර් මොහමඩ් නෆීර් නැමැති සිසුවා විශ්ව විද්‍යාල ප්‍රතිපාදන කොමිෂන් සභාවට පැමිණ ලිඛිත පිළිතුරක් ලබාදුන් අතර එම ලිපියෙහි අඩංගුවී තිබූ කරුණුවලට අනුව විභාග දෙපාර්තුමේන්තුව විසින් 2016 වසරේ ඔහුගේ අ.පො.ස (උසස් පෙළ) විභාග ප්‍රතිඵල පළමුව අත් හටුවා පසුව අනුරාධපුර අධ්‍යාපන කාර්යාලය විසින් පවත්වන ලද විමර්ෂණයකින් පසු අත්හිටවූ එම ප්‍රතිඵල නැවත නිකුත් කිරීමට කටයුතු කරන ලද බව දක්නට ලැබුණි.

එබැවින්, ඉහත සඳහන් කල පරිදි පළමුව මෙම සිසුවාගේ ප්‍රතිඵල අත්හිටුවා අනුරාධපුර අධ්‍යාපන කාර්යාලය විසින් පවත්වන ලද විමර්ෂණයකින් පසු අත්හිටවූ එම ප්‍රතිඵල නැවතනිකුත් කිරීමෙන් පසු එම සිසුවා අදාල විමර්ෂණයෙන් නිදොස් වූ සිසුවෙක් වශයෙන් සැළකිය හැකිද යන්න පිළිබඳ පැහැදිලි කරන මෙන් කාරුණිකව ඉල්ලා සිටිමි. ”

By letter dated 7th February 2018 the 13th Respondent replied the above quarry and informed the U.G.C. that, (13R13A)

“ඒ අනුව ඔහුගේ විභාග ප්‍රථිඵල තාවකාලිකව අත්හිටුවන ලද අතර විශ්ව විද්‍යාල ප්‍රවේශය සඳහා අයදුම් කිරීමට හැකිවන පරිදි දිස්ත්‍රික් කුසලතාවය නොමැතිව මෙම අයදුම්කරුගේ ප්‍රථිඵල පසුව නිදහස් කිරීමට කටයුතු කර ඇත.

කරුණු එසේ වුවද විශ්ව විද්‍යාල ප්‍රවේශයේදී අයදුම්කරු අයත්වන දිස්ත්‍රික්කය නිශ්චය කරගැනීම ප්‍රවේශ නීති රීති අනුව විශ්ව විද්‍යාල ප්‍රතිපාදන කොමිෂන් සභාවේ තීරණය පරිදි සිදුවිය යුතු බැවින් ඉහත සඳහන් අයදුම්කරු සම්බන්ධයෙන් ඒ අනුව කටයුතු කරන මෙන් කාරුණිකව දන්වමි. ”

According to the 3rd Respondent the above material was once again considered by the U.G.C. and decided to adhere to the previous decision of the Commission.

In the absence of any challenge to the acts done by the 13th and 14th Respondents by the Petitioner and the Petitioner’s decision not to bring the Education Authorities, who are responsible for the conduct of the investigation/inquiry into the 22 students (including the Petitioner) from A/Kahatagasdigiliya MMV who sat for the G.C.E. (Advance Level) Examination 2016 and not to challenge the procedure and/or outcome of the said investigation/inquiry, I see no reason to consider the procedure and the outcome of the said investigation/inquiry in this judgment.

When discussing the relief prayed against the 2nd to 12th Respondents, I will first consider the preliminary objection raised on behalf of the said Respondents.

In this regard the said Respondents first submitted that the Petitioner is guilty of suppression and/or misrepresentation of material facts and therefore the Petition should be rejected in limine by this court.

As already referred to in this Judgment, the Petitioner was silent on several matters when he invoked the jurisdiction of this Court under Article 126 of the Constitution. He was silent whether he commence the studies in the Advance Level classes at Ku/Giri/ Madeen National School, before seeking admission to A/Kahatagasdigiliya MMV. Even though the Petitioner heavily relied on the school leaving certificate with regard to the date of admission to A/Kahatagasdigiliya MMV he was silent as to how he gain admission to the A/Kahatagasdigiliya MMV in violation of the School Admission Circular 2018/17 dated 2008.04.30 issued by the Secretary to the Ministry of Education (13R3)

Under Clause 6.1 of the said circular, it is not permitted for a student who got through the G.C.E. (Ordinary Level) Examination from a school in a district with facilities to enter G.C.E. (Advance Level) Class to a school in a District with less facilities, except in two instances under Clause 6.2.

Clause 6.2 provides that,

a) When parents are transferred to a District with less facilities on a service requirement
b) When parents change their residence to a District with less facilities for security reason, they become entitled to admit their children to a school in the same District to follow G.C.E. (Advance Level) Class.

However, the Petitioner does not come under any of the categories identified in Clause 6.2 of the said circular.

Clause 10 of the said circular further provides that the admission process to Grade 12 should be concluded by 15th June of each year but according to the leaving certificate submitted by the Petitioner, he gain admission to A/Kahatagasdigiliya MMV on 2014.08.10, almost two months after the deadline identified in the circular.

The Petitioner was further silent, as to whether he attended the school regularly, but he heavily relied on the following information in support of his attendance to A/Kahatagasdigiliya MMV,

a) he sat for General Information Technology Examination from A/Kahatagasdigiliya MMV as a school candidate in 2015
b) the results of the individual and group projects submitted through A/Kahatagasdigiliya MMV as school candidate,

but failed to explain as to the reasons for selecting A/Kahatagasdigiliya MMV a school without basic facilities including a teacher to teach Chemistry, to follow Advance Level classes as a student who obtained very good results for his G.C.E. (Ordinary Level) Examination.

While referring to the above suppressions and/or misrepresentation by the Petitioner, the Respondents argue that those suppressions and/or misrepresentation are with regard to the admission of the Petitioner to a school in a District with less facilities in violation of the prevailed circulars and therefore those facts are material to the Petitioner's case before this Court. Respondents further submitted that if not for the Petitioner's suppression and/or misrepresentation the Petitioner would not be able to support his case before this court.

In the case of ***Jahangir Sheriffdeen V. Sandamali Aviruppola SC FR 01/2015*** SC Minute 03.10.2016 this court observed; that

> "When a person files a fundamental rights application in court, he makes a declaration to court that all what he has submitted to court in his petition and affidavit was true and moves court to act on the said material and further he enters into a contractual obligation with the court to the effect that all what would be submitted by him by way further documents would be true. Subsequently, if the court finds that his declaration to be false and/or he has not fulfilled the said contractual obligation, his application or the petition should be dismissed in limine. Further when he seeks intervention of court in a case of this nature, he must come to court with frank and full disclose of facts. If he does not do so or does not disclose true facts, his petition should be rejected on that ground alone."

In the case of ***T. M. Dingirimahathmaya V. H. Don Brampi Singho SC Appeal 145/2013*** SC minute dated 20th January 2021, this court observed that;

> "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"

As observe by this court, the Petitioner for reasons best known to him, had either suppressed or misrepresented facts that are relevant for his admission and continued attendance to A/Kahatagasdigiliya MMV. He had not made the education authorities who are responsible for the conduct of an inquiry with regard to the fraudulent activities that had taken place with regard to his admission to A/Kahatagasdigiliya MMV to the instant case. Even though he had made the 13th and 14th Respondents parties to instant case, had not sought any relief from them.

Petitioner's main complaint before this court was that the decision of the U.G.C, not to permit him to submit his application for University Admission 2017-2018 based on his G.C.E. (Advance Level)

Examination 2017 and thereby prevented him from gaining admission to a University based on his results at G.C.E. (Advance Level) Examination 2017.

When taking up the said position, his contention was to show that his second attempt was independent to his first attempt made from A/ Kahatagasdigiliya MMV and therefor his application for academic year 2017-2018 should be considered independent to his previous application. I don't think he is entitled to do so. Under Clause 1.7.9 of the University entrance Handbook 2016/2017 as well as 2017/2018, making a false declaration or producing forged documents for application and registration is an ineligibility for Admission to a state university and therefore it is the duty of the U.G.C. to satisfy with all material that was submitted by an applicant when forwarding an application for university admission.

If the applicant has gain admission to a school in a district with less facilities illegally and/or in violation of the circular issued by the Education Ministry, and gain admission to a state university based on a concession granted to a student in that district, he will certainly deprive a genuine student of that District.

In the said circumstances there is a duty cast on the Petitioner not a suppress and/or misrepresent material facts when he or she invokes the jurisdiction of this court alleging violation of fundamental rights guaranteed under the Constitution. As already referred to by me, the Petitioner was silent on several material facts, specially with regard to his admission and attendance to the A/ Kahatagasdigiliya MMV, a school situated within a District with less facilities. Even though it is not the duty of the U.G.C. to implement the circulars issued by the Education Ministry, U.G.C. has a duty to ascertain whether an applicant to a state university had adhered to such regulations and thereby not contravened the guidelines for University Admissions issued by the U.G.C., otherwise the U.G.C. is depriving a genuine student of that district of admission to a state university. In the said circumstance I hold that the Petitioner is guilty of suppression and/or misrepresentation of material facts with regard to his admission and attendance to a school in a district with less facilities.

However as already referred to in my judgment, the Petitioner had not made any official from the Provincial Department of Education who is responsible for the implementation of the circular issued by the Education Department within the North Central Province, a Respondent to the instant application and not claimed any relief from the 13th and 14th Respondents.

As already referred to in this judgment, U.G.C. had taken the following steps from the time it was informed by the 13th Respondent, of fraudulent activities at G.C.E. (Advance Level) Examination 2016 by several candidates including the Petitioner.

a) After an inquiry, with regard to 22 students who sat for the G.C.E. (Advance Level) Examination 2016 from A/Kahatagasdigiliya MMV 13th Respondent decided to release their results without the 'Z' score in order for them to apply for University Admissions 2016-2017 and informed U.G.C. of the said decision by letter dated 19.06.2017 (13R5)
   All together 80 names were forwarded including the 22 students referred to above by the 13th Respondent to the U.G.C. (Island wide)

b) U.G.C. by letter dated 07.07.2017 informed the 13th Respondent that out of 80 names forwarded, only 28 had applied for university Admission 2016-2017 and requested further details of fraudulent activities committed by the said 28 applicants (out of which 5 applicants from A/Kahatagasdigiliya MMV including the Petitioner

c) The required information was provided to the U.G.C. by the 13th Respondent through letter dated 10th August 2017. (13R8) U.G.C. requested the following clarification with regard to the exact period the students were admitted to the respective school from the 13th Respondent by letter dated 21st August 2017 (13R9A)

   "නමුත් මෙම ක්‍රමවේදයට අනුව අප විසින් ඔබ වෙත එවන ලද 2017.07.07 දිනැති ලිපියෙහි නම් සඳහන්කර තිබූ සිසුන්ගේ විශ්ව විද්‍යාල ප්‍රවේශය සඳහා ඔවුන්ට සලකාබැලූ දිස්ත්‍රික්කයන්හි නිරවද්‍යතාව තහවුරු කර ගැනීමට ඔබ විසින් අප වෙත එවන ලද 2017.08.10 දිනැති ලිපියෙහි අඩංගු වී තිබූ තොරතුරු ප්‍රමාණවත් නොවේ."

   ඒ අනුව මේ සමඟ අමුණා ඇති ඇමණුම 1 හා ඇමණුම 2හි නම් සඳහන් කර ඇති සිසුන් ඔවුන්ගේ නම ඉදිරියෙන් දක්වා ඇති පාසැල් කාලය තුල සත්‍යවශයෙන්ම අදාල පාසැල්වලට ඇතුලත්ව සිටියේද යන්න ඉතා පැහැදිලිව මා වෙත දක්වා එවන මෙන් කාරුණිකව ඉල්ලා සිටිමි. "

d) By letter dated 28th August 2017 13th Respondent had responded to the above request and the period Petitioner attended A/Kahatagasdigiliya MMV was referred to in the said letter as 2016.02.01-2016.05.31

e) Since there was reference to the period the Petitioner and 4 others students from A/Kahatagasdigiliya MMV attended the said school, U.G.C. had sought further clarification from the 13th Respondent, whether the period referred to as "the period attended the said school" is different to the "period studies at the said school" and if so, to inform the exact period the said five applicants had studies at the school.

f) By letter dated 25.10.2017 the 13th Respondent confirms the position that the period referred to as the period attended the school and period studied at the school are the same and therefore the period the Petitioner had studied at A/Kahatagasdigiliya MMV was from 2016.02.12-2016.05.31.

g) Based on the information received U.G.C. had decided to call for his explanation form the Petitioner and a show cause letter was sent on 13.12.2017 to the Petitioner giving a deadline to reply as 27.12.2017

h) In the absence of any response from the Petitioner U.G.C. at its 978th meeting decided
    a. Cancel the selection of the Petitioner to courses of study of the Universities for the academic year 2016/2017
    b. Cancel application for university admission of the Petitioner for the academic year 2016/2017
    c. Not to accept the Petitioner's application for university admission in future academic years

i) Even after the said decision the U.G.C. had once again consider the two-letter submitted by the Petitioner on 10.01.2018 and 15.01.2018 and sought further clarification from the 13th Respondent with regard to his decision to release the Petitioner's G.C.E. (Advance Level) Examination results 2016 without the District rank

j) By letter dated 07.02.2018 the 13th Respondent informed U.G.C. that the decision to release the G.C.E. (Advance Level) results 2016 without the District rank was taken only to facilities the Petitioner to apply for the University Admission 2016-2017 but, it has nothing to do with the decisions that has to be taken by the U.G.C. based on the guidelines issued. (13R13A)

k) U.G.C. after considering the above letter decided to adhere to the previous decision of the commission

When considering the steps, the U.G.C. had taken from the time it was notified by the 13th Respondent of fraudulent acts that has taken place at the G.C.E. (Advance Level) Examination 2016, it appears that every possible step that could be taken by the U.G.C. had been followed for the satisfaction of the U.G.C. When the U.G.C. was notified the details of 80 students, it had observed that out of 80, only 27 students had submitted applications for Admission 2016-2017 and called for further details that is required to decide the District of each candidates. Detailed information with regard to the 05 students who sat for G.C.E. (Advance Level) Examination from A/Kahatagasdigiliya MMV and applied for University Admission 2016-2017 was called from the 13th Respondent and every time such information was sought, the 13th Respondent had contacted the Education Authorities of North Central Province and obtained the necessary information from them and submitted to the U.G.C.

During the arguments before this court, the Petitioner made an attempt to show that some of the documents the 13th Respondent had relied, when responding to the quarries made by U.G.C., are neither not accurate nor complete and therefore any decision that was reached by U.G.C based on the said information could not be stand and is liable to be quashed by this court. In this regard the Petitioner submitted that the 13th Respondent had heavily relied on the attendance registers for five months beginning from 1st February 2016 to establish the period the Petitioner studies at A/Kahatagasdigiliya MMV, but failed to submit register for the period 2014-2015.

However as already observed in this judgment the Petitioner neither challenged the decisions/recommendations of the Education Authorities in the North Central Province nor made them Respondents to the instant case. He had not sought any relief from the 13th Respondent as well. In the absence of any challenge to the documents that has been considered by the U.G.C. when reaching the impugned decision, the Petitioner is not entitle to challenge such decision that has been taken by a party which is not before this court. However, the U.G.C. had taken every possible step for the Commission to satisfy before reaching a decision. As already observed, even after reaching a decision with regard to the petitioner, the Commission had once again considered the two appeals submitted by the Petitioner and call for fresh observation from the 13th Respondent in order to re consider the decision that has already taken by the Commission.

During the argument before this court, the learned counsel for the Petitioner further contended that the conduct of the U.G.C. not to allow the Petitioner to submit his application based on his G.C.E. (Advance Level) Examination 2017 was in violation of the legitimate expectation of the Petitioner. It was submitted that, on the basis of the admission policy identified under the hand book for Academic Year 2017-2018 published by the U.G.C., he had legitimate expectation, that on the results he had obtained as a private candidate from his native place, that the Petitioner would be selected to a faculty of engineering.

As already observed by me, the above contention was solely based on the belief that the two attempts made by the Petitioner should be considered separately, when considering admission for University by the U.G.C. However, the guidelines published by the U.G.C. does not permit to consider each attempt separately, if the applicant had applied under the provisions of the hand book in the previous attempt. The Petitioner had made the following declaration when he submitted the application for University Admission 2016-2017.

> "I certify that all my particulars given by me in this form are true and accurate. I am also aware that if any particulars given by me in this application are found to be false or inaccurate prior to my admission, my application will be rejected and that if such information is found to be false or inaccurate after my admission I will be dismissed from the University/ Higher Educational Institution concerned."

The effect of a similar declaration clause was considered in the case of ***Amal Senevirathne and Others V. Council of Legal Education and Others SC Appeal 163/2015 Sc Minute dated 01.04.2012*** and held,

> "In these circumstances it is clear that the 1st Respondent is vested with 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 marks which is the 'foundation to the legitimate expectation as held in ***Vasana V. Council of Legal Education*** (supra)"

From the material that was available, it is clear that the Petitioner had failed to meet the criteria set out in Clause 1.5 of the U.G.C. handbook of having minimum schooling period of one year at

A/Kahatagasdigiliya MMV and was disqualified under Clause 1.7.9 read with Clause 1.7 to gain admission to a University and thereby the Petitioner is not entitled to claim legitimate expectation based on his result at the G.C.E (Advance Level) Examination 2017.

For the reasons stated above I hold that,

a) the Petitioner is guilty of suppression and/or misrepresented of material facts that are relevant to admission and/or continued attendance to A/Kahatagasdigiliya MMV

b) the Petitioner had failed to establish that the conduct of the 2nd to 12th Respondents by not allowing the Petitioner to apply for University Admission based on his results of G.C.E. (Advance Level) Examination 2017 was in violation of the fundamental rights guaranteed under Article 12 (1) of the Constitution

c) the Petitioner has failed to establish that he entertained a legitimate expectation of entering the Engineering Faculty based on his G.C.E. (Advance Level) Examination 2017

I therefore dismiss the application in all the circumstances without costs.

Application is dismissed. No Costs

Judge of the Supreme Court

Justice Yasantha Kodagoda PC

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

SC / FR No. 64/2014

1. Werage Sunil Jayasekera,
   38, Susara,
   Kadawathagama,
   Kadugannawa.

2. Amarakoon Mudiyanselage Keerthi Amarakoon,
   "Amara Sevana",
   Varahakkogada,
   Danturei.

3. Sampath Priyadarshana Gunathilake,
   "Narmada",
   Hammalawa,
   Kuliyapitiya.

4. Kariyawasam Don Jayantha Weerasinghe,
   08/A, Abihamani,
   Vaharakkogada,
   Danturei.

5. Murukkuvadura Tilaka Asela Wijerathna,
   34/6 A, Sri Seewala Road,
   Nalluruwa,
   Panadura.

6. Amarakoon Achchilage Somapala Amarakoon,
   25/3E, Gohagoda Road,
   Katugastota.

7. Obada Kankanamlage Lalith Kumara,
   131, Pelahela,
   Dompe.

8. Atapattu Mudiyanselage Thilak Nanda Wijerathne,
   488/2, Halbarawa,
   Talahena, Malambe.

9. Widanagamage Shantha Kumara Wickramanayake,
   Totupala Road,
   Weragampitiya, Matara.

10. Meemendra Kumara Aberathna,
    Weliyaya Road,
    Digana, Mahawa.

11. Singahalage Gamini Weerasinghe,
    345/B, Denipagoda,
    Muruthugahamulla,
    Gampola.

12. Jayakody Arachchige Pradeep Lalantha Priya,
    33/1, Koskandawala,
    Yakkala.

13. Chandana Elanperuma Kodituwakku,
    “Samaya”,
    Samagi Mawatha,
    Walgama, Matara.

14. Bopage Prince Wijerathna,
Hospital Road,
Puwakdeniya,
Rambukkana.

15. Don Amarasiriwardenage Prasanna
Sylvester Wijesekera,
971/17, Maradana Road,
Colombo 08.

Petitioners

Vs.

1. B.A.P. Ariyaratne,
General Manager,
Department of Railways,
Maradana,
Colombo 10.

1A. Vijaya Amaratunga,
General Manager,
Department of Railways,
Maradana,
Colombo 10.

1B. S.M. Abewickrama,
General Manager,
Department of Railways,
Maradana,
Colombo 10.

1C. M.J.D. Fernando,
General Manager,
Department of Railways,
Maradana,
Colombo 10.

1D. W.A.D.S. Gunasinghe,
General Manager (Acting),
Department of Railways,
Maradana,
Colombo 10.

2. Dhammika Perera,
Secretary,
Ministry of Transport,
No. 1, D.R. Wijewardene Mawatha,
Colombo 10.

2A. Nihal Somaweera,
Secretary,
Ministry of Transport,
No. 1, D.R. Wijewardene Mawatha,
Colombo 10.

2B. G.S. Vithanage,
Secretary,
Ministry of Transport,
No. 1, D.R. Wijewardene Mawatha,
Colombo 10.

2C. N.B. Monti Ranatunga,
Secretary,
Ministry of Transport,
No. 1, D.R. Wijewardene Mawatha,
Colombo 10.

3. Dayasiri Fernando,
Chairman,

4. Palitha M. Kumarasinghe,
Member,

5. Sirimavo A. Wijeratne,
   Member,

6. S.C. Mannapperuma,
   Member,

7. Ananda Seneviratne,
   Member,

8. N.H. Pathirana,
   Member,

9. S. Thillanadarajah,
   Member,

10. M.D.W. Ariyawansa,
    Member,

11. A. Mohamed Nahiya,
    Member,

    3rd to 11th Respondents all at:
    Public Service Commission,
    No. 177, Nawala Road,
    Narahenpita.

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

Respondents

13. Justice Sathyaa Hettige, PC,
    Chairman,

14. Kanthi Wijetunga,
    Member,

15. Sunil S. Sirisena,
Member,

16. Dr. I.M. Zoysa Gunasekera,
Member,

13th to 16th Added Respondents all at:
Public Service Commission,
No. 177, Nawala Road,
Narahenpita.

Added Respondents

17. Dharmasena Dissanayaka,
Chairman,

17A. Hon. Justice Jagath Balapatabendi (Retired),
Chairman,

18. A. Salam Abdul Waid,
Member,

18A. Indrani Sugathadasa,
Member,

19. D. Shirantha Wijayatilaka,
Member,

19A. V. Shivagnanasothy,
Member,

20. Prathap Ramanujam,
Member,

20A. T.R.C. Ruberu,
Member,

21. V. Jegarasasingam,
Member,

21A. Ahamad Lebbe Mohamed Saleem,
Member,

22. Santi Nihal Seneviratne,
Member,

22A. Leelasena Liyanagama,
Member,

23. S. Ranugge,
Member,

23A. Dian Gomes,
Member,

24. D.L. Mendis,
Member,

24A. Dilith Jayaweera,
Member,

25. Sarath Jayathilaka,
Member,

25A. W.H. Piyadasa,
Member,

17A to 25A Respondents above; all at
Public Service Commission,
No. 177, Nawala Road,
Narahenpita.

Further Added Respondents

Before: **Chief Justice Jayantha Jayasuriya, PC**

Justice E.A.G.R. Amarasekara

Justice A.L. Shiran Gooneratne

Counsel: Senany Dayaratne with Ms. Nishadi Wickramasinghe **for the Petitioners.**

Rajitha Perera, SSC **for the 1C, 2C, 12th, 17thA - 25thA Added Respondents.**

Argued on: 12/10/2021

Decided on: **05/04/2022**

A.L. Shiran Gooneratne J.

The Petitioners in this application are employees who hold the rank of Sub Inspector of the Railway Protection Force who joined the Department of Sri Lanka Railways from its inception in the year 1988. The Petitioners claim that they have been kept stagnant at the position of Sub Inspector for 32 years wherein, in terms of the scheme of promotions, a Sub Inspector was eligible for promotion to the rank of Inspector upon completion of 7 years of satisfactory service and thereafter, to the rank of Assistant Superintendent upon completion of 6 years in the rank of Inspector. The Petitioners are aggrieved by the continuous failure and/ or inaction or tacit refusal on the part of the General Manager Department of Railways (1st Respondent) and 3rd to 11th Respondents to give effect to the recommendation made by the Human Rights Commission (HRC), dated 16/07/2007, marked 'P10', and the directions given by the Public Petitions Committee (PPC), order dated 13/06/2013, marked 'P14', to promote the Petitioners with effect from the date on which the Petitioners were eligible for promotions.

Hence, the Petitioners contend that their rights guaranteed under Article 12(1) of the Constitution is violated and their "legitimate expectations" denied due to the said continuous failure and/ or inaction or tacit refusal to enforce the said recommendations and/ or directions, and therefore to declare that an infringement has been caused by the said Respondents under Article 12(1) of the Constitution and also in the circumstances of this application, the Court make order granting 'just and equitable' relief in terms of Article 126(4) of the Constitution.

The Petitioners contend that they were recruited externally, at the inception of the Railway Protection Force (RPF), the successor to the Railway Security Service. With the establishment of the RPF on 1st November 1987, several employees had opted to retire and some had opted to remain in the Department of Railways and join the newly formed RPF. It is also contended that, in June 1997, on the recommendation of the Political Victimization Committee of the Ministry of Transport and the implementation of the Cabinet Memorandum marked ‘P2a’, and also the directions given by the Judgment of the Supreme Court in SC/FR/ 944/1999, approximately 50 of the said retired employees were reinstated with all annual increments applicable to their grade and placed in higher ranks than the Petitioners. It is also contended that according to a settlement reached in Application Bearing No. SC/FR/186/2005 dated 13/09/2011, approximately 150 employees who opted to remain in the Department by joining the RPF were also placed at a higher salary structure equal to one promotion from their current rank as contained in ‘P4a’ and ‘P4b’, respectively.

In the circumstances, the Petitioners contend that since 1988 to date, the Petitioners hold the rank of Sub Inspector for approximately 26 years, in denial of their legitimate expectation of securing promotions in terms of the applicable service minute. The Petitioners reiterate that in terms of the provisions of the Scheme of Recruitment and Promotions marked ‘P6’, the Petitioners would have been eligible to be promoted to the rank of Inspector and thereafter, to the rank of Assistant Superintendent in the year 1995 and 2001, respectively.

By letter dated 06/12/2012, the 2nd Respondent has sought necessary approval from the Public Service Commission to give effect to the recommendation of the Human Rights Commission to promote Sub-Inspectors to the rank of Assistant Superintendent as contained in 'P12'.

The Petitioners state that due to the failure of the 1st Respondent to give effect to the said recommendation made by the Human Rights Commission (HRC), the 1st, 5th, 6th, 7th, and 13th Petitioners forwarded Petition dated 12/07/2012 to the Public Petitions Committee Office, seeking relief. The Public Petitions Committee Office by letter dated 13/06/2013, marked 'P14', directed the 2nd Respondent to take steps to promote the said 5 Petitioners to the rank of Assistant Superintendent on a supernumerary basis pending the approval of the Public Service Commission (PSC).

Having taken into consideration the recommendation made by the Human Rights Commission, dated 16/07/2007 (P10), and the directions given by the Public Petitions Committee Office dated 13/06/2013, (P14), the Public Service Commission by letter dated 13/01/2014, (P16), decided that appointments cannot be made on supernumerary basis, the fact that examinations had been held, Petitioners also had the opportunity to obtain promotions through those examinations and it is open for them to obtain promotions based on the SOR. According to letter dated 21/05/2014, (1R9), the PSC has brought to the attention of the 1st Respondent, that existing vacancies should be filled in terms of the SOR and therefore no appointments can be made on a supernumerary basis.

Senior State Counsel appearing for the Respondents contend that due to the deliberate misrepresentation and suppression of material facts and the lack of *Uberrima Fides* of the Petitioners, this application should be rejected without going into the merits of the case. In the facts and circumstances of this case, the said contention is based on disputed matters and therefore, should be decided at a later stage.

For easy reference, the Petitioners to this application identified three categories of employees as stated below-

I. The officers attached to the original Sri Lanka Railways Service **who opted to retire from the Department of Railways** in 1988, who were re-instated in the RPF in June 1997.

Accordingly, 50 employees were absorbed to the RPF and matters relating to their placements, promotions back wages were to be determined in accordance with the scheme applicable to the 1980 July strikers (P2 and P3).

II. The officers attached to the original Sri Lanka Railways Service **who opted to remain in the Department of Railways** by joining the RPF at its inception.

According to the settlement reached in Application Bearing Number SC/FR/186/2005, the 1st to 3rd Petitioners of the said application, who were called "the beneficiaries" of the said settlement, were considered similarly placed contemporaries of officers who were recruited after retirement (category I above) and was placed at a higher salary structure equal to one promotion from their current rank. The settlement in that case was entered as Judgment of the Court, argued and decided on 13/09/2011, and in its terms of settlement as set out in paragraph 12 of the said application, the Court made special reference that the said settlement will not set a precedent.

III. Officers **who were recruited to the RPF externally at the inception of the RPF,** similar to that of the Petitioners.

Therefore, it is clear that the settlement entered in Action Bearing Number SC/FR/186/2005, was on the basis that the officers belonging to categories 1 and 2 are contemporaries and similarly placed. It is pertinent to note that prior to arriving at the said settlement entered as Judgment of this Court, the Court specifically considered *"the unique facts and circumstances surrounding and/ or attendant upon the situation*

of the aforesaid beneficiaries to the settlement arrived therein, and more particularly the fact that the beneficiaries of the settlement were contemporaries of the 3rd to 52nd Respondents in the Ceylon Government Railway Security Service, and similarly placed". It is contended that some of the Petitioners to the present application together with 14 others, sought to intervene in the said application, however, the said intervention was not permitted by Court.

As observed earlier, the Petitioners in the present action belong to the 3rd category who were recruited to the RPF at its inception. Therefore, the said Petitioners can be clearly distinguished from the officers belonging to category 1 and 2.

By Notice dated 07/01/2002, applications were called for the Post of Inspector from the rank of Sub Inspector as contained in '1R2'. According to the Scheme of Recruitment marked '1R1', applicable to the Petitioners, 4 Applicants were promoted to the rank of Inspector. The list of marks scored by the said Applicants are marked '1R4'.

Subsequent to the recommendation of the HRC dated 10/07/2007, marked 'P10', by notice dated 10/09/2009, marked '1R5', applications were once again called for the post of Inspector. Responding to the said notice dated 10/09/2009, the 1st, 3rd, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th and the 13th Petitioner applied for promotions. According to the applicable Scheme of Recruitment, 13 promotions have been made to the rank of Inspector, however, none of the Petitioners were successful. A copy of the recommendations of the Board of Interview is marked as '1R7'.

Recommendations made by of the Human Rights Commission.

HRC by its recommendation dated 16/07/2007, informed the Public Service Commission to formulate an effective and transparent scheme to promote the Petitioners in conformity with the applicable Scheme of Promotion. The Petitioners, *inter alia*, have prayed that this Court make order to give effect to the said

recommendation made by the Human Rights Commission dated 16/07/2007. In its recommendation, the HRC has taken into consideration 8 complaints filed by persons who were recruited as Sub Inspectors to the RPF on 02/05/1988, similar in rank to that of the Petitioners in this case. In the affidavits tendered to the HRC, the complainants drew attention of the said Commission to the Supreme Court Application Number SC/FR/944/99 filed by officers who retired, and sought to be absorbed to the RPF.

According to paragraph 11 of the affidavit tendered by the 1st Respondent, the reinstatement in 1997 of approximately 50 employees who retired in 1998, was to implement the Cabinet Memorandum marked 'P2a', the Cabinet Decision marked 'P2b' and the directions given by the Judgment of this Court in SC/FR/ 944/99, applicable to officers who are now identified as belonging to category 1. Also, in terms of the settlement arrived in SC/FR/186/2005, dated 13/09/2011, relief was granted to the aggrieved officers belonging to category 2, on the basis of similarly placed as officers belonging to category 1.

Directions given by the Public Petitions Committee Office.

The Public Petitions Committee Office considered the complaints of the 1st, 5th, 6th, 7th and the 13th Petitioner who were before them. The Complainants have conveniently overlooked the scheme of recruitment and the examination process referred to in '1R2' and '1R5'. The said Committee observed that the rest of the affected Petitioners are awaiting the implementation of the recommendation made by the HRC to the PSC and further observed that the 5 Petitioners before the said Committee cannot stay any longer for the implementation of the HRC recommendation and with no reasons given, directed the 2nd Respondent to back date and promote the said 5 Petitioners on supernumerary basis, on a suitable scheme. The said direction does not specify any particular rank to which the officers should be promoted and was made only in respect of the 5 Petitioners who were before the Committee. Therefore, the directive of the PPC, if implemented, would be akin to promotions made on a selective basis which

would benefit only 5 Petitioners out of similarly circumstanced Petitioners who are now before this Court. However, up to date no supernumerary promotions have been made to any of the Petitioners based on the said recommendation.

The Scheme of Recruitment.

In this back drop, the Petitioners strongly contend that strict compliance with the Scheme of Recruitment cannot be implemented in extenuating circumstances. In support of this contention, the Petitioners have endeavored to list instances where strict compliance and/ or implementation of the Scheme of Recruitment was not followed.

Firstly, the Petitioners have drawn the attention of Court to document marked 'XX' in the counter affidavit filed in this case. The said letter refers to a competitive examination for the promotion of officers to the rank of Inspector to be held on 27/08/2011. The said letter states that if you chose not to sit for the said examination, the Department should not be held responsible. In other words, a decision not to sit for the examination would be at your own peril.

The Petitioners have also drawn attention to documents marked 'P4a and P4b', in paragraph 7, of the counter affidavit dated 02/11/2016, which refer to a Petition and the Judgment entered in SC/FR/186/2005, respectively. As observed earlier, in the said case, a settlement Judgment was entered between officers belonging to the said category 2 on the basis that they were similarly placed with officers belonging to the said category 1.

Secondly, it is submitted that the inordinate delay in holding examinations perpetuated the grievance of the Petitioners. The Petitioners admit that applications were called in the year 2002 and 2009 for promotions to fill existing vacancies and pursuant to examinations been conducted, officers were promoted to the rank of Inspector. Applications were called for the post of Inspector by notice dated 07/01/2002, marked

‘1R2’. According to the marks obtained, 4 promotions were made to the rank of Inspector as reflected in document marked ‘1R4’ and thereafter by notice dated 10/09/2009, marked ‘1R5’, a further 13 promotions were made to the rank of Inspector. Some of the Petitioners who applied, were not successful.

Thirdly, the inordinate delay in holding examinations in terms of the Scheme of Recruitment.

Fourthly, to compete with younger aspirants for promotions whose probability of being successful at the written examination was higher. The Petitioners strongly contend that they were kept stagnant for over 30 years in one rank and therefore, had to compete with younger persons usually superior to that of older persons.

Acting in terms of ‘1R8’, the Respondents have written to the PSC and the response is contained in ‘1R9 and 1R10’. The PSC has observed that the promotions to the next rank are based upon competitive examinations in terms of the Scheme of Recruitment and the Petitioners had the opportunity to sit for the said examination. The Petitioner’s failed to qualify at the competitive examination on two occasions and therefore cannot now claim to be promoted as of right. If the delay in holding the examinations deprived promotions, the Petitioners should have challenged the purported delay in holding examinations at the appropriate stage, with the available remedies in law.

The 1st Respondent by letter dated 26/11/2012, whilst making reference to letter dated 16/07/2007, has clearly informed the Public Service Commission that presently there are no existing vacancies to effect promotions and further sought directions from the PSC seeking to divert from the Scheme of Recruitment in order to promote the 5 Petitioners on a supernumerary basis on the directions given by the PPC. By letter dated 13/01/2014, marked ‘1R9’, the PSC has categorically stated that the Petitioners have been afforded an opportunity to face examinations and therefore, the conditions of the Scheme of Recruitment should be followed in order to promote the Petitioners to the

next rank. A similar conclusion was arrived by the PSC in their letter dated 13/01/2014, marked '1R10'.

The Petitioners in this application joined the Railways Protection Force in 1988. There is no disclosure that persons named by documents pleaded in the affidavit dated 29/11/2018, marked 'Z1' to 'Z8', are appointees recruited to the RPF in its inception in 1988.

As observed earlier, the recommendation to the PSC by the HRC, *inter alia*, was to formulate an effective and transparent scheme to promote the Petitioners in conformity with the applicable SOR. Never was it recommended by the HRC that the authorities divert from the existing SOR to effect promotions to the Petitioners. Adhering to the said recommendation, the 1st Respondent held an examination on 27/08/2011, for persons to be promoted to the rank of Inspector, as evinced by letter dated 21/05/2014, marked '1R9'. It is also to be noted that the directions given by the PPC if implemented, would have treated the rest of the Petitioners who were similarly circumstanced, differently. The Petitioner's reliance on legitimate expectation is founded in statements made by the HRC and the PPC.

In the circumstances, can the Petitioners entertain a legitimate expectation to be promoted on a supernumerary basis arising on the recommendation of the HRC and/ or the direction given by the PPC.

Promoting officers to the next rank on a supernumerary basis was never the criteria applicable to officers recruited to the newly established RFT. With the change in policy, the Petitioners can be identified as a distinct group of officers who were directly recruited to the Railways Department and also be clearly distinguished from the officers similarly placed belonging to category 1 and 2. None of the Petitioners were promoted on a supernumerary basis or any other criteria which would likely to have frustrated the procedural and/ or substantive rights of the Petitioners legitimate expectations to be

promoted to the next rank. What the Petitioners are now seeking is a change in policy from that of the existing scheme of promotions to that of promotions to be made on a supernumerary basis. In the circumstances have the Petitioners establish unfairness or abuse of process in the application of the scheme of recruitment to the Petitioners.

Lord Woolf MR, in ***R vs. North & East Devon Health Authority, Ex parte Coughlan [1999] EWCA Civ 1871,*** laid down at least three possible outcomes to be considered by a Court to satisfy itself as to the legitimacy of an expectation, as stated below-

(a) The Court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight, it thinks right, but no more, before deciding whether to change course.

(b) On the other hand, the Court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the Court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it.

(c) Where the Court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the Court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, <u>the Court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.</u> (emphasis is mine)

On the question of substantive legitimate expectation, in ***Ariyarathne and Others vs. Illangakoon and Others (SC FR Application No. 444/2012*** decided on 30/07/2019, Prasanna Jayawardena J. stated 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".

A similar view was expressed in ***Meril vs. Dayananda de Silva and others (2001) 2 SLR 11.***

In ***Sirimal & Others vs. Board of Directors of the Co-operative Wholesale Establishment & Others (2003) 2 Sri L.R. 23,*** the Supreme Court, recognized a situation where substantive or procedural legitimate expectation would arise, where Weerasooriya J. held that,

"if the legitimate expectations are protected only procedurally, the most employees could hope for, would be an order requiring of consultation before a change of policy is affected. If, however, the legitimate expectations are substantive the position is deferent, 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".

As observed earlier, the asserted legitimate expectation of the Petitioners, derives from a statement made by a public body to consider formulating an effective and transparent scheme to promote the Petitioners in conformity with the applicable scheme of promotions and certainly not a statement to change the existing policy on promotions in favour of the Petitioners. The decision-making authority the PSC, was consistent in its directives that the Scheme of Recruitment be followed to fill vacancies and the existing vacancies were filled, accordingly. Therefore, the Petitioners mere expectation

or hope of being promoted on a supernumerary basis cannot be treated as an expectation which is legitimate or substantive, within the existing policy.

The above position was considered in ***Siriwardana vs. Seneviratne and 4 Others (2011) 2 SLR 1,*** where Dr. Shirani A. Bandaranayake, C.J. cited with approval the case of ***India vs. Hindustan Development Corporation (1993) 3 SSC 499***, where it was stated that;

"However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in a natural and regular sequence. Again, it is distinguishable from a mere expectation. Such expectation should be justifiable, legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and, therefore, it does not amount to a right in a conventional sense."

According to ***Andrew le seur, Maurice Sunkin, Jo E. K. Murkens, 'Public Law - Texts, Cases, and materials (Third Ed.)' (pg.732)***-

"Legitimate Expectation arises where claimants argue that public bodies have said or done things that have created an expectation that they will act in accordance with past practice, policies, promises or representations." (For recent discussion refer - P. Reynolds, on 'Legitimate expectations and the protection of trust in public officials' [2011] Public Law 330.)

The Petitioners are before this Court to assert their right to equal protection before the law. As seen before, this Court in a settlement Judgment clearly identified officers belonging to the 1st and 2nd categories as similarly placed and relief granted accordingly.

A promotion is to be effected according to the procedure laid down in the scheme of recruitment which requires a process of holding an examination. The scheme of promotion applicable to the Petitioners who belong to the 3rd category was applied to the Petitioners. Some of the Petitioners, who complied with the said Scheme were not successful. In the circumstances, the asserted relief by the Petitioners that they be promoted on a supernumerary basis would indeed be detrimental to the interests of the Respondents. For the reasons stated, the Petitioners would not be entitled to a declaration for an infringement of their fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

The Petitioners have also pleaded that this Court exercising its wide discretion in terms of Article 126(4), make a just and equitable order as it may deem. As already mentioned, the PPC, with no just or reasonable criteria, identified 5 officers who were present before the Committee to be promoted on a supernumerary basis. If implemented, the right to equality before the law of the other Petitioners may have been infringed. As discussed before, a process which included a competitive examination and the award of marks on seniority and special qualifications was available to the Petitioners according to the applicable Service Minute for the next promotion. Some of the Petitioners complied with the said process as far back as the year 2002. None of the Petitioners sought to challenge the said established process regarding promotions, at that stage. Therefore, considering the circumstances of this case, I refrain from making an order in terms of Article 126(4) of the Constitution.

As observed earlier, The Respondents contend that due to the deliberate misrepresentation and suppression of material facts and the lack of *Uberrima Fides* of the Petitioners, this application warrants a dismissal based upon the same. The provisions contained in the Service Minute '1R1', reveals that the next promotion of the Petitioners to the rank of Inspector would include a competitive examination and the award of marks for seniority and special qualifications. On 07/01/2002 and 10/09/2009, by '1R2 and 1R5' respectively, applications have been called twice to fill

in vacancies to the post of Inspector. According to '1R3 and 1R6', Some of the Petitioners applied for the examination held in 2002 and 2009 respectively and complied with the applicable Service Minute. The Petition does not contain any reference to the above.

However, the non-disclosure of conducting of examinations twice and that some of the Petitioners attempted and failed was admitted by the Petitioners in their counter affidavit.

The Petitioners filed this application on the premise that with the applicable Service Minute the Petitioners were eligible to be promoted to the next rank by satisfactorily completing the required number of years in service, but have been deprived of their promotions for the last 26 years. However as asserted above, the Petition did not disclose that some of the Petitioners had complied with the applicable Service Minute, but were not successful to be promoted to the next rank. The Petitioners in their counter objections have admitted that applications were called in 2002 for the rank of Inspector as evinced by '1R2' and again in 2009 as evinced by '1R5'. Having contended that the Petitioners were denied of their promotions and/ or prospects of promotions based on the applicable Service Minute, it was incumbent on the Petitioners to have disclosed such vital and decisive facts in the Petition, essential to the adjudication of matters in dispute. The Petitioner's conduct in suppression and misrepresentation of material facts, clearly lacked *Uberrima Fides*. This position is reflected in several Judgments delivered by this Court. ***(Jayasinghe vs. The National Institution of Fisheries and Nautical Engineering and Others, (2002) 1 SLR 277, Liyanage and Another vs. Divisional Secretary Gampaha and Others, (2013) 1 SLR 06, Jahangir Sheriffdeen vs. Principal Visakha Vidyalaya, SC/FR 01/2015, SCM 03/10/2016).***

Accordingly, this application has to be rejected on this ground as well.

Therefore, I hold that the Petitioners are not successful in establishing any inconsistency, inequality, or unreasonableness affecting an enforceable right, infringed by any of the Respondents, in terms of Article 12(1) of the Constitution.

The application is dismissed. I order no costs.

Judge of the Supreme Court

Jayantha Jayasuriya, PC. CJ.

I agree

Chief Justice

E.A.G.R. Amarasekara J.

I agree

Judge of the Supreme Court

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

An application in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No. 104/2017

1. Senadipathige Neville Gratiaen Stanley Rodrigo.
2. Senadipathige Sudesh Priyankara Rodrigo.
3. Senadipathige Chamara Prasanna Rodrigo.
4. Warnakulasuriya Anita Grace Peiris.

All of No. 12, Marian Place, Negombo, carrying on business under the name, style and firm of 'Rodrigo Suppliers.'

PETITIONERS

Vs.

1. G.S. Vithanage,
   Secretary (Former),
   Ministry of Foreign Employment,
   No. 30, Janadhipathi Mawatha, Colombo 1.

2. Eng. Karunasena Hettiarachchi.

2A. Kapila Waidyarathne, PC.

2B. Major General (Retd.) Kamal Gunarathne,
   Secretary, Ministry of Defence.

3. P. Ranepura,
   Secretary,
   Ministry of Skills Development and Vocational Training,
   'Nipunatha Piyasa,' Elvitigala Road,
   Narahenpita, Colombo 5.

4. D.U.S. Wickramarachchi,
   Chief Finance Office,
   Sri Lanka Customs,
   No. 40, Main Street, Colombo 11.

5. A.R. Deshapriya,
Director General,
Department of National Budget,
Ministry of Finance, Colombo 1.

6. Vice Admiral Ravindra Wijegunaratne.

6A. Vice Admiral Travis Sinniah.

6B. Vice Admiral Sirimevan Ranasinghe.

6C. Vice Admiral Priyal de Silva.

6D. Vice Admiral Nishantha Ulugethenna,
Commander of the Navy.

7. D.A.W. Wanigasooriya,
Chief Accountant,
Presidential Secretariat, Colombo 1.

8. Samanthi Weerasinghe,
Senior Assistant Secretary
(Parliamentary and Civil Affairs),
Ministry of Defence.

9. W.H.D. Priyadarshana,
Head of Division (Sales and Agricultural Branch),
Ministry of Defence.

10. Indika Ranathunga,
Director (Corporation and Statutory),
Ministry of Industry and Commerce,
73/1, Galle Road, Colombo 10.

11. M.P. Perera,
Assistant Director (Administration),
Department of Census and Statistics,
"Sankyna Mandiraya," Battaramulla.

12. Commander Y.M.G.B. Jayathilake,
Sri Lanka Navy.
6th, 6A – 6D and 12th Respondents at
Naval Headquarters, Colombo 1.

13. S.M. Jayasinghe,
Accountant (Funds),
Ministry of Defence.

14. W.G.C. Chandrika,
Director, Department of Public Finance,
Ministry of Finance, Colombo 1.

15. D.N.K. Hettiarachchi,
Chief Accountant.

2nd, 2A, 2B, 8th, 9th, 13th and 15th Respondents at Ministry of Defence,
15/5, Baladaksha Mawatha, Colombo 3.

16. Rodesha Enterprises (Pvt) Ltd.,
No. 25, Charles Place,
Rawathawatta, Moratuwa.

17. Hon. Attorney General,
Hulftsdorp, Colombo 12.

RESPONDENTS

Before: **P. Padman Surasena, J**
Kumudini Wickremasinghe, J
Arjuna Obeyesekere, J

Counsel: Chamantha Weerakoon Unamboowe with Lumbini Kohilawatte for the Petitioners

Dr. Avanti Perera, Deputy Solicitor General for the 2B, 15th and 17th Respondents

Argued on: 19th January 2022

Written Submissions: Tendered on behalf of the Petitioners on 8th February 2022

Tendered on behalf of the 2B, 15th and 17th Respondents on 5th March 2021

Decided on: 27th July 2022

Obeyesekere, J

The Petitioners, carrying on business under the name, style and firm of 'Rodrigo Suppliers' [*the Petitioners/Rodrigo Suppliers*] are engaged in the supply of dry fish, seafood and meat items on a wholesale basis. The Petitioners state that since 1985, they have supplied the said items to the Armed Forces and have produced copies of the agreements entered into with the Sri Lanka Navy for the years 2012-13, 2013-14, 2014-15 and 2016. The Petitioners state further that there have not been any complaints with regard to the quality of the dry fish supplied by them or the timeliness of delivery.

By an advertisement published in the 'Daily News' newspaper of 12th May 2016, the Chairman of the Standing Cabinet Appointed Procurement Committee [*SCAPC*] of the Ministry of Defence had invited applications for pre-qualification of suppliers for the supply of dry and fresh food to the Naval camps referred to in the said advertisement, for the period 1st January to 31st December 2017. The Petitioners had duly responded to the said advertisement and had been registered as a supplier to the Sri Lanka Navy for the year 2017.

The Bidding Document issued by Sri Lanka Navy for 2017 pursuant to the above pre-qualification process, consisted of nine sections, with Sections I, II and III being the Instructions to Bidders [*ITB*], Bid Data Sheet, and Evaluation and Qualification Criteria, respectively. The sections containing the General Conditions of Contract, Contract Data and Special Conditions of Contract have not been tendered to this Court by either party.

Pursuant to the pre-bid meeting held on 8th November 2016, the Petitioners had submitted individual bids for the supply of seven items of dry fish to thirteen Naval camps situated around the country. It must be noted that the Petitioners maintained price uniformity in respect of each item across all thirteen camps, irrespective of their location and proximity to Colombo – e.g. the price quoted for 'Dry fish (*balaya*)' was Rs. 144 per kg, for each of the thirteen camps.

The Petitioners state that bids were opened on 18th November 2016 in the presence of the authorised representatives of those who had submitted bids, and the prices

quoted by each of the bidders in respect of each camp had been announced. Accordingly, the prices quoted by the Petitioners for dry fish had been the lowest in respect of all thirteen camps.

By letter dated 23rd December 2016, the 15th Respondent, the Secretary to the SCAPC, had informed Rodrigo Suppliers that their bid for the supply of dry fish had been accepted in respect of five camps mentioned in the said letter. This letter was silent with regard to the awarding of the tender in respect of the balance eight camps in that it did not specify if the Petitioners' bid for the said eight camps has been rejected or whether the tender for the said camps had been awarded to any other person. Aggrieved by the decision to award them the tender only in respect of five camps, the Petitioners, by letter dated 28th December 2016, had requested the 1st Respondent, the Chairman of the SCAPC, that the tender in respect of the balance eight camps be awarded to Rodrigo Suppliers, as they had quoted the lowest price. The 1st Respondent had thereafter invited the Petitioners for a meeting on 16th February 2017. The Petitioners claim that they were informed at the said meeting that the tender for the supply of dry fish for the balance camps had been awarded to the 16th Respondent, and that the award made in favour of the 16th Respondent could not be cancelled.

By a petition filed on 9th March 2017, the Petitioners complained to this Court that they were the lowest substantially responsive bidder in respect of all camps, and as the prices quoted by them did not differ from camp to camp, the decision of the SCAPC (a) to award the tender in respect of five camps to Rodrigo Suppliers, and (b) to award the tender for the balance eight camps to the 16th Respondent, was inexplicable, unreasonable and arbitrary, and is thus a violation of their fundamental rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution. It must be noted that the petition did not contain any details with regard to the basis for the selection of the 16th Respondent nor had the Petitioners challenged the basis of selection of the 16th Respondent. The Petitioners had also sought an order that the tender awarded to the 16th Respondent be cancelled and be awarded to the Petitioners. This Court had accordingly granted leave to proceed in respect of the alleged violation of the said Articles.

At the hearing of this application, the learned Deputy Solicitor General, while explaining the reasons for the non-selection of Rodrigo Suppliers, raised two

preliminary objections with regard to the maintainability of this application. The first was that this application is futile as the tender was for the supply of dry fish in 2017, and has already been performed by the 16th Respondent. Although this position is correct, it only affects part of the relief claimed by the Petitioners. I therefore agree with the submission of the learned Counsel for the Petitioners that this does not prevent the Petitioners from seeking a declaration that their fundamental rights guaranteed by Articles 12(1) and 14(1)(g) have been infringed.

The second objection was that the application is time-barred. The learned Deputy Solicitor General drew our attention to the provisions of Article 126(2) of the Constitution, which stipulates that, "*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* …" [emphasis added].

She submitted that the imposition of a time-limit in Article 126(2) demonstrates with certainty the need for the prompt invocation of the jurisdiction of this Court – *vide* **Kumarasiri v Bandara** [SC (FR) Application No. 277/2009; SC minutes of 28th March 2014] – and that the consequence of not complying with this requirement in Article 126(2) is that a petition which is filed after the expiry of a period of one month from the time when the alleged infringement occurred, would be time-barred and unmaintainable.

In **Demuni Sriyani De Soyza and Others v Dharmasena Dissanayake, Chairman, Public Service Commission and Others** [SC (FR) Application No. 206/2008; SC minutes of 9th December 2016] Justice Prasanna Jayawardena, PC, considered a long line of jurisprudence on this matter, including **Edirisuriya v Navaratnam and Others** [1985 (1) Sri LR 100] and held as follows:

> *"The rule that, an application under Article 126 which has not been filed within one month of the occurrence of the alleged infringement will make that application unmaintainable, has been enunciated time and again from the time*

this Court exercised the Fundamental Rights jurisdiction conferred upon it by the 1978 Constitution."

"[T]he general rule is clearly that, this Court will regard compliance with the 'one month limit' stipulated by Article 126(2) of the Constitution as being mandatory and refuse to entertain or further proceed with an application under Article 126(1) of the Constitution, which has been filed ***after the expiry of one month from the occurrence of the alleged infringement*** *or imminent infringement"* [emphasis added].

Having laid down the above rule and the circumstances in which this Court has not applied the time-bar, this Court went on to state as follows:

"However, this Court has consistently recognized the fact that, the duty entrusted to this Court by the Constitution to give relief to and protect a person whose Fundamental Rights have been infringed by executive or administrative action, requires ***Article 126(2) of the Constitution to be interpreted and applied in a manner which takes into account the reality of the facts and circumstances*** *which found the application. This Court has recognized that it would fail to fulfill its guardianship if the time limit of one month is applied by rote and the Court remains blind to facts and circumstances which have denied a Petitioner of an opportunity to invoke the jurisdiction of Court earlier"* [emphasis added].

This brings me to the factual circumstances relating to the objection that this application is time-barred.

Referring to the averments contained in paragraphs 11, 14 and 19 of the petition, the learned Deputy Solicitor General submitted that the infringement that the Petitioners are complaining of, consists of two components – the first is the failure to award the tender for the balance eight camps to the Petitioners; the second is the decision to award the tender for the said camps to another bidder. These two, however, are intertwined and cannot be separated from one another.

Having identified the infringement, I shall now consider the date on which the Petitioners became aware of the said infringement as in my view, the time bar should

begin to operate from that date. The Petitioners admit that by the aforementioned letter dated 23rd December 2016, they were informed as follows:

> "2017 වර්ෂය සඳහා ත්‍රිවිධ හමුදාවන් වෙත ආහාර සැපයීම (අමු හා වියළි සලාක) සඳහා වන ප්‍රසම්පාදනයට, අමාත්‍ය මණ්ඩලය මගින් පත් කරන ලද ස්ථාවර ප්‍රසම්පාදන කමිටුවෙහි අනුමැතිය ලැබී ඇත. ඒ අනුව ඔබ ආයතනය සඳහා ඇමුණුමේ දක්වා ඇති පරිදි ශ්‍රී ලංකා නාවික හමුදාවේ ආහාර කාණ්ඩයන් වෙනුවෙන් එක් එක් කඳවුරු සඳහා ආහාර සැපයීමට සුදුසුකම ලබා ඇති බව සතුටින් දන්වා සිටිමි.
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> 2. 2016.12.31 දිනට ප්‍රථම නාවික හමුදාව සමග නියමිත පරිදි ගිවිසුම් වලට එළඹීමට කටයුතු කල යුතු අතර ඒ අනුව 2017 වර්ෂය සඳහා වන සැපයීම් විධිමත් පරිදි ඉටු කරන ලෙස කරුණිකව දන්වමි.
>
> 3. තවද, මාස 3ක් ගතවු පසු භාණ්ඩ සැපයීම පිළිබඳව විධිමත් ඇගයීමක් සිදු කරනු ලබන අතර ඒ අනුව ඉදිරි සැපයීම් කටයුතු තීරණය කරනු ලබන බව තව දුරටත් දන්වා සිටිමි."

It was the position of the learned Deputy Solicitor General that, having submitted a bid for thirteen camps and having been informed of the award only for five camps, together with the fact that the agreements for the supply of dry fish to those five camps were required to be signed by 31st December 2016, was sufficient to make the Petitioners aware that the tender for the balance eight camps had not been awarded to them. She submitted further that with the receipt of the above letter, the Petitioners became aware of the alleged infringement on 23rd December 2016 and therefore, the time period of 30 days stipulated in Article 126(2) commenced from that date. As the application has been filed on 9th March 2017, she submitted that the application is clearly out of time, and should be rejected.

There is merit in this argument, for two reasons.

The first is that, in terms of the agreement that Rodrigo Suppliers had entered into with the Sri Lanka Navy for the year 2016, Rodrigo Suppliers was the supplier of dry fish for the period of 1st January 2016 – 31st December 2016 to eleven camps, including seven of the camps for which they were not selected for the year 2017. Thus, the fact that its current agreement to supply to these seven camps would cease by 31st December 2016, together with the absence of any *ad hoc* extension of the 2016 agreement, was adequate to make the Petitioners aware that they have not been selected in respect of seven of the eight camps in question, if not all eight.

The second is that, in previous years, although the Petitioners had been the successful bidder in respect of several camps, the parties had entered into one single agreement in respect of all camps for which they had been selected. Thus, when Rodrigo Suppliers was informed by letter dated 23rd December 2016 to enter into an agreement in respect of five camps by 31st December 2016, that was sufficient to indicate that the tender for the supply of dry fish to the other eight camps is not being awarded to them.

It must be noted that the petition does not contain any explanation with regard to the failure to invoke the jurisdiction of this Court within one month of the above letter. Pursuant to the objection of the time-bar being raised in the affidavit of the Secretary of the SCAPC – the 15th Respondent – the response of the Petitioners in their counter-affidavit was that it was only at the meeting held on 16th February 2017 that they were informed by the 1st Respondent that the 16th Respondent had been selected in respect of the balance eight camps.

In the written submissions filed on their behalf, the Petitioners, while reiterating the above position, have stated further that:

(a) The letter dated 23rd December 2016 did not state that 'Rodrigo Suppliers' was unsuccessful in respect of the other eight camps;

(b) The said letter does not state who the successful bidder is;

(c) They could not have invoked the jurisdiction of this Court until they had this information; and

(d) The petition has been filed within one month of being informed of this fact at the meeting of 16th February 2017.

This submission of the learned Counsel of the Petitioners must be viewed in the light of Clauses 20.4, 41 and 43 of the ITB, which are re-produced below:

<u>Clause 20.4</u>

> *"The bid security of unsuccessful bidders shall be returned as promptly as possible upon the successful bidder furnishing the Performance Security pursuant to ITB Clause 43."*

Clause 41 – Notification of Award

> *"41.1 Prior to the expiration of the period of bid validity, the Purchaser shall notify the successful bidder, in writing, that its bid has been accepted;*
>
> *41.2 Until a formal contract is prepared and executed, the notification of award shall constitute a binding contract.*
>
> *41.3 Upon the successful bidder's furnishing of the signed contract form and performance security pursuant to ITB Clause 43,* ***the purchaser will promptly notify each unsuccessful bidder*** *and will discharge its bid security, pursuant to ITB Sub-Clause 20.4"* [emphasis added].

Clause 43 – Performance Security

> *"43.1 Within fourteen days of the receipt of notification of award from the purchaser, the successful bidder, if required, shall furnish the performance security in accordance with the Conditions of Contract, using for that purpose the Performance Security Form included in Section III.* ***The purchaser shall promptly notify the name of the winning bidder to each unsuccessful bidder*** *and discharge the bid securities of the unsuccessful bidders pursuant to ITB Sub-Clause 20.4.*
>
> *43.2 Failure of the successful bidder to submit the above-mentioned performance security or sign the Contract shall constitute sufficient grounds for the annulment of the award and forfeiture of the bid security and execution of the bid-securing declaration. In that event,* ***the SCAPC may award the contract to the next lowest bidder****, whose offer is substantially responsive and is determined by the SCAPC to be qualified to perform the contract satisfactorily"* [emphasis added].

The cumulative effect of the above provisions is that a bidder is entitled to (a) be informed in writing of the selection of the successful bidder, and (b) entertain expectations of being awarded the tender until the receipt of such notification. Neither party has filed any document issued to the Petitioners as required by Clauses

41.3 and 43.1. As previously discussed, even though the argument that the Petitioners ought to have known by 31st December 2016 that they had not been selected for the balance eight camps has merit, I cannot disregard the above provisions which have been inserted in the Bidding Document to safeguard the interests of bidders and ensure transparency in the bidding process. In these circumstances, the argument of the learned Counsel for the Petitioners that it was only on 16th February 2017 that the Petitioners became aware that the tender has been awarded to the 16th Respondent has to be accepted, with the result that the jurisdiction of this Court has been invoked by the Petitioners within the time period stipulated by Article 126(2).

I shall now consider the argument of the Petitioners that theirs was the lowest substantially responsive bid, and therefore, the decision to reject their bid in respect of the balance eight camps was arbitrary and unreasonable.

The 15th Respondent, while admitting that the prices quoted by the Petitioners were lower than those of the 16th Respondent, had stated in his affidavit that in the past, the Ministry of Defence had come across suppliers who quote unrealistic prices in order to secure the contract and once accepted, are unable to supply throughout the contract period at the quoted prices and hence default on their obligations to deliver, or else supply food of inferior quality which is not fit for human consumption, thus causing great inconvenience. Needless to state, such circumstances would then require the authorities to resort to emergency purchases at exorbitant prices.

In order to avoid the recurrence of this situation, Paragraphs 14.7 and 14.8 of the ITB issued by Sri Lanka Navy for 2017 provided as follows:

Clause 14.7

> "*During evaluation, if the TEC found an unrealistically low price, the price shall be subjected to the Cost Realism Evaluation by the TEC. For the purpose of the Cost Realism Evaluation, the criterion that shall be used to demarcate an unrealistic price is below 70% of the best price which is determined by the Procurement Committee.*"

Clause 14.8

> "*If any price is found unrealistic as per the above criterion, the Procurement Committee shall have the right to reject or accept any particular item or category.*"

I must observe that the above provisions have been reproduced in Section II of the Bidding Documents – *vide* Clauses 35.3(d)(a) and 35.3(d)(b), and in Section III. It must be noted that in their petition, the Petitioners have not challenged the legality of the above clauses and the ability of the TEC/SCAPC to reject a bid, even though Section 7.9.11 of the Government Procurement Guidelines (2006) requires for an explanation to be called where unrealistic prices have been quoted by a bidder, and for rejection to take place only thereafter.

Thus, in terms of Clause 14.7, where the TEC and the SCAPC determine that the best price for an item is Rs. 100, bids which are less than Rs. 70 are liable to be rejected on the basis that the price is unrealistic. Although the presence of the above provision in three different places of the Bidding Document demonstrates in no uncertain terms the objective sought to be achieved, the importance of the said requirement and due compliance thereof by all bidders, yet, the decision whether to reject such bidders quoting less than 70% of the best price was left to the discretion of the TEC and SCAPC.

The 15th Respondent had stated that the above provision relating to unrealistic prices was brought to the attention of all bidders, including the Petitioners, at the pre-bid meeting held on 8th November 2016. Whilst not denying this position, the Petitioners have stated that the Respondents failed to explain to the bidders the concept of *best price* and the basis of its calculation, an argument which cannot be accepted in view of Clause 35.3(f) of the ITB, which provides that the best price shall be determined based on a market survey.

The learned Deputy Solicitor General drew the attention of this Court to Clause 35.3(f) of the ITB, and Paragraph 3.3 of the Report of the TEC dated 21st December 2016 which explains that the best price in respect of each of the 688 items for which bids were invited and in respect of which evaluation was being carried out by the TEC, had been determined after taking into consideration the market prices, both wholesale and retail, for the years 2015 and 2016 obtained from the Hector Kobbekaduwa Agrarian

Research and Training Institute, the Department of Census and Statistics, Lak Sathosa, the Economic Centers, the Consumer Affairs Authority, leading supermarkets, manufacturers' price lists, and the prevailing exchange rates, fuel prices, labour charges, interest rates, etc. I must note that the Petitioners had no complaint with the manner in which the best price has been calculated or the price determined as being the best price.

The learned Deputy Solicitor General submitted further that the TEC, having determined the market price of all 688 items, had sought and obtained the approval of the SCAPC for the methodology it had adopted. The evaluation of the bids had been carried out by the TEC only thereafter. During this evaluation, it had been found that the price quoted by the Petitioners for the three items of dry fish in question – i.e. *Kumbala*, *Balaya* and *Keeramin* – was less than 70% of the best price determined for those three items and therefore the bid of the Petitioners was liable to be rejected.

The table below sets out the prices at which Rodrigo Suppliers have supplied the three items of dry fish in question since 2012, the average price for the period 2012-2016, the price at which it bid for the said items in 2017, the best price determined by the TEC/SCAPC for the year 2017, and the Petitioners' price for 2017 as a percentage of the best price.

Year	**Kumbala**	**Balaya**	**Keeramin**
2012/13	300	418	200
2013/14	330	430	350
2014/15	363	473	385
2016	324	450	420
Average price for 2012-2016 (rounded)	329	443	339
2017	**126**	**144**	**135**
2017 Best Price	335	457	445
Petitioners' price as a % of the best price	37.6%	31.5%	30.3%

In terms of Clause 14.8 as well as Clause 35.3(d)(b), the TEC had the discretion to accept or reject the bid. In view of the price of the Petitioners being very much below the 70% threshold, the TEC had the right and the justification to reject the bid of the Petitioners.

The TEC, however, did not either accept or reject the bid of the Petitioner. It instead adjusted the price quoted by the Petitioners by substituting the best price as the price of the Petitioners, and thereafter compared the adjusted price with the prices quoted by other bidders. For example, the best price for 1 kg of *balaya* was Rs. 457. The price quoted by the 16th Respondent for the Vakarai camp for *balaya* was Rs. 489. The price quoted by the Petitioners was Rs. 144. The price of the Petitioners had been adjusted to Rs. 457 by substituting it with the best price. Pursuant to this adjustment, the Petitioners' price was still the lowest and the Petitioners were therefore awarded the tender for the supply of *balaya* to the said camp, as well as four other camps, at Rs. 144 being the price quoted by the Petitioners.

In view of the aforementioned rationale for the fixing of a best price, I am of the view that the TEC and the SCAPC ought to have rejected the bid of the Petitioners, instead of awarding the tender in respect of five camps at a price which had been found to be unrealistic. The action of the TEC/SCAPC has attracted the very consequence that the 15th Respondent states the SCAPC was seeking to avoid – i.e., the failure on the part of a bidder to supply at such unrealistic prices.

The adjustment of prices by the TEC is a violation of the following provisions of the Bidding Document:

(1) Clause 29.1 of the ITB which stipulates that "*The SCAPC's determination of the bid's responsiveness is to be based on the contents of the bid itself*."

(2) Clause 29.2(c) of the ITB which provides that any rectification of a bid which would unfairly affect the competitive positions of other bidders presenting substantially responsive bids would amount to a material deviation of the former bid.

(3) Clause 36.1 of the ITB which stipulates that, "*The SCAPC shall compare all substantially responsive bids to determine the lowest evaluated bid, in accordance with ITB Clause 35*."

(4) Clause 35.3(d)(c) of Section II of the Bidding Document which restricted the right of the TEC to correct any unrealistic rate arising only due to an arithmetical error.

This artificial adjustment by the TEC/SCAPC has accrued to the benefit of the Petitioners and resulted in them being the lowest bidder in respect of five camps, for which the tender was awarded to the Petitioners. However, in respect of the other eight camps, the Petitioners' bid was the second lowest, with the lowest bid having been submitted by the 16th Respondent. By adopting a procedure not provided for in the evaluation criteria laid down in the Bidding Document, the TEC and SCAPC have not only removed the advantage that other bidders enjoyed over the Petitioners, but this has resulted in a moving of the metaphorical goal posts, and a failure to maintain a level playing field among all bidders. The result is that the Petitioners are the beneficiaries of an irregularity committed by the TEC/SCAPC, and have no cause for complaint.

As I have already noted, the Petitioners did not challenge in their petition the basis adopted by the TEC/SCAPC in adjusting the prices and in selecting the 16th Respondent. Even after the basis was disclosed by the 15th Respondent, the Petitioners did not challenge the said basis in their counter-affidavit. However, the learned Counsel for the Petitioners has submitted in the written submissions that if the price quoted by the Petitioners was found to be unrealistic, the TEC/SCAPC ought to have acted in terms of Section 7.9.11(a) of the Government Procurement Guidelines, which reads as follows:

> "*If such bidder [who has submitted the lowest substantially responsive bid] has quoted unrealistically low rates on critical or very important items, the bidder shall be requested to prove to the satisfaction of the TEC, how the bidder intends to procure such items / perform the Works / provide the Services as per the quoted rates, for such purposes the bidder may be asked to provide a rate analysis*."

The argument presented to this Court on behalf of the Petitioners was that the TEC/SCAPC have failed to follow the above provisions of Section 7.9.11(a). As noted earlier, the said requirement, quite apart from being impractical when evaluating bids for 688 items, is contrary to the provisions of Clause 14.8 of the ITB and Clause 35.3(d)(b) of the Bid Data Sheet, which conferred upon the TEC/SCAPC the right to reject a bid where the price is less than 70% of the best price. The Petitioners, having had no qualms regarding this provision in spite of it appearing in three different places

in the Bidding Document, and not having raised any issue with the said provision in their pleadings, cannot be allowed to raise this argument at this late stage, as the Respondents are deprived of a fair opportunity to respond. This, in itself, is a fatal blow to the Petitioners' case. But, even if I were to go one step further and consider the merits of that argument, I would still be disinclined to agree with the Petitioners, in view of the provisions of Section 2.7.2 of the Government Procurement Guidelines, which enable the Cabinet of Ministers to (a) approve the appointment of a SCAPC to cater to the extraordinary situations that require a SCAPC, and (b) permit a "*deviation from the general procurement procedures*." Thus, while it appears that conditions laid down in the Government Procurement Guidelines can override those in the ITB and the Bid Data Sheet, the Respondents would have been in a position to apprise this Court if this is actually the position, had the Petitioners raised this issue in their pleadings.

In the above circumstances, I am of the view that the fundamental rights of the Petitioners guaranteed under Articles 12(1) and 14(1)(g) of the Constitution have not been infringed by the Respondents. This application is accordingly dismissed, with costs fixed at Rs. Two Hundred Thousand payable by the Petitioner to the 15th Respondent.

JUDGE OF THE SUPREME COURT

P. Padman Surasena, J

I agree.

JUDGE OF THE SUPREME COURT

Kumudini 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 for under and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. FR Application No. 109/2014

1. Nadesan Balamurali

2. A. Anbalgan

3. R. Vijayakumaran

(All members of the School Development Society Talawakelle Tamil Maha Vidyalaya, Talawakelle,)

Petitioners

Vs.

1. W.J.L.S Fernando,

   Project Director, Upper Kotmale Hydro Power Project,

   Ceylon Electricity Board,

   No. 385, Fourth Floor,

   Landmark Building Galle Road,

   Colombo 03.

2. Ceylon Electricity Board,

   No. 72, Ananda Kumaraswamy Mawatha,

   Colombo 07

3. S.G.K Bodhimanna,
   Divisional Secretary,
   Divisional Secretariat Office,
   Nuwaraeliya
4. M.G.A Piyadasa,
   Zonal Director Education,
   Zonal Education Office, Nuwaraeliya
5. H.M Wijayasiri,
   Provincial Director of Education,
   Provincial Department of Education,
   Central Province, Kandy
6. R. Krishnasamy,
   Principal,
   Tallawakelle Tamil Maha Vidyalaya,
   Talawakelle
7. Hon. Attorney General,
   Attorney Generals' Department,
   Colombo 12

Respondents

Before: Jayantha Jayasuriya, PC, CJ.
L.T. B Dehideniya, J.
S. Thurairaja, PC, J.

Counsels: Shantha Jayawardena with Ms. Thilini Vidanagamage for the Petitioners
Nihal Jayawardena, PC with Malik Hannan for the 1st and 2nd Respondents
Ms. Yuresha de Silva, DSG for the 3rd and 7th Respondents
Uditha Egalahewa, PC with Ranga Dayananda for the 4th -6th Respondents

Argued on: 04.04.2022

Decided on: 30.09.2022

L.T.B. Dehideniya, J.

The Petitioners invoke the jurisdiction of this court alleging the infringement of Fundamental Rights guaranteed under the Article 12(1) of the Constitution by the Respondents.

The Petitioners are members of the School Development Society of Talawakelle Tamil Maha Vidyalaya and argues that they have a vested interest in the wellbeing of the school and the right to education of the students. The alleged infringement is based on the failure of the 1st and 2nd Respondents to build the new Auditorium of the school as agreed by them. The school was relocated as the land on which previous buildings of the school was situated was acquired for Upper Kothmale Hydro Power Project. The Respondents' position is that the Petitioners have no legal standing to file the present application and the Learned President's Counsel submits that when filing a legal action on behalf of a society by members of a society, it is necessary to satisfy the Court by proving that they have been authorised by the respective society to file such an action. It is further submitted that School Development Society cannot simply file an action without passing a resolution by the members of the society at an Executive Committee Meeting. However, The Respondents have not tendered any evidence or authorities to substantiate the above legal context

A School Development Society consists of parents / guardians of the children of a School. It is clear that the parents have a fair right and a duty to stand for their children if an authority deprives the future wellbeing of the school children. In par with the said view, the legal standing of the School Development Society of Talawakelle Tamil Maha Vidyalaya can be discussed in a child rights perspective.

When considering the Sri Lanka's legal position in protection of the rights of the child, Sri Lanka ratified the UN Convention on the Rights of the Child (CRC) on 12 July 1991. Even though the CRC has not been directly incorporated into national law, Sri Lanka has, however,

expressed its view that many of the provisions of the CRC are in line with many of the current rights espoused by the 1978 Sri Lankan Constitution (Constitution). Following the ratification of the CRC, in 1992 Sri Lanka adopted the Children's Charter with a view to ensuring the standards of the Convention. CRC sets a general obligation of preserving the interests of the child on the state authorities and the courts of law in all actions concerning children. **Article 3 (1)** of the CRC declares that,

> *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

Furthermore, to give effect to its obligations under the International Covenant on Civil and Political Rights (ICCPR), the Sri Lankan Parliament passed the **ICCPR Act No. 56 of 2007. Section 5(2)** of the Act states as follows:

> *"In all matters concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities, or legislative bodies, the best interest of the child shall be of paramount importance." (emphasis added)*

Thus, the ICCPR Act codifies the internationally recognized principle of 'securing the interests of the child shall be of paramount importance.' Article 5(2) of the ICCPR Act can be identified as a similar provision to Article 3(1) of the CRC. In accordance with the aforesaid legal context, Sri Lanka being a state party to the CRC and adopting the Children's Charter with a view to ensuring that standards of the Convention and further assuring the interests of the children by the ICCPR Act, it is noteworthy that, in the case of children who encounter the law, among other relevant factors, it is essential for Courts to acknowledge the interests of children to assure the protection of law the children deserve.

Moreover, under the **Article 27(13)** (directive principles of the state policy and fundamental duties) of the Constitution, government is duty bound to promote interests of children and youth with special care, so as to ensure their full development, physical, mental, moral, religious and social, and to protect them from exploitation and discrimination.

Under the **Article 27(2) (g)** of the Constitution, Sri Lanka is pledged to raise the moral and cultural standards and ensure the full development of human personality of people including children. Under the **Article 27(2) (h)** it is further provided that Sri Lanka is obligatory to eradicate of illiteracy and to assure all persons of the right to universal and equal access to education at all levels. Therefore, it is apparent that this Court should emphasise the importance of the obligation on the State to ensure 'education' to children as recognised by the Constitution and international treaty obligations.

Aforementioned state obligation has been reassured in a range of case law. In the case of ***Kirahandi Yeshin Nanduja De Silva and another v. Sumith Parakramawansha et al*** (SC/FR 50/2015, SC minutes dated 02 August 2017) it was held that though the right to education has not been recognized as a fundamental right in the Sri Lankan Constitution, under the Article 27 of the Constitution, the government is obliged to take into consideration the Directive Principles of State Policy when enacting laws and taking action regarding governance. It was further held that it is paramount to give equal access to education in order to establish free and just society.

Per Priyantha Jayawardena PC, J at p.8;

"Though the right to education has not been recognized as a fundamental right in the Sri Lankan Constitution, the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels have been recognized as a directive principle in the

Constitution. Thus, the Government is obliged take into consideration the Directive Principles of State Policy when enacting laws and taking action regarding governance. In this context, I am of the view that it is paramount to give equal access to education in order to establish a free and just society."

In the case of ***Holidays (Amendment Bill)*** (SC/SD 6-7/2019, "Decisions of the Supreme Court on Parliamentary Bills" 2019-2020 Vol XV 25 at 34-35) this Court has emphasized the importance of assuring proper education and it was held that any attempt to undermine the overall objective of Education by limiting or restricting or attaching undue prominence to text book related or school curricular exam-orientated education, will erode the Right to Education but also will not only defeat the rationale of Education.

In April 2003 the Principle of the school had informed the needs of the school in the context of proposed relocation and an Auditorium was identified as one such infrastructure facility. In this context it is noteworthy that the school concerned is an upper secondary school having classes up to G.C.E Advanced Level in Science, Commerce and Arts streams which needs an Auditorium for the educational purposes of the students. Accordingly, when carefully observing the factual matrix and the aforementioned legal obligations on Sri Lanka to secure the Right to Education, it can be noted that the Auditorium in question is important to guarantee proper education of the school children.

Under the **Article 17** of the Constitution every person is protected against the infringement of the fundamental rights. The term used in the Constitution is 'every person'. If there is an infringement on rights of the children, they have the right to come before the Supreme Court for redress. As it was discussed earlier, School Development Society who has a vested interest on the education of the school children has a right to invoke the jurisdiction of the Supreme Court.

Under the **Article 126** states that the Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right. As such, the Supreme Court has a power to intervene in all cases concerning a violation of fundamental rights.

When considering the protection of the interests of the children and the constitutional powers vested upon the Supreme Court as discussed above, members of the School Development Society of Talawakelle Tamil Maha Vidyalaya have a right to invoke the jurisdiction of the Supreme Court on the infringement of the fundamental rights guaranteed by the **Article 12(1)** of the Constitution on behalf of the students of Talawakelle Tamil Maha Vidyalaya. In the instant application the Petitioners have invoked the jurisdiction of this Court by way of an application for fundamental rights as provided by the Constitution.

By February 2013, the School Development Society, Past Pupils Association with School PSI Committee has raised concerns with the 1st Respondent on the issue of incompletion of infrastructure facilities. It is pertinent to note that the principal (6th Respondent) is the President of said three associations. In this communication they had drawn the attention of the 1st Respondent on the promise to construct the Auditorium (Block-I) according to the initial plan marked **P-5**. In the letter dated 05.04.2013, the Principal had conveyed the adverse consequences that would be caused to the studies of the students if the Auditorium is not constructed. Nevertheless, the letter of the Principal dated 17.07.2013 indicates that the 1st Respondent had failed to reply a series of communications on this matter.

The 6th Respondent –the Principal, who is also the president of the school development society (**P-12**) confirmed that the three Petitioners were the Secretary and two committee members of the school development society. School Development Society or any other

society who has an interest on matters relating to the school had not intervened at the initial stages of the relocation of the school. However, when the conduct of the 1st and 2nd Respondents became apparent that the interests of the school will be adversely affected (due to the deviation from initial plans) School Development Society and other societies who have an interest on the wellbeing of the school had intervened. (vide **P-12** dated 2013.02.15). Therefore, none of the three Petitioners be identified as *"a mere busy body or a meddlesome interloper"* when they invoked the jurisdiction of this Court. The said legal context is discussed in the case of ***Ajith P. Dharmasuriya v. Mahaweli Authority of Sri Lanka*** (SC/ FR 330/2015, SC minutes dated 09 January 2017)

K. Sripavan, C.J. at p.5;

> *"The strict rule of standing which insists that only a person who had suffered a specific legal inquiry can maintain an action for judicial redress is relaxed and a broad rule evolved which gives standing to any member of the public who is not a mere busy body or a meddlesome interloper but who has sufficient interest in the proceeding. There can be no doubt that the risk of legal action against the State or its agencies by citizen will induce the State or its agencies to act with greater responsibility and care thereby improving the administration of justice."*[emphasis added]

Therefore, this court has a vested responsibility to question whether there has been a violation of fundamental rights and to make an appropriate decision on the instant issue.

When analysing the scope of 'executive or administrative action' under Article 126, it is necessary to delve into the law to examine whether the actions of 1st and the 2nd Respondents falls within executive or administrative action as referred to in said Article of the Constitution. The term 'executive or administrative action' is not specifically defined in the

Constitution. Nevertheless, **Article 4(d)** of the Constitution refers to the term *'organs of the government'* in relation to respecting, securing and advancing the fundamental rights guaranteed by the Constitution. This legal position is discussed in a range of case law. In the case of ***Reinzie Perera v. University Grants Commission*** [1978-79-80] 1 Sri L.R 128 it was held that fundamental rights operate only between individuals and the State and in the context of fundamental rights the 'State' includes every repository of state power. It was further observed that the expression 'executive or administrative action' embraces executive action for the state or its agencies or instrumentalities exercising governmental functions.

A similar view had been expressed in the case of ***Wijethunga v. Insurance Corporation and Another*** [1982] 1 Sri L.R 1 at p.6. Sharvananda A.C.J. held that the term executive action comprehends official actions of all Government Officers.

Moreover, according to the Section 2(2) of the Ceylon Electricity Board Act No. 29 of 1979, the Ceylon Electricity Board is a body corporate having perpetual succession, which can sue and be sued in such name. Further, when observing the provisions contained in the Act as a whole it appears that the Minister exercises appreciable control over the Ceylon Electricity Board in appointing members, General Manager, Chairman to the Board. In terms of Section 8 of the Act the Minister is empowered to give general and special directions to the Board. Therefore, when considering the Constitutional provisions together with statutory provisions and case law jurisprudence, it can be arrived at conclusion that the Petitioners can invoke the jurisdiction of this Court in terms of Articles 17 and 126 of the Constitution in relation to the alleged conduct of the 1st, 2nd Respondents.

The Petitioners submit that in or around 2001-2003, School Administration of Talawakelle Tamil Maha Vidyalaya was informed by the 1st and the 2nd Respondents that due to the Upper Kothmale Hydro power project the school needed to be relocated. Petitioner argues

that according to the letter dated 18.08.2004 (document marked **P-5)**, the Respondents have agreed to relocate the school and rebuild the facilities as listed in **P-5**. Further, the Petitioners consider the document P-5 as the initial agreement to the proposed plan of the constructions. The Petitioners contend that the 1st and the 2nd Respondents have neglected or failed to construct the Auditorium (listed in **P-5** as Block-I) as agreed by the letter marked **P-5** and such conduct is arbitrary, irrational and unreasonable. The Respondents' position is that **P-5** is not an agreement, but a letter which has been addressed to the Provincial Director (Central) Department of Education Kandy seeking his approval at the earliest to the plans submitted pertaining to the construction of buildings.

When carefully examining the letter marked **P-5**, it appears that the said letter contains a promise given by a state authority (Ceylon Electricity Board) to the School to construct the infrastructure facilities including the Auditorium. Furthermore, it has been admitted by the 1st and 2nd Respondents in the letter marked as **P-5** that *"..Principle of the Talawakelle Tamil School has verbally agreed to the new layout plan and plan of the buildings".* **P-5** contains of the layout plan of the proposed buildings and proposed dimensions of the said buildings.

It is a question of great importance before this Court whether a breach of a promise made by a state authority can be considered as an infringement of Article 12(1). According to the existing law a breach of a promise made by a public authority can be challenged from the perspective of Legitimate Expectation and Public Law on the basis of an alleged infringement of the fundamental right to equality guaranteed by Article 12(1) of the Constitution. This view has been adopted in a range of case law.

In the case of ***Wickremesinghe v. Ceylon Petrolium Corporation and Others*** [2001] 2 Sri. L.R 409 S.N Silva CJ. considered whether a breach of a promise/agreement can be challenged under the Article 12 of the Constitution and held that;

At p. 410

"Since the termination of the Agreement is challenged on the basis of an infringement of the right to equality guaranteed by Article 12(1) of the Constitution, the legality of the termination has to be reviewed not in the light of the law of contract but in the domain of the Constitutional guarantee of equality enshrined in Article 12"

At p. 412

"..In that respect the termination of the Petitioners dealership is in compliance with specific terms of the Agreement (PI) and the Petitioner may not be entitled to any relief in respect of the termination under the law of contract and the common law on the subject. But, that is from the perspective of the Private Law. In these proceedings, the termination is challenged from the perspective of Public Law on the basis of an alleged infringement of the fundamental right to equality, guaranteed by Article 12(1) and (2) of the Constitution. Therefore the matters to be considered transcend the mere examination of the terms of the Agreement and a review of the legality of the termination in the light of the Law of Contract and enter the domain of the constitutional guarantee of equality enshrined in Article 12."

A similar view was expressed in the case of ***Kalidasage Roshan Chaminda v. Kurunegala Plantations Limited and Others*** (SC FR. Application No. 24/2013, SC minutes dated 03.09.2014). Eva Wanasundara PC. J, considered the observations of the Chief Justice S.N Silva in ***Wickremesinghe v. Ceylon Petrolium Corporation and*** Others (supra) at p. 413;

"Therefore the impugned termination of the Dealership Agreement by P4, should be reviewed in these proceedings not from the narrower perspective of only the

terms of the Agreement but from broader perspective of the exercise of executive or administrative action by an agency of the Government and the constitutional guarantee of equality which should guide the exercise of power under the Agreement."

Eva Wanasundara PC. J at P. 8-9

"I am of the opinion that the 1st Respondent's refusal to extend the lease period should be reviewed not from the narrow perspective of only the terms of the agreement but from the broader perspective of the exercise of executive and administrative action. The refusal to extend the lease period by the 1st Respondent is an act of agency of the Government and the Constitutional guarantee of equality should guide the exercise of power under the agreement. Every instance of unfairness to an individual will not give rise to a justiciable grievance under the ideology of the rule of law and equality under the law but the party which is seemingly more powerful in this instant case, after the conclusion of signing the contract, being a state entity should not have abused the power in its hands. The conduct of the Respondents seem to be arbitrary even though mala fides has not been pleaded in the petition."[emphasis added]

Considering the above discussed case law jurisprudence, it appears that breach of the promise refers to in the **P-5** can be challenged under the Article 12(1) of the Constitution.

The Petitioners' contention is that upon the assurance given in terms of the document marked **P-5,** the Petitioners entertain a *legitimate expectation* that the School will be relocated to a suitable location with the facilities agreed as per the said document, including the Auditorium (Block-I). In the eyes of the law an expectation is considered to be legitimate where it is founded upon a promise or practice by the authority that is said to be bound to fulfil the

expectation and the applicability of the doctrine of legitimate expectation should be based on the facts and circumstances of each case. In the case of ***Dayaratne v. Minister of Health and Indigenous Medicine*** [1999] 1 Sri L.R 393 Amarasinghe J. held that destroying of a legitimate expectation is a ground for judicial review which amounted to a violation of equal protection guaranteed by Article 12 of the Constitution.

A similar view was expressed in the case of ***Ginigathgala Mohandiramlage Nimalsiri v. Colonel P.P.J. Fernando and Others*** (SC FR. Application No. 256/2010, SC minutes dated 17.09.2015) and Justice Priyantha Jayawardena PC. has further discussed the application of the concept of legitimate expectation in the context of infringement of fundamental rights.

> Priyantha Jayawardena PC. J, at p. 8-9
>
> *"In Sri Lanka the said doctrine of legitimate expectation is applied in the fields of public law, fundamental rights law and in labour law. In labour law the said doctrine is applicable to the state sector and the private sector in like manner. The doctrine of legitimate expectation applies to situations to protect legitimate expectation. It arises from establishing an expectation believing an undertaking or promise given by a public official or establishing an expectation taking into consideration of established practices of an authority."* [emphasis added]
>
> At p.9
>
> *"In order to seek redress under the doctrine of legitimate expectation a person should prove he had a legitimate expectation which was based on a promise or an established practice. Thus, the applicability of the said doctrine is based on the facts and circumstances of each case."* [emphasis added]

In light of the above legal context and the facts and circumstances of the instant application, it is evident that the Petitioners have entertained a legitimate expectation with regard to the

promise made by the 1st and 2nd Respondents to relocate the school and construct all the facilities in terms of the document marked **P-5.** Nevertheless, when considering the evidence submitted by both parties, it appears that the 1st and the 2nd Respondents have failed or neglected to construct the Auditorium (Block I) as promised. The Petitioners on behalf of the students of the School relies on the promise made by the 1st and 2nd Respondents to construct the buildings including the Auditorium to ensure the quality and undisturbed education of the students. The Petitioners submits that the 1st and 2nd Respondents deviated from the promise to construct the Auditorium due to political involvement of the Ceylon Workers' Congress (CWC). The 1st and 2nd Respondents have stated in the letter dated 01.03.2013 (document marked **P-13**) that they had to sign a Memorandum of Understanding (MOU) with the CWC to stop demolition of the old buildings and to agree upon sharing the Auditorium building with the Saumaya Moorthy Thondaman Foundation.

The letter dated 01.03.2013 marked as **P-13**, at p.1

> *"..At the time of demolition of the Old Tamil School buildings, CWC intervened to stop demolition. They demanded a building for Saumaya Moorthy Thondaman Foundation and insisted to sign MOU with CEB before demolition. At that stage, CEB had no option but to sign the MOU on the advice of the Ministry of Power and Energy to continue project activities without hindrance. However, in the MOU it was agreed to share auditorium and library with Tamil Maha Vidayalaya."*

The Petitioners, further submits that the 1st and 2nd Respondents have acted under dictation of a superior authority (political party or any other undisclosed party) or has abdicated their power vested on such authority. Such conduct had resulted in depriving the School of the new Auditorium as promised by the initial contract. In the eyes of the law, when law vests discretionary powers in a designated authority or an official, it is the said authority who has

to exercise the same according to its judgement and discretion; and no one else. There is, however, a distinction between seeking advice or assistance on the one hand and acting under dictation on the other hand. Advice or assistance may be taken and then discretion may be exercised by the authority concerned genuinely without blindly or mechanically acting upon the advice.

The legal basis of which is more fully discussed by the jurist Christopher Wade in Administrative Law, H.R.W Wade and C.F Forsyth (10th Edition at p.269- Chapter: Surrender, Abdication and Dictation) as follows:

> *"Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercise by another. The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void.."* [emphasis added]

Aforesaid legal position is adopted in the case of ***R.P Karunarathna Bandara v. P.B Disanayaka and Others*** (SC/FR Application No.356/2016, SC minutes dated 28.06.2018) and decided that such conduct of an authority amounts to an infringement of Petitioner's fundamental rights guaranteed under Article 12(1) of the Constitution.

> Per H.N.J Perera J. at p.11
>
> *"..In the instant case there is material to show that the 8th Respondent has surrendered and abdicated her discretion to the 5th Respondent and had acted*

under the dictates of the 5th Respondent. The 8th Respondent is prohibited from acting under dictates of the 5th Respondent.

'An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else' (vide: Chapter 10 of 'Administrative Law' Wade and Forsyth, 10th Edition, page 259)"

1st and the 2nd Respondents have admitted that at the time of demolition of the old Tamil School buildings, CWC intervened to stop demolition and they demanded a building for Saumaya Moorthy Thondaman Foundation and insisted to sign MOU with CEB before demolition, therefore; CEB had no option but to sign the MOU (vide document marked **P-13**).

The Respondents' position is that they had to deviate from the initial plans due to threats of landslides. Nevertheless, for the first time the Respondents had taken up this position in document marked **P-13** dated 01 March 2013 whereas issues on the 'auditorium' and intervention by Thondaman Foundation had commenced from March 2011 (document marked **P-8**). It is further observed that 1st and 2nd Respondents in their statement of objections filed in the High Court of Nuwaraeliya in HC/NE (Writ) 16/2013 on 17 December 2013 had admitted the delay in completing the school relocation but failed to take up the specific position that an issue on landslides had either delayed or forced them to change the initial plan (vide document marked **1R3**). Furthermore, 1st and 2nd Respondents failed to produce any material before this Court (either by way of an Affidavit, report or correspondence from and authority who could have made such claim) to substantiate their position.

Therefore, when carefully examining evidence of the present application, it appears that 1st and the 2nd Respondents have acted under dictation or influence of a political party in implementing the promise given to the school by CEB. Consequently, the 1st and the 2nd Respondents have deviated from the initial promise and failed/neglected to build the Auditorium (Block I) as promised. 2nd Respondent entering into a MOU with a third party is a violation and disregard to the promise made to the School and this conduct is not only unlawful but arbitrary as well.

As discussed above, Legitimate Expectation has been described as a concept which derives from an undertaking given by someone in authority. In the instant case it is the promise given by the Respondents to construct the Auditorium (Block-I) as laid out in the initial lay out plan marked **P-5** which establishes the Legitimate Expectation on the School including students and the parents of the students. Due to the incompletion of the Auditorium the students had to continue their education with limited facilities and the co-curricular activities of the students have been paused without a proper Auditorium Building. Further the Principle of the school had duly informed the Respondents of the need to have the required facilities as promised in **P-5** for the wellbeing of the students (vide document marked **P-7**). The Petitioners complaint that the fundamental rights guaranteed in terms of Article 12(1) had been violated is based on the concept of legitimate expectation as they had such an expectation that the Respondents would construct the Auditorium building as promised in order to continue proper education of the students of Talawakelle Tamil Maha Vidyalaya. Therefore, it is the view of this Court that the arbitrary decision of the Respondents to deviate from the initial plan due to extraneous reasons including intervention by political authority had resulted in a violation of the Article 12(1) of the Constitution.

Moreover, 1st and 2nd Respondents have raised the issue of time bar regarding the Petitioners' application. This application had been filed on 11 April 2014. Although a

possible deviation from the initial plan (**P-5**) promised by the Respondents had been surfaced for the first time in 2011, parties had been on constant discussions on the possible options. Even on July 2013, the Respondents had sought the intervention of Secretary Ministry of Power and Energy. Thereafter, 1st and 2nd Respondents in their statement of objections filed in the High Court of Nuwaraeliya in HC/NE (Writ) 16/2013 on 17 December 2013 had admitted the delay in completing the school relocation. However, the Respondents did not claim the relocation process is completed (**vide 1R3**).

Therefore, the alleged violation due to non-compliance with the initial agreement had been a continuing violation and it was only on 16 October 2014 (six months after the filing of the present application), the 1st Respondent had handed over the newly constructed buildings to the Divisional Secretary who in turn handed over it to the Provincial Director of Education (**vide document marked 1R1**).Hence there is no merit in submission of the Respondents that this application is out of time.

As per the legal context discussed above, 1st and the 2nd Respondents as public authorities had no reason to deviate from the initial promise with the School by handing over the discretion to a political party or any other undisclosed authority. Further, 1st and 2nd Respondents are bound by the Contractual obligation to build all the buildings including the Auditorium (Block-I) as promised to ensure the undisturbed education of the students.

Therefore, by concluding the Judgement, this Court declares that, the Fundamental Rights guaranteed to the Petitioner under the Article 12 (1) of the Constitution have been infringed by the 1st and the 2nd Respondents by not building the Auditorium (Block I) as set out in the document marked **P-5**.

Thus, this Court directs the 2nd Respondent to construct an Auditorium for Thalawakele Tamil Maha Vidyalaya in a suitable location according to specifications promised in P-5, in

consultation with all stake holders including 4th, 5th, and 6th Respondents and School Development Society of Talawakelle Tamil Maha Vidyalaya. I further order the 1st Respondent to pay Rs. 25000/= as costs to each of the three Petitioners.

Judge of the Supreme Court

Jayantha Jayasuriya, PC, CJ

I agree

Chief Justice

S. Thurairaja, PC, J

I agree

Judge of the Supreme Court

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

In the matter of an application under and in terms of Article 17 & 126 of the Constitution of the Republic.

1. R. L. Buddhika Yangani Henri,
2. Hewa Bettage Sadiv Sasmin (minor)

   The Petitioners of; 294/A/1, Matara Gedarawatta, Gunersekara Mawatha, Puvakwatta, Kuburugamuwa.

Petitioners

S.C. (F/R) Application No. 116/2021

Vs.

1. Francis Welege, Principal,
   Rahula College, Matara. (Chairman)

1A. Sudath Samarawickrama,Principal,

Rahula College, Matara.

1. Padmini Ganewatta, Principal Primary Section
2. Nuwan Senaka Representative of the Old Boys Association

   The 1st to the 3rd Respondent of; Interview Board, Rahula College, Matara
3. H.D.B.L. Gunathilaka, Additional Director of Minister, Isurupaya

4. P.A.U. Dulmani
5. P.K. Nanayakkara, Deputy Vice Principal of Sujatha Vidyalaya
6. C.R. Vikramanayaka, Representative of the School Development Committee
7. Manuranga De Silva, Representative of the Old Boys Association

   The 4th to 8th Respondents of; Appeals Board, Rahula College, Matara
8. Director- National Schools,

   Isurupaya, Battaramulla.
9. Secretary, Ministry of Education, Isurupaya, Battaramulla
10. Hon. Attorney General; Attorney General's Department, Hulftsdrop, Colombo 12.

Respondents

BEFORE: **S. THURAIRAJA, P.C., J.**

KUMUDINI WICKREMASINGHE, J.

JANAK DE SILVA, J.

COUNSEL: Ms. Fadhila Fairoze for the Petitioners

Nayomi Kahawita SC for the 1A and 10th Respondents

ARGUED & **:** 23/03/2022

DECIDED ON

JANAK DE SILVA, J.

In this matter, Court has granted leave to proceed against the Respondents under Article 12(1) of the Constitution. Further, on 19/01/2022, Court has made a direction in terms of prayer (d) to the petition, directing the 1A Respondent to reserve a vacancy at Rahula College, Matara for the 2nd Petitioner.

An application was submitted to admit the 2nd Petitioner to Rahula College, Matara for the year 2021. The application is marked as P5(a).

According to the applicable circular governing the admission of children to Rahula College, Matara for the year 2021, a total of 180 students had to be admitted at the interviews conducted in accordance with the relevant circulars.

In terms of Clause 6.0 of Circular marked P3(a) and the Guidelines marked P4, 25% of the intake is reserved for the children of Old Boys. Accordingly, for the year 2021, a total of 45 students should have been admitted under the Old Boys Category.

Admittedly, the 2nd Petitioner obtained 50 marks at the interview while the cut off mark for the Old Boys Category was 55.5.

The learned State Counsel admits that in the event the 2nd Petitioner is found by this Court to be entitled to 5.5 marks more than what he received, he is entitled to be admitted to Grade 1 of Rahula College, Matara for the year 2021.

One of the main contentions of the learned Counsel appearing for the Petitioners is that they did not get marks for the documents marked P11, P12 and P13.

The learned State Counsel admitted this position but submitted that marks were not allocated as these 3 documents bear the signature of the Deputy Principal of Sri Rahula College. The learned State Counsel drew the attention of Court to item No. 7 in the log entry marked X5 where it is stated that in order to be considered under the Old Boys Category, the leaving certificate signed by the Principal of Sri Rahula College must be

submitted. Furthermore, it is stated there that if the document signed by the Principal cannot be produced, the document certified by the person having custody will be acceptable. It is also observed that item No. 4 therein states that certificates submitted for consideration under Old Boys Category must be signed by the Principal, Rahula College, Matara. P11, P12 and P13 do not bear the signature of the Principal, Rahula College, Matara.

In this regard, Court observes that the leaving certificate marked P7 has been issued by the Deputy Principal, Rahula College, Matara. However, the Interview Board has considered this document and given 14 marks for the 2nd Petitioner after having considered the period his father was a student at Rahula College, Matara.

Having done so, the Interview Panel failed to give the necessary marks for the document P11, P12 and P13 which have been signed by the Deputy Principal, Rahula College, Matara. The Interview Panel and the school authorities cannot approbate and reprobate.

Scrutton, L.J. in *Verschures Creameries Limited vs. Hull & Netherland Steamship Co. Ltd.* [(1921) 2 KB 608 at 612] held:

> *"A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction."*

Samarakoon C.J. in *Visuvalingam and Others v. Liyanage and Others* [(1983) 1 Sri L.R. 203 at 227] adopted the principle with a different formulation by stating that one *"cannot blow hot and cold."*

In *Ranasinghe v. Premadharma and others* [(1985) 1 Sri.L.R. 63 at 70] Sharvananda C. J. held:

> *"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. When the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one, he cannot afterwards assert the other; he cannot affirm and disaffirm."*

We are of the view that having accepted P7 and given marks for that document, the Interview Panel should have also given marks for P11, P12 and P13.

Furthermore, it is observed that before the Appeals Board, the Petitioners produced documents marked P29a, P29b and P29c signed by the Principal Sri Rahula College Matara which essentially contained the same contents as P11, P12 and P13. They were not considered on the basis that they are new documents. In our view, Clause 10.3 of P4 is wide enough to empower the Appeals Board to consider these 3 documents as they contained the same contents of the 3 documents submitted to the Interview Panel albeit signed by the Principal, Rahula College, Matara.

In the aforesaid circumstances, we are of the view that the 1st to 8th Respondents have acted arbitrarily in refusing to give marks for the 3 documents marked P11, P12 and P13.

The learned State Counsel acting in accordance with the best traditions of the Attorney General's Department conceded that the log entries referred to above and the acts of the 1st to 8th Respondents in refusing to give marks to documents P11, P12 and P13 after giving marks to P7 is arbitrary.

Upon our finding that P11, P12 and P13 are documents that the Interview Panel and the Appeals Board should have taken cognizance of and given marks, the 2nd Petitioner will be entitled to 6.5 marks in addition to 50 marks already obtained by him.

Accordingly, 2nd Petitioner becomes entitled to receive 56.5 marks and thus becomes entitled to be admitted to Grade 1 of Rahula College, Matara for the year 2021.

For the forgoing reasons, we hold that the 1st to 8th Respondents have violated the fundamental rights guaranteed to the Petitioners in terms of Article 12(1) of the Constitution by arbitrarily refusing to admit the 2nd Petitioner to Grade 1 at Rahula College, Matara for the year 2021. We declare this refusal to be null and void.

We make order directing the 1A Respondent to admit the 2nd Petitioner to Grade 2 for the year 2022 at Rahula College, Matara.

Court makes further order awarding the Petitioners compensation in a sum of Rs. 25,000/- to be paid by the 1st to 8th Respondents within 3 months of today.

Application allowed.

Registrar is directed to forthwith communicate this judgment to the 1A Respondent with copy to the Hon. Attorney General.

JUDGE OF THE SUPREME COURT

S. THURAIRAJA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

KUMUDINI 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 under and in terms of Articles 17 and 126 of the Constitution

Liyanagamage Anoma Santhi,

Welikanda,

Ahungalla.

Petitioner

SC /FR/ Application No.135/2017

Vs,

1. W.A. Mahinda,
   Headquarters' Inspector,

2. Sandaruwan,
   Police Constable 69864,

3. Bandara Karunathilake,
   Sub-Inspector,

   1st to 3rd Respondents, all of Ambalangoda Police Station,
   Ambalangoda.

4. Pujith Jayasundara,
   Inspector General of Police,
   Police Headquarters, Colombo 01.

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

Respondents

Before: **Justice Vijith K. Malalgoda, PC**
Justice S. Thurairaja, PC
Justice Mahinda Samayawardhena

Counsel: Sanjeewa Ranaweera with Malaka Palliyaguruge Instructed by Dinesh de Silva for the Petitioner.
Vishva M. Gunaratne with Darshika Perera for 1st to 3rd Respondents
Ms. Chathurangi Mahawaduge SC for Hon. Attorney General.

Written Submissions on: On behalf of the 5th Respondent 08.01.2021
On behalf of the 1st to 3rd Respondents 25.06.2021
On behalf of the Petitioner 07.06.2022

Argued on : 17.06.2022

Judgment on : 29.09.2022

Vijith K. Malalgoda PC J

The Petitioner made an application in terms of Article 126 of the Constitution for the alleged violation of her Fundamental Rights guaranteed under Articles 12 (1) and 13 (1) of the Constitution as a consequence of an illegal arrest of her by several officers attached to Ambalangoda Police Station including the 2nd Respondent. This court, having considered material placed before it, granted leave to proceed for the alleged violations under Articles 12 (1) and 13 (1) on 07.07.2017. Some of the Respondents namely, the 1st to 3rd Respondents who were originally represented by the Hon. Attorney General, had later retained Private Counsel and were represented by the said counsel during the arguments before us.

As revealed before us, the Petitioner was a 58 years old widowed woman with 05 grown up children at the time she filed the instant application. In her Petition filed before this Court, the Petitioner admits having a past record of several convictions for possession and sale of illicit liquor and drugs but had taken up the position that she had a reformed life in the recent past.

It was her position that she left her residence in Welikanda Ahungalla where she stayed with her daughter, somewhere in May 2016 and had visited her eldest daughter namely, Induwadura Anusha de Sliva who lived in Mabulgoda Pannipitiya and stayed with her for some time.

When she was with her eldest daughter, she learnt that somewhere around 24th June 2016, the 2nd Respondent and five other police officers attached to Ambalangoda Police Station had broken into the house of the Petitioner's daughter at Welikanda- Ahungalla in the absence of her daughter at home. However, her sister Liyanagamage Ashoka Shanthi and her daughter in law Peyahadi Devika de Silva who occupied the house adjacent to the house of the Petitioner's daughter had witnessed the incident.

Since the Petitioner was not in the village and was living with her eldest daughter in Pannipitiya area, she lodged a complaint at the Police Headquarters with regard to the incident that took place on 24th June at her younger daughter's place in Ahungalla. The Petitioner underwent a cataract surgery at Hemas Hospital Wattala on 25.09.2016. On 24th, the Petitioner's younger daughter who lived in Ahungalla had received a police message through Ahungalla Police informing her mother, i.e., the Petitioner before this court, to be present at the office of the Senior Superintendent of Police Elpitiya on 26.09.2016 for an inquiry with regard to the written complaint the Petitioner had lodged with the Inspector General of Police. The Petitioner, who returned to the village immediately after the eye surgery, had visited the office of the Senior Superintendent at Elpitiya with her son on the 26th at 10.00 a.m.

As revealed before this court, the Petitioner and her son had waited several hours at the Senior Superintendent's office waiting for the Senior Superintendent, but since they were informed by the other officers that the Senior Superintendent will not be available, they came out of the office premises in order to go home. At that time the Petitioner was stopped outside the Senior Superintendent's Office by a team of police officers including the 2nd Respondent and was dragged into a jeep that was parked nearby. According to the affidavit filed by the son of the Petitioner namely, Induwadura Inosh de Silva, when his mother was dragged inside the Jeep, he had rushed to the police office and informed them as to what happened to his mother, but the officers at the Senior Superintendent's office were silent and had refused to record a statement from him.

The Petitioner who was arrested on the 26th near the Police office at Elpitiya was produced before the Magistrate of Balapitiya on the same day and remanded to the Fiscal Custody in a case that was pending before the said court on a 'B' Report filed by Ambalangoda Police Station. The said report referred, to a raid conducted by the officers attached to Ambalangoda Police Station on 23.06.2016 at the Petitioner's residence, where the police had recovered 710 milligrams of heroin but could not arrest the suspect since the Petitioner had fled the scene of crime leaving 6 Packets of suspected brown powder. After producing the Petitioner before Magistrate's Court, the 3rd Respondent submitted evidence before Court by way of an affidavit and moved the Productions to be sent to the Government Analyst. The Petitioner continued to be in remand custody until the receipt of the Government Analyst's Report. On 06.03.2017 PS 28850 who appeared for the prosecution had informed court that the police will not proceed with the case since the Government Analyst had not found any dangerous drugs in the brown powder and the learned Magistrate had accordingly discharged the suspect on the same day.

Whilst submitting that the Respondents have fabricated a false case against her and subsequently arrested her illegally when she came to appear before the Senior Superintendent Elpitiya to attend an inquiry, the Petitioner had submitted that the said conduct of the 1st to the 3rd Respondents were in violation of the Petitioner's Fundamental Rights guaranteed under Article 12 (1) and 13 (1) of the Constitution.

In response to the position taken up by the Petitioner, the 1st to the 3rd Respondents have submitted that,

a) The Petitioner is a well-known drug dealer in the area and her antecedents reveal 07 convictions for drug related offences.
b) On credible information received through the Assistant Superintendent of Police of the area, the 1st Respondent along with 2nd and 3rd Respondents conducted a raid and apprehended one Asanka de Silva at Sri Gunananda Mawatha Mohottiwatta Balapitiya for possession of a substance suspected as heroin.
c) Upon being questioned, the suspect revealed that he purchased the said quantity of 'drugs' from one 'Anoma Shanthi' alias 'Kudu Nona', who lived close by, and the police party visited the house of the Petitioner.
d) Upon seeing the arrival of the Police party, the Petitioner who was standing near the gate of her house had fled the area. At that time the Petitioner dropped six packets as the Petitioner stripped off some of her garments. Since the police party did not consist of a female officer to apprehend the Petitioner, they gave up the idea of chasing her but, the substance which was dropped by her was subsequently taken into custody by the police party.

e) The facts pertaining to the said raid was reported to court under B/91496/2016 before the Magistrate's Court of Balapitiya on 24.06.2016 and time was obtained to produce the suspect.

f) The Petitioner was subsequently arrested on 26.09.2016 while she was travelling in a three-wheeler at Aruwala Bridge and produced before the Hon. Magistrate on the same day and remanded for fiscal custody.

g) The Respondents were unaware of a complaint made by the Petitioner to the Police Headquarters and/or with regard to an inquiry by the Senior Superintendent of Police Elpitiya scheduled for the 26.09.2016.

h) On the strength of the Government Analyst's Report, and the application made by the police, Hon. Magistrate Balapitiya discharged the suspect from the proceedings.

Whilst submitting the above in the affidavit filed before this court, the Respondents have annexed a copy of the relevant case record marked R-1. The said record contained the very first 'B' Report filed before the Magistrate's Court on 24.06.2016, immediately after the raid at the house of the Petitioner and the subsequent proceedings before the Magistrate's Court of Balapitiya.

In the 'B' Report, signed by the 1st Respondent, it was reported to court that, a police party led by the 3rd Respondent along with three other officers including the 2nd Respondent, whilst on patrol duty, had acted on information received by a private informant with regard to the sale of illegal drugs and raided the house of one Liyanagamage Anoma Shanthi alias "කඩ නොනා" at Sumangala Mawatha Welikanda.

After seeing the police party, the suspect who was standing near the gate of her house had fled the area dropping six packets which were in her custody at that time.

The six packets which contained 710 milligrams of suspected brown powder, were produced at the Police Station on the same day.

When the Petitioner was arrested by the officers of Ambalangoda Police Station on 26.09.2016, a further report was filed before the Magistrate's Court on the same day and moved to remand her to the fiscal custody under the provisions of the Poisons Opium and Dangerous Drugs Ordinance. Whilst making an order to remand the Petitioner for fiscal custody, the learned Magistrate had made the following observation in the journal entry.

> "බන්ධනාගාර ගත කරමි. බන්ධනාගාරය මඟින් ඇසේ ශල්‍යකර්මයකට අදාලව ප්‍රතිකාර අවශ්‍යනම් ලබා දීමට අවධානයට යොමු කරමි. "

From the material that was placed before this Court by both parties, it is clear that the Petitioner who had undergone an eye surgery on the 25.09.2016 at a private Hospital in Wattala, had appeared at the Senior Superintendent's Office at Elpitiya on the following day to attend an inquiry with regard to a complaint she made at the Police Headquarters. The Inspector General of Police, the 4th Respondent before this Court had failed to explain whether he called for any information from the Senior Superintendent of Police Elpitiya as to why the Senior Superintendent of Police was not present for the inquiry, when he summoned the complainant for an inquiry before him on the 26th morning. According to the further report filed on the 26th after the arrest of the Petitioner, the 1st Respondent had not explained as to how and on what information the police managed to arrest the Petitioner after several months from the raid they carried out in Ahungalla.

According to their own reports filed before the Magistrate's Court, the Petitioner had fled the area when the police party raided her house and the police could not arrest her for nearly 03 months since then. If the Petitioner was absconding during this period, that has to be specifically stated in

the report that was filed on the 26th September, but there is no such reference in the report filed before the Magistrate's Court.

According to the affidavit filed by Induwadura Inosh de Silva, the son of the Petitioner who was with the Petitioner at the time of her arrest, he immediately rushed to the SSP's Office and informed the Officers at the Office of the illegal arrest of his elderly mother, but the officers at the SSP's office, neither took any interest to listen to him nor recorded his complaint at that time.

With regard to the raid said to have been conducted by the 2nd and the 3rd Respondents with several other officers on the 23.06.2016, the 1st Respondent had filed a 'B' Report before the Magistrate's Court of Balapitiya on the following day, but the Respondents have taken two contradictory positions, when the said report is compared with the affidavit filed by the 2nd Respondent before the Supreme Court on behalf of all the Respondents.

As already referred to in this judgment, prior to the raid at the house of the Petitioner, the police party led by the 3rd Respondent arrested one Asanka de Silva on credible information received through the ASP, which led to the raid carried out at the house of the Petitioner. However, the 'B' Report does not refer to the credible information received through the ASP, which led to the arrest of Asanka de Silva but it only refers to receiving credible information from a private informant whilst the police party was on patrol duty. There is no reference to the arrest of one Asanka de Silva in the 'B' Report. When considering the above, it appears that the facts placed before the Magistrate's Court by the 1st Respondent on 24.06.2016 are incorrect.

With regard to the raid carried out at the house of the Petitioner, the Respondents have submitted that they did not chase behind the Petitioner in the absence of a lady officer in the raiding party. If the police decided to act on the information received by the private informant, they should have first

obtained the assistance of a lady officer, since the raid has to be carried out on a female suspect at her residence.

The above position taken by the Respondents before this court is also contradictory with the narration given by the Petitioner before this court. As submitted by the Petitioner, she decided to lodge a complaint at the Police Headquarters when she heard of some police officers including 2nd Respondent forcibly entering her daughter's house whilst the residents were away. The Petitioner who wanted an impartial investigation with regard to the said incident had decided to come back to Balapitiya and visited the Senior Superintendent's office at Elpitiya, even after undergoing an eye surgery on the previous day.

This position was corroborated by two witnesses namely Liyanagamage Ashoka and Peyahandi Devika de Silva the sister and niece of the Petitioner who lived in close vicinity, by submitting affidavits before this court. The said witnesses were silent on any subsequent visit by the police officers looking for the Petitioner until an officer from the Ahungalla Police Station visited the house of the Petitioner's daughter on 24th September and left a police message informing the Petitioner to be present for an inquiry at the police office Elpitiya. The Respondents were also silent as to the subsequent investigation carried out by Ambalangoda Police Station to apprehend the Petitioner who escaped when the police party raided her house on the 23.06.2016. However, it is unusual for the officers, attached to Ambalangoda police station to have visited Elpitiya area, assisted by a lady officer, and to have spotted the Petitioner who was travelling in a three-wheeler, when the Petitioner left the police office Elpitiya since the Senior Superintendent of Police did not turn up for the inquiry.

According to the Petitioner and her son who had tendered an affidavit before this court, the Petitioner was dragged into a police jeep that was parked near the police office. Except for the copies of the case record, the Respondents have not produced the arrest notes for the perusal of this court.

Similarly, the Respondents has failed to produce the notes with regard to the raid carried out by several officers from Ambalangoda Police Station on 23.09.2016 at Ahungalle. The two versions given by the Petitioner and the Respondents contradict each other. According to the Petitioner she was not in her village on the day the so-called raid was carried out by the Respondents. In addition to the above, the Respondents had given two versions as to how they decided to carry out the raid at the Petitioner's house.

In this regard it is also important to observe the role played by officers attached to Ambalangoda Police station by conducting a raid at the house of the Petitioner, (as submitted by the Respondent) which is situated outside the police area of Ambalangoda. It is admitted that the Petitioner as well as her daughter lived in the police area of Ahungalle Police Station. The Respondents were once again silent whether they received specific instructions and/or orders to carry out the raid outside their police area.

With regard to the failure by the Respondents to place relevant information before Court when their conduct was in question, this court is mindful of the following observation made by Anil Gooneratne (J) in the case of ***Kelum Dharsana Kumarasinghe V. S. Hettiarachchi SC FR 108/2010 Supreme Court Law Reports 2015 387 at 395***.

> "When the Law enforcement Authorities concerned take steps to deprive persons of their personal liability by arrest and detention, the Apex Court need to be informed of all details of such arrest and detention, if such arrest is challenged in court. In the absence of such details and cogent reasons to arrest the detainees would naturally fortify the case of the detainees, who have placed material of illegal arrest by the state machinery which sees to have been abused at that point of time. The liberty of an individual or a group of persons, as per Article 13 (1) is a matter of great constitutional importance. This liberty should not be

interfered with, whatever the status of that person or persons arbitrarily or without legal justification."

The fact that the Petitioner lodged a complaint at the Police Headquarters is not denied by the Respondents before this court. The Petitioner has produced marked P-1 the message said to have been received from the Ahungalla Police Station with regard to the inquiry. The outcome of the said inquiry is very much relevant to the instant case, since it will confirm whether the Petitioner was present in Ahungalla on 23.06.2016 as claimed by the Respondents or she was away from the village as complained by the Petitioner. In this regard it is important to note that it is the Petitioner who went to the police Headquarters and lodged the complaint with regard to the conduct of a police party including the 2nd Respondent on the 23.06.2016 and had returned to the village immediately after undergoing an eye surgery in order to attend the inquiry with regard to her complaint.

The 4th Respondent, the Inspector General of Police, to whom the complaint was made by the Petitioner, had neither informed the outcome of the inquiry with regard to the complaint made by the Petitioner nor had shown any interest to take part in the proceedings of the instant application before this court.

Having placed the above material, which was revealed during the arguments before the Supreme Court I will now consider whether the 1st to 3rd or any one of the said Respondent have violated the Fundamental Rights of the Petitioner guaranteed under Article 12 (1) of the Constitution.

Article 12 (1) refers to equality before law, as follows;

"All persons are equal before the Law and are entitled to the equal protection of the law"

The arrest of the Petitioner had taken place near the Police Office Elpitiya when she came to attend an inquiry before the Senior Superintendent of Police. She was dragged into a police jeep when she

protested against the arrest. It is very much clear from the above material that reasons for her arrest were not explained to her. The Petitioner was unaware of a 'B' Report that had been filed before the Magistrate's Court of Balapitiya under the provisions of the Poisons Opium and Dangerous Drugs Ordinance, making her an accused with regard to a raid carried out by the officers of Ambalangoda Police Station. Otherwise, she would not have made a complaint at the Police Headquarters and come to Elpitiya to attend the inquiry immediately after undergoing an eye surgery. The material that was placed before the Magistrate's Court in the 'B' Report is contradictory to the material placed before this court by the Respondents and the arrest notes that are material to the case before the Supreme Court had not been produced before Court. The fourth Respondent, the Inspector General of Police had not informed this Court of the progress with regard to the complaint made by the Petitioner at the Police Headquarters.

When above facts are considered, it is clear that the Petitioner has not received equal protection of law. It is the 1st Respondent who had signed the 'B' Report with regard to the so-called raid that had been carried out by several officers including the 2nd Respondent, led by the 3rd Respondent. The notes made with regard to the said raid are not before us but the Petitioner had lodged a complaint at the Police Headquarters with regard to an incident that had taken place at her daughter's place when the residents were away. The Respondents have neither explained the reason nor had submitted authority they received to carry out a raid outside the police area of Ambalangoda Police Station. In such a situation it can also be concluded that the Respondents have fabricated charges against the Petitioner. This fact is further established from the fact that Petitioner had finally been discharged from the proceedings before the Magistrate's Court after being in remand custody for nearly six months when the Government Analyst could not identify "dangerous drugs" in the samples submitted to him.

When all these matters are considered, I have no hesitation to conclude that the 1st to the 3rd Respondents are responsible for the above conduct, and therefore had violated the Fundamental Rights of the Petitioner guaranteed by Article 12 (1) of the Constitution. I will now consider whether the said Respondents have violated the Fundamental rights of the Petitioner guaranteed by Article 13 (1) of the Constitution, which reads as follows;

"No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."

From the material that had already been discussed in this judgment, it is clear that the Petitioner was arrested by a police party including the 2nd and the 3rd Respondents outside the Police Office Elpitiya. However, it was the position of the Respondents that the Petitioner was arrested at Aruwala Bridge while she was travelling in a three-wheeler, but arrest notes made by the arresting officer is not before us for our perusal. Even if the said position is considered as correct, the Respondents had failed to submit before this court, the information they received in order to apprehend the suspect, who was required by them with regard to a case already filed in the Magistrate's Court of Balapitiya. This arrest had taken place three months after the raid. According to the Petitioner as well as her son, the police officers had dragged her into a jeep which was parked closer to the Police Office, when they came out from the Police Office. The above position taken by the Petitioner is not challenged by the Respondents by submitting arrest notes before us. Subsequent to her arrest a further report was filed before the Magistrate's Court signed by the 1st Respondent.

Even though the Petitioner was a 'wanted suspect' at the time of her arrest, the law requires the arresting officer to explain the reason for the arrest. There is no material before this court to conclude that the reasons for the arrest had been explained to the Petitioner. As already referred to in this judgment, the Petitioner is unaware of any detection that had taken place on the 23.06.2016

involving the Petitioner, and as she was suspicious of the conduct of the Respondents, she had lodged a complaint at the Police Headquarters. The Respondents have never taken up the position that they could not arrest the Petitioner until 26th September, since she was evading her arrest or had absconded to avoid her being arrested. In the said circumstances, it is clear that the Petitioner was not explained of the reasons for her arrest at the time of her arrest by a police party including the 2nd and the 3rd Respondents and the said Respondents have violated the Fundamental Rights of the Petitioner guaranteed under Article 13 (1) of the Constitution.

For the reasons set out hereinbefore I hold that, the 1st, 2nd and 3rd Respondents have violated the Fundamental Rights of the Petitioner guaranteed under Article 12 (1) of the Constitution and the 2nd and 3rd Respondents have also violated the Fundamental Rights guaranteed under Article 13 (1) of the Constitution.

I therefore direct the 1st Respondent to pay Rs. 100000/- to the Petitioner from his personal funds. I further direct the 2nd and 3rd Respondents to pay Rs. 200000/- by each Respondent to the Petitioner from their personal funds.

The State is directed to pay Rs. 50000/- as the cost for the litigation.

Application allowed.

Judge of the Supreme Court

Justice S. Thurairaja, PC

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 under Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No. 139/12

1. Mahapitiya Gedera Shanuka Gihan Karunaratne (Minor)
   Shantha Stores,
   Nagahapola,
   Akuramboda.

   Appearing through his Next Friend:
   Mahapitiya Gedera Ananda Karunaratne (Father)
   Shantha Stores,
   Nagahapola,
   Akuramboda.

2. Purijjala Puwakpitiyegedara Amila Dilshan Puwakpitiya (Minor),
   Thalwatte Road,
   Nillannoruwa,
   Madupola.

   Appearing through his Next Friend:
   Purijjala Puwakpitiyegedera Neeladasa

Puwakpitiya (Father),
Thalwatte Road,
Nillannoruwa,
Madupola.

PETITIONERS

-VS-

1. Lory Koswatte
   Deputy Principal,
   M/Weera Keppetipola Madya Maha Vidyalaya,
   Pallepola,
   Akuramboda.

2. H.M. Gunasekera
   Secretary,
   Ministry of Education,
   Isurupaya,
   Battaramulla.

3. Chief Inspector of Police Abeysinghe
   Officer-in-Charge,
   Mahawela Police Station,
   Mahawela.

4. N.K. Illangakoon
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.

5. Hon. Attorney General
Attorney Generals' Department,
Colombo 12.

RESPONDENTS

BEFORE: Buwaneka Aluwihare, PC, J.
A.H.M.D. Nawaz J.
A.L.S. Gooneratne J.

COUNSEL: Shantha Jayawardema with Hirannya Damunupola for Petitioners.
W. Dayaratne PC with Ms. R. Jayawardena for 1st Respondent.
Madhawa Tennakoon DSG for 3rd to 5th Respondents.

ARGUED ON: 26. 07. 2021

WRITTEN SUBMISSIONS; 02.08.2021

DECIDED ON: 13.10.2022

Judgement

Aluwihare PC. J.,

(1) The 1st Petitioner, Mahapitiya Gedera Shanuka Gihan Karunaratne and the 2nd Petitioner, Purijjala Puwakpitiyegedara Amila Dilshan Puwakpitiya, being minors, invoked the fundamental rights jurisdiction

of this Court through their next friends, Mahapitiya Gedera Ananda Karunaratne and Purijjala Puwakpitiyegedara Neeladasa Puwakpitiya respectively. The Petitioners by way of this application challenge, *inter alia*, the torture and/or cruel, inhuman and degrading punishment or treatment meted out to them by the 1st Respondent by severely caning them and causing injuries in violation of the Circulars of the Ministry of Education and thereby violating their fundamental rights guaranteed under Article 11 and further violating their fundamental rights guaranteed under Article 12 (1) of the Constitution for having meted out corporal punishment on them.

(2) This Court granted leave to proceed against the 1st Respondent for the alleged violation of the Petitioners' fundamental rights guaranteed under Articles 11 and 12 (1) of the Constitution. Leave to proceed was also granted against the 3rd Respondent for the alleged violation of the Petitioners' fundamental rights guaranteed under Article 12 (1) of the Constitution.

(3) The Petitioners had complained of inaction, on the part of the 3rd Respondent [the Officer -in-Charge of Mahawela Police station] as he had failed to take any action against the 1st Respondent for alleged assault. During the hearing of this Application, however, it was brought to the attention of the Court that the 3rd Respondent, had in fact taken steps to file action against the 1st Respondent in the magistrate's court of Naula, based on the complaint made against him by the Petitioners and as such, it was intimated on behalf of the Petitioners that they do not wish to pursue the reliefs sought against the 3rd Respondent. Therefore, this court is left to decide, as to whether the 1st Respondent had committed the alleged violation.

<u>The Facts</u>

(4) The 1st and 2nd Petitioners were students of Veera Keppetipola Madya Maha Vidyalaya, Pallepola, Akuramboda at the time of the incident.

(5) According to the Petitioners, on the day in question [24th October 2011], during school hours, the Petitioners together with some classmates were chatting under the mango tree, in close proximity to the school dining hall. Some others who were unknown to the Petitioners had pelted stones at a mango tree. Some stones had strayed and damaged a few glass panes of a building which housed the said dining hall.

(6) The 1st Respondent was the Deputy Principal of the school, who was acting for the principal who was on leave on that day. The 1st Respondent states that on being informed by the acting Matron of the girls' hostel that she had heard the shattering of the glass panes of the dining hall, the 1st Respondent had gone to inspect the said hall and found around fifteen students bustling inside and outside the hall. The 1st Respondent states that he apprehended three students and upon questioning them, came to the conclusion that the 1st and 2nd Petitioners were the main instigators. Thereafter the 1st Respondent had wanted the Petitioners to meet him at his office.

(7) The 1st Petitioner states that his colleagues and he, ran away on seeing the 1st Respondent near the said dining hall and went to their respective classrooms. While the 1st Petitioner was in the science laboratory, a classmate named Premaratne informed the 1st Petitioner that the 1st Respondent had wanted all of them to meet him. Thereafter the 1st Petitioner, Premaratne and two other classmates who had been with them under the mango tree, namely Edward and Wasantha, proceeded to the school office.

(8) When the 1st Petitioner arrived at the office, he had seen the 2nd Petitioner and another student, kneeling near the office door. According to the 1st petitioner, the 2nd Petitioner was crying and appeared to be in severe pain.

(9) The 1st Petitioner has averred that the 1st Respondent came out from the office and asked him; "who is Karunaratne?". When the 1st Petitioner stated that it was he, the 1st Respondent had administered four cuts with

a cane on his buttocks and then caned the other students who had accompanied him to the school office.

(10) The 1st Petitioner claims that he was thereafter taken to the corridor outside the office and was asked whether he broke the window. When he intimated that he was not responsible for the incident and that he was unaware as to who was responsible for the damage caused to the windows, the 1st Respondent had again caned the 1st Petitioner on his buttocks. Due to the force of the assault, the 1st Petitioner states that he fell to the ground, and begged the 1st Respondent not to hit him. Disregarding his pleas the1st Respondent had continued to cane him on the back of his chest and shoulders. The 1st Petitioner further claims that the 1st Respondent continued to cane him, till the cane broke.

(11) The 1st Petitioner's version as to the assault, is supported by the Affidavits of two other students who had accompanied the 1st Petitioner to the school office, namely Manoj Priyankara Premaratne ('P1') and Wasantha Jayalath Wickramasinghe ('P2').

The version of the 2nd Petitioner

(12) Following the incident [of pelting stones], the 2nd Petitioner had returned to his classroom and had observed the 1st Respondent leading away some students. The 2nd Petitioner states that, a little while later, the 1st Respondent had come to his classroom with a student named Wijeweera and had inquired as to who Puwakpitiya was. The 2nd Petitioner had stood up and the 1st Respondent then had asked him to collect his bag and to come to his office.

(13) The 2nd Petitioner relates that at the office, the 1st Respondent had gone through his bag and had asked him whether he broke the window. When the 2nd Petitioner answered in the negative, the 1st Respondent had rudely remarked in response; 'Do you think this is your mother's and father's inheritance'.

(14) The 2nd Petitioner claims that the 1st Respondent then had dealt him several blows on the back of his chest and the shoulders with a cane and that some strokes had also alighted on his arms causing him immense

pain. After the beating, the 2nd Petitioner had been forced to kneel on the ground near the office door and the unbearable pain made him cry.

(15) Following the assault on him, the 2nd Petitioner alleges that the 1st Respondent proceeded to hit another student named Kumara and demanded from him, the names of the other students who were near the dining hall. Kumara had then given the names of the 1st Petitioner and of the students, Edward and Wasantha.

(16) The 2nd Petitioner claims that the 1st Respondent hit the 1st Petitioner, Edward and Wasantha when they arrived at the office. He further states that he saw the 1st Respondent taking the 1st Petitioner to the corridor and that he heard the 1st Petitioner pleading with him not to hit him.

(17) The 1st Respondent thereafter had approached the 2nd Petitioner to cane him as well, but was interrupted by the ringing of the telephone. The Petitioners state that when the 1st Respondent returned after answering the phone, he had written down the names of the Petitioners and the other students who were present and had retorted, "this is the last day, if you have money, do whatever you can and show me, go to Court or the Police or any place you want", and ordered that they get back to their respective classrooms.

(18) The Petitioners state that the assault occurred in the presence of other members of staff and students which caused them a great deal of humiliation.

The version of the 1st Respondent

(19) The 1st Respondent had admitted the fact that he caned the Petitioners. [Paragraph 10 of the statement of objections]. The relevant portion of the said paragraph is as follows; "*The 1st Respondent… states that he warned the students for damaging the said windows and* ***when he wanted to cane them on their palms all of them refused to raise their palms and therefore the 1st Respondent caned them on their buttocks*** *and sent them to their respective classes.*" The 1st Respondent has further reaffirmed this in paragraph 11 of his Affidavit.

(20) The Petitioners state that, as a result of the caning, they were in immense pain and informed their parents about the assault using the telephone facility available at a cooperative store. Their parents had arrived at the school premises and having informed the respective class teachers about the thrashing, had taken the Petitioners out of the school at around 11.30 am. The parents, thereafter, had lodged complaints at the Mahawela Police station regarding the incident.

(21) 1st Respondent too had made a complaint at the Mahawela Police station alleging that a group of Grade 11 students had pelted stones at the roof and at the windows of the dining hall of the girls' hostel and had caused damage to the school buildings. In the statement the made to the police [3R4], the 1st Respondent has stated that he admonished the students who were allegedly involved in the incident.

(22) The Petitioners had been admitted to the District Hospital, Matale on 24th October 2011 for treatment of the injuries sustained and had been treated as 'in-house patients' till 26th October 2011. The Petitioners had been subjected to a medical examination which revealed that the 1st Petitioner had sustained two contusions over the posterior chest wall and contusions over the lateral aspect of both thighs (P3) while the 2nd Petitioner was found to have sustained multiple contusions and abrasions over the posterior chest wall and abrasions over the right posterior-lateral aspect of the upper arm. (P4). The 1st Petitioner was also treated for anxiety and adjustment disorder (P3a).

(23) The Petitioners had been examined by the Judicial Medical Officer as well on 26th October 2011. As per the medico-legal reports (P5 and P6) the injuries sustained by both Petitioners were recorded as consistent with the Petitioners being assaulted with a linear rigid weapon with a circular shaped cross section similar to a cane. The judicial medical officer has also made an observation that the appearance of the injuries is consistent with the history given by the injured. The extent of the physical harm caused to the bodies [the injuries] of the Petitioners is

amply demonstrated by the photographs marked and produced as P8 (a) and P8(b).

(24) Subsequent to the filing of this application the Petitioners and five other students of the school had been prosecuted by the Police before the Naula Magistrate's Court for having caused mischief. All seven students had pleaded guilty to the charge and the learned Magistrate, without proceeding to convict them had warned and discharged them and had ordered each of them to pay Rs. 1000/-as state costs.

(25) The 1st Respondent contends that the punishments which were of 'disciplinary' nature were vindicated by the fact that the petitioners accepted liability. The 1st Respondent further contends that he had had no intention of subjecting the Petitioners to cruel and inhuman treatment or punishment and acted in good faith with the objective of maintaining discipline in the school and with the intention of discouraging such behaviour among the students, in the future. Furthermore, the 1st Respondent strongly denies that he caned the Petitioners in the manner alleged by them and refutes the allegation that the injuries of the Petitioners were as a result of his caning.

Violation of Article 12 (1)

(26) It was contended on behalf of the Petitioners that, as per Circular No. 2005/17 dated 11th May 2005 issued by the Secretary to the Ministry of Education, that there is a total prohibition on the infliction of corporal punishments on students in government schools as a disciplinary measure. It is the Petitioners' position that the 1st Respondent by his blatant violation of the said Circular, has violated their fundamental rights under Article 12 (1) of the Constitution.

(27) The decision to issue the circular banning corporal punishment from our schools as a form of discipline, undoubtedly would have been taken after careful study by the relevant authorities of its adverse impacts on a child based on medical studies.

(28) In addition, international instruments relating to the rights of children to which Sri Lanka became a signatory or a party also may have influenced the decision to ban corporal punishment in schools as Sri Lanka is bound to discharge its obligation to the international community.

(29) Research had shown that corporal punishment is less effective than other methods of behaviour management in schools, and "praise, discussions regarding values, and positive role models do more to develop character, respect, and values than does corporal punishment". They say that evidence links corporal punishment of students to a number of adverse outcomes, including: "increased aggressive and destructive behaviour, increased disruptive classroom behaviour, vandalism, poor school achievement, poor attention span, increased drop-out rate, school avoidance and school phobia, low self-esteem, anxiety, somatic complaints, depression, suicide and retaliation against teachers". What is recommended are a number of alternatives to corporal punishment, including various nonviolent behaviour-management strategies, modifications to the school environment, and increased support for teachers.

(30) Steven R. Poole in a joint Article *"The Role of the Paediatrician in Abolishing Corporal Punishment in Schools"* [1st July 1991 PEDEATRICS] says;

> "A number of medical, pediatric or psychological societies have issued statements opposing all forms of corporal punishment in schools, citing such outcomes as poorer academic achievements, increases in antisocial behaviour, injuries to students, and an unwelcoming learning environment."
>
> The United Nations Committee on the Rights of the Child has defined corporal punishment as; "*any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light.*"

(31) Sri Lanka became a signatory to The United Nations Convention on the Rights of the Child, [herein after the UNCRC] on 26th January 1990 and ratified it on it 12th July 1991, thus furthering its commitment towards protecting and upholding the rights of the child. With respect to discipline, Article 28 of the UNCRC has laid down fundamental standards to be followed in formulating school disciplinary policies. The said Article requires all States Parties to 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.*"

(32) This Article must be read in conjunction with Article 19 of the UNCRC which states that state parties should 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.*"

(33) The infliction of corporal punishment has been condemned by numerous international instruments, in particular the UNCRC, as being violative of the rights of the child to human dignity and physical integrity. In 2006 the United Nations Committee on the Rights of the Child, the international body charged with monitoring compliance with the UNCRC, issued General Comment 8, discussing the right of the child to protection from corporal punishment. The Committee drew the conclusion that Article 19 of the UNCRC; "*does not leave room for any level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them.*"

(34) With reference to Article 28 of the UNCRC, the Committee also noted that corporal punishment "*directly conflicts with the equal and*

inalienable rights of children to respect for their human dignity and physical integrity."

(35) The negative perception of corporal punishment has been recognised by many other international instruments and conventions. For instance, the Committee on Economic, Social and Cultural Rights, the body charged with overseeing the International Covenant on Economic, Social and Cultural Rights (ICESCR), states in General Comment 13 (on the right to education) as follows;

"*In the Committee's view,* ***corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration and both Covenants:*** *the dignity of the individual.*" (UN Committee on Economic, Social and Cultural Rights, General Comment 13, Article 13, The Right to Education, UN Doc. E/C.12/1999/10 (1999), para. 41.[Emphasis is mine]

(36) The Ministry of Education in its endeavour to discourage the practice of corporal punishment in National schools, had issued the Circular No. 2005/17 dated 11th May 2005, containing provisions which are consonant with the principles enunciated relating to corporal punishment in the international instruments referred to earlier. The Petitioners, in substantiating their case, relied on the said circular. It was submitted that the circular was promulgated with the intention of fostering a school environment in which corporal punishment is eliminated and replaced by more conducive methods of disciplining students having regard to their inherent dignity, physical integrity, as well as their mental well-being. The Circular acknowledges the rise in the abuse of school children at the hands of academic as well as non-academic staff and states that in light of the global movement towards promoting and protecting the rights of the child there can be no leeway for children to be subjected to any form of harassment or abuse in schools.

(37) Paragraph 2.0 of the aforesaid Circular which is titled 'Physical Punishment', states that school principals and teachers should not inflict corporal punishments on students. Paragraph 2.1 lists out the negative effects of corporal punishment on children, for example, that it increases the chances of child abuse, leads to increased child aggression and anti-social behaviour, has a negative effect on a child's cognitive functioning, self-regulation and social-emotional development. It is also noted in the Circular that if a teacher is incapable of disciplining a student without resorting to corporal punishment, it is a clear indication of that teacher's weak disciplinary capability.

(38) The Circular not only places a blanket prohibition on corporal punishment, but by Paragraph 2.2 lists alternative and positive methods of discipline such as informing the students of the school rules and clearly setting out what is expected of them, providing proper guidance and counseling, advising the child on his wrongdoings and/or informing the child's parents/guardian, suspending the student for a maximum of 2 weeks in the case of serious misdemeanors upon verification by an inquiry.

(39) Paragraph 2.3 sets out the legal consequences of resorting to corporal punishment. It is specifically stated that corporal punishments on students will give rise to a cause of action with respect to the infringement of fundamental rights under Article 11 of Chapter III and Article 126 of Chapter XVI of the Constitution. A cause of action may also arise with respect to the offence of cruelty to children in terms Section 308A of the Penal Code as well. It is further stated that the teacher concerned would be liable to disciplinary action by the Education Ministry under the Establishment Code if it is proved that he/she had resorted to corporal punishment.

(40) The 1st Respondent admitted that he caned the students and the consequent physical and mental trauma experienced by the Petitioners as evidenced by their medical reports support the inference that they were indeed subjected to corporal punishment.

(41) The 1st Respondent's assertion is that he did not act out of malice and had no intention of subjecting the Petitioners to cruel and inhuman treatment and tried to act within the limits of the Circular and followed Paragraph 2.2, which provides alternative methods to discipline students. He has even attempted to justify his decision to cane the Petitioners by arguing that the reason why he did not follow Section 2.2 of the Circular and suspend the Petitioners was due to the fact that they were about to sit for their Ordinary Level Examination and he did not wish for their studies to be hampered. He also claims in his Affidavit (1R9) that it is his firm belief that the Circular can only be followed with respect to activities within the classroom and that the Circular cannot be solely depended on and followed, with respect to illegal activities that occur inside or outside the classroom.

(42) The arguments made on behalf of the 1st Respondent neither mitigates nor diminishes the gravity of his action. Furthermore, the views formed by the1st Respondent regarding the laws and regulations that regulate his duties and responsibilities as a teacher attached to the State sector, cannot in any way be regarded as an excuse for his actions. All evidence suggests that he has clearly violated the guidelines laid down by the Circular, in particular Section 2.00. I am unable to accept the assertion of the 1st Respondent that the impugned acts on the part of the 1st Respondent involved disciplinary action not violative of fundamental rights.

(43) In the present case the action of the 1st Respondent not only is a clear violation of the relevant circular, but also tantamount to the commission of an offence under Section 308A of the Penal Code. As held in the case of **Reddiar v. Van Houten and Others** (1988)1 SLR 265, violation of a circular applicable to a citizen, amounts to the violation of the Article 12 (1). Therefore, it can be held that the violation of Circular No. 2005/17 by the 1st Respondent amounts to a violation of the Petitioners' fundamental rights guaranteed under Article 12 (1) of the Constitution.

Violation of Article 11

(44) The Petitioners claim that the merciless assault by the 1st Respondent which left them with multiple injuries as well as mental trauma and suffering, amounts to torture and/or cruel, inhuman or degrading treatment or punishment, and as such the action of the 1st Respondent violated their fundamental rights guaranteed under Article 11 of the Constitution.

(45) Article 11 of the Constitution declares the right to be free from torture. It reads; "*No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*"

Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, defines torture as "*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.*"

(46) Article 37 of the United Nations Convention on the Rights of the Child [UNCRC] imposes an obligation on state parties to protect children from torture or other cruel, inhuman, or degrading treatment or punishment and the said Article stipulates; "*State Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman, or degrading treatment or punishment.*"

(47) In addition to the UNCRC, there are numerous international instruments by which states are under an obligation to protect the child's right to be free from any form of physical violence. These international conventions

guarantee that the fundamental rights of the child encompass protection against all forms of torture and inhuman and degrading activities. For instance, Article 9 of the International Covenant on Civil and Political Rights delineates; *"Everyone has the right to liberty and security of person*" and both the Article 7 of the ICCPR as well as the Article 5 of the Universal Declaration of Human Rights states that, "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*"

(48) In the instant case, it has been established that the Petitioners suffered injuries due to the corporal punishment meted out by the 1st Respondent. As discussed earlier, within the context of human rights, corporal punishment can be perceived as a violation of children's fundamental right to physical integrity and human dignity. Thus, it can be regarded as cruel, inhuman or degrading treatment and could even amount to physical abuse and/or torture if administered frequently and severely.

(49) The jurisprudence developed over time has recognized that corporal punishment can amount to a violation of Article 11 of the Constitution. In the case of **Bandara v. Wickremasinghe (1995) 2 SLR** 167 in which the Petitioner, a school student had been assaulted during school hours by the Deputy Principal, Vice Principal and a teacher, Kulatunga J. observed that "*the discipline of students was a matter within the purview of school teachers and that whenever they act with the objective of maintaining discipline, they act under the colour of office. Therefore, if in doing so, they exceed their power, they may become liable for the infringement of fundamental rights by executive and administrative action.*"

(50) Another conclusion that can be drawn from this is that the State cannot deny responsibility with respect to the actions of a civil servant done under the colour of office. As was held in **Lister v. Hesley Hall** [2002] 1 AC 215, vicarious liability can arise for unauthorized, intentional wrongdoings committed by an employee acting for his own benefit, in so

far as there exists a connection between the wrongdoings and the work for which he was employed to render it within the scope of employment. In the instant case, the 1st Respondent caned the Petitioners during school hours, within the school premises. One of the duties of the 1st Respondent was to maintain school discipline and therefore the fact that he abused his authority does not sever the connection with his employment. There exists a sufficient connection between the duties of the 1st Respondent and the abuse he committed to render it within the scope of employment. Accordingly, the State cannot evade liability.

(51) Children constitute a unique category given their dependency on others, their state of development, their maturity as well as their vulnerability. Therefore, they require a higher degree of protection from all forms of violence. This Court has been conscious of the natural disposition of a child when deciding cases regarding an alleged violation of Article 11 of the Constitution.

(52) For instance, Kulatunga J in the case of **Bandara v. Wickremasinghe** (*supra*) acknowledged the fact that harsh disciplinarian tactics which involve the excessive use of force would also have a detrimental impact on the mental constitution of a child. His Lordship observed that in granting relief, the Court must "*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.*"

(53) In a similar vein, it was observed in the case of **Wijesinghe Chulangani vs. Waruni Bogahawatte** SC FR App No. 677/2012 (Supreme Court minutes; 12th June 2019) that while it is established law that in addition to a high degree of certainty, that a very high degree of maltreatment is also required to make a finding on cruel, inhumane, degrading treatment under Article 11, "… *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."

(54) Therefore, it is clear that in instances where a child has allegedly been subjected to torture and/or cruel, inhuman or degrading treatment or punishment, the approach adopted by the Court in examining and weighing the alleged violation should be influenced by the fact that the victim is a growing child whom the law and society as a whole must protect at all times from all forms of violence.

(55) In the instant case, despite the 1st Respondent's assertion that he did not intend to harm the Petitioners and was solely acting with the aim of preventing further damage being caused to school property, the medical evidence placed before this Court supports the Petitioners' version of events and establishes that the impugned uninhibited assault was both violent, degrading and had a detrimental impact on the physical and mental wellbeing of the Petitioners. The 1st Respondent acting under the colour of office, had clearly exceeded his powers as a disciplinarian and subjected the Petitioners to cruel, inhuman and degrading treatment or punishment in violation of Article 11 of the Constitution.

(56) For the reasons set out above, I hold that the Petitioners have succeeded in establishing an infringement of their fundamental rights guaranteed by Article 12(1) and 11 of the Constitution by the 1st Respondent. There is no material before this court to come to such a finding against any of the other Respondents cited in this application.

In the circumstances of the case, I make order directing the 1st Respondent to pay a sum of Rs.75,000 each to 1st and 2nd Petitioners. I further direct the State to pay the 1st and 2nd Petitioners a sum of Rs. 25,000 each as compensation.

Application allowed

JUDGE OF THE SUPREME COURT

JUSTICE A.H.M.D. NAWAZ

I agree

JUDGE OF THE SUPREME COURT

JUSTICE A.L.S. GOONERATNE

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for 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. 141/2017

Dr. Indika Mudalige,
391/3C, 2nd Lane, Ekamuthu Mawatha,
Thalangama North, Battaramulla.

Petitioner

Vs.

1. National Water Supply and
   Drainage Board,
   Ratmalana.
2. G.A Kumararatna,
   General Manager,
   National Water Supply and
   Drainage Board,
   Ratmalana.
3. Mangala Abeysekera,
   Project Director,
   National Water Supply and drainage
   Board,
   Ratmalana.

4. Sarath Chandrasiri Vithana,
Secretary,
Ministry of City Planning and Water Supply,
No.05, 'Lak Diya Medura',
New Parliament Road,
Pelawatte, Battaramulle.

5. K.D Ebert and Sons Holdings (Pvt) Ltd,
No. 5/41, Madiwela Road,
Embuldeniya, Nugegoda.

6. JITF-KDESH JV (Pvt) Ltd,
No.5/41, Madiwela Road,

7. Asian Development Bank (ADB)
Sri Lanka Resident Missiom,
23, Independence Avenue,
Colombo 07.

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

Respondents

Before: B.P Aluwihare, PC, J.
Priyantha Jayawardena, PC, J.
L.T.B Dehideniya, J.

Counsels: Senany Dayaratne with D. Imbuldeniya for the Petitioner.

Sanjeewa Jayawardena, PC with Nilshantha Sirimanne for the 5th and 6th Respondents instructed by K. Upendra Gunasekara.

N. Pulle, DGS for the AG.

Argued on: 09.01.2019
Decided on: 25.11.2022

L.T.B. Dehideniya, J.

The Petitioner invokes the jurisdiction of this court alleging the infringement of Fundamental Rights guaranteed under the Article 12(1) and the Article 14(A) of the Constitution by the Respondents.

The Petitioner is a Medical Doctor and Consultant Psychiatric by Profession. The Petitioner has filed the instant application on the ground that a grave irregularity has been committed in relation to the tender contract No. GSWWMIIP/AFD/AMB/CIVIL/ICB/04 (document marked as **P-3**) awarded by the National Water Supply and Drainage Board (hereinafter sometime referred to as the 1st Respondent) to the 5th and 6th Respondent companies. The said tender was proposed to implement the project of *'AFD Contractual Co- Financing- Ambatale Water Supply System Improvement and Energy Saving Project – Supply and Laying of 9km of DI Pipes (1200mm) from Ambatale to Colombo City Limit'*.

Petitioner states that as a mandatory requirement, a party who awarded a tender contract must comply with all the technical standard specifications in order to precede the project. Petitioner submits that according to the specifications for DI pipes and fittings (document marked as A),

the Restrained Self Anchoring Joints which are to be used in the project must comply with ISO10804:2010 standards or equivalent. The Petitioner's position is that the Respondent companies which were awarded the tender do not comply with the necessary standards of the equipment. The Petitioners contention is that the 1st - 4th Respondents have acted illegally attempting to change the standards, conditions and requirements set out at the time of calling for tenders, after awarding the said tender.

It was further submitted by the Petitioner that as a result of the high pressure of the water contained within the pipes, and the weight of the pipes themselves, the joints on the pipe line must be of very superior manufacture and quality to prevent the joints from breaking and leaking. Moreover, the Petitioner states that since the Ambathale water pumping station is situated adjacent to the Kelani river, such waterlogged soil will necessarily provide very poor support for the heavy iron pipes and therefore the Restrained Self Anchoring Joints which are to be used to connect the pipes used in the said project will have to be of superior quality.

The Petitioner argues that the decision to award the contract to the 5th and 6th Respondents have a severe effect of endangering the safety of the public and unlikely to cause immense hardship to the water consumers who utilize the water supplied by the 1st Respondent for their daily needs and cause a great financial loss to state and citizens of Sri Lanka. The Petitioner states that he has a right to prosecute this application on his own behalf and behalf of citizens of Sri Lanka in the Public Interest.

When this matter was taken up for support, the Respondents raised several preliminary objections with regard to the maintainability of this application, in particular, the jurisdiction of the Supreme Court to entertain and hear the Petitioner's Application. The principal objection was that the Application of the Petitioner has been filed outside the mandatory period of one month

stipulated in **Article 126(2)** of the Constitution and on that basis, the Respondents moved to have this application dismissed in limine.

Article 126(2) of the Constitution reads as follows:

> *"Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself for 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.." (emphasis added)*

To consider whether the Petitioner has complied with Article 126 (2), in relation to the alleged conduct of the Respondents that the Petitioner is challenging, this Court has to carefully examine the dates which have been submitted by the Respondents.

The Respondents submit that the invitation to bid for the Tender in question was called for by the Chairman of the Standing Cabinet Appointed Procurement Committee and it was publicly advertised on or about 30.06.2014 (document marked as **X-2**). The 5th and 6 Respondents submitted their bid on 09. 09. 2014. Through a letter dated 06.10.2014 the 1st Respondent had sought clarification from several potential bidders, including the 5th and 6 Respondents, with regard to the type test approval done in accordance with the ISO 10801:2010 standard in respect of restrained pipes and fittings (document marked as **X-4**). It was submitted that once clarifications were provided, the 1st Respondent referred it to the Technical Evaluation Committee for evaluation and the 5th and 6th Respondents' bid was accepted on or about 15. 12.

2014. The Standing Cabinet Appointed Procurement Committee approved the awarding of tender to the 5th and 6th Respondents on or around 23. 06. 2015. Thereafter one of the unsuccessful bidders appealed to the Procurement Appeal Board. In appeal, the Procurement Appeal Board gave its decision and approved the Tender award to the 5th and 6th Respondents on 10. 08. 2015 (vide document marked **X-16**). After forwarding the decision of the Procurement Appeal Board and the recommendation of the Cabinet Appointed Procurement Committee to the Cabinet of Ministers, the Cabinet of Ministers approved the awarding of the tender to the 5th and 6th Respondents on 05.11.2015. The said Decision of the Cabinet was published in newspapers and made to the public on 07.11.2015 (vide the Cabinet Memorandum and the announcement marked **X-17**).

It is noteworthy that the accuracy of the aforementioned dates have not been contested by the Petitioner. Therefore, it seems at first glance that the alleged infringement of the Fundamental Rights stated by the Petitioner has continued for more than a year, with the very last stage of approval taking place on **05.11.2015** and the same being communicated to the public on **07.11.2015.** The Petitioner in his submissions has provided an explanation for the objection of the time bar. The Petitioner submits that at the beginning, all that the Petitioner had was a suspicion that the 1st Respondent was acting illegally in sanctioning the use of sub-standard equipment by the 5th and 6th Respondents and therefore; the Petitioner did not invoke the jurisdiction of this Court at the time.

According to the Petitioner's submissions, after having a suspicion on the actions of 1st Respondents, the Petitioner made a request to the 1st Respondent under the Right to Information Act No.12 of 2016 regarding the information pertaining to the tender in question on or around 21.03.2017 (vide the letter of request marked as **P-8** and the postal article receipt marked as **P-**

8(a)). The Petitioner further submits that, the said request for information gave the 1st Respondent a time period of two weeks to respond to the queries of the Petitioner, which was up to 04.04.2017 and since the Petitioner did not receive any response, the Petitioner filed the present application on 11.04.2017. Therefore, the Petitioner argues that he invoked the jurisdiction of this Court within one month of posting the said request for information from the 1st Respondent.

When considering all the circumstances discussed above, it appears that it has taken nearly two years to the Petitioner to make a request for information from the 1st Respondent, from the final Decision of the Cabinet was published in newspapers and made to the public on 07.11.2015. If the Petitioner had a strong desire to inquire about violation of fundamental rights, the said request for information under the Right to Information Act No. 12 of 2016 could have been made within a reasonable time after the final decision of granting the tender was made public. Almost two years from the final decision had been made to public cannot be considered as a reasonable time.

Judicial view of the objection of time bar in a Fundamental Rights application has been discussed in a range of case law.

In the case of ***Edirisuriya v. Navaratnam*** (1985) 1 Sri LR 100 at p.105-106 it was held that 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. Further, in the case of ***Ilangaratne vs. kandy Municipal Council*** [1995 BALJ Vol.VI Part 1 p.10] his Lordship Justice Kulatunga observed that, the result of the express stipulation of a one month time limit in Article 126(2) is that, this Court has no jurisdiction to entertain an application which is filed out of time – i.e. after the expiry of one month from the occurrence of the alleged infringement or imminent infringement which is

complained of and if it is clear that an application is out of time, the Court has no jurisdiction to entertain such application.

A similar view has expressed in the case of ***Demuni Sriyani de Soyza and others v. Dharmasena Dissanayake*** (SC/FR 206/2008, SC Minutes dated 09.12.2016)

> Per Justice Prasanna Jayawardena PC at p.8
>
> *"Article 126(2) of the Constitution stipulates that, a person who alleges that any of his fundamental rights have been infringed or are about to be infringed by executive or administrative action may ... "within one month thereof" ... apply to this Court by way of a Petition praying for relief or redress in respect of such infringement. The consequence of this stipulation in Article 126(2) is that, a Petition which is filed after the expiry of a period of one month from the time the alleged infringement occurred, will be time barred and unmaintainable. This rule is so well known that it hardly needs to be stated here.*
>
> *The rule that, an application under Article 126 which has not been filed within one month of the occurrence of the alleged infringement will make that application unmaintainable, has been enunciated time and again from the time this Court exercised the Fundamental Rights jurisdiction conferred upon it by the 1978 Constitution."* (emphasis added)

However, the court has in exceptional circumstances exercised its discretion to consider applications for fundamental rights when the Petitioner was prevented from taking actions that would have allowed the filing of a petition within one month of the alleged violation and if there had been no lapse on the part of the Petitioner. This principle was laid down in the case of

Gamaethige vs. Siriwardena (1988) 1 Sri L.R 384, where Justice Mark Fernando held that, while the time limit is mandatory, in exceptional cases, on an application of the principle *lex non cogit ad impossibilia*, if there is no lapse, fault or delay on the part of the Petitioner, this Court has a discretion to entertain an application made out of time.

It is important for this Court to decide whether there are any exceptional circumstances to look into in the present application. When considering the required standard to prove exceptional circumstances, in the case of ***K.H.G Kithsiri v. Hon. Faizer Musthapha MP, Minister of Provincial Councils and Local Government and Others*** (SC/FR Application No.362/2017, SC minutes dated 10.01.2018) it was held that;

At p. 8

> *"If the facts and circumstances of an application make it clear that a Petitioner, by the standards of a reasonable man, should have become aware of the alleged infringement by a particular date, the time limit of one month will commence from that date on which he should have become aware of the alleged infringement."*

The Petitioner in the instant application has not submitted any evidence on exceptional circumstances occurred, which led to a late application of fundamental rights. And in the period of nearly two years that has passed before filing this application, no evidence has been presented regarding any other attempt by the Petitioner to question the legality of the tender in question.

While the Fundamental Rights are an integral part of the Constitution, it would be incorrect to term them as unconditional. These rights, by the Constitution itself, are restricted by conditions which aim to balance the individual freedom and rights to the necessity of public good and

welfare. In such a background, This Court cannot be justified to allow such an attempt to bring in a fundamental rights application that has already time barred due to a limitation established by the Constitution itself.

In the above circumstances, I uphold the preliminary objection on time bar raised on behalf of the Respondents and dismiss the Application of the Petitioner in limine.

Judge of the Supreme Court

B.P. Aluwihare, PC, J.

I agree

Judge of the Supreme Court

Priyantha Jayawardena, PC, J.

I agree

Judge of the Supreme Court

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

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

1. ***M.M.F Rizna***

2. ***M.N.M Arham (minor)***

The Petitioners of No. 103/43, Abdul Wahab Mawatha, Thalapitiya, Galle.

PETITIONERS

SC (FR): SCFR 147/2018

Vs.

1. ***P.P.W Seneviratne Principal,***
   Vidyaloka College, Galle.

2. ***Jayantha Wickramanayake, Director-National Schools, Ministry of Education***
   Isurupaya, Battaramulla.

3. ***Sunil Hettiarachchi,*** *Secretary Ministry of Education, Isurupaya, Battaramulla.*

4. ***Hon. Attorney General;*** Attorney General's Department, Hulftsdorf, Colombo 12.

RESPONDENTS

Before: Priyantha Jayawardena PC, J
Vijith K. Malalgoda PC, J
Murdu N. B. Fernando PC, J

Counsel: Pulasthi Hewamanne for the petitioners

Dr. Avanti Perera, SSC for the AG

Argued on: 10th January, 2019

Decided on: 21st February, 2022

Priyantha Jayawardena PC, J

Facts of the Application

The 1st petitioner had filed the instant application on behalf of her youngest son, the 2nd petitioner, who is a minor, stating that her son had been denied admission to Grade-1 of Vidyaloka College, Galle for the year 2018. Therefore, the denial of admission to the 2nd petitioner to Grade-1 of the said school was a violation of the Fundamental Rights of the 2nd petitioner guaranteed by the Constitution.

The petitioners stated that Vidyaloka College is a school that was vested in the government under the Assisted Schools and Training Schools (Special Provisions) Act No. 05 of 1960 and the Assisted Schools and Training Schools (Supplementary Provisions) Act No. 08 of 1961.

The petitioners further stated that admissions to the said schools are governed by circular No. 22/2017 dated 30th of May, 2017 (and the Instructions) issued by the Ministry of Education in respect of admissions to Grade-1 of State Schools for the year 2018.

Accordingly, the petitioners stated that in terms of section 4.1 of the said circular, 33 children should be admitted into each Grade-1 class, with an additional 5 vacancies being reserved for children of members of the Three Armed Forces and the Police.

Furthermore, the petitioners stated that in terms of section 7.1 of the said circular, students should be selected for the existing vacancies to Grade-1 of the said school, according to the categories and percentages indicated below:

Categories	**Percentage**
Children of residents in close proximity to the school	50%
Children of past pupils of the school	25%
Brothers/sisters of students already studying in the school	15%
Children of staff members of institutions directly involved in school education	05%
Children of officers transferred on the exigency of service	04%
Children of persons arriving after living abroad with the child	01%

It was stated that in terms of section 4.2 of the said circular, in filling vacancies in schools vested in the government, the proportion of children belonging to different religions at the time the school was vested in the government will be taken into consideration. Moreover, the number of vacancies in the said school shall be divided among different religions and other categories.

The petitioners stated that the general practice of Vidyaloka College is to admit a total of three (3) Muslim students to Grade-1 for each academic year.

It was further stated that the 2nd petitioner's eldest brother had gained admission to Grade-1 of the said school in the year 2007, as a Muslim applicant under the "Proximity" category. Moreover, the second brother of the 2nd petitioner had also gained admission to Grade-1 of the said school, in the year 2013, as a Muslim applicant under the "Brothers" category.

Furthermore, the 2nd petitioner had applied to Grade-1 of the said school under both the "Proximity" and "Brothers" categories as a Muslim applicant. It was further stated that the 2nd petitioner had obtained the 7th highest marks under the "Proximity" category and the highest marks under the "Brothers" category.

However, the 2nd petitioner had been denied admission under both of the aforementioned categories.

The petitioners stated that one Muslim applicant under the "Proximity" category had been offered admission to Grade-1 of the said school for the year 2018.

Further, it was stated that another Muslim applicant had been offered admission to Grade-1 of the said school for the year 2018 under the "Past Pupils" category. However, the said applicant had not accepted the offer for admission to Vidyaloka College. Thus, the vacancy under the "Past Pupils" category had not been filled.

Therefore, the petitioners stated that the said vacancy should be allocated to the "Brothers" category and in the circumstances, the 2nd petitioner is entitled to gain admission under the "Brothers" category as he is the Muslim applicant with the highest marks under the said category.

Hence, the petitioners had requested the 2nd respondent to intervene and grant redress to the grievances of the petitioners. Thereafter, the 2nd respondent had requested the 1st respondent to clarify the position concerning the 2nd petitioner's admission. However, the 1st respondent had failed to respond to the said request.

The petitioners further stated that in response to a complaint lodged by the petitioners at the Human Rights Commission of Sri Lanka, the 1st respondent had sent a letter to the said Commission, setting out the reasons for not admitting the 2nd petitioner to the said school.

The petitioners had also appealed to the 3rd respondent by letters dated 8th and 14th of February, 2018 requesting him to intervene and address the grievances of the petitioners, but the 3rd respondent had not responded to the said letters.

Thus, the petitioners stated that the denial of admission of the 2nd petitioner to Vidyaloka College under the "Brothers" category was illegal, arbitrary, unreasonable and violative of the Fundamental Rights of the 2nd petitioner guaranteed by Article 12 (1) of the Constitution.

Objections of the 1st respondent

The 1st respondent filed objections and stated that in terms of the said circular applicable for the year 2018, thirty three (33) children should be admitted to each Grade-1 class, with an additional five (5) vacancies being reserved for children of members of the Three Armed Forces and the Police.

The 1st respondent further stated that Vidyaloka College has three (3) Grade-1 classes into which ninety-nine (99) students are admitted by interviews and an additional fifteen (15) students are admitted as children of members of the Three Armed Forces and the Police.

Moreover, the 1st respondent denied that Vidyaloka College has a practice of admitting three (3) Muslim applicants to Grade-1 for each academic year.

The 1st respondent stated that the Muslim religious quota for Grade-1 of Vidyaloka College is 2% of the total vacancies for students selected by interviews for a given year. Accordingly, 2% of ninety-nine (99) vacancies equated to two (2) vacancies to Grade-1 for Muslim applicants for the year 2018.

Further, the 1st respondent admitted that the 2nd petitioner had the 7th highest marks under the "Proximity" category and the highest marks under the "Brothers" category.

Moreover, the 1st respondent admitted that since the only Muslim student who had applied under the "Past Pupils" category had not accepted admission to the said school, the vacancy under the "Past Pupils" category remained vacant.

Furthermore, it was submitted that the ninety-nine (99) students to be admitted to Grade-1 by interviews must be selected in accordance with the categories and percentages stipulated in section 7.1 of the said circular.

Accordingly, it was stated that the remaining vacancy under the "Past Pupils" category should be allocated to a Muslim applicant under the "Proximity" category as the highest percentage of vacancies are allocated from the said category.

The 1st respondent stated that in the year under reference, the said school had received thirty four (34) applications from Muslim students under the "Proximity" category for admission to Grade-1. Accordingly, the vacancy which was not filled under the "Brothers" category would be allocated to the "Proximity" category.

In the circumstances, the 1st respondent stated that the respondents had not violated the Fundamental Rights of the 2nd petitioner.

Submissions of the petitioners

The counsel for the petitioners submitted that in terms of section 4.1 of the said circular, thirty three (33) children who are selected by interviews should be admitted to each Grade-1 class.

It was further submitted that prior to the academic year under reference, three (3) Muslim applicants had gained admission to Grade-1 of Vidyaloka College.

Further, it was submitted that the said school has three (3) Grade-1 classes into which ninety nine (99) students are selected by interviews. Thus, the admission of three (3) Muslim students in previous academic years shows that the Muslim quota is 3% of the total vacancies for students selected by interviews in Grade-1 for a given year.

Moreover, when the said 3% religious quota is applied according to the percentages and categories stipulated in section 7.1 of the said circular, the number of vacancies for Muslim applicants are as follows:

a) 50% of 3 vacancies under the "Proximity" category is one vacancy

b) 25% of 3 vacancies under the "Past Pupils" category is one vacancy

c) 15% of 3 vacancies under the "Brothers" category is one vacancy

Hence, the petitioners submitted that the 2nd petitioner is entitled to be admitted to Grade-1 under the "Brothers" category vacancy as he is the Muslim applicant with the highest marks under the said category.

Without prejudice to the above, the petitioners submitted that if the quota for Muslim students is 2% of the total number of vacancies for students selected by interviews to Grade-1 for a given year, the 2nd petitioner is entitled to be admitted to Grade-1 of the said school.

Further, the petitioners submitted that 2% of ninety nine (99) vacancies equates to two (2) vacancies for Muslim students to Grade-1. From the said two (2) vacancies, one (1) had already been filled by a Muslim student under the "Proximity" category.

Moreover, the other vacancy remained available as the Muslim applicant selected under the "Past Pupils" category had not accepted admission to the said school.

It was submitted that section 4.2 of the said circular does not state that any remaining vacancies for Muslim applicants should be proportionately divided in accordance with the percentages stated in section 7.1 of the said circular.

Section 4.2 of the circular states:

> *"the number of vacancies in the said school shall be accordingly divided among different religions and categories".* [Emphasis added]

Accordingly, the petitioners submitted that since the vacancy under the "Proximity" category had been filled by a Muslim student, the remaining vacancy under the "Past Pupils" category should be allocated to the "Brothers" category.

Moreover, it was submitted on behalf of the petitioners that allocating the remaining vacancy to a category other than "Proximity" would provide equal access to education, which is the objective of any regulation applicable to school admissions.

In support of the above submission, the learned counsel cited ***Haputhantirige and Others v Attorney General*** **[2007] 1 SLR 101 at 119,** where it was held:

> *"Both from the perspective of the application of the equal protection of the law guaranteed by Article 12(1) and from the perspective of national policy, the objective of any binding process of regulation applicable to admission of students to schools should be that it assures to all students equal access to education."*

In the circumstances, the petitioners submitted that the refusal to admit the 2nd petitioner to Vidyaloka College had violated his rights guaranteed by Article 12 (1) of the Constitution.

Submissions of the respondents

The counsel for the respondents submitted that the petitioners had not produced any material to support their contention that the said school has been having a practice of admitting three (3) Muslim applicants to Grade-1 for each academic year.

Further, the respondents submitted that the religious quota for Muslim students for Grade-1 of Vidyaloka College is 2% of the total vacancies for students selected by interviews to Grade-1 for a given year.

In support of the above submission, the respondents drew the attention of court to the Grade-1 admissions lists for the years 2007, 2012, 2013 and 2014 which were produced marked as *"1R2(b)", "1R2(g)", "1R2(h)"and "1R2(i)"* respectively, where it expressly referred to the quota of Muslim students as 2%.

Further, the respondents relied on the Grade-1 admissions lists for the years 2009 to 2017 marked as *"1R2(d)" to "1R2(1)",* which showed that from 2009 to 2017, only two (2) Muslim applicants had been admitted for each academic year, to Grade-1 of the said school.

Moreover, the respondents submitted that the remaining vacancy under the "Past Pupils" category should be allocated in accordance with section 4.2 of the said circular which states:

> *"When the number of applications is less than the number of vacancies set apart for a given category of a religion, remaining vacancies shall be proportionately divided among other categories of the same religion".*

Accordingly, it was submitted that the said section 4.2 of the said circular applies to the instant application as the number of applications in the "Past Pupils" category (zero) is less than the number of vacancies set apart for that category (one).

Hence, it was submitted that when the remaining vacancy is proportionately divided amongst the categories stated in section 7.1 of the said circular, it should be allocated to the "Proximity" category.

Further, the respondents submitted that if Vidyaloka College had applied the criteria submitted by the petitioners for filling the remaining vacancy, the said school would be in violation of the said circular.

In support of the above submission, the respondents cited ***Farook v Dharmaratne, Chairman, Provincial Public Service Commission, Uva and Others*** **2005 (1) SLR 133**, where it was held:

> *"Article 12 (1) of the Constitution does not provide for any situation where the authorities will have to act illegally".*

In the circumstances, it was submitted that the respondents had not violated the Fundamental Rights of the 2nd petitioner guaranteed by Article 12 (1) of the Constitution.

What is the quota for Muslim students in Vidyaloka College?

The petitioners submitted that three (3) Muslim students are admitted to Grade-1 of Vidyaloka College for each academic year. It was further submitted that the quota for Muslim applicants is 3% of the total vacancies for students selected by interviews to Grade-1 for a given academic year.

However, the 1st respondent submitted that Vidyaloka College has a Muslim quota of 2% of the total vacancies for students selected by interviews to Grade-1 for a given academic year. In support of the said submission, the respondents relied on the admissions lists for Grade-1 for the academic years 2009 to 2017 produced marked as *"1R2(d)" to "1R2(1)".*

A careful examination of the said documents shows that in the years 2009 and 2010, only two (2) Muslim students had been admitted to Grade-1; one applicant from the "Proximity" category and the other from the "Past Pupils" category.

Further, from the years 2011 to 2014, only two (2) Muslim applicants from the "Proximity" category had been admitted to Grade-1 for each academic year.

Moreover, from the years 2015 to 2017, only two (2) Muslim applicants had been admitted per year to Grade-1; one applicant from the "Proximity" category and the other from the "Brothers" category.

Therefore, the said documents depict that in each academic year from the years 2009 to 2010, only two (2) Muslim applicants had been admitted to Grade-1 of the said school. This is contrary to the position of the petitioner that three Muslim applicants had been admitted to Grade-1 in each academic year.

The respondents further relied on the admissions lists for Grade-1 for the years 2007, 2012, 2013 and 2014 marked as *"1R2(b)", "1R2(g)", "1R2(h)"and "1R2(i)"* respectively.

A perusal of the above shows that in each of the aforesaid documents, it is stated that the quota allocated for Muslim applicants for Grade-1 is 2%.

The burden of proof in establishing the Muslim quota for Grade-1 lies on the petitioners. However, the petitioners had failed to produce any material to support their contention. On the contrary, the respondents have proved that the quota for Muslim applicants is 2% by producing the aforesaid documents.

In light of the above, I am of the opinion that the Muslim quota for Grade-1 of the said school is 2% of the total vacancies for students selected by interviews to Grade-1 for a given academic year.

Total number of vacancies for Muslim students selected by interviews for Grade-1

Section 4.1 of the said circular applicable for the year 2018 states:

> *"33 children will be selected for each parallel class in Grade 1. In addition, 05 more children will be selected from among children of those who were in operation areas in the Armed Forces and the Police."*

The 'children of those who were in operation areas in the Three Armed Forces and the Police' are not selected by interviews, but in accordance with the procedure stipulated in section 13 of the said circular. Therefore, the vacancies allocated to the said category are excluded from the total number of vacancies for students selected by interviews for Grade-1.

In terms of section 4.1 of the said circular, 33 children are to be selected by interviews for each class in Grade-1.

The 1st respondent submitted that the said school has three (3) Grade-1 classes. Hence, a total of ninety nine (99) vacancies are available for students selected by interviews for Grade-1 in the academic year 2018.

Accordingly, when the 2% Muslim quota is applied to the ninety nine (99) vacancies, two (2) vacancies are available for Muslim applicants to Grade-1 of the said school.

How should the vacancies be allocated?

Section 7.1 of the said circular states;

"(a) Out of the vacancies existing in Grade 1 in a school, the number of children to be selected by the interview will be made from the children belonging to the following categories according to the percentages indicated here:

Children of residents in close proximity to the school	*50%*
Children of parents who are past pupils of the school	*25%*
Brothers/sisters of students already studying in the school	*15%*
Children of persons in the staff members of institutions directly involved in school education	*5%*
Children of officers in Public Sector/ State Corporations/ State Banks receiving transfers on service exigency	*4%*
Children of persons arriving after living abroad with the child	*1%*

(b) Marks will be allocated for selection according to the marking scheme indicated under each category. Maximum number of marks obtainable will be 100."

[Emphasis added]

Therefore, in terms of the said section, the ninety nine (99) vacancies for students selected by interviews must be allocated as follows:

(a) Children of residents in close proximity to the school: 99 x 50 % = 50 vacancies

(b) Children of parents who are past pupils of the school: 99 x 25% = 25 vacancies

(c) Brothers of students already studying in the school: 99 x 15% = 15 vacancies

(d) Children of persons in the staff members of institutions directly involved in school education: 99 x 5% = 5 vacancies

(e) Children of officers in Public Sector/State Corporations/State Banks receiving transfers on service exigency: 99 x 4% = 4 vacancies

(f) Children of persons arriving after living abroad with the child: 99 x 1% = 1 vacancy

The document produced marked as *"I"* by the 1st respondent shows that in the year 2018, ninety nine (99) vacancies were allocated by the said school as follows:

(a) Children of residents in close proximity to the school: 48 students

(b) Children of parents who are past pupils of the school: 24 students

(c) Brothers of students already studying in the school: 15 students

(d) Children of persons in the staff members of Institutions directly involved in school education: 5 students

(e) Children of officers in Public Sector/State Corporations/State Banks receiving transfers on service exigency: 4 students

(f) Children of persons arriving after living abroad with the child: 1 student

As shown above, out of the said ninety nine (99) vacancies, only ninety seven (97) vacancies have been allocated to Grade-1 of the said school to be filled by interviews. Hence, the two remaining vacancies should be allocated to the Muslim applicants under the religious quota allocated to the said school. Thus, it needs to be considered under which categories the two remaining vacancies should be allocated.

In terms of section 7.1 of the said circular, it is evident that twenty five (25) vacancies should be allocated to the "Past Pupils" category. However, only twenty four (24) vacancies under the said category were filled by Vidyaloka College as the Muslim applicant selected and offered admission for the same had not accepted the said admission. Further, there were no other Muslim applicants under the said category.

The petitioners alleged that the said vacancy in the "Past Pupils" category should be allocated to the "Brothers" category. Further, it was submitted that the 2nd petitioner was entitled to fill the said vacancy as he had obtained the highest marks amongst the Muslim applicants in the "Brothers" category.

However, in terms of section 7.1 of the said circular, only fifteen (15) vacancies should be allocated to the "Brothers" category.

It is evident from the document marked as *"1"* that all fifteen (15) vacancies in the "Brothers" category for the year 2018 had already been filled by Vidyaloka College.

Therefore, the remaining vacancy in the "Past Pupils" category that was not accepted by the said Muslim student cannot be allocated to the "Brothers" category as it would exceed the number of vacancies that are allocated to the "Brothers" category in terms of section 7.1 of the said circular.

Further, in terms of section 7.1 of the said circular, fifty (50) vacancies must be allocated to the "Proximity" category. However, the aforesaid document marked as *"1"* indicates that only forty eight (48) vacancies in the "Proximity" category were filled by Vidyaloka College.

Accordingly, the remaining vacancy in the "Past Pupils" category could only be allocated to the "Proximity" category without exceeding the number of vacancies in the "Proximity" category as per the criteria stipulated in section 7.1 of the said circular.

Therefore, I am of the view that the remaining vacancy in the "Past Pupils" category must be filled by the Muslim applicant who had obtained the second highest marks from the "Proximity" category.

In the instant application, the petitioners admitted that the 2nd petitioner had only obtained the 7th highest marks under the "Proximity" category. Thus, there are six other Muslim applicants who have scored more than the 2nd petitioner under the said "Proximity" category.

In the circumstances, the 2nd petitioner was not entitled to be admitted to Grade-1 of the said school for the year 2018.

Due to the foregoing reasons, I hold that the 2nd petitioner's Fundamental Rights had not been violated by the respondents. Accordingly, the application is dismissed.

I order no costs.

Judge of the Supreme Court

Vijith K. Malalgoda PC, J

I agree **Judge of the Supreme Court**

Murdu N. B. Fernando PC, J

I agree **Judge of the Supreme Court**

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

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

1. ***M.M.F Rizna***

2. ***M.N.M Arham (minor)***

The Petitioners of No. 103/43, Abdul Wahab Mawatha, Thalapitiya, Galle.

PETITIONERS

SC (FR): SCFR 147/2018

Vs.

1. ***P.P.W Seneviratne Principal,***
   Vidyaloka College, Galle.

2. ***Jayantha Wickramanayake, Director-National Schools, Ministry of Education***
   Isurupaya, Battaramulla.

3. ***Sunil Hettiarachchi,*** *Secretary Ministry of Education, Isurupaya, Battaramulla.*

4. ***Hon. Attorney General;*** Attorney General's Department, Hulftsdorf, Colombo 12.

RESPONDENTS

Before: Priyantha Jayawardena PC, J
Vijith K. Malalgoda PC, J
Murdu N. B. Fernando PC, J

Counsel: Pulasthi Hewamanne for the petitioners

Dr. Avanti Perera, SSC for the AG

Argued on: 10th January, 2019

Decided on: 21st February, 2022

Priyantha Jayawardena PC, J

Facts of the Application

The 1st petitioner had filed the instant application on behalf of her youngest son, the 2nd petitioner, who is a minor, stating that her son had been denied admission to Grade-1 of Vidyaloka College, Galle for the year 2018. Therefore, the denial of admission to the 2nd petitioner to Grade-1 of the said school was a violation of the Fundamental Rights of the 2nd petitioner guaranteed by the Constitution.

The petitioners stated that Vidyaloka College is a school that was vested in the government under the Assisted Schools and Training Schools (Special Provisions) Act No. 05 of 1960 and the Assisted Schools and Training Schools (Supplementary Provisions) Act No. 08 of 1961.

The petitioners further stated that admissions to the said schools are governed by circular No. 22/2017 dated 30th of May, 2017 (and the Instructions) issued by the Ministry of Education in respect of admissions to Grade-1 of State Schools for the year 2018.

Accordingly, the petitioners stated that in terms of section 4.1 of the said circular, 33 children should be admitted into each Grade-1 class, with an additional 5 vacancies being reserved for children of members of the Three Armed Forces and the Police.

Furthermore, the petitioners stated that in terms of section 7.1 of the said circular, students should be selected for the existing vacancies to Grade-1 of the said school, according to the categories and percentages indicated below:

Categories	**Percentage**
Children of residents in close proximity to the school	50%
Children of past pupils of the school	25%
Brothers/sisters of students already studying in the school	15%
Children of staff members of institutions directly involved in school education	05%
Children of officers transferred on the exigency of service	04%
Children of persons arriving after living abroad with the child	01%

It was stated that in terms of section 4.2 of the said circular, in filling vacancies in schools vested in the government, the proportion of children belonging to different religions at the time the school was vested in the government will be taken into consideration. Moreover, the number of vacancies in the said school shall be divided among different religions and other categories.

The petitioners stated that the general practice of Vidyaloka College is to admit a total of three (3) Muslim students to Grade-1 for each academic year.

It was further stated that the 2nd petitioner's eldest brother had gained admission to Grade-1 of the said school in the year 2007, as a Muslim applicant under the "Proximity" category. Moreover, the second brother of the 2nd petitioner had also gained admission to Grade-1 of the said school, in the year 2013, as a Muslim applicant under the "Brothers" category.

Furthermore, the 2nd petitioner had applied to Grade-1 of the said school under both the "Proximity" and "Brothers" categories as a Muslim applicant. It was further stated that the 2nd petitioner had obtained the 7th highest marks under the "Proximity" category and the highest marks under the "Brothers" category.

However, the 2nd petitioner had been denied admission under both of the aforementioned categories.

The petitioners stated that one Muslim applicant under the "Proximity" category had been offered admission to Grade-1 of the said school for the year 2018.

Further, it was stated that another Muslim applicant had been offered admission to Grade-1 of the said school for the year 2018 under the "Past Pupils" category. However, the said applicant had not accepted the offer for admission to Vidyaloka College. Thus, the vacancy under the "Past Pupils" category had not been filled.

Therefore, the petitioners stated that the said vacancy should be allocated to the "Brothers" category and in the circumstances, the 2nd petitioner is entitled to gain admission under the "Brothers" category as he is the Muslim applicant with the highest marks under the said category.

Hence, the petitioners had requested the 2nd respondent to intervene and grant redress to the grievances of the petitioners. Thereafter, the 2nd respondent had requested the 1st respondent to clarify the position concerning the 2nd petitioner's admission. However, the 1st respondent had failed to respond to the said request.

The petitioners further stated that in response to a complaint lodged by the petitioners at the Human Rights Commission of Sri Lanka, the 1st respondent had sent a letter to the said Commission, setting out the reasons for not admitting the 2nd petitioner to the said school.

The petitioners had also appealed to the 3rd respondent by letters dated 8th and 14th of February, 2018 requesting him to intervene and address the grievances of the petitioners, but the 3rd respondent had not responded to the said letters.

Thus, the petitioners stated that the denial of admission of the 2nd petitioner to Vidyaloka College under the "Brothers" category was illegal, arbitrary, unreasonable and violative of the Fundamental Rights of the 2nd petitioner guaranteed by Article 12 (1) of the Constitution.

Objections of the 1st respondent

The 1st respondent filed objections and stated that in terms of the said circular applicable for the year 2018, thirty three (33) children should be admitted to each Grade-1 class, with an additional five (5) vacancies being reserved for children of members of the Three Armed Forces and the Police.

The 1st respondent further stated that Vidyaloka College has three (3) Grade-1 classes into which ninety-nine (99) students are admitted by interviews and an additional fifteen (15) students are admitted as children of members of the Three Armed Forces and the Police.

Moreover, the 1st respondent denied that Vidyaloka College has a practice of admitting three (3) Muslim applicants to Grade-1 for each academic year.

The 1st respondent stated that the Muslim religious quota for Grade-1 of Vidyaloka College is 2% of the total vacancies for students selected by interviews for a given year. Accordingly, 2% of ninety-nine (99) vacancies equated to two (2) vacancies to Grade-1 for Muslim applicants for the year 2018.

Further, the 1st respondent admitted that the 2nd petitioner had the 7th highest marks under the "Proximity" category and the highest marks under the "Brothers" category.

Moreover, the 1st respondent admitted that since the only Muslim student who had applied under the "Past Pupils" category had not accepted admission to the said school, the vacancy under the "Past Pupils" category remained vacant.

Furthermore, it was submitted that the ninety-nine (99) students to be admitted to Grade-1 by interviews must be selected in accordance with the categories and percentages stipulated in section 7.1 of the said circular.

Accordingly, it was stated that the remaining vacancy under the "Past Pupils" category should be allocated to a Muslim applicant under the "Proximity" category as the highest percentage of vacancies are allocated from the said category.

The 1st respondent stated that in the year under reference, the said school had received thirty four (34) applications from Muslim students under the "Proximity" category for admission to Grade-1. Accordingly, the vacancy which was not filled under the "Brothers" category would be allocated to the "Proximity" category.

In the circumstances, the 1st respondent stated that the respondents had not violated the Fundamental Rights of the 2nd petitioner.

Submissions of the petitioners

The counsel for the petitioners submitted that in terms of section 4.1 of the said circular, thirty three (33) children who are selected by interviews should be admitted to each Grade-1 class.

It was further submitted that prior to the academic year under reference, three (3) Muslim applicants had gained admission to Grade-1 of Vidyaloka College.

Further, it was submitted that the said school has three (3) Grade-1 classes into which ninety nine (99) students are selected by interviews. Thus, the admission of three (3) Muslim students in previous academic years shows that the Muslim quota is 3% of the total vacancies for students selected by interviews in Grade-1 for a given year.

Moreover, when the said 3% religious quota is applied according to the percentages and categories stipulated in section 7.1 of the said circular, the number of vacancies for Muslim applicants are as follows:

a) 50% of 3 vacancies under the "Proximity" category is one vacancy

b) 25% of 3 vacancies under the "Past Pupils" category is one vacancy

c) 15% of 3 vacancies under the "Brothers" category is one vacancy

Hence, the petitioners submitted that the 2nd petitioner is entitled to be admitted to Grade-1 under the "Brothers" category vacancy as he is the Muslim applicant with the highest marks under the said category.

Without prejudice to the above, the petitioners submitted that if the quota for Muslim students is 2% of the total number of vacancies for students selected by interviews to Grade-1 for a given year, the 2nd petitioner is entitled to be admitted to Grade-1 of the said school.

Further, the petitioners submitted that 2% of ninety nine (99) vacancies equates to two (2) vacancies for Muslim students to Grade-1. From the said two (2) vacancies, one (1) had already been filled by a Muslim student under the "Proximity" category.

Moreover, the other vacancy remained available as the Muslim applicant selected under the "Past Pupils" category had not accepted admission to the said school.

It was submitted that section 4.2 of the said circular does not state that any remaining vacancies for Muslim applicants should be proportionately divided in accordance with the percentages stated in section 7.1 of the said circular.

Section 4.2 of the circular states:

> *"the number of vacancies in the said school shall be accordingly divided among different religions and categories".* [Emphasis added]

Accordingly, the petitioners submitted that since the vacancy under the "Proximity" category had been filled by a Muslim student, the remaining vacancy under the "Past Pupils" category should be allocated to the "Brothers" category.

Moreover, it was submitted on behalf of the petitioners that allocating the remaining vacancy to a category other than "Proximity" would provide equal access to education, which is the objective of any regulation applicable to school admissions.

In support of the above submission, the learned counsel cited ***Haputhantirige and Others v Attorney General*** **[2007] 1 SLR 101 at 119,** where it was held:

> *"Both from the perspective of the application of the equal protection of the law guaranteed by Article 12(1) and from the perspective of national policy, the objective of any binding process of regulation applicable to admission of students to schools should be that it assures to all students equal access to education."*

In the circumstances, the petitioners submitted that the refusal to admit the 2nd petitioner to Vidyaloka College had violated his rights guaranteed by Article 12 (1) of the Constitution.

Submissions of the respondents

The counsel for the respondents submitted that the petitioners had not produced any material to support their contention that the said school has been having a practice of admitting three (3) Muslim applicants to Grade-1 for each academic year.

Further, the respondents submitted that the religious quota for Muslim students for Grade-1 of Vidyaloka College is 2% of the total vacancies for students selected by interviews to Grade-1 for a given year.

In support of the above submission, the respondents drew the attention of court to the Grade-1 admissions lists for the years 2007, 2012, 2013 and 2014 which were produced marked as *"1R2(b)", "1R2(g)", "1R2(h)"and "1R2(i)"* respectively, where it expressly referred to the quota of Muslim students as 2%.

Further, the respondents relied on the Grade-1 admissions lists for the years 2009 to 2017 marked as *"1R2(d)" to "1R2(1)",* which showed that from 2009 to 2017, only two (2) Muslim applicants had been admitted for each academic year, to Grade-1 of the said school.

Moreover, the respondents submitted that the remaining vacancy under the "Past Pupils" category should be allocated in accordance with section 4.2 of the said circular which states:

> *"When the number of applications is less than the number of vacancies set apart for a given category of a religion, remaining vacancies shall be proportionately divided among other categories of the same religion".*

Accordingly, it was submitted that the said section 4.2 of the said circular applies to the instant application as the number of applications in the "Past Pupils" category (zero) is less than the number of vacancies set apart for that category (one).

Hence, it was submitted that when the remaining vacancy is proportionately divided amongst the categories stated in section 7.1 of the said circular, it should be allocated to the "Proximity" category.

Further, the respondents submitted that if Vidyaloka College had applied the criteria submitted by the petitioners for filling the remaining vacancy, the said school would be in violation of the said circular.

In support of the above submission, the respondents cited ***Farook v Dharmaratne, Chairman, Provincial Public Service Commission, Uva and Others*** **2005 (1) SLR 133**, where it was held:

> *"Article 12 (1) of the Constitution does not provide for any situation where the authorities will have to act illegally".*

In the circumstances, it was submitted that the respondents had not violated the Fundamental Rights of the 2nd petitioner guaranteed by Article 12 (1) of the Constitution.

What is the quota for Muslim students in Vidyaloka College?

The petitioners submitted that three (3) Muslim students are admitted to Grade-1 of Vidyaloka College for each academic year. It was further submitted that the quota for Muslim applicants is 3% of the total vacancies for students selected by interviews to Grade-1 for a given academic year.

However, the 1st respondent submitted that Vidyaloka College has a Muslim quota of 2% of the total vacancies for students selected by interviews to Grade-1 for a given academic year. In support of the said submission, the respondents relied on the admissions lists for Grade-1 for the academic years 2009 to 2017 produced marked as *"1R2(d)" to "1R2(1)".*

A careful examination of the said documents shows that in the years 2009 and 2010, only two (2) Muslim students had been admitted to Grade-1; one applicant from the "Proximity" category and the other from the "Past Pupils" category.

Further, from the years 2011 to 2014, only two (2) Muslim applicants from the "Proximity" category had been admitted to Grade-1 for each academic year.

Moreover, from the years 2015 to 2017, only two (2) Muslim applicants had been admitted per year to Grade-1; one applicant from the "Proximity" category and the other from the "Brothers" category.

Therefore, the said documents depict that in each academic year from the years 2009 to 2010, only two (2) Muslim applicants had been admitted to Grade-1 of the said school. This is contrary to the position of the petitioner that three Muslim applicants had been admitted to Grade-1 in each academic year.

The respondents further relied on the admissions lists for Grade-1 for the years 2007, 2012, 2013 and 2014 marked as *"1R2(b)", "1R2(g)", "1R2(h)"and "1R2(i)"* respectively.

A perusal of the above shows that in each of the aforesaid documents, it is stated that the quota allocated for Muslim applicants for Grade-1 is 2%.

The burden of proof in establishing the Muslim quota for Grade-1 lies on the petitioners. However, the petitioners had failed to produce any material to support their contention. On the contrary, the respondents have proved that the quota for Muslim applicants is 2% by producing the aforesaid documents.

In light of the above, I am of the opinion that the Muslim quota for Grade-1 of the said school is 2% of the total vacancies for students selected by interviews to Grade-1 for a given academic year.

Total number of vacancies for Muslim students selected by interviews for Grade-1

Section 4.1 of the said circular applicable for the year 2018 states:

> *"33 children will be selected for each parallel class in Grade 1. In addition, 05 more children will be selected from among children of those who were in operation areas in the Armed Forces and the Police."*

The 'children of those who were in operation areas in the Three Armed Forces and the Police' are not selected by interviews, but in accordance with the procedure stipulated in section 13 of the said circular. Therefore, the vacancies allocated to the said category are excluded from the total number of vacancies for students selected by interviews for Grade-1.

In terms of section 4.1 of the said circular, 33 children are to be selected by interviews for each class in Grade-1.

The 1st respondent submitted that the said school has three (3) Grade-1 classes. Hence, a total of ninety nine (99) vacancies are available for students selected by interviews for Grade-1 in the academic year 2018.

Accordingly, when the 2% Muslim quota is applied to the ninety nine (99) vacancies, two (2) vacancies are available for Muslim applicants to Grade-1 of the said school.

How should the vacancies be allocated?

Section 7.1 of the said circular states;

"(a) Out of the vacancies existing in Grade 1 in a school, the number of children to be selected by the interview will be made from the children belonging to the following categories according to the percentages indicated here:

Children of residents in close proximity to the school	*50%*
Children of parents who are past pupils of the school	*25%*
Brothers/sisters of students already studying in the school	*15%*
Children of persons in the staff members of institutions directly involved in school education	*5%*
Children of officers in Public Sector/ State Corporations/ State Banks receiving transfers on service exigency	*4%*
Children of persons arriving after living abroad with the child	*1%*

(b) Marks will be allocated for selection according to the marking scheme indicated under each category. Maximum number of marks obtainable will be 100."

[Emphasis added]

Therefore, in terms of the said section, the ninety nine (99) vacancies for students selected by interviews must be allocated as follows:

(a) Children of residents in close proximity to the school: 99 x 50 % = 50 vacancies

(b) Children of parents who are past pupils of the school: 99 x 25% = 25 vacancies

(c) Brothers of students already studying in the school: 99 x 15% = 15 vacancies

(d) Children of persons in the staff members of institutions directly involved in school education: 99 x 5% = 5 vacancies

(e) Children of officers in Public Sector/State Corporations/State Banks receiving transfers on service exigency: 99 x 4% = 4 vacancies

(f) Children of persons arriving after living abroad with the child: 99 x 1% = 1 vacancy

The document produced marked as *"I"* by the 1st respondent shows that in the year 2018, ninety nine (99) vacancies were allocated by the said school as follows:

(a) Children of residents in close proximity to the school: 48 students

(b) Children of parents who are past pupils of the school: 24 students

(c) Brothers of students already studying in the school: 15 students

(d) Children of persons in the staff members of Institutions directly involved in school education: 5 students

(e) Children of officers in Public Sector/State Corporations/State Banks receiving transfers on service exigency: 4 students

(f) Children of persons arriving after living abroad with the child: 1 student

As shown above, out of the said ninety nine (99) vacancies, only ninety seven (97) vacancies have been allocated to Grade-1 of the said school to be filled by interviews. Hence, the two remaining vacancies should be allocated to the Muslim applicants under the religious quota allocated to the said school. Thus, it needs to be considered under which categories the two remaining vacancies should be allocated.

In terms of section 7.1 of the said circular, it is evident that twenty five (25) vacancies should be allocated to the "Past Pupils" category. However, only twenty four (24) vacancies under the said category were filled by Vidyaloka College as the Muslim applicant selected and offered admission for the same had not accepted the said admission. Further, there were no other Muslim applicants under the said category.

The petitioners alleged that the said vacancy in the "Past Pupils" category should be allocated to the "Brothers" category. Further, it was submitted that the 2nd petitioner was entitled to fill the said vacancy as he had obtained the highest marks amongst the Muslim applicants in the "Brothers" category.

However, in terms of section 7.1 of the said circular, only fifteen (15) vacancies should be allocated to the "Brothers" category.

It is evident from the document marked as *"1"* that all fifteen (15) vacancies in the "Brothers" category for the year 2018 had already been filled by Vidyaloka College.

Therefore, the remaining vacancy in the "Past Pupils" category that was not accepted by the said Muslim student cannot be allocated to the "Brothers" category as it would exceed the number of vacancies that are allocated to the "Brothers" category in terms of section 7.1 of the said circular.

Further, in terms of section 7.1 of the said circular, fifty (50) vacancies must be allocated to the "Proximity" category. However, the aforesaid document marked as *"1"* indicates that only forty eight (48) vacancies in the "Proximity" category were filled by Vidyaloka College.

Accordingly, the remaining vacancy in the "Past Pupils" category could only be allocated to the "Proximity" category without exceeding the number of vacancies in the "Proximity" category as per the criteria stipulated in section 7.1 of the said circular.

Therefore, I am of the view that the remaining vacancy in the "Past Pupils" category must be filled by the Muslim applicant who had obtained the second highest marks from the "Proximity" category.

In the instant application, the petitioners admitted that the 2nd petitioner had only obtained the 7th highest marks under the "Proximity" category. Thus, there are six other Muslim applicants who have scored more than the 2nd petitioner under the said "Proximity" category.

In the circumstances, the 2nd petitioner was not entitled to be admitted to Grade-1 of the said school for the year 2018.

Due to the foregoing reasons, I hold that the 2nd petitioner's Fundamental Rights had not been violated by the respondents. Accordingly, the application is dismissed.

I order no costs.

Judge of the Supreme Court

Vijith K. Malalgoda PC, J

I agree **Judge of the Supreme Court**

Murdu N. B. Fernando PC, J

I agree **Judge of the Supreme Court**

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

In the matter of an application under and in terms of Article 126 of the Constitution.

SC FR 163/2019

Janath S. Vidanage
Petitioner

Vs.

1. Pujith Jayasundara
   Inspector General of Police

and 3 others.
Respondents

SC FR 165/2019

Nagananda Kodithuwakku
Petitioner

Vs

1. Hon. Maithripala Sirisena
   The Minister of Defence

and 8 others
Respondents

SC FR 166/2019

Saman Nandana Sirimanne
Petitioner

Vs.

1. Pujith Jayasundara
   Inspector General of Police

and 3 others
Respondents

SCFR 184/2019

1. Jude Dinuke Laknath Perera

and 3 others
Petitioners

Vs.

1(a) Gotabaya Rajapakse
His Excellency the President
Presidential Secretariat
Galle Face, Colombo 01.

and 48 others
Respondents

SCFR 188/2019

P.K.A.D. Sunil Perera
Petitioner

Vs.

1. Attorney General
Attorney Generals' Department,
Colombo 12.
(On behalf of)
Maithripala Sirisena
President and Minister of Defence
(as per the 19th Amendment)

and 15 others
Respondents

SCFR 191/2019

1. Rev. Fr. Galgana Mestrige Don Henry
Marian Ashok Stephen.

and 2 others
Petitioners

Vs.

1. Hemasiri Fernando
Former Secretary to the Ministry of Defence

and 12 others
Respondents

SCFR 193/2019

Hilmy Ahamed
Petitioner

Vs.

1. Hon. Attorney General
Attorney Generals' Department,

1A. Mithripala Sirisena
(Former President of Sri Lanka)

and 12 others
Respondents

SC.FR 195/2019

Mr. Saliya Pieris,
President's Counsel,
The President,
Bar Association of Sri Lanka,

and 4 others
Petitioners

Vs.

1. Gen. S.H.S. Kottegoda (Retd.)
Secretary, Ministry of Defence,

and 93 others
Respondents

SCFR 196/2019

Seerangan Sumithra
Petitioner

Vs.

1. Mr. Ranil Wickremesinghe
Hon. Prime Minister
Minister of National Policies, Economic Affairs, Resettlement and Rehabilitation
Northern Province Development and Youth Affairs

and 43 others
Respondents

SC FR No. 197/19

Dr. Visakesa Chandrasekaram,
Petitioner

Vs

1. Mr. Ranil Wickramasinghe,
Hon. Prime Minister of the Republic, Minister of National Policies, Economic Affairs, Resettlement and Rehabilitation,
Northern Province Development and Youth Affairs,

and 44 others.
Respondents

SC FR 198/2019

Pussewela Kankanamge Kasun Amila Pussewela.
Petitioner

Vs

1. Mr. Ranil Wickramasinghe,
Hon. Prime Minister of the Republic, Minister of National Policies, Economic Affairs, Resettlement and Rehabilitation,
Northern Province Development and Youth Affairs,

and 43 others.
Respondents

SCFR 293/2019

Moditha Tikiri Bandara Ekanayake,
Attorney-at-Law
Petitioner

Vs.

1. Hemasiri Fernando,
Former Secretary to Ministry of Defence,

and 43 others
Respondents

Before : Jayantha Jayasuriya, PC, CJ

B.P. Aluwihare, PC,J

L.T.B.Dehideniya, J

Murdu N.B. Fernando, PC,J

S. Thurairaja, PC,J.

A.H.M.D.Nawaz, J .

A.L. Shiran Gooneratne, J

Counsel : Gamini Perera with Ishara Gunawardana, Leel Gunawardana and Wijitha Salpitikorala for the Petitioners in SCFR No. 163/19 & 166/19.

Dharshana Weraduwage with Dhanushi Kalupahana and Ushani Atapattu for the Petitioner in SCFR 165/2019.

Wardani Karunaratne for the Petitioner in SC.FR.No.184/19.

Lakshan Dias with Maneesha Kumarasinghe and Dayani Panditharathne for the Petitioner in SCFR 188/19.

Saliya Peiris, PC with Thanuka Nandasiri for the Petitioners in SCFR 191/19.

Rushdhie Habeeb with Mrs. Shahla Rafeek for the Petitioner in SC.FR.No.193/19.

Sanjeewa Jayawardena, PC with Ms. Dilumi de Alwis, Charitha Rupasinghe, Ms. Lakmini Warunwithana, Niranjan Arulpragasan, Milhan Mohammed, Ms. Ridmi Benaragama and Gimhani Arthanayaka, Ms. Ranmali Meepagala & Eranga Tilekeratne for the Petitioner in SC.FR.No.195/19.

Thanuka Nandasiri on behalf of Mr. Kameel Maddumage with Nuwan Bopage for the Petitioner in SC.FR.No.196/19, 197/19 & 198/19.

Manohara de Silva, PC with Mrs. Nadeeshani Lankatileka for the Petitioner in SC.FR. 293/19.

Priyantha Nawana, PC, SASG with Nerin Pulle, PC, ASG, Dileepa Peiris, DSG, Dr. Avanthi Perera, SSC, Sureka Ahmed, SC and Induni Punchihewa, SC for the 3rd 4th Respondents in SCFR 163/19 & 166/19. 6A & 7th Respondent in SCFR 165/19. 34th Respondent in SCFR 184/19. 6th , 9th 15th and 16th Respondents in SCFR 188/19. 4th, 11th,12th and 13th Respondents in SCFR 191/19. 1st, 6th & 14th Respondents in SCFR 193/19. 4th, 44th, 48th, 52nd , 54th, 55th, 56th, 77A, 78A,84A and 64th Respondents in SCFR 196/19, 197/19 , 197/19. 3rd, 4th, 35th, 42nd and 44th Respondents in SCFR 293/19.

Suren Fernando with Sanjith Dias for the 2nd Respondent in SCFR No.165/19, 184/19, 188/19 & 193/19, for 6th Respondent in SCFR 191/19 & 293/19, for 8th Respondent in SCFR 195/19 and for the 1st Respondent in SCFR 196/19, 197/19 &198/19.

Viran Korea with Niran Anketel, Dushinka Nelson and Thilini Vidanagamage for the 1st Respondent in SCFR163/19 &166/19,

for the 2nd Respondent in SCFR 293/19, for 3rd Respondent in SCFR 191/19 &195/19, for 5th Respondent in SCFR 188/19, for 6th Respondent in SCFR 165/19, for 7th Respondent in SCFR 196/19, 197/19 & 198/19, for 12th Respondent in SCFR 193/19 and for 33rd Respondent in SCFR 184/19.

Mohan Weerakoon PC with Mr. Prabuddha Hettiarachchi for 2nd Respondent in SCFR 163/19,16 for 3rd Respondent in SCFR 188/19, for 1st Respondent in SCFR 191/19 and 293/19, for 5th Respondent in SCFR 193/19, for 6th Respondent in SCFR 196/19, 197/19 and 198/19, and for 32nd Respondent in SCFR 184/19.

Faizer Musthapa , PC with Shahida Barrie, Pulasthi Rupasinghe, Amila Perera, Ashan Bandara and Dhananjaya Perera for the 1st Respondent in SCFR 165/19, 184/19 & 193/19, for 44A Respondent in SCFR 196/19, 197/19 & 198/19, for 66A Respondent in SCFR/195/19.

Dulindra Weerasuriya PC with Chamith Marapana and Saman Malinga for the 12th Respondent in SCFR 184/19, 7th Respondent in SCFR 188/19 and 293/19, 10th Respondent in SCFR 195/19, 3rd Respondent in SCFR 193/19 and 2nd Respondent in SCFR 196/19, 197/19 & 198/19.

Sudarshana Gunawardana for the 10th Responded in SCFR 188/19, 7th Respondent in SCFR 193/19, 5th and 14th Respondents in SCFR 196/19, 197/19 and 198/19. 36th Respondent in SCFR 293/19, 38th, 39th and 45th Respondents in SCFR 195/19.

K.V.S. Ganesharajan with Sri Ranganathan Ragul and Nasikethan for the 94A Respondent in SCFR195/19.

Argued on : 20.07.2022, 27.07.2022, 02.08.2022

Decided on : 26.09.2022

The quintessential question that has arisen before Court in the course of the hearing of the substantive applications is whether the immunity afforded to an incumbent President in terms of Article 35 (1) of the Constitution must inure to the benefit of Mr. Ranil Wickremesinghe who holds the office of the President as at present. It is axiomatic that all the proceedings in the fundamental rights applications commenced long before Mr. Ranil Wickremesinghe assumed the office of President. As opposed to the submissions made on behalf of Mr. Wickremasinghe that the immunity delineated in Article 35 (1) accrued in his favour when he became both the Acting

President and subsequently the President of the country, there were rival submissions made against the proposition and this Court will assay them but not before we have set out the lineal trajectory of the immunity provision since the year 1978.

The arguments for and against immunity have pivoted on Article 35 of the 1978 Constitution as it stands under the 20th Amendment to the Constitution.

Provisions of Article 35 (1) as enacted by the 20th Amendment to the Constitution

Article 35 (1) of the Constitution, as it now stands under the 20th Amendment, reads as follows:

> *While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him in his official or private capacity;*
>
> *Provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney General, in respect of anything done or omitted to be done by the President in his official capacity;*
>
> *Provided further that the Supreme Court shall have no jurisdiction to pronounce upon the exercise of the powers of the President under paragraphs (g) of Article 33.*

It must be stated that the standalone Article 35 (1) of the Constitution sans the two provisos, as it now stands under the 20th Amendment, is a re-enactment of the originally existing Article 35 (1) of the 1978 Constitution without any material alteration. The 19th Amendment which became effective on 15.05.2015 carried a different wording in regard to the term "proceedings". Whereas the original Article 35 (1) of the 1978 Constitution and the current Article 35 (1) after the 20th Amendment confer immunity from suit in any type of "proceedings", the previously existing Article 35 (1) of the 19th Amendment conferred immunity from suit in respect of "civil or criminal proceedings". Thus one could see that the use of the expression **"no proceedings**" in the old Article 35 (1) and the identical provision of the 20th Amendment puts it beyond doubt that as long as a person holds office as President, he would stand outside the pale of not only criminal and civil proceedings but also judicial review.

Though this explicit formulation in Article 35 (1) of the 20th Amendment is sufficient to confer immunity from suit in respect of fundamental rights applications, an exception is however provided for in the first proviso to the Article in that in an application under Article 126 of the Constitution it is not the President who should be made a respondent thereto, but it is the Attorney General in respect of anything done or omitted to be done by the President in his official capacity. In other words the first proviso to Article 35 (1) excludes the application of President's immunity **where a person complains to the Supreme Court under Article 126 that the act or omission *qua* President** amounts to a violation of a fundamental right. Such an action should be though commenced against the Attorney General.

It is to be pointed out that this exception had its provenance in the 19th Amendment (the first proviso to Article 35 (1) therein) and it continues to survive the 20th Amendment. It is pertinent to observe at this stage that Clause 5 of the 20th Amendment Bill to the Constitution sought to remove this constitutional provision (the first proviso to Article 35 (1)) that had permitted recourse to the Supreme Court in regard to an alleged infringement or imminent infringement resulting from an act of the President. The nub of the 20th Amendment Bill was to restore the status quo ante that had prevailed prior to the enactment of the 19th Amendment. In other words Clause 5 of the 20th Amendment to the Constitution Bill did not contain a proviso to the President's immunity as was found in the 19th Amendment. The Supreme Court observed in a majority determination as follows:[1]

> *Thus it is seen that our Constitution which is founded on rule of law does not tolerate non-justiciability. It is premised on the very basic tenet that every injury must be remedied. If the avenue for redress is to be taken away, that is a matter that directly impinges on the fundamental rights of the people as found in Article 3 of the Constitution…*
>
> *Therefore, the removal of the existing right guaranteed through the Constitution to the people to invoke the jurisdiction of the Supreme Court under Article 126 in relation to acts of the President is inconsistent with Articles 3 and 4 of the Constitution. Hence we*

[1] SC SD 01-39/2020

determine that clause 5 in its current form requires the approval of the people at a referendum.

In light of the above determination of the Supreme Court that the removal of the first proviso to Article 35 (1) that had been introduced in the 19th amendment constituted an inconsistency with the Constitution, the bill was eventually passed with the above proviso having been restored. Thus the first proviso to Article 35 (1) continues *proprio vigore* in the 20th Amendment enabling the impugnment of President's acts or omissions *qua* President in fundamental rights applications.

Thus it is so ingrained in both the 19th and 20th Amendments that the first proviso to Article 35 (1) entails that it is only the action or inaction of the incumbent President *qua* President that could be challenged for infringement or imminent infringement of fundamental rights protected under Chapter III or IV of the Constitution.

It is worth recounting at this stage that the argument advanced by the learned Counsel for the incumbent President in favour of immunity and that of other learned President's Counsel who argued against immunity both riveted on Article 35 (1) and its first proviso.

Whilst the argument for immunity relied for its strength and stay on the very words of Article 35 (1), the contention against immunity drew attention to the fact that it is only the acts and omissions *qua* President that would qualify for immunity. In other words the argument against conferral of any immunity on the incumbent President focused on the unavailability of immunity for an executive or administrative action that emanated from a different capacity other than that of a President. The learned Counsel pointed out that these fundamental rights applications impugn the alleged omission of the incumbent President, at a time when he was the Prime Minister of the country in 2019 -the *annus horribilis* in question. In such a scenario it was argued by Shammil Perera P.C, Manohara de Silva P.C Saliya Peiris P.C and Faiszer Mustapha P.C that the inaction complained of was from an executive omission *qua* Prime Minister and such a factual matrix would not attract the immunity afforded in Article 35 (1) of the Constitution.

On the contrary Mr. Suren Fernando the learned Counsel for the incumbent President has invited this Court to decline jurisdiction and discontinue proceedings in respect of Mr. Ranil

Wickremesinghe because no proceedings shall be continued against him since he has assumed the office of President. Mr. Priyantha Nawana P.C Senior Additional Solicitor General has associated himself and made submissions to the like effect. Mr. Faiszer Mustapha P.C who appeared for the former President Maithripala Sirisena advanced the argument of absurdity if this court were to hold that no proceedings could be had against a former Prime Minister whilst a former President would have to defend himself in respect of the allegations made against him for alleged violations of fundamental rights.

All these arguments partake of the fundamental question of constitutional interpretation surrounding Article 35 (1) of the Constitution and its first proviso.

Before we deal with these principal arguments, it is apposite to allude to the constitutional litigation and jurisprudence that have emerged out of the seemingly clear words of Article 35 (1), since the provision of Article 35 (1) sans its provisos, as it stands now, is identical to the original Article 35 (1) of the 1978 Constitution. The case law we assay presently arose under the original Article 35 (1) of the 1978 Constitution.

But a distinguishing aspect of this case has to be borne in mind. While the previous case law alludes to the acts or omissions *qua* President of the previous holders of the office, the question before us in this case is whether proceedings must be discontinued in relation to a former Prime Minister who has since become the President. Could his acts or omissions allegedly in the capacity of the office of Prime Minister continue to be challenged now that he has become the President? Is the immunity in Article 35 (1) extensive enough to suspend the fundamental rights proceedings, which began long before he became the President? This is the pith and substance of the jurisdictional question that has arisen before us and before we proceed to answer this question, we would indulge in an analysis of the scope and extent of the immunity provision that has had a chequered history.

The decision of a bench of 9 judges of the Supreme Court in ***Visuvalingam v Liyanage*** *(No 1)*[2] was the first case that grappled with the original Article 35 (1) of the 1978 Constitution and in a sense a watershed in the interpretation of the Presidential immunity conferred by Article 35 of the Constitution. Though the then Article 35 (1) did not contain provisions similar to the first

[2] (1983) 1 Sri LR 203

provisos of the 19th and 20th Amendments and thus proceedings could not be taken even against the Attorney General as the representative of the State for alleged violation of fundamental rights by the President, Justice S. Sharvananda (as His Lordship then was) gave an indication of the extent of the immunity in the case when he stated:

> *"…an intention to make acts of the President non-justiciable cannot be attributed to the makers of the Constitution. Article 35 of the Constitution provides only for the personal immunity of the President during his tenure of office from proceedings in any Court. The President cannot be summoned to Court to justify his action. But that is a far cry from saying that the President's acts cannot be examined by a Court of Law*."[3]

Justice Sharvananda further added:

> *"[T]hough the President is immune from proceedings in a Court a party who invokes the acts of the President in his support will have to bear the burden of demonstrating that such acts of the President are warranted by law; the seal of the President by itself will not be sufficient to discharge that burden*."[4]

The conclusion to be arrived at in the light of the ruling of the Supreme Court as highlighted above is that in terms of Article 35 (1) of the Constitution, as long as a person holds office as President of the country, he cannot be impleaded in court for acts or omissions in his official or private capacity. However if someone relies on the lawfulness of the act, he bears the obligation of proving it lawful.[5]

Rationale for conferring immunity

Be that as it may, what is germane to the resolution of the issue before this Court is the purposive construction that the Supreme Court placed on Article 35 (1) of the Constitution. In ***Mallikarachchi v Shiva Pasupati***[6] Chief Justice Sharvananda went on to explain the rationale for the doctrine, stating that "[i]t is very necessary that when the Executive Head of the State is

[3] Ibid: p.210
[4] Ibid.
[5] Also vide *Karunathilaka v Dayananda Dissanayake, Commissioner of Elections* (Case No 1) 1999 (1) Sri LR 157 at 177
[6] *Mallikarachchi vs. Shiva Pasupati* (1985) 1 SLR 74.

vested with paramount power and duties, he should be given immunity in the discharge of his functions." [7] Enunciating the purpose of Article 35, he said:

> *"[t]he principle upon which the President is endowed with this immunity is not based upon any idea that, as in the case of the King of Great Britain, he can do no wrong. The rationale of this principle is that persons occupying such a high office should not be amenable to the jurisdiction of any but the representatives of the people, by whom he might be impeached and be removed from office, and that once he has ceased to hold office, he may be held to account in proceedings in the ordinary courts of law."*[8]

Pursuant to this reasoning which underpinned the purpose of immunity, the Chief Justice observed that the President is not above the law of the land. The Chief Justice observed that the immunity of head of state is not unique to Sri Lanka and noted that the efficient functioning of the executive required the President to be immune from judicial process. His Lordship went on to say:

> *"It is…. essential that special immunity must be conferred on the person holding such high Executive office from being subject to legal process or legal action and there from being harassed from frivolous actions. If such immunity is not conferred, not only the prestige, dignity and status of the high office will be adversely affected, but the smooth and efficient working of the Government of which he is the head will be impeded. That is the rationale for the immunity cover afforded for the President's actions, both official and private."*[9]

Thus, in the elucidation of the intent and purpose underlying the immunity the Chief Justice attributed the conferral of immunity to two distinct arguments. First, the President – for the duration of his term in office – ought not to be answerable to the jurisdiction of any court, except the representatives of the people by whom he may be impeached. Second, the efficient working of the government would be impeded if the President were not to be provided with immunity.

[7] Ibid.
[8] Ibid: p.78.
[9] Ibid.

In ***Kumaratunga v Jayakody and Another***[10] the Supreme Court observed that Article 35 (1) of the 1978 Constitution provided a wider ambit of immunity than the scope of immunity provided under Article 23 (1) of 1972 Constitution. Under the first autochthonous Constitution the immunity applied to the institution or continuation of civil or criminal proceedings while any person held the office of the President of the Republic. The extent of immunity operated in respect of anything that the President had done, or omitted to have done during the period that he had held that office as the President of the Republic.

Article 23 (1) of the 1972 Constitution read as follows:

> "*While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his official or private capacity*".

The corresponding Article 35 (1) of the 1978 Constitution and the 20th Amendment mirrored the same language except in the collocation of the words "**no proceedings**" which replaced the expression "**no civil or criminal proceedings**" of Article 23 (1) of the 1972 Constitution. But it is worthy of note that Article 35 (1) of the 19th Amendment adopted the very words of Article 23 (1) of the 1972 Constitution. As we said before in this order, the all embracing collocation "**no proceedings**" in the 20th Amendment prima facie aims at prohibition of judicial review but in two provisos to the main sub article of the 20th Amendment, derogations have been enacted. The first proviso excludes the application of President's immunity where a person claims by an application under Article 126 that a violation of his fundamental rights has occurred. The second proviso excludes from the Supreme Court its own jurisdiction to pronounce upon the exercise of the President's power to "declare war and peace" under Article 33 (2) (g) of the Constitution. The 20th Amendment, like its predecessor the 19th Amendment, also stops the running of the period of limitation during the time the immunity applies-see Article 35 (2) of the Constitution which reads as follows:

> "*Where the provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating the period of time prescribed by that law*…."

[10] (1984) 2 Sri L.R 45

From the foregoing discussion it is clear that apart from the first proviso to Art.35(1) of the Constitution which takes away the immunity of the President, there are four other instances given in Art.35 (3) in which immunity from suit is taken away. These four instances are set out in Art.35(3) of the Constitution thus:

> *"The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130 (a) relating to the election of the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament.*
>
> *Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney General."*

First, where the President under Article 44(2) of the Constitution "…assigns to himself any subject or function not assigned to any Minister…" proceedings may be instituted against the President, in that capacity regarding matters arising out of that Ministry. However, such proceedings may be instituted against the Attorney General in his capacity as the Principal Law officer of the State who has a right to appear before the Court on behalf of the President.

Second, Parliament has a power to move a Resolution alleging that the President is "permanently incapable of discharging the functions of his office by reason of physical or mental infirmity or that the President has been guilty of" one of the offences enumerated in the five sub-paragraphs of Article 38 (2)(a). In order to invoke this power the Resolution must be signed by "not less than two thirds of the whole number of Members of Parliament…. Or not less than one-half of the whole number of Members of Parliament". In the latter case the Speaker of the House plays a key role. Where not less than one-half of the members have signed the Resolution the Speaker must be satisfied that, "such allegation or allegations merit inquiry and report by the Supreme Court". In either event the Speaker is obliged to refer the matter to the Supreme Court for inquiry and report. In either category of references, the Supreme Court is allowed a maximum period of two months within which the Report containing the decision of the Supreme Court must be

submitted to the Speaker. The Constitution requires that the hearings be held before at least five judges, of whom the Chief Justice shall be one of them, unless he himself decides not to sit." The hearing shall be in private although the court has the power to hear in open sessions.

The Report presented to Parliament shall be voted on and if it proves to be adverse to the President, and the Resolution to remove the President is voted upon "by not less than two – thirds of the whole number of Members (of Parliament) voting in its favor", he shall then be removed from office, and shall under the Constitution, cease to be the President. This is a process that the Constitution provides for the impeachment of a President.

At the hearing before the Supreme Court "…the President shall have the right to appear and to be heard in person or by an Attorney at law…" The President however may not be compelled to appear if he wishes not to take any part in the proceedings. He still has the right not to take part in the proceedings, notwithstanding the fact that his immunity has been excluded from application at those proceedings.

Third, the President has no immunity from proceedings where his own election as President is being challenged under Article 130 (a) or the validity of a referendum.

Fourth, in proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament, another exception is enacted in regard to the immunity found in Article 35 (1).

It repays one's attention that the above are the only exceptions in the Constitution as regards the immunity of a President.

In a nutshell, in all proceedings that fall under Article 35(3), the application of the presidential immunity is excluded.

The exceptions mentioned above are the constitutional exceptions to the application of presidential immunity.

As is apparent now, the above discussion can be summed up pithily. The Court has already discussed the scope and extent of Article 35(1) which accords immunity from suit to the President. We took this opportunity to comprehensively deal with Article 35(1) in order to show that the blanket immunity that the President enjoyed under the original Article 35(1) of the 1978

Constitution has since become qualified or been eroded. In fact, the changing contours of immunity provisions in Sri Lanka have been commented upon in the case of ***Rajavarothiam Sampanthan v Attorney General*** [11] where the Supreme Court observed that the decision in ***Mallikarachchi v Shiva Pasupathi*** (supra) relied on by the Attorney General in the case, is of no relevance, as the absolute immunity granted to the President did not exist anymore after the Nineteenth Amendment. As has been made clear, even when the Constitution afforded absolute immunity to the President, his actions have been reviewed on the basis that 'immunity shields only the doer and not the act' – see ***Karunathilaka v Dayananda Dissanayaka***[12] Justice Mark Fernando pertinently observed in the case at page 176

> *"The immunity conferred by Article 35 is neither absolute nor perpetual. While Article 35(1) appears to prohibit the institution or continuation of legal proceedings against the President, in respect of all acts and omissions (official and private), Article 35(3) excludes immunity in respect of the acts therein described. It does so in two ways. First, it completely removes immunity in respect of one category of acts (by permitting the institution of proceedings against the President personally); and second, it partially removes Presidential immunity in respect of another category of acts, but requires the proceedings be instituted against the Attorney-General. What is prohibited is the institution (or continuation) of proceedings against the President. Article 35 does not purport to prohibit the institution of proceedings against any other person, where that is permissible under any other law. It is also relevant that immunity endures only "while any person holds office as the President". It is a necessary consequence that immunity ceases immediately thereafter, indeed it would be anomalous in the extreme if immunity for private acts were to continue. Any lingering doubt about that is completely removed by Article 35(2), which excludes such period of office, when calculating whether any proceedings have been brought within the prescriptive period. The need for such exclusion arises only because legal proceedings can be instituted or continued thereafter. If immunity protected a President even out of office, it was unnecessary to provide how prescription was to be reckoned."*

[11] *Rajavarothiam Sampanthan v Attorney General*, SC FR 351-356/2018, and 358-361/2018, SCM 13 December 2018

[12] (1999) 1 Sri.LR 157.

Despite the attenuation of immunity by constitutional amendments and judicial pronouncements in the above manner, the immunity from proceedings does exist in its uncompromising terms of Article 35 (1) and it is this provision that is invoked to discontinue proceedings in respect of Mr. Ranil Wickremasinghe.

This Court has already alluded to the *raison d'être* for these immunity provisions favoring a sitting President of the country. The overarching purpose that girdles the immunity provision was again reiterated by H.D.Tambiah J (as His Lordship then was) in ***Kumaratunga v Jayakody*** (supra). His justification for the conferment of immunity bears repetition. His statement of the law, applies with equal force, to the new version of Art.35(1) as found in the 20th Amendment. Tambiah J said:

> *"On a mere reading of Article 35(1), it is clear that absolute personal immunity is conferred on the President, during the tenure of his office, from any proceedings in any court or Tribunal in respect of anything done or omitted to be done by him either in his official or private capacity. It is not an immunity for all times but limited to the duration of his office. Article 35(1) says "no proceedings", that is every type of proceedings, without limitation or qualification. The Article further says "no proceedings" shall be instituted or continued against the President in respect of anything done or omitted to be done by him in his official or private capacity. If that is so, he, cannot be impleaded, he is above the process of any Court to bring him to account as President in respect of anything done in his official or private capacity. The President, while in office, has been put beyond the reach of the Court. – there are two aspects in Article 35(1) – immunity of the President from all proceedings, and the Bar to the Court entertaining and continuing with the proceedings."*[13]

When Sharvananda CJ and H.D. Tambiah J (as His Lordship then was) characterized immunity as personal to the office of the President and justified it on the imperative requirement to protect the Head of the State from being frivolously dragged into Court, and harassed needlessly, it ought to be borne in mind that they employed a purposive construction of the immunity provision.

[13] Ibid., at pages 58 – 59.

It bears repeating that constitutional interpretation is different from statutory or common law interpretation because of the general and open-ended nature of the language used in Constitutions. Furthermore, the text of Constitutions is of an ancient origin and it concerns topics that are central to a country's basic political structures and values. These factors have helped develop a distinct set of constitutional interpretative techniques that require their judicious use in judicial interpretation. This distinction between constitutional interpretation and statutory interpretation was further highlighted by Chief Justice Dickson of the Canadian Supreme Court in the following words:

> *"The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realties often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind."* [14]

We have been referred to US precedents on immunity available to a President and it is to be noted that unlike the Sri Lankan Constitution of 1978, the doctrine of immunity finds no explicit reference in the Constitution of the United States. Even so historical antecedents and judicial deference to executive power have shaped the emergence of the doctrine in course of time. The absence of constitutional authority left the creation of an American immunity doctrine, which has evolved over time rendering the contours of the scope of immunity uncertain-see ***Mississippi v. Johnson***[15] where the President was placed beyond the reach of judicial direction.

The court concluded it lacked jurisdiction to enjoin President Andrew Johnson from enforcing the Reconstruction Acts. In 1982, the United States Supreme Court by a bare 5-4 majority held that the President enjoyed absolute immunity from civil damages for official action taken within

[14] *Hunter v Southam Inc.,* 1984 SCC OnLine Can SC 36: (1984) 2 SCR 145
[15] *Mississippi v. Johnson* 71 U.S (4 Wall) 475.

the outer perimeter of his authority. The plaintiff in ***Nixon v. Fitzgerald***,[16] an Air Force cost control expert, alleged that Nixon and White House aides violated his First Amendment rights by forcing him from his job in retaliation for damaging testimony he gave before Congress. The Court reasoned that the President's unique position as chief constitutional officer demanded the absolute immunity from civil damages. Article II grounds the President unique responsibilities, such as conducting foreign affairs, serving as Commander-in-Chief of the armed forces and managing the entire executive branch, which the Court held required the utmost discretion and sensitivity. As these responsibilities entail decisions likely to arouse intense passions, the Court lamented that each presidential decision, like a judge's verdict, could prove a lighting rod for civil suits. In sum, the Court opined that subjecting the President to civil damages liability based on his actions would hamstring his ability to make the difficult decisions the Republic required him to make. This prospect outweighed the losses to just one person that civil damages could compensate. The court accordingly upheld President Nixon's absolute immunity defense on public policy grounds and dismissed Fitzgerald's claim.

Clinton v Paula Jones[17] pertained to civil liability relating to a person's private acts before he became the president. The Supreme Court denied the President's application for qualified temporary immunity that would stay the trial until the President ceased to hold office. Justice John Paul Stevens writing for the majority held that the doctrine of separation of powers was intended to protect one branch of government from intruding into the domain of the other, and that a trial judge performing his judicial duties did not interfere with the authority of the President. Justice Breyer's concurrence expressed the view that the President would have the benefit of immunity only if he would be able to show that the process of court would substantially interfere with the constitutionally assigned duties of the President. The foregoing would show that the United States courts do indulge in a balancing act between good government and immunity and this has been made possible by a non-codification of the doctrine of immunity in the U.S. Constitution. But it cannot be gainsaid that there is a perceptible strand of opinion in the U.S that the demands of the presidency would require immunity and often times the very invocation of purposive interpretation is discernible in the U.S precedents.

Across the Palk Strait Article 361 of the Indian Constitution provides absolute immunity to the President and even the Governor for the exercise and performance of the powers and duties of

[16] *Nixon v Fitzgerald* (1982) 457 U.S 731.
[17] *Clinton v Jones* (1997) 520 U.S 681.

their office or for any act done or purporting to be done by them in the exercise and performance of those powers and duties, subject, as regards the President, to an impeachment under Article 61.

So the conferral of immunity of varying degrees is not unique to Sri Lanka and as we said at the beginning, we return to the question that looms large in this case-namely whether the immunity as set out in Article 35 (1) would attach to Mr. Ranil Wickremesinghe -the incumbent President of the country. He became the acting President on 13th July 2022 and on 20th July 2022 Mr.Wickremesinghe was elected as the 9th President by Parliament.

As we said before, several counsel argued that immunity afforded in Article 35 (1) of the Constitution would not be applicable to Mr. Ranil Wickremasinghe as what is rendered immune to a suit is an act or omission *qua* President. For instance Shammil Perera P.C citing ***Mallikarachchi v Shiva Pasupati*** (supra) submitted that immunity conferred by Article 35 (1) only immunizes from suit, or during the tenure of the office of the President, acts or omission *qua* President. The learned President's Counsel contended, as did Mr.Manohara de Silva P.C that Article 35 (1) of the Constitution cannot apply to an act or omission which arose in the official capacity of a former Prime Minister. Faiszer Mustapha P.C who appeared for the former President contended that immunity lies only in respect of acts or omissions in the capacity of the President. The substance in essence of all the argument against immunity is that upon assumption of office as President, immunity inures to any person only for prospective acts or omissions *qua* President and if the prospective act or omission in the capacity of the President results in an infringement of fundamental rights, that becomes actionable by virtue of the first proviso to Article 35 (1). The learned Counsel further submitted that the Constitution has made no provisions for immunity of prior acts or omissions that were committed in a different capacity. The fact remains that the acts or omissions complained in these proceedings all related to purported fundamental rights violations that allegedly took place prior to the assumption of office as acting President and later as President by Mr. Ranil Wickremasinghe.

It is indubitable that these applications were **instituted** against Mr Ranil Wickremesinghe as one of the Respondents for alleged acts done or omitted to be done long before he became the President on 20th July 2022. Can the proceedings continue now against him?

The very words of Article 35 (1) provide the answer. *What is prohibited by Article 35 (1) is the institution (or continuation) of proceedings against the President. Article 35 does not purport to*

prohibit the institution or continuation of proceedings against any other person. The words in Article 35 (1) "**no proceedings shall be …..continued….."** are intentional. In point of fact proceedings could only be continued if they have been instituted. The Oxford English dictionary defines the word "continue" in its transitive sense to mean "to carry on, keep up, maintain, go on with, persist in (an action, usage, etc.).." . In fact in the legal context the Oxford English dictionary gives an example of a sentence that had appeared in *Boston (*Mass.*) Journal* 23 May 1/6-*He appeared before Judge Sanger of the District court in Cambridge this morning, and has his case continued until June 4.* The use of the word *"continue"* in the above sentence connotes that something had begun in the past and continued thereafter. The corollary follows that having regard to the facts and circumstances of these applications, they all were instituted before Mr. Ranil Wickremasinghe commenced office as President and Article 35 (1) would bar the proceedings from continuing upon Mr. Ranil Wickremasinghe assuming office as President.

The proceedings were instituted and began long before Mr. Ranil Wickremesinghe became the President on 20th July 2022. Article 35 (1) has embargoed the proceedings to continue because the constitutional injunction is a total prohibition, during the presidency, of any proceedings to continue. It must be pointed out that the contention of learned President's Counsel and other counsel who appeared for several of the respondents ignored the impact and import of the words **"no proceedings shall be …continued.."** and a textual and originalist interpretation of Article 35 (1) irresistibly leads us to the conclusion that all other actions and applications relating to official acts, omissions or personal acts prior to the assumption of office as President, cannot be continued in view of the clear and unambiguous wording of Article 35 (1) of the Constitution.

According to the arguments against conferring immunity on Mr. Ranil Wickremesinghe, it is only the act or omission *qua* President that cannot be proceeded against. Neither the English nor the Sinhala text of Article 35 (1) renders itself susceptible to such an interpretation. Both texts are so extensive in their amplitude that even if private actions, be it civil or criminal, had commenced against Mr. Ranil Wickremasinghe, they could not continue because of the stringent terms of Article 35 (1). In the same way if fundamental rights applications had been instituted before Mr. Ranil Wickremasinghe became the President, it could not continue upon his assumption of office as President. The wording of Article 35 (1) is as plain as a pikestaff. Thus if proceedings have been instituted in respect of acts or omissions even *qua* Prime Minister, these proceedings cannot continue because Article 35 (1) prohibits the **continuation of proceedings** even in relation to official acts or omissions as Prime Minister.

A juxtaposition of the two provisions in both Sinhala and English texts of the Constitution shows that both prohibit the continuation of proceedings that were filed against a person long before he becomes the President.

While any person holds office as President:

- *no proceedings shall be instituted **or continued** against him*
- *in any court or tribunal*
- *in respect of anything done or omitted to be done by him*
- *either in his official or private capacity:*

However *nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney-General, in respect of anything done or omitted to be done by the President, in his official capacity:*

- ජනාධිපතිවරයා ලෙස ධුරය දරන කවර වූ හෝ තැනැත්තෙකු විසින්
- පෞද්ගලික තත්ත්වයෙහි ලා හෝ නිල තත්ත්වයෙහි ලා හෝ
- කරන ලද හෝ නොකර හරින ලද කිසිවක් සම්බන්ධයෙන්
- ඔහුට විරුද්ධව කිසිම අධිකරණයක හෝ විනිශ්චය අධිකාරයක කිසිම නඩු කටයුත්තක් පැවරීම හෝ පවත්වාගෙන යාම නොකළ යුත්තේය.
- එසේ වුවද, ජනාධිපතිවරයා විසින් ඔහුගේ නිල තත්ත්වයෙහි ලා කරන ලද හෝ නොකර හරින ලද කිසිවක් සම්බන්ධයෙන් නීතිපතිවරයාට විරුද්ධව 126 වන ව්‍යවස්ථාව යටතේ ඉල්ලීමක් කිරීමට යම් තැනැත්තෙකුට ඇති අයිතිය සීමා කරන ලෙස මේ අනුව්‍යස්ථාවේ කිසිවක් කියවා තේරුම් නොගත යුත්තේය.

In the circumstances the prohibition that has been imposed by the Constitution will be rendered nugatory if their literal and natural meanings are not given effect to. In fact as we have seen above the prohibition of **institution or continuation of proceedings** against an incumbent President has been constitutionally stipulated having regard to the several duties and obligations cast upon the President. In view of the undivided attention he is obligated to pay towards the affairs of the State, the prohibition has been enacted.

Though the immunity has been described as personal, the President cannot even waive the immunity. Because he cannot waive the immunity, no proceedings can be instituted or continued. We reiterate that the word "*continued*" is used in contra distinction to "*instituted"*. One can continue proceedings only if they have been instituted.

Article 35 (1) presupposes that proceedings must have been instituted before any person becomes the President. Article 35 (1) goes on to enact that proceedings in respect of acts committed or omitted, that were instituted before one became the President, cannot continue.

Therefore settled is the doctrine that no proceedings shall be instituted or continued against the President, during his tenure of office and except for the exceptions that have been specifically provided for in the first proviso and Article 35 (3), the constitutional embargo that proceedings that commenced before the election of the President cannot continue must be enforced.

The exception to immunity enacted in first proviso to Article 35 (1) is only in relation to prospective acts or omissions of the President *qua* President and the prior acts or omissions that have been alleged fall outside the ambit of the first proviso. As for the alleged omissions averred against Mr. Ranil Wickremesinghe in these applications, it is Article 35 (1) alone that would apply exclusively to confer immunity and the first proviso has no application to such a situation.

In a contractual context, the English Court of Appeal held in ***Re Mahmoud and Ispahani***[18] that a prohibition that has been imposed for public good has to be implemented. The reasoning of this case applies with equal force to the constitutional contract that the 1978 Constitution has made for the people of this country and all organs of state are under an obligation to recognize and advance this prohibition. So on a textual, originalist and purposive construction of the Constitution, this Court takes the view that Article 35 (1) of the Constitution applies *stricto sensu* in regard to the alleged omissions complained of in these applications and for the reasons and justification we have adumbrated, the immunity intended by the Constitution in Article 35 (1) should apply to Mr. Ranil Wickremesinghe.

What remains now is the argument of absurdity that was tangentially touched upon by a learned President's Counsel. The contention ran as follows. The proceedings against the former President Mr.Maithripala Sirisena are likely to continue whilst proceedings against the former Prime Minister would not continue. Such an eventuality, according to learned President's Counsel, leads to absurdity.

Undoubtedly it is a venerable principle of interpretation that a law will not be interpreted to produce absurd results. But there is no absurdity in giving recognition to the textual context of the very words of the Constitution pure and simple. The proceedings against the former President Mr.Maithripala Sirisena were instituted and continued against him by virtue of the first proviso to Article 35 (1) read with Article 126 of the Constitution. The proceedings against the former Prime Minister Mr. Ranil Wickremesinghe were instituted and continued under Article 126 of

[18] (1921) 2 K.B 716

the Constitution simpliciter. When these applications were filed, the immunity in the respect of the former President Mr.Maithripala Sirisena had to drop because of the first proviso to Article 35 (1).

The proceedings have to continue against him because there was no immunity that attached to him even when the proceedings began. There is no immunity that inures to him now and these proceedings need to continue against him. In regard to the incumbent President, the constitutional embargo supervened on 20th July 2022 when he was elected President and this court has to decline jurisdiction to continue proceedings against him by virtue of Article 35 (1) applying to him.

As such different regimes apply to the former President and the incumbent President respectively and this court cannot choose to ignore the plain words of the Constitution and no absurdity arises when the words of the social contract-the Constitution-are patently clear and constitute the legitimate basis of interpretation. As we said before, the *sui generis* character of constitutional interpretation has been recognized in a number of commonwealth jurisdictions. *Dhavan J in* ***Moinuddin vs State of Uttar Pradesh***[19] *stated at 491-*

> *The choice between two alternative construction should be made in accordance with well recognized canons of interpretation.*
>
> *Firstly , court must adopt one which will ensure smooth and harmonious working of the constitution and eschew that which would lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory,*
>
> *Secondly, constitutional provisions are not to be interpreted and applied by narrow technicalities , but as embodying the working principles for practical government,*
>
> *Thirdly, constitutional provisions are not to be regarded as mathematical formulae and that their significance is not formal but vital. Hence practical considerations rather than formal logic must govern provisions which are obscure.*
>
> *Fourthly, the one which avoids a result unjust or injurious to the nation should be preferred.*
>
> *Fifthly, court must read the constitution as a whole, take into considerations of different paths and try to harmonize them*
>
> *Sixthly, and above all court should proceed on the assumption that no conflict or repugnancy between different parts was intended.*

[19] AIR 1960 All 484

Since the prohibition against continuation of proceedings against an incumbent President has been imposed for the common good of the affairs of the State and it is important that the head of state has to be freed from any form of harassment, hindrance or distraction to enable him to fully attend to the performance of his official duties and functions this contextual approach to the words of Article 35 (1) is consistent with the spirit of the Constitution. Accordingly this Court proceeds to hold that no proceedings in respect of these applications can continue against Mr. Ranil Wickremasinghe at this stage.

Jayantha Jayasuriya, PC
Chief Justice

Buwaneka Aluwihare, PC
Judge of the Supreme Court

L.T.B.Dehideniya
Judge of the Supreme Court

Murdu N.B. Fernando, PC
Judge of the Supreme Court

S. Thurairaja, PC
Judge of the Supreme Court

A.H.M.D.Nawaz
Judge of the Supreme Court

A.L. Shiran Gooneratne
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 No. 195/2022

1. Dr. Athulasiri Kumara Samarakoon.
2. Soosaiappu Neavis Morais.
3. Dr. Mahim Mendis.

Petitioners

Vs.

1. Hon. Ranil Wickremesinghe
   Minister of Finance 2022-Present.
2. Mahinda Rajapakse
   Former Cabinet Minister of Finance
   2019 – 2020.

2A. Basil Rajapakse
   Former Cabinet Minister of Finance
   2020 – 2022.

2B. Ali Sabri, PC
   Former Cabinet Minister of Finance
   2022.

3. Prof. G.L. Peiris.
4. Dinesh Gunawardena.
5. Douglas Devenanada.
6. Dr. Ramesh Pathirana.
7. Prasanna Ranathunga.
8. Rohitha Abeygunawardena.

9. Dullas Alahapperuma.

10. Janaka Wakkumbura.

11. Mahinanda Aluthgamage.

12. Mahinda Amaraweera.

13. S.M. Chandrasena.

14. Nimal Siripala de Silva.

15. Johnston Fernando.

16. Udaya Gammanpila

17. Bandula Gunawardena.

18. Gamini Lokuge.

19. Vasudeva Nanayakkara.

20. Chamal Rajapakse.

21. Namal Rajapakse

22. Keheliya Rambukwella.

23. C.B. Ratnayake.

24. Pavithra Devi Wanniarachchi.

25. Sarath Weerasekera.

26. Wiman Weerawansa.

27. Janaka Bandara Tennakoon.

The 1st to 27th Respondents are all former Members of the Cabinet of Ministers of the Republic and presently sit as Members of Parliament of the Republic.

28. The Monetary Board of the Central Bank of Sri Lanka.

29. Ajith Nivad Cabral
Former Governor of the Central Bank of Sri Lanka.

30. W.D. Laxman
Former Governor of the Central Bank of Sri Lanka.

31. S.R. Attygalle
Former Secretary to the Treasury.

32. S.S.W. Kumarasinghe
Former Member of the Central Bank of Sri Lanka.

32A. Gotabaya Rajapakse

ADDED 32A RESPONDENT

33. Hon. Attorney General.

34. Chulantha Wickremaratne
Auditor General.

35. Hon. Justice Eva Wanasundara.

36. Hon. Justice Deepali Wijesundara.

37. Mr. Chandra Nimal Wakishta.

Members of the Commission To Investigate Allegations of Bribery or Corruption.

38. Mr. P.B. Jayasundera.

39. Mr. Dhammika Dasanayake.

Respondents

SC FR No. 212/2022

1. Chandra Jayaratne

2. Julian Bolling

3. Jehan CanagaRetna,

4. Transparency International Sri Lanka

Petitioners

Vs

1(a) Hon. Attorney General.

1(b) Hon. Gotabaya Rajapakse
Former President of Sri Lanka.

2. Hon. Mahinda Rajapakse
Former Prime Minister, Former Minister of Buddhasasana, Religious & Cultural Affairs Former Minister of Urban Development & Housing, Former Minister of Economic Policies and Plan Implementation and Former Minister of Finance.

3. Hon. Basil Rajapakse
Former Minister of Finance.

4. Hon. M.U.M. Ali Sabri, PC
Former Minister of Finance.

5. Hon. Ranil Wickremesinghe
Prime Minister.

6. Deshamanya Professor W.D. Lakshman
Former Governor of the Central Bank.

7. Mr. Ajith Nivad Cabral
Former Governor of the Central Bank.

8. Dr. P. Nandalal Weerasinghe
Governor of the Central Bank of Sri Lanka.

9. The Monetary Board of the Central Bank of Sri Lanka.

10. S.R. Attygalle
Former Secretary to the Treasury.

11. Mr. K.M. Mahinda Siriwardana
Secretary to the Treasury.

12. Mr. Saliya Kithsiri Mark Pieris, PC.
President of the Bar Association of Sri Lanka.

13. Mr. Isuru Balapatabedi, AAL
Secretary of the Bar Association of Sri Lanka

Respondents

Before : Jayantha Jayasuriya, PC, CJ

B.P.Aluwihare, PC, J

Vijith K. Malalgoda, PC,J

L.T.B. Dehideniya, J &

Murdu N.B. Fernando, PC, J

Counsel : Upul Jayasooriya,PC with Vishwaka Peiris and Sampath Wijewardene for the Petitioners in SCFR 195/22.

Chandaka Jayasundera, PC with S.A. Beiling, Chinthaka Fernando, Sayuri Liyanasooriya and Manisha Dissanayake for the Petitioner in SCFR 212/22.

Romesh De Silva, PC with Uditha Egalahewa, PC and Niran Anketell for the 28th Respondent in SCFR 195/22 and 8th & 9th Respondents in SCFR 212/22.

Shavendra Fernando PC with Jeevantha Jayathilake, A Arawwla Ralitha Amarasekera & Sapumal Tennakoon for the 29th Respondent in SCFR 195/22 and 7th Respondent in SCFR 212/22.

Nihal Jayawardena, PC with Radhya Herath for the 31st Respondent in SCFR 195/22 and 10th Respondent in SCFR 212/22.

Manohara de Silva, PC with Boopathy Kahathuduwa for 32nd Respondent in SCFR 195/22.

Nerin Pulle,PC, ASG, with Shiloma David , SC, Indumini Randeny &Vishni Ganepola, SC for the 33rd, 34th and 39th Respondents in SCFR 195/22 and 1A &11th Respondents in SCFR 212/22.

Anura Meddegoda, PC with Mr. Yasa Jayasekera, Chathura Galhena , Ms. Nadeesha Kannangara and Saumya Wijesinghe for the 38th Respondent in SCFR 195/22.

Gamini Marapana, PC with Navin Marapana for the 2nd &2A respondents in 195/22 and 2nd & 3rd respondents in SCFR 212/22.

K. Kanag Iswarn, PC with Shivaan Kanag Iswaran & Lakshmanan Jayakumar for the 12th & 13th Respondents in SCFR 212/22.

Suren Gnanaraj with Wathsala Kekulawala, Rashmi Dias and Sakuni Weeraratne for the 30th Respondent in SCFR 195/22 and 6th Respondent in SCFR 212/22.

Argued on	:	01.08.2022,03.08.2022, 10.08.2022, 31.08.2022, 02.09.2022, 15.09.2022, 16.09.2022, 22.09.2022, 23.09.2022, 27.09.2022 and 03.10.2022
Decided on	:	07.10.2022

Court is inclined to grant leave to proceed in both these applications for alleged violations of fundamental rights guaranteed under Articles 12(1) and 14(1)(g) of the Constitution. Accordingly, leave to proceed is granted for the said violations in terms of Article 126(2) of the Constitution, in both applications.

Court makes the following orders in SC FR 195/2022:

1. Leave to proceed is granted against **2nd, 2A, 2B, 3rd to 27th, 28th to 32nd, 32A and 38th** respondents;

2. In view of Court's decision to grant leave to proceed against the 28th respondent board and the fact that two of former Governors of the Central Bank and two of the members who served in the 28th respondent board during the period relevant to this application have been cited as respondents in this application, Court is of the view that the remaining members of the 28th respondent board who served during the said period should also be made respondents.

   Hence, **petitioners** are directed to add Dr. Sanjeewa Jayawardane P.C and Dr. Ranee Jayamaha who are current members of the 28th respondent board, as **32B & 32C respondents**. Petitioners are further directed to amend the Caption accordingly and the amended caption should be filed within two weeks from today;

3. **34th respondent** – Auditor General - is directed to conduct an audit upon examining all relevant material and submit a report on the following:
   a. the decision made by the 28th respondent (Monetary Board) to set the value of the Sri Lankan Rupee at or around 203/- as against the US Dollar and all matters connected to the said decision;

   b. the delay in seeking facilities from the IMF by the Republic;

   c. all matters relating to the settlement of International Sovereign Bond/s to the value of US$ 500 million on 18.01.2022, utilising foreign reserves;

   The said report should comprise observations, including whether any loss had been caused to the Central Bank due to one or more of the three matters referred to above. 34th respondent is further directed to submit to this court, the report titled "Special Audit Report on Financial Management and Public Debt Control in Sri Lanka 2018-2022" dated 4th July 2022.

34th respondent is further required to comply with the above directions not later than 02nd January 2023;

4. **28th respondent** – The Monetary Board of the Central Bank of Sri Lanka - is directed to produce all documents, relating to matters referred to by Dr. Sanjeewa Jayawardane P.C and Dr. Ranee Jayamaha, at the meeting of the Committee on Public Enterprise held on 25.05.2022, specifically;

    a. the suggestion said to have been made, that the Republic should seek relief and / or other financial assistance from the International Monetary Fund,

    b. objection to and / or otherwise disagreement expressed regarding the artificial maintenance of exchange rate of the Sri Lankan Rupee at / or at a level below 203/- as against the US Dollar.

    Said documents are required to be submitted to this Court not later than 30th November 2022;

5. **Petitioners** are directed to issue notices through the Registrar of this Court on all the respondents against whom leave to proceed is granted and 32B and 32C respondents within one week of filing the further amended caption as per the direction (2) above.

6. **Registrar** is directed to communicate this order to the 28th and 34th respondents forthwith.

Court makes the following orders in SC FR 212/2022

7. Leave to proceed is granted against **1(b), 2nd, 3rd, 6th, 7th, 9th and 10th** respondents;

8. **8th respondent** – Governor of the Central Bank - is directed to produce copies of communications and recommendations given to the 1(b), 2nd, 3rd, 6th, 7th, 9th and 10th respondents by the Central Bank with regard to the matters impugned in this application during the time material to this application, not later than 30th November 2022;

9. **9th respondent** – The Monetary Board of the Central Bank of Sri Lanka - is directed to produce copies of all reports given to the 2nd and 3rd respondents in terms of sections 64 and 68 of the Monetary Law Act, No 37 of 1974, during the time relevant to this application, not later than 30th November 2022;

10. **Petitioners** are directed to issue notices through the Registrar of this Court on all the respondents against whom leave to proceed is granted within one week.

11. **Registrar** is directed to communicate this order to the 8th and 9th respondents, forthwith.

Both these matters are to be mentioned at 10.00 a.m. on 09th January 2023, for directions on filing of objections, written submissions and for scheduling the hearing.

Registrar is directed to constitute the same Bench.

Jayantha Jayasuriya, PC
Chief Justice

Buwaneka Aluwihare, PC
Judge of the Supreme Court

Vijith Malalgoda, PC
Judge of the Supreme Court

L.T.B.Dehideniya
Judge of the Supreme Court

Murdu N.B. Fernando, PC
Judge of the Supreme Court

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

In the matter of an application made in terms of Article 126 of the Constitution.

Viraj Priyankara Abeyratne,
No.179, Wijaya Road,
Kolonnawa.

Petitioner

SC (F/R) No. 222/2016

Vs.

1. Ceylon Electricity Board,
   Sir Chittampalam A. Gardiner Mawatha,
   P.O. Box 50, Colombo 02.

2. W.D.A.S. Wijepala,
   The Chairman,
   Ceylon Electricity Board,
   Sir Chittampalam A. Gardiner Mawatha,
   P.O. Box 50, Colombo 02.

3. M.C. Wickramasekara,
   The General Manager,
   Ceylon Electricity Board,
   Sir Chittampalam A. Gardiner Mawatha,
   P.O. Box 50, Colombo 02.

4. S.S. Kahanda,
   Deputy General Manager,
   Southern Province,
   Ceylon Electricity Board,
   No. 167, Matara Road,
   Galle.

5. Public Utilities Commission of Sri Lanka,
   6th Floor, BOC Merchant Tower,
   St. Micheal's Road,
   Colombo 03.

6. G.G.C.S. Kumara,
   Pradeshiya Electrical Engineer,
   Ceylon Electricity Board,
   Tangalle.

7. Udaya Hettige,
   Electrical Superintendent,
   Ceylon Electricity Board,
   Tissa Road,
   Tangalle.

8. Priyantha Lal Ratnayake,
   The Secretary,
   Pradeshiya Sabha,
   Tangalle.

9. R.M.S. Yapa,
   Divisional Secretary – Tangalle,
   Beliatte Road,
   Kadurupokuna,
   Tangalle.

10. W.H Karunaratne,
    The District Secretary,
    Hambanthota District,
    District Secretariat,
    Hambanthota.

11. Ediriweera Patabendige Ranjith,
    No.276, Galagahawatta,
    Unakuruwa,
    Tangalle.

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

Respondents

Before: **Justice L.T.B. Dehideniya**

Justice A.H.M.D. Nawaz

Justice A.L. Shiran Gooneratne

Counsel: Dammika Jayanetti instructed by Nayana Dissanayake **for the Petitioner.**

Rajitha Perera, SSC, **for the 1st to 7th, 9th and 12th Respondents.**

Harishke Samaranayake instructed by Ms. Shamila Karunaratne **for the 8th Respondent.**

Yohan Cooray instructed by Thushara Pieris **for the 11th Respondent.**

Argued on: 09/07/2021

Decided on: **22/02/2022**

A.L. Shiran Gooneratne J.

The Petitioner is the owner and developer of the land called Walatahena, alias, Kesbatuduwe Wellawatte and Aliyawetuna Hena, more fully described in the schedule to the Petition. Upon the purchase of the two blocks of land, the Petitioner cleared and created a private road from the upper block, Aliyawetuna Hena to descend to the lower block, Walatahena alias Kesbatuduwe Wellawatte and therefrom, to the beach. The

Petitioner claims that the 8th Respondent has arbitrarily certified that the said road constructed by the Petitioner within his land, as a public road belonging to the Tangalle Pradeshiya Sabha and along with the 6th and 9th Respondents and at the behest of the 11th Respondent, facilitated the drawing of electricity lines over the said private road to provide an electricity connection to the 11th Respondent who is forcibly occupying a portion of the said land owned by the Petitioner, in violation of the Petitioners fundamental rights guaranteed under Article 12(1) and 14(1)(g) of the Constitution.

The Petitioner, *inter alia*, also prays for an order directing the 1st to 4th and 6th and 7th Respondents to remove all electrical lines, poles and any other apparatus and/or equipment from the land belonging to the Petitioner described more fully in the schedule to the Petition.

When this case came up for support, the Court was inclined to grant leave to proceed for the alleged violation of fundamental rights enshrined in Article 12(1) and 14(1)(g) of the Constitution by the 4th, 6th, 8th and 9th Respondents.

The facts of the case as established from the pleadings and the documents therein are set out as follows:

The Petitioner is the Managing Director of Suduwella Resort Limited and the owner of the two portions of land more fully described in the Petition. The Petitioner claims title to Walatahena, alias Kesbatuduwe Wellawatte and Aliyawetuna Hena by Deed of Transfer No. 3223 and No. 17916 and the half share of the Petitioner's deceased wife, transferred to the Petitioner by Executors Conveyance No. 6489 and No. 6488 respectively (P1 to P4).

The Petitioner contends that the 11th Respondent who was in forcible occupation of a portion of the land named Walatahena alias Kesbatuduwe Wellawatte, voluntarily vacated the illegal occupation upon receiving a cash settlement from the Petitioner, however, reentered the said portion, consequent to the 26/12/2004 Tsunami, and has

been forcibly occupying the said potion of the land to date. The land unlawfully occupied by the 11th Respondent is depicted in Survey Plan No. 2103/ 9000, marked 'P5'. The said cash settlement arrived between the Petitioner and the 11th Respondent dated 20/05/2003, is marked 'P49'.

The Petitioner instituted Case Bearing No. 2968/L and No. 2972/L in the District Court of Tangalle to prevent the 11th Respondent entering the land called Aliyawetuna Hena, for vindication of title of the land called Walatahena alias Kesbatuduwe Wellawatte and the eviction of the 11th Respondent from the portion of the said land. Consequent to an order obtained in Case No. 2968/L, a survey carried out by the Survey General's Department and the plan, super imposed on the Survey Plan No. 1301, had established that the impugned road from Aliyawetuna Hena to Walatahena, claimed to be used by the public is within the Petitioner's land as reflected in the Surveyors' Report marked 'P51'. After an inspection of the land, the said plan has been approved by the 8th Respondent. In Case Bearing No. 22650, the 8th Respondent by letter dated 16/12/2016, has informed the Magistrates Court of Tangalle, that the impugned road does not belong to the Tangalle Pradeshiya Sabaha (P52). Presently, due to a court order made in Case Bearing No. HCRA 07/2017, the Petitioner has fenced the impugned road.

It is contended that from the year 2008, the 11th Respondent who was in forcible occupation was attempting to obtain electricity to the said portion of the land claiming that the impugned road is a public road. The Petitioner has raised objections to such attempts with the 6th to 8th Respondents, as more fully set out below.

By letter dated 01/12/2008 addressed to the Electrical Superintendent of Tangalle (7th Respondent) marked 'P21', the Petitioner objected to any attempt made by the 11th Respondent to obtain electricity through the Petitioners land. Thereafter, the Petitioner's lawyers and the Petitioner addressed letters dated 24/03/2010 and 05/01/2012, to the Electrical Superintendent Tangalle, marked 'P22' and 'P23' respectively, objecting to the supply of electricity to the 11th Respondent through the

Petitioner's land. The Petitioner further states that the 11th Respondent in an attempt to claim that the impugned road is a public road, instigated fishermen to make representations to the Pradeshiya Sabha, when in fact, there was a public road for the use of the fishermen. In response, the Petitioner through his lawyers sent letter dated 26/02/2009 marked 'P24', and informed the Grama Sevaka and the Chairman of the Pradeshiya Sabha, that the road was constructed by the Petitioner for private use. Survey Plan No. 2103/9000 (P29), submitted to the Pradeshiya Saba and approved after inspection of the land on 05/04/2016, does not reflect a public road belonging to the Pradeshiya Sabha.

A Way Leave Notice dated 07/03/2013, marked 'P27', received by the Petitioner from the 6th Respondent and copied to the 8th Respondent seeking permission to draw electricity lines through the Petitioner's land to the portion of land forcibly occupied by the 11th Respondent was objected to by the Petitioner by letter dated 22/03/2013, marked 'P25'. The said letter addressed to the Chairman of Tangalle Pradeshiya Sabha sought intervention to prevent the drawing of electricity lines over the Petitioner's private land. On the same day by letter dated 22/03/2013 marked 'P26', the Petitioner also informed the Electrical Superintendent Tangalle, objecting to the drawing of electricity lines over his land.

Around June 2016, the Petitioner was once again informed that the 11th Respondent was attempting to obtain electricity to the land forcibly occupied and accordingly the Petitioner by letter dated 16/06/2016 marked 'P11', addressed to the 7th Respondent, objected to the drawing of electricity lines over his land. The Petitioner by letter dated 24/06/2014 marked 'P12', also informed the 5th Respondent (Public Utilities Commission of Sri Lanka) informing the said authority that electricity lines were being installed over the Petitioner's land without his consent.

The application before this Court was necessitated by the issuance of letter marked '8R6', dated 21/06/2016, by the Secretary Pradeshiya Sabha Tangalle (8th Respondent)

to the Divisional Secretary Tangalle (9th Respondent) and copied to the Pradeshiya Electrical Engineer (6th Respondent) stating that the impugned road is a public road belonging to the Pradeshiya Sabha and the Pradeshiya Sabha has no objection to the supply of electricity to the said road. The Petitioner claims that the said letter was written at the behest of the 11th Respondent to facilitate the supply of electricity and not at the request of the residents of the area to provide lighting to the impugned road as reflected in documents marked '8R1' to '8R5'. The Petitioner denies the assertion of the 8th Respondent that the impugned road is a public road as reflected in letter dated 21/06/2016, marked '8R6'. In this context it is important to note that in Case Bearing No. 22650 in the Magistrates Court of Tangalle, filed in terms of Section 66 of the Primary Courts Procedure Act, the 8th Respondent by letter dated 16/12/2016 (P52), submitted that the impugned road is used by the public, however, does not refer to the said road as a road vested with the Tangalle Pradeshiya Sabha.

Application dated 30/05/2016, seeking electricity to the portion of land occupied by the 11th Respondent.

It is necessary to refer to the facts in some detail since the events culminating in the supply of electricity to the 11th Respondent, is in issue.

- The 11th Respondent submitted an application to the 6th Respondent for an electricity connection by application dated **30/05/2016** (6R1).
- The D.S. 04 certification on residence and character by the Grama Niladari of the area is dated **30/05/2016** and countersigned by an administrative Grama Niladhari on 30/05/2016. (The D.S. 04 Certificate issued by the Grama Niladhari of the Division in which the applicant resides is valid only for 6 months from the date countersigned by the **Divisional Secretary**) (6R2).
- The Petitioner by letter dated **16/06/2016** objected to the supply of electricity and sought an inquiry (6R3).

- By letter dated **20/06/2016,** the 11th Respondent informs the 9th Respondent that he has lodged an application to obtain electricity and electricity lines could be drawn through the road belonging to the Pradeshiya Sabha (9R4). The date stamp on '9R4' indicates that the said document was received by the Pradeshiya Sabha on 06/06/2016.
- By letter dated **21/06/2016,** approval of the 9th Respondent was sought in terms of item 3(1) to schedule I of the Sri Lanka Electricity Act No. 20 of 2009 as amended, due to the objections raised by the Petitioner (9R1) (this application clearly states that the Petitioner is objecting to the supply of electricity).
- The 9th Respondent receives letter dated **21/06/2016,** sent by the 8th Respondent (copied to the 6th Respondent) informing him that the impugned road belongs to the Pradeshiya Sabha and the Pradeshiya Sabah has no objection to the supply of electricity to the impugned road (9R2).
- The 9th Respondent by letter dated **22/06/2016,** informs the 6th Respondent to proceed with the application to obtain electricity since the Pradeshiya Sabha has no objection to the said application (9R3).

Objections raised by the Petitioner.

Apart from the Petitioner's letter dated 16/06/2016 objecting to the supply of electricity, the Petitioner by letters dated 24/06/2016, informed the Public Utilities Commission (5th Respondent) and the 8th Respondent that electricity lines were installed without the consent of the Petitioner and to withhold such activity until a proper inquiry is held by the 9th Respondent. (P12 and P13)

However, on the 25/06/2016, the 8th Respondent with the licence of the Ceylon Electricity Board, (1st Respondent) facilitated the 6th Respondent to enter the land owned by the Petitioner to draw electricity lines to the portion of the land occupied by the 11th Respondent. (P14A to P14D). Moreover, the Petitioner contends that he came

to know that the installation of electricity lines was approved by the 6th, 8th and 9th Respondents on the previous day.

Consequently, the Petitioner lodged a complaint with the Tangalle Police on the 25/06/2016, with reference to the unauthorized entry and the commencement of installing electricity lines through the land belonging to the Petitioner (P15). The Petitioner further claims that the 11th Respondent along with a few other individuals had unlawfully entered the Petitioner's land and commenced felling of trees to facilitate the said process.

By letter dated 26/06/2016 (P17), the Petitioner informed the 4th Respondent, the immediate superior of the 6th Respondent, outlining the circumstances mentioned above and seeking the 4th Respondents intervention to stop drawing electricity lines over the Petitioner's land. The Petitioner states that he received no response to the said letter. The Petitioner by letter dated 27/06/2016, (P18) again sought clarification as to how a private road constructed by the Petitioner could be deemed as a public road vested in the Pradeshiya Sabha, as the Petitioner had not been notified of such acquisition or intended acquisition by the Pradeshiya Sabha or neither do any Gazette Notifications deal with regard to an acquisition/ intended acquisition of the Petitioner's land.

The position taken by the Pradeshiya Electrical Engineer, (6th Respondent) the Secretary Pradeshiya Saba Tangalle, (8th Respondent) and the Divisional Secretary Tangalle. (9th Respondent)

The 6th respondent in his affidavit claims that he sought approval to draw electricity lines from the 9th Respondent on 21/06/2016 (6R4) in terms of item 3(i) to schedule I (sic) of the Sri Lanka Electricity Act No. 31 of 2013 as amended, due to the objections raised by the Petitioner. (P11) However, he received a copy of letter dated 21/06/2016, (6R5) sent by the 8th Respondent and the letter dated 22/06/2016, (6R6) by the 9th Respondent informing that the impugned road belongs to the Pradeshitya Sabha and the Pradeshiya Sabha has no objection to the drawing of the electricity lines. In the

circumstances, in terms of schedule I of the said Act, approval was no longer required from the 9th Respondent.

The 8th Respondent claims that, according to the Grama Sevaka report, (8R5) the impugned road is used by more than 200 families (public petitions dated 16/03/2016, 16/07/2016, and 13/07/2016 marked '8R1', '8R2', and '8R3') and accordingly, letter dated 21/06/2016 (8R6) was issued stating that the impugned road is a public road and that he has no objection in supplying electricity to the said road.

The stand taken by of the Divisional Secretary Tangalle (9th Respondent) is that by letter dated 21/06/2021 (9R2), the 8th Respondent informed him that the impugned road belongs to the Tangalle Pradeshiya sabha and that the Pradeshiya Saba has no objection for the supply of electricity and accordingly informed the 6th Respondent to take necessary action. (9R3) He further states that when the Pradeshiya Sabha confirms and informs the 6th respondent that the land belongs to them, there is no approval needed from the Divisional Secretary.

The 11th Respondents claim to a part of the land claimed by the Petitioner is based on the Survey Plan Bearing No. 6839 marked '11R1', submitted by the 11th Respondent in Case Bearing No. 2972/L pending before the District Court of Tangalle.

Article 12(1)

Article 12(1) of the Constitution, deals with the right to equality and reads as follows: *"All persons are equal before the law and are entitled to the equal protection of the law."*

In **C.W. Mackie & Co Ltd vs. Hugh Molagoda, Commissioner General of Inland Revenue and Others (1986) 1 SLR 300**, Sharvananda, C.J. commented that;

"The essence of the right of equality guaranteed by Article 12(1) and the evil which the article seeks to guard against is the avoidance of designed and intentional hostile

treatment or discrimination on the part of those entrusted with administering the law. In order to sustain the plea of discrimination based upon Article 12(1) a party will have to satisfy the court about two things, namely (1) that he has been treated differently from others, and (2) that he has been differently treated from persons similarly circumstanced without any reasonable basis.
It was further observed that .... To succeed in the plea the petitioner has to establish discrimination in the performance of a lawful act. The doctrine of equality is intended to advance justice according to law, by avoiding hostile discrimination. Justice is not advanced if breach of the law is to be countenanced in the process. As stated, earlier Article 12 does not guarantee equal violation of the law."

Subsequent to the inspection of the land belonging to the Petitioner and approval of Survey Plan No. 2103/9000, (P29) on 05/04/2016, the 8th Respondent issued letter dated 21/06/2016, (8R6) to supply electricity through the Petitioner's land on the basis, that the impugned road is a public road belonging to the Tangalle Pradeshiya Saba. However, the existence of a public road is not evident in the said plan. The 8th Respondent by letter dated 16/12/2016, in Case Bearing No. 22650, informed the learned Magistrate that the impugned road does not belong to the Pradeshiya Sabha but a road used by the public (P52). As borne out by 'P53', and 'P54', when the land was surveyed on 21/03/2003 and on 30/05/1998, respectively, there was no connecting road or a footpath in existence through the land claimed by the Petitioner.

Documents marked 'P21', 'P22', 'P23' and 'P26' makes it clear that since 2008, the 11th Respondent attempted to obtain electricity through the Petitioner's land. Due to objections raised by the Petitioner a Way Leave Notice was sent by the 1st Respondent Board (P27). The Petitioner filed a written objection to the said Notice and called for an inquiry to be held. Thereafter no steps were taken to provide electricity to the 11th Respondent.

The defining moment to the present application was when the 8th Respondent by letter dated 21/06/2016, informed the 9th Respondent with a copy to the 6th Respondent that the impugned road belongs to the Tangalle Pradeshiya Saba and further states that the said letter is issued at the request of the residents of the area. (8R6) The Petitioner contends that the said letter '8R6' was received by him only through the objections filed by the 8th Respondent. On the very next day, (22/06/2016) the 9th Respondent informs the 6th Respondent to proceed with the application to supply electricity since the Pradeshiya Sabha has no objection to the said application. (6R6)

The 8th Respondent has not submitted any document to this court which justifies that the impugned road belongs to the Tangalle Pradeshiya Sabha.

According to the affidavit of the 6th Respondent, the Electrical Engineer has examined the address given in the application on 04/06/2016. Due to the objections raised by the Petitioner by letter dated 17/06/2016, the approval of the 9th Respondent was sought on 21/06/2016, in terms of item 3(1) to schedule I of Act No. 20 of 2009 as amended.

Item 3(3) to schedule I, states thus: -

(3) where paragraphs (1) or (2) applies and-

(a) the licensee has made all reasonable efforts to secure the grant of a way leave; and

(b) such efforts have been unsuccessful, the Divisional Secretary of the administrative District in which the land, over which the way leave is being for or from which an electrical line which is installed is requested to be removed, as the case may be, shall within six weeks of an application being made in that behalf by the licensee concerned, and-

(i) upon holding an inquiry after giving an opportunity to the owner or occupier of the land concerned, of being heard;

(ii) -----

Having clearly known the procedure that should be followed in the event of an unsuccessful effort to obtain necessary way leave, the 6th Respondent decided to act on the letter issued by the 8th Respondent (6R5) on the basis that approval of the 8th Respondent is no longer required. Having received '6R5' on 22/06/2016, on the same date the installation of electricity lines through the impugned road was completed within a period of 3 days during the weekend, as borne out by the Police Complaints marked 'P15' and 'P16'.

By letter dated 21/06/2016, the 9th Respondent was informed by the 8th Respondent that the impugned road belonged to the Tangalle Pradeshiya Sabhawa. (9R2) By this time, the 9th Respondent was aware that the Petitioner had objected to the granting of electricity through the impugned road by the Petitioner and also by the 6th Respondent. Furthermore, the Way Leave Notice dated 07/03/2013, was also copied to the 9th Respondent informing that the impugned road is a private road. The contention of the 9th Respondent was that when the Pradeshiya Sabha states it owns the road there is no further need to go to the Secretary of the Pradeshiya Sabha.

In terms of Item 3 to Schedule I, it is mandatory that the Divisional Secretary of the administrative district in which the land is situated hold an inquiry within 6 weeks of an application being made to grant an opportunity to the owner or occupier of the land concerned to be heard. Completely overlooking the said process, the 9th Respondent, by letter dated 22/06/2016, purporting to act on the no objection letter sent by the 8th Respondent, dispensed with the way leave inquiry and on the same day permitted the drawing of power lines through the land claimed by the Petitioner.

The Petitioner thereafter by letter dated 27/06/2016, (P18) sought clarification from the 9th Respondent as to how a private road constructed by the Petitioner could be deemed as a public road to which the 9th Respondent has failed to reply to date.

In ***Wijesinghe vs. Attorney General*** **and Others (1979) 1 SLR 102** Sharvananda C.J. said *"a mere violation of law by the executive does not amount to a violation of equal protection."*

Following the ratio laid down in ***Wijesinghe vs. Attorney General*** **(supra)**, it is necessary that the court examine whether the actions of the 6th, 8th and 9th Respondents were mere errors of judgment or intentional or purposeful discrimination of the Petitioner's personal rights.

Objections were raised by the Petitioner in 2008, when the 11th Respondent was attempting to obtain electricity. When the Petitioner objected to the Way Leave Notice, no further steps were taken in that regard. When a similar application was made by the 11th Respondent in the year 2016, the 6th Respondent having received objections to the Way Leave Notice, disregarded the administrative action contemplated in terms of Item 3 to Schedule I of the Act for necessary way leave, citing a decision of the 8th Respondent that the road to which electricity lines were to be drawn is a public road. There is no evidence before court to justify the said decision. However, answering a question posed by court during oral submissions as to whether the 9th Respondent was aware at the time he received the letter that there was a dispute whether the road belongs to the Pradeshiya Sabha, the counsel replied in the affirmative. If this issue had arisen for the first time, such action could be expected, however, the 9th Respondent was already aware of conflicts between the parties. If so, it was the duty of the 9th Respondent to check and clarify issue, prior to asserting authority as reflected in '9R3'.

The Supreme Court in ***Kaviratne and others vs. Commissioner General of Examinations and others 2012 (BLR) 140,*** *held that the court is not concerned with the motivation for the impugned action, but only with its effects.*

As observed earlier, the application for electricity is made on 30/05/2016, the certificate on residence and character is issued by the Grama Niladhari on 30/05/2016, countersigned by another grama Niladhrai (according to D.S. 4 form, should be

countersigned by the Divisional Secretary) is also dated 30/05/2016. The Petitioners objections to the supply of electricity is dated 16/06/2016. The Way Leave Notice is dated 21/06/2016 and the determination by the 8th Respondent that the impugned road is a public road is also dated 21/06/2016. The installation of electricity lines through the impugned road commenced on 22/06/2016 and completed within a period of 3 days during the weekend.

Then the question to be posed is whether the denial of the Petitioner's right to a fair and an objective inquiry, prior to the process to install or to keep installed an electrical line over the land claimed by the Petitioner violates, equal protection of the law.

Referring to the concept of equality, in ***Ananda Dharmadasa and others vs. Ariyaratne Hewage and Others (2008) 2 SLR 19,*** the Supreme Court cited with approval the case of ***Royappa vs. State of Tamil Nadu AIR 197, S.C. 555***, where Bhagawati, J. had stated 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 positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies.*"

In 2008, the 11th Respondent made a similar application to obtain electricity to the potion of land he claims to own and possess. In that instance the Petitioner objected to the way leave notice on the basis that the impugned road is a private road. The 8th Respondent has pleaded a document titled, a road document applicable to the Hambanthota District for the year 2000, marked '8R7', giving a list of the roads vested with the Pradeshiya Sabha. The said Respondent has not specifically drawn the attention of court to the impugned road in the said document. Accordingly, it is absolutely clear that the 8th Respondent arbitrarily informed the 6th and 9th Respondents that the impugned road is a public road.

Necessary way leave is defined in the said Act as;

"C*onsent for the licensee to install and keep installed the electric line on, under or over the land and to have access to the land for the purpose of inspecting, maintaining, adjusting, repairing altering, replacing or removing the electric line;"*

The issuance of a way leave notice in writing would be an acknowledgement of sought, that the road over which the electricity lines are to be drawn is not a public road. A way leave notice is issued when the licensee has made all reasonable efforts to secure a necessary way leave and when all such efforts have been unsuccessful. In such instance, it is mandatory that the Divisional Secretary, within 6 weeks of such application decide on the matter. As observed earlier, the Petitioner on his part, on various occasions, has brought to the notice of the said Respondents that the impugned road which runs through the Petitioner's land is a private road constructed by the Petitioner. No evidence was brought before court to establish that the Petitioner's position was ever considered by the Respondents or that the Respondents position was made known to the Petitioner. The said Respondents cannot deny the existence of such facts and circumstances as disclosed by the Petitioner, which would warrant an inquiry to be held according to law. Therefore, the Petitioner has been deprived of a lawful inquiry, to any other person similarly circumstanced in the subject matter, would be entitled to.

The decisions taken by the 8th and 9th Respondents, consequent to the decision taken by the 6th Respondent, that the impugned road is a public road and accordingly to dispense with the inquiry process is not justified by the evidence tendered by the 6th, 8th and 9th Respondents. The evidence in this case clearly points to the fact that the said Respondents were aware that the Petitioner objected to a similar application filed in the year 2008. Therefore, clearly the Petitioner's right to object to the Way Leave Notice at an inquiry has been dispensed with, discriminating the Petitioner in the performance of a lawful act. "*Discrimination may be bona fide or mala fide. If the person who alleges discrimination succeeds in establishing that the step was taken intentionally for the purpose of injuring him or in other words that it was a hostile act directed against him,*

the executive act complained of must be annulled—". ***(Elmore Perera vs. Major Montague Jayawickrema Minister of Public Administration and Plantation Industries and others (1985) 1 SLR 285)***

When the 11th Respondent attempted to obtain electricity in the year 2008, the Petitioner by letter dated 26/02/2009, (P24) informed the Chairman of the Pradeshiya Sabha that the impugned road was constructed by the Petitioner for private use. The document purporting to claim that the impugned road is a public road belonging to the Tangalle Pradesiya Sabawa does not state any reasons for its decision or the basis on which such decision was made and therefore is unjustifiably made. The 8th and 9th Respondents were aware that the Petitioner had objected to the supply of electricity, not once but twice, in separate applications. However, the Petitioner's right to an inquiry in terms of the law was denied.

When considering this application, the Court necessarily should take note of the effort taken by the Petitioner to initiate or be a party to multiple actions filed in court to assert his property rights, as a result of the actions of the 6th, 8th and 9th Respondents enforcing the law inconsistently and/or unlawfully. The 8th Respondent was possessed with sufficient material to be well informed that the impugned road was a private road, however, chose not to act upon. Most of the official correspondence between the 6th, 8th and 9th Respondents, claimed to be received and sent on the same date, have no date stamp. The lightning speed in which the process to supply electricity to the 11th Respondent was executed, would not have been possible in the normal procedure, to coordinate official acts and issue corresponding letters within a day, if not for collusion between the 6th, 8th and 9th Respondents.

The manner in which the Respondents were dealing with the administration of providing electricity to the 11th Respondent, the sole beneficiary of such act, clearly had an adverse impact on the Petitioner. The conduct of the said Respondents as observed in detail, in chronological order, culminating in the supply of electricity to the 11th

Respondent, falls nothing short of an attempt to frustrate and demoralize the Petitioner to compel him to submit to an illegal act initiated by the 8th Respondent. In this background the Respondents application of the law to deny the Petitioner's right to a fair, objective and an informed inquiry mandated by statute, cannot be construed as a mistake or an error of judgment. The facts and circumstances of this case to deny the Petitioner of an inquiry, clearly points to a deliberate design and a well calculated act on the part of the 6th, 8th and 9th Respondents to intentionally discriminate the Petitioner, in denial of equal protection of the law, enshrined under Article 12(1).

Article 14 (1) (g)

The Petitioner's intention was to construct a high-end luxury resort in the said land with the support of investors. However, due to the electricity lines being drawn through the Petitioner's land, it is contended that, the investors were hesitant to invest, due to the unlawful conduct of officials to favor one party. Other than the evidence which the court has already dealt with, there is no evidence to suggest that there was any other act or omission, additionally to be considered as constituting an infringement under Article 14(1)(g). Therefore, I find that it is not necessary to consider whether the acts of the said Respondents constituted an infringement of Article 14(1)(g).

Accordingly, I grant the Petitioner a declaration that his fundamental rights under Article 12(1) has been infringed by the 6th, 8th and 9th Respondents and make order that the Petitioner be paid a sum of Rs. 300,000/- as compensation, by each of the said Respondents.

I make further order to quash the decision made by the 8th Respondent declaring that the impugned road belongs to the Tangalle Pradeshiya Sabha, as reflected in document '8R6'.

Taking into consideration all the circumstances of this case, I am of the view that an order to remove all electricity lines poles and any other apparatus from the land claimed

by the Petitioner, may cause an undue disturbance and therefore, the respective parties are directed to maintain the status quo until the 9th Respondent decide on the matter.

The application is allowed. No costs ordered.

Judge of the Supreme Court

L.T.B. Dehideniya 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 made in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

K.A. Gunasena
No. 18/6A,
Nikape Road,
Dehiwala

PETITIONER

SC APPLICATION NO.
SC (FR) 303/2013

Vs.

1. Public Service Commission
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

2. Justice Sathyaa Hettige, PC,
Chairman,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

2A. Mr. Dharmasena Dissanayaka,

Chairman,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

3. Mrs. Kanthi Wijetunge,
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

3A. Mr. A. Salam Abdul Waid,
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 05

3B. Prof. Hussain Ismail,
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

4. Mr. Sunil S Sirisena,
Member,
Public Service Commission,

No. 177, Nawala Road,
Narahenpita,
Colombo 05.

4A. Ms. D. Shirantha Wijayatilaka,
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

4B. Mrs. Sudharma Karnarathna,
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

5. Mr. S.C. Mannapperuma,
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

5A. Dr. Prathap Ramanujm,
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,

Colombo 05

6. Ananda Seneviratne,
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

6A. Mrs. V. Jegarasasingam,
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

7. N.H. Pathirana,
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

7A. Mr. Santi Nihal Seneviratne,
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

7B. Mr. G.S.A. de Silva PC,
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

8. S. Thillinadarajah,
Member,
Public Service Commission,
No. 177, Nawala Road,
Colombo 05.

8A. Mr. S. Ranugge
Member,
Public Service Commission,
No. 177, Nawala Road,
Colombo 05.

9. Dr. I.M. Zoyza Gunasekara,
Member,
Public Service Commission,
No. 177, Nawala Road,
Colombo 05.

9A. Mr. D. L. Mendis
Member,
Public Service Commission,
No. 177, Nawala Road,
Colombo 05.

10. A. Mohamed Nahiya,
Member,
Public Service Commission,
No. 177, Nawala Road,
Colombo 05.

10A. Mr. Sarath Jayathilaka,
Member,
Public Service Commission,
No. 177, Nawala Road,
Colombo 05.

11. Dr. B. M. S Batagoda,
Deputy Secretary of the Treasury,
Ministry of Finance and Planning,
The Secretariat,
Colombo 01.

11A. Ms. G. D. C. Ekanayake
Deputy Secretary of the Treasury,
Ministry of Finance and Planning,
The Secretariat,
Colombo 01.

11B. Mr. A.R. Desapriya
Deputy Secretary of the Treasury,
Ministry of Finance and Planning,
The Secretariat,
Colombo 01.

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

RESPONDENTS

Before: Buwaneka Aluwihare, PC, J.
L.T.B. Dehideniya J.
Murdu N. B. Fernando, PC, J.

Counsel: Ranil Samarasooriya with Shashirenga Sooriyabatabendi for the Petitioner.
Rajiv Goonetillake, Senior State Counsel for the Respondents

Argued on: 04. 09. 2020

Decided on: 18.11.2022

JUDGEMENT

Aluwihare PC J,

The Petitioner has come before this Court alleging that the 1st to 11th Respondents have violated the Petitioner's fundamental rights guaranteed under Article 12 (1) of the Constitution.

At the outset, it must be noted that the Petitioners in SC (FR) Application No. 295/2013, SC (FR) Application No. 305/2013, SC (FR) Application No.

332/2013, and SC (FR) Application No. 333/2013, agreed to abide by the judgement of this application.

The Petitioner in addition to a declaration that his fundamental rights guaranteed to him under Article 12 (1) had been violated, had also prayed for the quashing of the letter of the 11th Respondent dated 2nd July 2013 ('P23') and the decision of the Public Service Commission (1st Respondent) contained therein. The Petitioner had further prayed for a direction to the Public Service Commission [1st Respondent] to give effect to the decision of the Administrative Appeals Tribunal (AAT) contained in 'P17' and to grant the Petitioner a promotion to Class I, on a supernumerary basis.

The Petitioner, was a public servant attached to the Sri Lanka Accountants' Service, whose services were terminated by the State due to the Petitioner's participation in the general strike of July1980 [hereinafter '1980 July strike'].

Subsequently, all punishments imposed on the employees who participated in the said strike were withdrawn by virtue of the Public Administration Circular No. 32/89 and the Petitioner was reinstated. In view of the fact, however, that he had passed the relevant examinations, he had been placed in Class II Grade II of the Sri Lanka Accountants' Service with effect from 17th August 1992.

Thereafter, by letter [A/3/2/152] dated 27th January 1999 [P4], the Secretary to the Public Service Commission informed the Petitioner that the Cabinet of Ministers by a decision taken on 22nd April 1998, had **antedated the Petitioner's appointment to Class II Grade II of the Sri Lanka Accountant's Service to 20th May 1984 from 17th August 1992,** without back wages however.

<u>Promotion to Class II Grade I in the Sri Lanka Accountants' Service</u>

In terms of Clause 4 (1) of the Minutes of the Sri Lanka Accountants' Service published in the Gazette Extraordinary No. 509/7 dated 7th June 1988, an Officer confirmed in **Class II Grade II,** who has completed 10 years of satisfactory service in the Sri Lanka Accountants' Service as at 27th July 1987 or on the date he becomes eligible for promotion to **Class II Grade I** of the said service, may be promoted, provided the officer has satisfied the following requirements;

(a) has passed or been exempted from the 1st and 2nd Efficiency Bar examination on the due date;

(b) has passed or been exempted from the Second Language requirement.

(c) in the case of such an officer only who is appointed to the service on or after 2nd June 1986 and successfully completed the Training Course in Accountancy conducted by the Sri Lanka Institute of Development Administration.

(d) has earned on the due dates all the increments during the period of five years prior to his becoming eligible for promotion.

(e) has not been subjected to disciplinary punishment for any offence committed during the period of five years immediately preceding the day on which he becomes eligible for promotion;

The Petitioner had requested that in terms of the Minute referred to above, he be promoted to Class II Grade I on the expiry of a period of ten years from the date to which his appointment to Class II Grade II was antedated i.e., he is entitled to the be promoted with effect from 20th May 1994.

The Public Service Commission (1st Respondent), however, refused to grant the Petitioner the promotion to Class II Grade I on the ground that the Petitioner's appointment to Class II Grade II was antedated with a condition, that he would not be paid arrears of salary and therefore his period of active service would commence from 1992, the effective date of his reappointment. Therefore, his satisfactory service would commence from 1992. (*vide* the letter dated 17th May 2002 of the Ministry of Finance marked as **'P7',** and the letter dated 18th July 2002 of the Secretary to the Public Service Commission marked as **'P8')**.

Being aggrieved by the aforesaid decision, the Petitioner tendered an appeal to the Parliamentary Commissioner for Administration (Ombudsman) who following an inquiry recommended that the Petitioner be promoted to Grade II Class I of the Accountants' Service with effect from 20th May 1994. However, the 1st Respondent did not comply with this recommendation.

The Petitioner appealed to the Administrative Appeals Tribunal on 22nd June 2007. The Administrative Appeals Tribunal delivering its Order [on 18th November 2011 ('P15') as amended on 22nd November 2011 ('P17') directed the Public Service Commission (1st Respondent) to grant the Petitioner the promotion to Class II Grade I with effect from 20th May 1994.

Consequent to the said order of the AAT ['P17'], the Petitioner's promotion to Class II Grade I was granted with effect from the said date. **(P18**- dated 16.02.2012)

In a further development, by a letter dated 2nd July 2013 **('P23')** the 11th Respondent i.e., the Deputy Secretary to the Treasury of the Ministry of Finance and Planning, communicated to the Petitioner the fact that the PSC [1st Respondent] had annulled the antedating of the promotion of the Petitioner to Class II Grade I, which had been granted consequent to the decision of the Administrative Appeals Tribunal **('P17')**.

The basis set out in the above mentioned letter ('P23') was that the Petitioner was appointed to Class II Grade II by virtue of a Cabinet decision on the 17.08.1992, subject to the condition that he would not receive back wages and that, only his period of 'active service' would be taken into account, when calculating the requisite number of years of service for his promotion to Class II Grade I. As such he was not eligible to have his promotion antedated.

The Petitioner argues that the letter marked 'P23' and the decision of the 1st Respondent to annul the Petitioner's antedated promotion to Class II Grade I is bad in law for one or more of the following reasons;

1. The antedating of the Petitioner's promotion was made consequent to a decision made by the Administrative Appeals Tribunal that sat in appeal on the decision made by the PSC [1st Respondent] refusing to grant the said promotion.

2. The 1st Respondent was represented in the appeal proceedings thus making the Order made by the Tribunal on 18th October 2011 and the amended Order on 22nd November 2011, binding on the 1st Respondent Commission and its members.

3. If the 1st Respondent Commission was aggrieved by the said decision the order should have been appealed against, which course of action the 1st Respondent Commission, however, did not pursue..

4. Since no appeal was made, the said decision of the Administrative Appeals Tribunal is still in force and is binding on the PSC [1st Respondent] and its members.

The Respondents' position

The Respondents' position was that there were two schemes under which the 1980 July strikers were given relief. The first was, the relief granted in terms of the Public Administration Circular 32/89 as amended by PA Circular 39/18(v) dated 10th March 1992, by which those who were deemed to have vacated their posts were reinstated **with back wages** and they were given time to sit for their relevant promotional examinations.

The second scheme was a Cabinet decision dated 22nd April 1998 by which reappointments were back dated **without back wages** on the recommendations of the Political Victimization Committee. As a result, , the Petitioner's reappointment on 17.08.1992 was back dated to 20.05.1984, but without back wages.

The Respondents further argue that since the Petitioner fell into the latter category and was reinstated without back wages as opposed to others who were appointed with back wages [paragraph 5 of the affidavit of the 2nd Respondent], his promotion to Class II Grade I would have to be considered by only taking into account his active period of service, and as such he was not eligible to have his promotion antedated. Therefore, the Petitioner's promotion to Class II Grade I should be with effect from 17th August 2002 which is 10 years from17th August 1992, the actual date of Petitioner's re-appointment to Class II Grade II.

It was submitted on behalf of the Respondents, that the PSC [1st Respondent] had overlooked the fact that the Petitioner had been reinstated without back wages sequel to a Cabinet decision as opposed to, reinstatements with back wages as per the Circular 32/89 and therefore mistakenly given effect to the Administrative

Appeals Tribunal's decision which ordered the promotion of the Petitioner on the basis of the Public Administration Circular 32/89(V). From the foregoing, it appears that the PSC [1st Respondent] treated the two groups of strikers differently.

The Administrative Appeals Tribunal [AAT] and its decision

The AAT was established under Article 59(1) of the Constitution and in terms of Article 59(2), has the power to alter, vary or rescind any order or decision made by the Public Service Commission.

According to Section 3 (a) of the Administrative Appeals Tribunal Act No. 4 of 2002 the Tribunal has the power to hear and determine any appeal preferred to it from any order or decision made by the Public Service Commission in the exercise of powers under Chapter IX of the Constitution. Furthermore, Section 8 (2) provides that a decision made by the tribunal shall be final and conclusive and shall not be called in question in any suit or proceedings in a court of law.

Commenting on Section 8 (2) of the Act, Gooneratne J. in **W.J. Fernando and Others vs. Priyanatha Perera and Others** SCFR 383/2008 SC Minutes 28.02.2017 observed that;

"*The preclusive clause has been included in the said Act with regard to challenging the decision of the AAT and the legislature has done so to ensure that a decision of the AAT must have finality. As such PSC will be bound to abide by a decision of the AAT.*" (at page 11).

It was also observed that;

"*It is not incorrect to state that the Administrative Appeals Tribunal (AAT) is the Appellate Body and the PSC will be bound to abide by a decision of the AAT.*"

It was further held in the aforesaid case that the Public Service Commission would have to comply with the order of the Administrative Appeals Tribunal if the Commission had failed to canvass the order in a court of competent jurisdiction.

In the instant case the PSC [1st Respondent] informed the Deputy Secretary to the Treasury as well as the Administrative Appeals Tribunal of the reasons for the

reversal of the order ('P17') by letters dated 6th June 2013 marked as 'R1' and 'R2'respectively. The PSC, however, did not canvass the AAT decision before a court of competent jurisdiction. The Respondents, with reference to the case of **W.J. Fernando and Others vs. Priyantha Perera and Others** (supra) conceded that the 1st Respondent Commission ought to have canvassed the decision of the Administrative Appeals Tribunal ('P17') instead of writing to the said Tribunal (R2). The Respondents, in their written submissions had pointed out that the documents R1 and R2 setting out the reasons behind the PSC's decision as to why it cannot concur with the AAT decision, were anterior to the judgement of this court in **W.J Fernando and others** (supra) which had decided the very legal issue that had arisen in this case.

The Promotion of the Petitioner to Class I on a supernumerary basis and the payment of arrears of salary. [Relief sought by the Petitioner by prayer (f)]

Prior to the cancellation of the Petitioner's antedated promotion to Class II Grade I, the Petitioner also sought a promotion under and in terms of the Accountant's Service Board Circular No. 5 dated 14th March 2003, ('P19'), which incorporates a decision by the Cabinet of Ministers, together with arrears of salary. According to this Circular, a Class II Grade I Officer who has completed 18 years of service was entitled to be promoted to Class I, on a supernumerary basis. The said request, however, was turned down by the 1st Respondent.

As per the order of the Administrative Appeals Tribunal ['P17'] the Petitioner's promotion to Class II Grade I must come into effect from 20th May 1994. Therefore, the number of years of service for the purpose of calculating the 18 years required for his promotion to Grade I, should be calculated from 20th May 1994. Accordingly,[in terms of the aforesaid circular] the Petitioner's promotion to Class I on a supernumerary basis should come into effect from 20th May 2012.

Violation of the Petitioner's fundamental right enshrined in Article 12(1)

As referred to earlier, the PSC [1st Respondent] appears to have treated, the employees who lost their employment due to the 1980 July strike and who got their employment back, differently, based on whether their reinstatements were **with back wages or without back wages.** This resulted due to the difference of the terms

of the schemes under which the two groups of workers were reinstated. The fact remains, however, that all these employees lost their employment as a result of taking part in the 1980 July strike. **Neither group had served in their posts** until they were reinstated. Thus, all these workers were similarly circumstanced and the fact that some of them did not receive back wages cannot be considered as an intelligible criterion to treat them differently, when it came to granting of promotions, in particular the computation of the period of 'active service'.

Furthermore, the Petitioner's appointment to Sri Lanka Accountants' Service Class II Grade II was antedated to 20th May 1984 subject to the condition that he would be placed on a salary point granting incremental credit for the period and that he would not be paid back wages. This was done by virtue of the aforementioned Cabinet decision dated 22nd April 1998 (*Vide* the letter dated 27th January 1999 marked 'P4')

<u>The violation of Article 12 (1)</u>

In the totality of the circumstances enumerated, it is argued on behalf of the Petitioner that the actions of the 1st to 11th Respondents are arbitrary, capricious, unreasonable and unfair resulting in the Petitioner being singled out for discriminatory action which has resulted in the violation of the Petitioner's fundamental right to equality and equal protection of the law as guaranteed by Article 12 (1) of the Constitution.

Article 12 (1) requires the law to be applied equally among similarly circumstanced persons without any form of discrimination. However, differential treatment is **not always regarded as discrimination**. Such form of treatment can be sustained if it is reasonable and not arbitrary.

In the case of **Probhudas Morarjee Rajkotia and Others v. Union of India** and Others (1966) S.C. 1044 it was observed that,

"*To make out a case of denial of the equal protection a plea of differential treatment is by itself not sufficient. The petitioner…. must make out that not only had he been treated differently from others, but that he has been so treated from persons*

similarly circumstanced without any reasonable basis and such differential treatment is unjustifiably made."

When inquiring as to whether the Petitioner's fundamental rights under Article 12 (1) have been violated the following criteria should be borne in mind;

"*In order to sustain the plea of discrimination based upon Article 12 (1) a party will have to satisfy the court about two things, namely (1) that he has been treated differently from others, and (2) that he has been differently treated from persons similarly circumstanced without any reasonable basis.*" **(C.W. Mackie and Co. Ltd v. Hugh Molagoda, Commissioner General of Inland Revenue and Others** (1986) 1 SLR 300 at page 308).

The public servants who participated in the General Strike of July 1980 were consequently regarded by the State as having vacated their posts. Therefore, they constitute a group which was similarly circumstanced. It appears, however, that they had not been reinstated together. Whilst, one group received antedated appointments by virtue of the Public Administration Circular No. 32/89 (V) with back wages, the other group to which the Petitioner belongs, received antedated appointments by virtue of a Cabinet decision without back wages.

The fact of the matter is that none of the reinstated employees in fact was in active service from the date to which their appointments were antedated. From the tenor of the 1st Respondent's objections, it appears that the Public Service Commission (1st Respondent) has treated the reinstated employees who received back wages as being in active service from the date to which their appointments were antedated and the reinstated employees including the Petitioner who did not receive back wages as not being in active service from the date to which their appointments were antedated. Thus, the PSC has treated these group of employees *differently* when granting of promotions came into issue. This satisfies the first limb of the criteria referred to in the case of **C.W. Mackie and Co. Ltd** (supra), that the Petitioner was treated differently from others.

In view of Article 12 (1), if a group that is similarly circumstanced, is to be treated differently, it must be on the basis of an intelligible, distinguishable and rational criteria. When examining whether the Petitioner has been treated differently from

similarly circumstanced persons without a reasonable basis as per the second limb, it must be noted that in this instance, the criteria adopted to make decisions regarding promotions, relate to the factor of back wages. This gives rise to the question of whether this amounts to a rational, intelligible criteria on which the Public Service Commission should base its decisions regarding promotions.

None of the individuals who was reinstated had 'active service' from the date to which their appointments were antedated. Therefore, it is unreasonable to treat as some of them have been in active service purely on the ground that they received back wages. It is clear that the criterion adopted by the Public Service Commission in calculating the period of active service for the purpose of promoting the Petitioner was arbitrary and therefore the second limb of the criteria in C.W. Mackie and Co Ltd (supra) is satisfied.

It is also apt in this instance to highlight the fact that it is sound law that the violation of Article 12 (1) is not restricted to positive acts of unequal treatment and encompasses the arbitrary and mala fide exercise of power. The evolution of the scope of Article 12 (1) was expounded in the case of **Sampanthan v. Attorney General** (SC Minutes of 13th December 2018) where the Court cited Justice Kulatunga's commentary in "Right to Equality – National Application of Human Rights" BALJ, Vol. VIII, Part I, page 8;

" […] *notwithstanding the Full bench in Elmore Perera's case, the Supreme Court has abandoned the classification theory in granting relief for infringement of right to equality. Relief is now freely granted in respect of arbitrary, and mala fide executive action in the exercise of the Court's jurisdiction under Article 126 of the Constitution.*" (Hon. Justice Kulatunga PC., [1999])

The Court in **Sampanthan v. Attorney General** (supra) also noted that Article 12 (1) "*offers all person's protection against arbitrary and mala fide exercise of power…*".

Considering the facts of the instant case, what can be observed is that the conduct of the 1st to 11th Respondents not only amount to discriminatory treatment but can also be regarded as arbitrary and irrational. Therefore, it can be held the

Petitioner's fundamental rights guaranteed in terms of Article 12 (1) of the Constitution have been violated by the 1st to 11th Respondents.

The relief prayed for, by the Petitioner.

The Petitioner's position is that under and by virtue of the provisions contained in the Public Administration Circular No. 32/89 (V), he is entitled to back wages. In terms of Paragraphs 7 and 8 of the said circular, the Petitioner would have to be considered as having passed the examinations and interviews held during the period he was not in service and if from the relevant date he has his seniority restored, then arrears of salary, salary increments etc. have to be granted along with promotions. The Respondents' however, argue that the Petitioner is not entitled to back wages as that is the condition subject to which his date of appointment was antedated under the aforementioned Cabinet decision. I am of the view that the payment of back wages claimed by the Petitioner under the Public Administration Circular 32/89V cannot be considered, at this point by this court.

Petitioners' promotion to Class II Grade I

The Respondents' unwavering position is evident in the letter of the Ministry of Finance and Planning dated 12th June 2012 ('P20') sent with regard to the enforcement of the Order of the Administrative Appeals Tribunal ('P17'). It is stated in the letter that since the Tribunal had only ordered that the Petitioner's promotion be antedated and that he be entitled to incremental credit, hence the 1st Respondent would not be able to pay back wages in accordance with that order.

In response to this letter the Petitioner by letter dated 1st July 2012 (marked as 'P21') submitted that the Administrative Appeals Tribunal's order did not explicitly rule out the payment of back wages and in order to highlight the discrimination levelled against him, the Petitioner has given the names of five officers who had also participated in the General strike of July 1980, and had received antedated appointments and subsequently antedated promotions to Class II Grade I including back wages.

The Petitioner in this case had sat for the examination for recruitment to Class II Grade II of the Sri Lanka Accountants' Service. However, on account of his

participation in the July 1980 strike, he was not appointed, but those who had not participated were given appointments with effect from 1st March 1985. By virtue of the Public Administration letter dated 27.01.1999 [P4], Petitioner's reappointment to Class II Grade II of the Sri Lanka Accountants' Service was backdated to the 20th May 1984 and the Petitioner was considered to have been on no pay leave from 20th May 1984 to 17th August 1992, which was the day on which he had accepted the appointment.

The Petitioner's contention was that having completed 10 years of satisfactory service since 20th May 1984, he was entitled to be promoted to Class II Grade I with effect from 20th May 1994. However, the Public Service Commission's position was that the Petitioner's period of no pay leave could not be taken into consideration when recommending him for promotion to Class II Grade I in terms of the Establishment Code and that the Petitioner would complete 10 years of service in Class II Grade II only on 17th August 2002.

The Petitioner complained that his fundamental rights under Article 12 (1) had been infringed by the failure to give him a promotion to Class II Grade I of the Sri Lanka Accountant's Service together with incremental credit and sought an order that his 10-year period of service necessary for his promotion to Class II Grade I be reckoned from the date to which his appointment to Class II Grade II was antedated.

The Petitioner has also made reference to the case of ***J. Dharmasiri de Silva vs. The Secretary, PSC and 11 others*** in SC Application No.87/2001 [SC Minutes 04.07.2001]

In the above case, the Court had rejected the claim of the Public Service Commission that the appointment of the Petitioner in that case was prospective and not retrospective and allowed Petitioner's application to have his period of service of 10 years in Class II Grade II be calculated from the day to which his appointment was antedated and ordered for him to be granted incremental credit.

The Petitioner in the instant case argues that the order made by the Administrative Appeals Tribunal in respect of him is similar to the order made by the Supreme

Court in the aforementioned case. However, unlike, the Petitioner in that case, he has been discriminated against by being denied back wages.

For the reasons set out above, we conclude that the Petitioner had established a violation of his fundamental right guaranteed under Article 12(1).

Accordingly, the 1st Respondent Commission is hereby directed to give effect the decision of the Administrative Appeals Tribunal dated 22.11.2011 [P17] forthwith. The 1st Respondent is further directed to act in terms of the Accountant's Service Board Circular No. 5 dated 14th March 2003 [P19] and place the Petitioner on class I on a supernumerary basis, adhering to the terms of the said Circular.

Application allowed

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B. DEHIDENIYA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE MURDU FERNANDO PC

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka in respect of the violations of Article 12(1) of the Constitution.

CASE NO. SC/FR/311/2019

M.D. Malik Sachinthana, 231/1,
Lucasgoda,
Tissamaharama.

PETITIONER

vs

1. University Grants Commission,
   No. 20, Ward Place,
   Colombo 7.

2. Chairman,
   University Grants Commission,
   No. 20, Ward Place,
   Colombo 7.

3. Director,
   Advanced Technological
   Institute,
   Labuduwa, Galle.

4. Director General,
   Sri Lanka Institute of Advanced
   Technological Education,
   No. 320, T.B. Jayah Mawatha,
   Colombo 10.

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

RESPONDENTS

BEFORE : **MURDU N.B. FERNANDO PC,J**
S. THURAIRAJA PC,J AND
YASANTHA KODAGODA PC,J

COUNSEL : Sunil Cooray for the Petitioner
Thanuka M. Nandasiri with R.M.N.R Bandara for the 3rd & 4th Respondents
Ms. Sureka Ahmed, SC for the 1st, 2nd & 5th Respondents

WRITTEN SUBMISSIONS : Petitioner on 28th February 2022
1st, 2nd and 5th Respondents on 14th February 2022

ARGUED ON : 19th January 2022

DECIDED ON : 9th June 2022

S. THURAIRAJA, PC, J.

Manimel Dura Malik Sachinthana (hereinafter sometimes referred to as the "Petitioner") sat the General Certificate of Education Examination (Advanced Level) in August 2018 (as his second attempt to enter University) and applied to be admitted to a Faculty of Law.

The 1st Respondent is the University Grants Commission (hereinafter sometimes referred to as the UGC) which is a body Corporate established under the Universities Act, No. 16 of 1978. The 2nd Respondent is the Chairman of the 1st Respondent.

The 3rd Respondent is the Director of the Advanced Technological Institute (hereinafter referred to as ATI), the institute under which the Petitioner has allegedly been registered for a three-year course of study to obtain a Higher National Diploma. The 4th Respondent is the Director General of the Sri Lanka Institute of Advanced Technological Education (hereinafter referred to as SLIATE) established under Act No. 29 of 1995.

This matter was supported on 10/02/2020 before this Court and leave was granted under Article 12(1) of the Constitution against 1st - 4th Respondents. The 1st - 4th Respondents are alleged to have directly violated the Fundamental Rights of the Petitioner.

The Facts

The Petitioner states that he sat for the General Certificate of Education, Advanced Level (hereinafter referred to as GCE A/L) Examination in August 2018, from the Hambantota District in the Arts Stream and obtained 'A' passes (Distinction passes) in all three subjects. In order of merit, he was placed 4th in the Hambantota district and 90th all Island, securing a Z-score of 2.1652.

The minimum Z-score required to be admitted to the Faculty of Law of the University of Colombo for the academic year 2018/2019 was 1.9574, as such the Petitioner was eligible to be admitted to the University. Accordingly, the Petitioner states that he made an application to the 1st Respondent to enter the Faculty of Law of the University of Colombo, Peradeniya or Jaffna as he was keen on becoming a lawyer.

However, the 1st Respondent had rejected the Petitioner's application to enter a Faculty of Law. The reason being that the Petitioner had registered for a three-year course of study to obtain a Higher National Diploma in Technology and Hospitality under Part 1, paragraph 1.7(6)(a) of the Handbook issued by the 1st Respondent with regard to admissions to universities for the academic year 2018/2019 based on the results of the GCE A/L examination held in 2018. However, in the normal circumstances he would have gotten a definite placement at the Faculty of Law of the University of Colombo.

However, the Petitioner states that there is no evidential proof that the Petitioner was a properly registered student of the ATI, Galle. Using his results obtained at the GCE A/L examination in August 2016 (first attempt), the Petitioner sat the entrance examination to be admitted as a student of the ATI, Galle. Although he was successful in the examination, he states that he never registered as a student as he did not submit the mandatory documents, including his school leaving certificate.

Nevertheless, as it was submitted by the Petitioner that the ATI has included the Petitioner's name as a prospective student of the institute. On further investigation it had been revealed by the Officials of the ATI that due to a mistake of their clerical staff the Petitioner's name had not been removed from their computer system, whereas his name had in fact been removed from their books and they had admitted another student in his place. As per the submitted documents and evidence before this Court it was revealed that the Petitioner, though successful at the entrance examination, never registered himself or attended any lectures.

Accordingly, the Petitioner on 11/02/2022 requested the officials of ATI to inform the 1st Respondent UGC, that he was not a registered student of ATI at any time. However, the Petitioner states that ATI, erroneously by a letter dated 11/02/2019 (document marked "X5"/ "2R5") informed the 2nd Respondent Chairman of UGC, that the Petitioner had been registered for a Diploma with the said Institute on 08/05/2018 and that by his own request on 11/02/2019 ceased to follow the diploma any further.

Then, by a letter dated 13/02/2019 (the document marked "X6"/ "2R7") addressed to 2nd Respondent, sent by ATI it had been stated that the Petitioner had been registered for a Higher National Diploma Program on Tourism and Hospitality Management with the said Institute on 08/05/2018 and from the initial stage he had not attended any lectures and that by his own request on 02/07/2018 ceased to follow the diploma any further.

By the document marked "X7A", a letter dated 25/02/2019 addressed to 4th Respondent Director General of Sri Lanka Institute of Advanced Technological Education (SLIATE), sent by the 1st Respondent UGC, sought clarifications as to the contradictory statements said in aforementioned letters and the delay in supply of requested information regarding the Petitioner.

A letter dated 27/02/2019 (document marked "X7"/ "2R10") addressed to Director General of SLIATE sent by ATI, furthered to clarify the document marked "X6" the letter dated 13/02/2019 (which stated that the Petitioner had willingly withdrawn from the course on 02/07/2018), stating that it was sent so that the Petitioner may be eligible to enter a University, satisfying the requirement that he had ceased registration 60 days prior to the last date of registration, so as not to hinder the Petitioner's future.

A letter dated 11/04/2019 (document marked "X8") addressed to SLIATE sent by the Petitioner made an appeal to the 4th Respondent, Director General of SLIATE, requesting that correct facts be informed to the 1st Respondent, UGC.

A letter dated 10/04/2019 (document marked "X9"/ "2R11") addressed to 2nd Respondent, Chairman of UGC sent by 4th Respondent, Director General of SLIATE clarified the true position as to the erroneous misconception which has taken place.

Thereafter, the Petitioner started to visit the officers of the UGC, and to request them to reconsider his position and to admit him to the Law Faculty of the University of Colombo. However, he was turned down by the authoritative administrative bodies, informing him that once a decision is taken that a student is disqualified to be admitted to a University, it cannot be changed thereafter, and that it had never been done.

The Petitioner states in view of the letter dated 10/04/2019 (document marked "X9") together with the letter dated 13/02/2019 (document marked "X6"), that the purporting cancellation of the erroneous registration was done on 02/07/2018 within the time frame of 60 days; thus, the Petitioner is qualified to be admitted to a University, according to the Handbook issued by the 1st Respondent UGC (which the relevant pages were marked as "X10").

Further, it is clear by document marked "X11" that, in instructions for registration at ATI, it is mandatory that the school Leaving Certificate be forwarded for the due registration process to be admitted as a student at the Institute.

The Petitioner states that after much difficulty, the Petitioner and his father were able to meet the 2nd Respondent himself on the 05/07/2019, who holds the position of Chairman of the 1st Respondent. At the conclusion of the meeting, the 2nd Respondent being the head of the 1st Respondent incorporated body, had verbally informed the Petitioner that the aforesaid decision of the 1st Respondent, UGC refusing to admit the Petitioner to a University is final and that it cannot be changed.

Variances in facts as per the Respondents

The 2nd Respondent to this application (Chairman of the UGC) admitted that the Petitioner sat for the GCE A/L examination in 2018 from the Hambantota District in the Arts Stream, securing 'A' passes in all three subjects, as he states the Petitioner obtained a Z score of 2.1647 and was ranked No.91 in the Island (no evidential proof was provided).

Further, he admitted the fact that the Petitioner submitted his application to the 1st Respondent to gain admission to the Faculty of Law of the University of Colombo. However, he stated that the said application contained incorrect information that the Petitioner was not a registered student at the ATI, Galle. Therefore, he was ineligible to be admitted to the Faculty of Law of the University of Colombo, hence his application was rejected. He admits only the receipt of the documents marked "X5, X6, X7". Further, the 2nd Respondent admits that the Petitioner had met his predecessor.

He further states that the Petitioner's name was included as No. 267 in the list of registered students (marked "2R3") which was sent via email by the 3rd Respondent on 04/06/2018 to the 1st Respondent. The list states that the last date for registration for the said Diploma programme was 20/07/2018.

The 3rd Respondent, Director of ATI and the 4th Respondent, the Director General of SLIATE stated that the Petitioner was a student of the ATI and that he was well aware that he had been properly registered as a student at the ATI till 11/02/2019.

Hence, he is not entitled to apply for any other University which comes under the UGC. They further admit that the Petitioner was absent from lectures and that he did not follow the aforesaid programme.

Thus, the 1st - 4th Respondents all state that the Petitioner was a registered student of the ATI, Galle.

Infringement of Article 12(1) of the Constitution

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 University Grants Commission, a body corporate established under the University Act, No. 16 of 1978 to intake students each year to the Universities established under the said Act based on the Z-scores obtained by students sitting the GCE A/L examination held each year.

In the instant case, the Petitioner had obtained a Z-score of 2.1652 which is well above the required Z-score of 1.9574 to enter the Faculty of Law at the University of Colombo (as provided in document marked "X1a").

As per the documents provided by the Petitioner, it is evident that the Petitioner was not a validly registered student of the ATI, Galle. As per the letter dated 10/04/2019 marked "2R11" and the letter dated 13/03/2020 marked "2R13", SLIATE admits that, although the Petitioner was successful at the entrance examination to ATI, he had not submitted his school leaving certificate. It is by the mistake of the officials of ATI that the Petitioner has been included as a 'prospective' student of ATI (as seen in the document marked "2R3") and they have no objections against the Petitioner being admitted to University. Further, as stated by the Petitioner, his name has been removed from the records of the Institute and another student has been admitted in his place. The same has not been challenged by the Respondents.

Therefore, ATI has not followed a valid registration process in admitting the Petitioner as a student of their Institute as the required mandatory documents had not been submitted by the Petitioner. As per the guidelines to be admitted to ATI, the Petitioner must have submitted his school leaving certificate, which he did not submit as he had used it to apply for University admission. Furthermore, in the letter of the Petitioner dated 11/04/2019 (document marked "X8") he has stated that although he was successful at the entrance examination, he had not attended any lectures, used any library facilities or received the Mahapola scholarship. He had not been asked to attend any lectures nor was he informed of his registration at the Institute or received any documents relating to that. Thus, it is valid for the Petitioner to assume that his registration at ATI was not successful.

As per the clarification letter sent by the ATI on the request of the UGC (marked "2R10"), as the Petitioner had not attended any lectures, so as not to hinder the Petitioner's future, ATI admits that Petitioner has withdrawn from the said Diploma within the stipulated period of 60 days.

Therefore, under normal circumstances it is clear that the Petitioner would definitely be eligible to be admitted to the Faculty of Law at the University of Colombo. As the UGC handbook provides that if a student withdraws their registration 60 days prior to the last date of registration, the student is allowed to enter University based on the results of his second attempt at the GCE A/L Examination.

The court exercising equity jurisdiction can consider that the Petitioner had a legitimate expectation to enter the Faculty of Law as he had a sufficient Z-score. Therefore, I find his Fundamental Rights enshrined in Article 12(1) violated and I am of the opinion that the Petitioner should be given a placement in the next intake of students for the Faculty of Law at the University of Colombo.

As per Justice Fernando, in the case of **Surendran v The University Grants Commission and Another (1993) 1 SLR 344**,

> *"Justice must not only be done, but must be seen to be done. And in the field of higher education this requires that the system of University admissions, both as formulated and as implemented, must not only be fair but seen to be fair."*

Education in Sri Lanka has a long history that dates back two millennia. While the Constitution of Sri Lanka does not provide free education as a fundamental right, by **Article 27(2) (h) of the 1978 Constitution under Chapter VI** – Directive Principles of State Policy (DPSP) the State is pledged to *"the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels"*.

The right to education is illustrated by the formulation in **Article 26 of the Universal Declaration of Human Rights**. Article 26 (1) of the said Declaration states that : *"Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit"*.

Therefore, although there is no specific provision dealing with the right to Education in our Constitution as such in the Universal Declaration of Human Rights, the said right has been accepted and acknowledged by our Courts through the provisions embodied in Article 12 (1) of the Constitution. In doing so, the Supreme Court has not only considered that the Right to Education should be accepted as a fundamental human right, but also had accepted the value of such Education, which has been described by **James A. Garfield** (in his letter accepting the Republican nomination to run for President on 12th July 1880), as, *"next in importance to freedom*

and justice is popular Education, without which neither freedom nor justice can be permanently maintained."

The establishment of the free education strategy in 1944 was a standard shift in the history of the education system in Sri Lanka. This policy provided equal prospects for all to accomplish access to the education system and formed a strong basis for long term ecological development within the human capital of the country. A report recently published by the National Education Commission of Sri Lanka even recognizes education as a right rather than a privilege available to all citizens. Therefore, it must be understood that education must stay equally and freely available to everyone as per C.W.W. Kannangara's long term vision.

Therefore, I am of the opinion that the UGC cannot arbitrarily deprive the Petitioner of the opportunity to follow his higher education at a State funded University as he is clearly eligible to be admitted as per the evidential documents provided. As per the letters submitted by both ATI and SLIATE, they have no objections in the Petitioner being admitted to a University. The Petitioner had not attended any lectures nor did he return with his school leaving certificate to register himself as a student at ATI.

Therefore, taking into consideration these factors I see no reason for the UGC to disqualify the Petitioner's application. Although it appears to be that the Petitioner was a registered student under an Institute coming under the UGC, it is as admitted by the Respondents, that the fault lies with the ATI.

The UGC as an Institution advocating free education must not deprive a student of his future. In doing so it's breaking down the very futures of the students it is trying to build. Therefore, I do not see a reasonable explanation as to why the UGC should reject the Petitioner's application as the Petitioner is not a validly registered student of

ATI to start with. The critical need everywhere in the world is for education to prepare students to lead successful, fulfilling lives.

As per Justice Sharvananda in **Rienzie Perera v University Grants Commission ([1978-79-80] 1 SLR 128,**

> *"Education is one of the most important functions of the State today. The large expenditure of money incurred by the State for education signifies its recognition of the importance of education to a democratic society. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education. Such an opportunity, where the State undertakes to provide it, is a right which must be made available to all on equal terms. The Constitution enjoins the organs of Government to secure and advance and not deny this fundamental right of equality of treatment."*

As was mentioned by this bench, "Free Education is the only way to go up in life". Therefore, government institutions must ensure that they do not deprive students of this opportunity.

Decision

Considering the facts of the case while I declare the Petitioner's Fundamental Rights enshrined in Article 12(1) of the Constitution are violated, I direct the 1st and 2nd Respondents to admit the Petitioner to the appropriate University that he would have been eligible for as per the Z-score that he has obtained during the GCE A/L Examination in August 2018 and be admitted to the next available intake with immediate effect.

If this Petitioner had been admitted he would have completed 3 years of his 4-year degree programme. Denial of admission by the UGC had caused not only the cost

of litigation, but 3 years of his youth. Considering all, I impose a cost of Rs.500,000 be paid to him within 6 months by the 1st Respondent.

Application allowed.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO PC, J

I agree

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA PC, J

I agree

JUDGE OF THE SUPREME COURT

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

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

SC (FR) No. 346/2017

1. **Kekulandara Mudiyanse le Huri Arawe Gedara Sudath,**
   19/1, Watagoda Temple Road,
   Aruppala,
   Kandy

2. **Kekulandara Mudiyanse le Huri Arawe Gedara Kusal Annuththara Kekulandara,**
   19/1, Watagoda Temple Road,
   Aruppala,
   Kandy

3. **Kekulandara Mudiyanse le Huri Arawe Gedara Maithree Annuththara Kekulandara**
   19/1, Watagoda Temple Road,
   Aruppala,
   Kandy

PETITIONERS

Vs.

1. **E.P.T.K. Ekanayake**,
   Director of Education,
   Department of Education,
   Central Province,
   Kandy

2. **S.A.K. Kulatunga,**
   Assistant Director of Education,
   Department of Education,

Central Province,
Kandy

3. **M.W. Wijeratne,**
Zonal Director,
Zonal Education Office,
Kandy

4. **R. Rajapakse,**
Principal,
Kandy Maha Vidyartha Viduhala,
Kandy

4A. **M.R.P. Mayadunne,**
Principal,
Kandy Maha Vidyartha Viduhala,
Kandy

5. **P.B. Wijayaratne,**
Secretary,
Chief Ministry,
Central Province,
Kandy

5A. **R.M.P.S. Ratnayake,**
Secretary,
Chief Ministry,
Central Province,
Kandy

6. **Hon. Sarath Ekanayaka,**
Central Province Chief Minister,
Central Province Chief Ministry,
Digana Road,
Kundasale

7. **Hon. Akila Viraj Kariyawasam,**
Minister,
Ministry of Education,
Isurupaya,
Battaramulla

8. **The Attorney General,**
Attorney General's Department,

Colombo 12.

RESPONDENTS

Before: Priyantha Jayawardena PC, J
Murdu N. B. Fernando PC, J.
Yasantha Kodagoda PC, J.

Counsel: Ermiza Tegal with Thiagi Piyadasa for the petitioners,
Viveka Siriwardena, DSG for the 1s to 3rd, 4A, 5A and 8th respondents

Argued on: 03rd of June, 2020

Decided on: 05th of April, 2022

Priyantha Jayawardena PC, J

Facts of the Application

The 1st petitioner, who is the father of the 2nd and 3rd petitioners, filed the instant application on behalf of the 2nd and 3rd petitioners, who were students in Grade 7 and Grade 3 of Vidyartha College, Kandy, respectively.

The petitioners alleged that the inaction on the part of the 4th respondent to take appropriate action against the alleged harassment caused to the 2nd and 3rd petitioners, and the failure of the 1st, 2nd, 3rd and/or 5th respondents to take appropriate and timely remedial action against the purported inaction of the 4th respondent, resulted in the violation of the Fundamental Rights of the 2nd and 3rd petitioners enshrined in Article 12 (1) of the Constitution.

The 1st petitioner stated that in January 2016, he objected to the appointment of an individual to the post of treasurer of the Parents' Committee of Vidyartha College made by the 2nd petitioner's class teacher (hereinafter sometimes referred to as the "said class teacher") as he was aware of previous corrupt practices of the proposed treasurer.

The 1st petitioner stated that, approximately two weeks after the said incident, the 2nd petitioner had been beaten by the said class teacher. The 1st petitioner further stated that despite the

complaints made by him regarding the said incident to the 4th respondent, who was the then principal of Vidyartha College, no action had been taken by him against the said class teacher.

Further, the 1st petitioner stated that on the 16th of February, 2016, the said class teacher had threatened to kill the 2nd petitioner after accusing him of beating another student. Thus, the 1st petitioner had once again complained to the 4th respondent about the said incident, and had lodged a complaint at the Kandy Police station regarding the harassment caused to the 2nd petitioner by the said class teacher.

The 1st petitioner stated that subsequently, the teachers in Vidyartha College had begun to ill-treat the 3rd petitioner, his younger son.

Thereafter, the 1st petitioner had made complaints to the 1st, 3rd and 6th respondents regarding the harassment caused to the 2nd petitioner by the said class teacher and the inaction of the 4th respondent to take steps in respect of the said complaints against her.

Moreover, the 1st petitioner had lodged a complaint with the Human Rights Commission regarding the alleged inaction of the 4th respondent to take action against the said harassment caused to the 2nd and 3rd petitioners.

The 1st petitioner further stated that during the parents-teachers meeting held on the 30th of March, 2017, the 4th respondent had requested other parents of students at the said school to defend the said class teacher against false allegations made by the 2nd petitioner.

Moreover, the 1st petitioner stated that the Assistant Principal and two other teachers of the said school had assaulted the 2nd petitioner, while several other parents had assaulted his wife on the 5th of April, 2017. The 1st petitioner stated that the 2nd petitioner and his mother were hospitalised as a result of the said incident.

Consequently, the 1st petitioner had once again lodged a complaint at the Kandy Police station and the Human Rights Commission stating that the 2nd and 3rd petitioners had refused to attend school due to the aforementioned assault.

The 1st petitioner further stated that a consultant psychiatrist had recommended that the 2nd and 3rd petitioners should be transferred to a different school as they were experiencing trauma from being ill-treated at Vidyartha College.

The 1st petitioner stated that he was informed by the Education Department of the Central Province on the 5th of July, 2017, that steps were being taken to issue a charge sheet against the said class teacher.

Moreover, the Human Rights Commission, after holding an inquiry in respect of the complaint made by the 1st petitioner, had, by letter dated 13th of July, 2017, requested the 1st respondent to provide a suitable alternative school for the 2nd and 3rd petitioners situated in close proximity to the petitioners' residence. Accordingly, the 1st, 3rd and 5th respondents had informed Wariyapola Sri Sumangala College to admit the 2nd and 3rd petitioners.

Thereafter, the 1st petitioner had informed the Human Rights Commission and had sent letters to the 1st and 3rd respondents stating that the suggested alternative school was of a lower academic standard than Vidyartha College and was situated further away from the petitioners' residence than other suitable schools in the area, such as St. Sylvester's College. Thus, the 1st petitioner had contended that the 2nd and 3rd petitioners should be given admission to a better school such as St. Sylvester's College.

In the circumstances, it was stated that the inaction of the 4th respondent to take appropriate action in respect of the alleged harassment caused to the 2nd and 3rd petitioners, and the failure of the 1st, 2nd, 3rd and/or 5th respondents to take appropriate action against the purported inaction of the 4th respondent, resulted in the 2nd and 3rd petitioners being unable to attend Vidyartha College, thereby violating the Fundamental Rights of the 2nd and 3rd petitioners guaranteed by Article 12 (1) of the Constitution.

After the application was supported, the court had granted leave to proceed for the alleged violation of Article 12 (1) of the Constitution.

Objections of the 1st respondent

The 1st respondent filed objections and stated that in January 2016, the said class teacher had caned the 2nd petitioner to discipline him as he had harassed new students who had joined Grade 6 of Vidyartha College pursuant to the scholarship examination.

The 1st respondent further stated that in response to the complaint made by the 1st petitioner against the alleged harassment caused to the 2nd petitioner by the said class teacher in January 2016, the 4th respondent had promptly directed the said class teacher to stop using corporal punishment to discipline the 2nd petitioner.

Further, in February 2016, in response to the 1st petitioner's second complaint alleging that the said class teacher threatened to kill the 2nd petitioner, the 4th respondent had taken steps to remove her from the said post of 'class teacher'. Further, she had been removed from teaching the subject of 'practical technical skills' in the 2nd petitioner's class and a different class had been assigned to her.

The 1st respondent stated that he had received a letter on the 1st of June, 2016 from the 1st petitioner alleging the harassment caused to the 2nd petitioner by the said class teacher. Consequently, the 1st respondent had appointed a committee on the 9th of June, 2016 to conduct a preliminary inquiry into the alleged harassment of the 2nd petitioner.

Further, the 1st respondent denied the 1st petitioner's allegation that the 4th respondent had requested other parents of the students to defend the said class teacher during a parents-teachers meeting held on the 30th of March, 2017. Moreover, it was also denied that the Assistant Principal and two other teachers of Vidyartha College had assaulted the 2nd petitioner and that some parents of students had assaulted the 2nd petitioner's mother on the 5th of April, 2017. He further denied that the teachers in the said school had ill-treated the 3rd petitioner.

It was further stated that, consequent to a complaint made by the 1st petitioner, the Human Rights Commission had requested the 1st respondent to provide a suitable school for the 2nd and 3rd petitioners in close proximity to the petitioners' residence by letter dated 13th of July, 2017.

Accordingly, the 1st, 3rd and 5th respondents had taken a decision to admit the 2nd and 3rd petitioners to Wariyapola Sri Sumangala College in August, 2017 and had informed the principal of the said college accordingly.

The 1st respondent denied the 1st petitioner's claim that the 2nd and 3rd petitioners had not been provided with a suitable alternative school and stated that Vidyartha College and Wariyapola Sri Sumangala College are of a similar academic standard as both schools fall under '1AB category' and that the distance between the two aforementioned schools is approximately 100 meters.

Moreover, it was stated that even though the 1st petitioner requested for the 2nd and 3rd petitioners to be admitted to St. Sylvester's College, the 2nd petitioner had only obtained 169 marks at the scholarship examination, which was lower than the cut-off mark of 174 required to gain admission to St. Sylvester's College.

Further, the 1st respondent stated that the said class teacher was transferred to St. Sylvester's College and was serving in the said school at the time the 1st petitioner made the request to transfer the 2nd and 3rd petitioners to the said school. Therefore, it is evident that their motive in filing the instant application was to gain admission to St. Sylvester's College.

Moreover, the 1st respondent stated that at the time of filing his objections, a charge sheet dated 31st of December, 2017 was issued against the said class teacher for the harassment of the 2nd petitioner.

The 1st respondent further stated that a student who fails to attend a school for 40 consecutive days without notice is considered as having left the school in terms of the circulars issued by the Ministry of Education. However, despite the failure of the 2nd and 3rd petitioners to attend school without any notice since the 5th of April, 2017, their names had not been removed from the school register. Hence, it is apparent that the said school had acted in the best interests of the 2nd and 3rd petitioners.

It was further stated that, taking into consideration the abovementioned facts, the respondents had taken appropriate remedial action regarding the complaints made against the alleged harassment faced by the 2nd and 3rd petitioners, and as such, they had not violated the Fundamental Rights of the 2nd and 3rd petitioners guaranteed under Article 12 (1) of the Constitution.

Subsequently, by way of a motion, the respondents produced the preliminary inquiry report, the charge sheet, the disciplinary inquiry report and the disciplinary order made against the said class teacher for the alleged harassment of the 2nd petitioner, marked as '***X1***', '***X2***', '***X3***' and '***X4***', respectively.

At the time of the hearing of the instant application, the learned counsel for the petitioner informed court that the petitioners would only pursue the reliefs prayed for in paragraphs (e) and (h) of the petition which states as follows;

> "(e) Declare that the refusal and/or failure of the 1st, 2nd, 3rd and/or 5th respondents to take appropriate and timely remedial action against the 4th respondent constitutes an infringement and/ or a continuing infringement of the Petitioners' Fundamental Right to equality before the law and equal protection of the law protected by Article 12 (1) of the Constitution.

(h) Declare that the refusal and/or failure of the 4th respondent to address the complaints made on behalf of the 2nd and 3rd petitioner which subsequently caused them to refrain from attending Vidyartha College constitutes an infringement and/or a continuing infringement of the Petitioners' Fundamental Right to equality before the law and equal protection of the law protected by Article 12 (1) of the Constitution."

Have the 2nd and 3rd petitioners' Fundamental Rights enshrined in Article 12 (1) of the Constitution been infringed?

In view of the abovementioned prayers to the petition, it needs to be considered whether there was an inaction on the part of the 4th respondent to take action in respect of the complaints of harassment under reference, and whether there was a failure on the part of the 1st, 2nd, 3rd and/or 5th respondents to take appropriate and timely remedial action against the purported inaction of the 4th respondent.

The 1st petitioner stated that after he objected to the appointment of an individual to the post of treasurer of the Parents' Committee of Vidyartha College by the said class teacher, she had assaulted the 2nd petitioner, in January 2016. Thereafter, on the 16th of February, 2016, the petitioner stated that the said class teacher had threatened to kill the 2nd petitioner for allegedly beating another student.

The 1st petitioner stated that despite the complaints made by him regarding the aforementioned incidents, no action was taken by the 4th respondent against the said class teacher.

The material furnished to this court shows that after the first complaint of the 1st petitioner alleging that the said class teacher had caned the 2nd petitioner, the 4th respondent had directed her to refrain from using corporal punishment to discipline the 2nd petitioner.

Further, after the second complaint where it was alleged that the said class teacher had threatened to kill the 2nd petitioner, the 4th respondent had removed her from the post of 'class teacher' and from teaching the subject of 'practical training skills' in the 2nd petitioner's class.

Moreover, upon receiving a letter from the 1st petitioner on the 1st of June, 2016, the 1st respondent had appointed a committee on the 9th of June, 2016 to conduct a preliminary inquiry into the alleged harassment caused to the 2nd petitioner by the said class teacher. The 4th

respondent has facilitated the holding of the said preliminary inquiry against the said class teacher.

Pursuant to the findings of the preliminary inquiry, the 1st petitioner had been informed, by letter dated 5th of July, 2017, that steps were being taken to issue a charge sheet against the said class teacher by the Education Department of the Central Province.

Subsequently, a charge sheet dated 31st of December, 2017 had been issued by the 1st respondent against the said class teacher in respect of the alleged harassments caused to the 2nd petitioner.

Consequently, an inquiring officer had been appointed to conduct the disciplinary inquiry against the said class teacher on the 28th of April, 2018, and the said disciplinary inquiry had been conducted from the 05th of July, 2018 to 06th of September, 2018.

Thereafter, the disciplinary inquiry report dated 2nd of October, 2018 had been submitted by the inquiring officer. The said report stated that the said class teacher was found guilty of all charges by the inquiring officer.

Consequently, by a disciplinary order dated 21st of November, 2018, her salary increments were deferred for two years. Further, the said class teacher, who was then serving in St. Sylvester's College, Kandy, was given a punishment transfer to CP/W/Kengalla Maha Vidyalaya, by letter dated 11th of December, 2018.

Moreover, even though the 1st petitioner stated that the 4th respondent had requested other parents of the students to defend the said class teacher against false allegations made by the 2nd petitioner, no material was produced in court to substantiate the said allegation.

Further, although the 1st petitioner stated that a police complaint was lodged when certain teachers and parents of Vidyartha College allegedly assaulted his wife and the 2nd petitioner on the 5th of April, 2017, a copy of the said police complaint was not produced in this court.

Conclusion

In view of the above, I am of the opinion that appropriate and timely remedial action had been taken against the said class teacher by the disciplinary authority in terms of the procedure stipulated in the Establishments Code.

Hence, I am of the view that there is no inaction on the part of the 4th respondent to take action in respect of the complaints of harassment under reference. In view of the aforementioned findings, the question of whether there was a failure on the part of the 1st, 2nd, 3rd and/or 5th respondents to take timely and appropriate remedial action against the purported inaction of the 4th respondent does not need further consideration by this court.

Thus, I hold that the respondents have not violated the Fundamental Rights of the 2nd and 3rd petitioners enshrined in Article 12 (1) of the Constitution.

In the foregoing circumstances, the petition is dismissed with no costs.

Judge of the Supreme Court

Murdu N. B. Fernando PC, J

I agree **Judge of the Supreme Court**

Yasantha Kodagoda PC, J

I agree **Judge of the Supreme Court**

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

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

SC/FR Application No. 356/2014

1. Don Piyasena Karunaratne,
   No. 01, Stadium Road, Anuradhapura.

2. Thamara Gunatunge,
   No.05, Stadium Cross Road,
   Anuradhapura.

3. Magilin Nona Hapangama,
   No.03, Stadium Cross Road,
   Anuradhapura.

Petitioners

Vs.

1. Anuradhapura Municipal Council,
   Anuradhapura.

2. H. P Somadasa,
   Mayor,
   Anuradhapura Municipal Council,
   Anuradhapura.

3. S.S.M Sampath Rohana Dharmadasa,
   Municipal Commissioner,
   Anuradhapura Municipal Council,
   Anuradhapura.

4. Honourable Attoreny General
Attorney General's Department,
Colombo 12.

Respondents

Before: Jayantha Jayasuriya, PC, CJ.
L.T. B Dehideniya, J.
Yasantha Kodagoda, PC, J.

Counsels: Senany Dayaratne with Nishadi Wickramasinghe for the Petitioners
Darshana Kuruppu with Ms. Sajini Elvitigala for the 1st- 3rd Respondents

Argued on: 22.09.2020

Decided on: 08.11.2022

L.T B. Dehideniya, J.

The Petitioners invoke the jurisdiction of this court alleging the infringement of Fundamental Rights guaranteed under the Article 12(1) of the Constitution by the Respondents.

The Petitioners who were former employees of Anuradhapura Municipal Council (hereinafter sometime referred to as the 1st Respondent) have filed the present application seeking an order directing the 1st and/or, 2nd and/or, 3rd Respondents to transfer the

absolute ownership of the houses belonging to the 1st Respondent, which the Petitioners occupy on tenancies. The Petitioners submit that the Petitioners (and/or their spouses) were allocated there residencies on a rent purchase basis, pursuant to the direction of the then Minister of Local Government dated 09.10.1979, under Section 3(1) of the Local Authorities Housing Act No. 14 of 1964 (as amended) marked as **P-3**.

Petitioners state that being aware of the continuing practice of departments to transfer of houses on such tenancy agreements on completion of 20 years, the Petitioners made various requests to the 3rd Respondent to transfer absolute ownership of the houses to the Petitioners, but it was of no avail. It was further submitted that the said requests were made on the basis that, when the direction of the then Minister marked as **P-3** read together with the tenancy agreements, it establishes a Legitimate Expectation on Petitioners and place confidence in Petitioners that they are entitled to purchase the houses.

The Respondent's contention is that the Petitioners are not entitled to absolute ownership of the said houses on the ground that the houses in question are not low cost houses but they are official quarters within the meaning of Local Authority Quarters (Recovery of Possession) Act No. 42 of 1978, in which absolute ownership cannot be granted to tenants. It was submitted that according to Section 5(A) of the Local Authorities Housing Act as amended the Local Authority has the power to transfer houses if the monthly rental of such house did not exceed twenty five rupees and the Advisory Board is satisfied that the other statutory conditions are fulfilled. Therefore, the Respondents argue that even assuming the said houses are low-cost houses, since the monthly rental mentioned in the rent agreements are forty-five rupees, the Respondents have no authority to transfer

absolute ownership of the houses to the Petitioners. It is the view of the Respondents that the Petitioners have not come to Courts with clean hands.

As per the submissions tendered by the parties, it is essential for this Court to examine the scope of the definition of a low-cost house in the context of existing law and the tenancy agreement signed by the Petitioners. The 1st Respondent has presented three categories of houses to consider in a matter similar to the present application. The said categories are as follows;

1. Slum clearance houses
2. Low-cost houses
3. Staff quarters

The Respondents' submission is that though absolute ownership of the slum clearance houses and low-cost houses can be transferred to the occupants, absolute ownership of staff quarters/official quarters cannot be transferred under the law. It was further submitted that if the Authority is providing low-cost houses or slum clearance houses, it has to be stated clearly in the relevant letters or agreements and the words used in the tenancy agreements of the Petitioners are '<u>මාණ්ඩලික නිවාස</u> අංක .... සල්ගාදු හෝටලය ඉදිරිපිට', in which the words 'මාණ්ඩලික නිවාස' should be identified as official/ staff quarters. Therefore, the Respondents contend that the absolute ownership of the houses given to Petitioners cannot be transferred to Petitioners and the Petitioners are bound to handover their houses when they were transferred and/or retired from the service.

When considering whether the Petitioners are entitled to claim ownership of the houses in question, it is important for this Court to delve into the background of the Petitioners case and the nature of the tenancy agreement. 1st Petitioner had been allocated a house

(vide document marked **P-2(a)**) with effect from 18.12.1963. 2nd Petitioner had been allocated a house (vide document marked **P-2(b)**) with effect from 23.09.1972 and the 3rd Petitioner with effect from 12.02.1965 (vide document marked **P-2(c)**). All three Petitioners submit that they occupied the said houses throughout and even at the time the present application was filed. Further, when considering the factual matrix of the instant application, it appears that the Petitioners had continued to occupy the houses allocated to them even after their retirement from service from the Municipal Council.

The Petitioners submit that in or around 1981, the Petitioners received notice of quit in terms of Local Authority Quarters (Recovery of Possession) Law No. 42 of 1978. The Petitioners seek to claim the absolute ownership of the houses in question on the ground that the Petitioners are occupying houses built under the 'low-cost housing scheme' of the Municipal Council. In terms of **Section 5(A)** of the Local Authorities Housing Act, as amended, the Local Authority is vested with the power to transfer the absolute ownership of houses let under Section 3(1) of the Act, if the Advisory Board constituted for the Local Authority is satisfied that the statutory conditions are fulfilled.

The Petitioners with the belief that their houses belong to the low-cost houses category, argued that when reading **Section 5(A)** of the Local Authorities Housing (Amendment) Act No. 63 of 1979 in conjunction with the direction of the Minister of Local Government dated 09.10.1979 made under **Section 3(1)** of the Local Authorities Housing Act No. 14 of 1964 (as amended) marked as **P-3** that they are entitled to claim absolute ownership of the houses they received as former employees of the Municipal Council. However, **Section 5(A)** of the Local Authorities Housing (Amendment) Act No. 63 of 1979 clearly

states that advisory board has power to transfer houses if the monthly rental of such house immediately prior to such letting did not exceed 'twenty-five rupees'.

Section 3(1)

(1) Subject as hereinafter provided, a local authority may, either upon a resolution passed in that behalf at a duly constituted meeting of that local authority or upon the direction of the Minister, let to any person any house-

(a) which has vested in that local authority under section 2; or

(b)which has been, or may be, constructed by that local authority within the administrative limits of that local authority for the purpose of residence, on such terms as will enable that person to become the owner of that house and the land appertaining thereto after making certain number of monthly payments as rent.

Section 5(A)

(1) Where prior to the date of coming into force of this section a house to which this Act applies has been let to any person under the provisions of section 3(1) and the monthly rental of such house immediately prior to such letting did not exceed twenty- five rupees, the local authority within the administrative limits of which that house Is situated shall, by an instrument of disposition, transfer, free of charge, that house to that person. [emphasis added]

The Respondents' position is that there is no evidence that the houses in question were let to the Petitioners on the basis that they are "low cost houses" even though Section 3(1) of

the Local Authorities Housing Act, as amended, enables local authorities to let houses on a rent purchase basis. The approval granted by the Secretary to Ministry of Local Government, Housing and Construction dated 09 October 1979 marked **P-3** is limited to the letting "low cost houses". Respondents contend that the houses in question are not such houses but are official quarters. However, in or around 1989, Urban Council of Anuradhapura had filed a *rent and ejectment case* (Case No.12715/RE) in the District Court of Anuradhapura to recover default rent payments related to the houses in question. The said case being a rent and ejectment case shows that the Urban Council of Anuradhapura had not considered the houses as official quarters, but had relied upon the tenancy agreement to file the case. If the local authority considered the said houses as official quarters, the local authority should have initiated proceedings under the Local Authority Quarters (Recover of Possession) Law. Therefore, it is the view of this Court that the Petitioners have received the houses in question on rent basis. This view had been accepted in the decisions of the applications bearing Nos. HC Anuradhapura Certiorari 19/96, CA (PHC) 108/98, HC Anuradhapura Certiorari 13/94, CA (PHC) 01/96, HC Anuradhapura Certiorari 23/96 and CA (PHC) 109/98 (marked as **P-7 (a)**, **P-7 (b)**, **P-7 (c)**, **P-7 (d)**, **P-7 (e)** and **P-7 (f)**, respectively) filed by the Petitioners to seek relief to quash notices of quit issued by the Respondents.

It was further argued on behalf of the Respondents that the provisions in **Section 5(A)** of the Act have no relevance to the present application since the houses in question do not fulfil the requirements set out in the said Section. Section 5(A) of the Act clearly sets out that only houses that are required to pay a monthly rent less than twenty-five rupees (Rs. 25/-) could be considered for transferring the absolute ownership. However, according to

the documents marked **P-2(a)**, **P-2(b)** and **P-2(c)** when the houses were allocated to the Petitioners, the monthly rent the Petitioners were required to pay was forty-five rupees (Rs. 45/-).

As discussed above, Section 3(1) of the Local Authorities Housing Act, as amended, enables authorities to let houses on a rent purchase basis and the Section 5(A) of the said Act empowers the local authorities to transfer the absolute ownership of houses let under Section 3(1) if the Advisory Board constituted for the Local Authority is satisfied that the statutory conditions are fulfilled. When considering the documents marked as **P-2(a), P-2(b)** and **P-2(c),** it appears that none of the said documents are rent purchase agreements, but, rent agreements. The rent agreements marked as P-2(a), P-2(b) and P-2(c) consist of certain conditions to be fulfilled by the tenants throughout the rent period, such as; no permanent fixers, improvements or repairs shall be made without the written permission of the special commissioner, no trade shall be done within the premises, tenants shall keep the premises clean and sanitary etc. From the nature of the said conditions, it is clear that the houses in question were given to the Petitioners on rent basis and not on rent purchase basis. Therefore, it is evident that none of the agreements on which the relevant houses were let to the Petitioners' have been made under section 3(1) of the Local Authorities Housing Act and there is no condition on any of the agreements to the effect that the Petitioners are entitled to have the absolute ownership of houses transferred upon payment of rent for a specified period.

Further, none of the said rent agreements indicate a promise made by the local authority to transfer the absolute ownership of the houses in question. Further, the phrase "**තවද, ඉන් අනතුරුව මෙම නිවස ඔබට කුලියට සින්න වීමේ පදනම මත දීම ගැනද යථා කාලයේදී**

සලකා බලනු ලැබේ.” in the document marked **P-4(f)** exhibits a mere consideration by the local authority. Therefore, it is clear that the local authority has retained the discretion to transfer the absolute ownership of the houses in question.

Respondents have tendered the supplementary tenement list for the Petitioners' houses (documents marked as **R-20** and **R-21**). In terms of the said supplementary tenement list all the premises that the Petitioners claim absolute ownership are 'staff quarters' vested with the Municipal Council of Anuradhapura. Therefore, according to evidence produced by the Respondents, the Petitioners have failed to substantiate that the houses under consideration are classified as 'low cost' houses.

The Respondents have drawn the Court's attention to the case ***C.W Jayasekera v. Municipal Council of Anuradhapura and Others*** (SC/FR Application No.63/2013, SC minutes dated 26.07.2017) where considerably similar circumstances have been discussed. Petitioner in the said application had been issued with a notice of quit in terms of the Local Government Official Quarters (Recovery of Possession) Act, similar to the Petitioners in the present application. However, in clear contrast to the present situation, the Petitioner failed both in High Court and the Court of Appeal to quash the said quit notice, and there are no judicial pronouncements that the said house occupied by the Petitioner is not official quarters, but received in a rent basis. Therefore, it is apparent that the decision of the case ***C.W Jayasekera v. Municipal Council of Anuradhapura and Others*** cannot be considered in the present application.

As per the aforementioned discussion of the factual matrix and the existing law relating to the present application, it is the view of this Court that the Petitioner do not have a right to claim for a transfer the absolute ownership of the houses. Further, it is clear that the

Respondent local authority has not given any legitimate expectation to Petitioners to make such a claim.

By concluding the judgement, this Court adopts the view that no violation of the Fundamental Right guaranteed to the Petitioners under Article 12 (1) of the constitution has taken place.

Petition dismissed.

Judge of the Supreme Court

Jayantha Jayasuriya, PC, CJ

I agree

Chief Justice

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 in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No. 377/2015

1. Rita Rathnayake,
   105/1a, Ginnaliya Road,
   Urubokka.

2. Rani Gunathilake Siriwardana,
   Padaukema,
   Tissamaharama.

3. Rathnaweera Patabandige Ramya,
   Miriswatta,
   Diyasyaya,
   Tissamaharama.

4. Wehella Hewage Shirani,
   Dikwella Niwasa,
   Koggala Road,
   Ruhunuridiyagama.

PETITIONERS

-Vs-

1. Y. Wickramasiri,
   Secretary to the Provincial Ministry of
   Education,
   Land and Land Development, Highways,
   Information, Rural and Estate Infrastructure
   Facilities of Southern Province,
   2nd Floor,
   Talbot Town Shopping Complex,
   Dickson Junction,
   Galle.

2. H. W. Wijerathne,
   Chairman,
   Provincial Public Service Commission,
   6th Floor, District Secretariat Office,
   Kaluwella,
   Galle.

2A. Gunasena Hewawitharana,
   Chairman,
   Provincial Public Service Commission,
   6th Floor, District Secretariat Office,
   Kaluwella,
   Galle.

3. U. G. Vidura Kariyawasam
   Secretary,
   Provincial Public Service Commission,
   6th Floor, District Secretariat Office,
   Kaluwella,

Galle.

4. R. K. R. R. Ranaweera,
   Member,
   Provincial Public Service Commission,
   6th Floor, District Secretariat Office,
   Kaluwella,
   Galle.

5. V. A. V. D. P. Rasanjanee,
   Member,
   Provincial Public Service Commission,
   6th Floor, District Secretariat Office,
   Kaluwella,
   Galle.

6. Hemakumara Nanayakkara,
   Governor of Southern Province,
   Governor's Office,
   Upper Dickson Road,
   Galle.

6A. Marshall Perera PC,
   Governor of Southern Province,
   Governor's Office,
   Upper Dickson Road,
   Galle.

6AA. Dr. W. W. Gamage,
Governor of Southern Province,
Governor's Office,
Upper Dickson Road,
Galle.

7. Secretary to the Ministry of Education,
Isurupaya,
Battaramulla.

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

9. K. K. P. A. Siriwardana,
Member,
Provincial Public Service Commission,
6th Floor, District Secretariat Office,
Kaluwella,
Galle.

9A. K. K. G. J. K. Siriwardhane,
Member,
Provincial Public Service Commission,
6th Floor, District Secretariat Office,
Kaluwella,
Galle.

10. D. W. Vitharana,
Member,

Provincial Public Service Commission,
6th Floor, District Secretariat Office,
Kaluwella,
Galle.

11. Shirmal Wijesekara,
Member,
Provincial Public Service Commission,
6th Floor, District Secretariat Office,
Kaluwella,
Galle.

12. D. K. S. Amarasiri
Member,
Provincial Public Service Commission,
6th Floor, District Secretariat Office,
Kaluwella,
Galle.

12A. Sunil Dahanayake,
Member,
Provincial Public Service Commission,
6th Floor, District Secretariat Office,
Kaluwella,
Galle.

13. K. L. Somarathna,
Member,
Provincial Public Service Commission,
6th Floor, District Secretariat Office,

Kaluwella,
Galle.

13A. L. K. Ariyaratne,
Member,
Provincial Public Service Commission,
6th Floor, District Secretariat Office, Kaluwella,
Galle.

14. Munidasa Halpadeniya,
Member,
Provincial Public Service Commission,
6th Floor, District Secretariat Office,
Kaluwella,
Galle.

RESPONDENTS

Before : **P. PADMAN SURASENA J**

ACHALA WENGAPPULI J

MAHINDA SAMAYAWARDHENA J

Counsel : Upul Kumarapperuma with Sudarshana Gunawardhana,
Muzar Lye and Radha Kuruwitabandara for the Petitioners.

Yuresha De Silva, SSC for the Respondents.

Argued on : 22-10-2021

Decided on : 19-05-2022

P Padman Surasena J

The Petitioners had joined as Volunteer Teachers to work in Government schools in Southern Province of Sri Lanka. The Government had implemented this as a temporary measure to address the shortage of teachers then prevailed in the public schools of several provinces in the country.

After a lapse of some time, then Minister of Education placed before the Cabinet, the Memorandum dated 28-11-2006 titled "Recruitment of Volunteer Teachers serving in various Provinces in the Island as Teaching Assistants". The said Cabinet Memorandum dated 28-11-2006 has been produced marked **1R 1**. The Cabinet of Ministers having considered the said Cabinet Memorandum, by its decision dated 04-01-2007, granted the approval to recruit the Volunteer Teachers referred to therein, as Teacher Assistants subject to the conditions stipulated in paragraphs 3.1 to 3.5 of the said Cabinet Memorandum. The said Cabinet Decision dated 04-01-2007 has been produced marked **1R 2**.

Consequent to the aforesaid Cabinet Decision (**1R 2**), applications were called for, from Volunteer Teachers who have fulfilled the stipulated conditions for the selection of suitable candidates to be appointed as Teacher Assistants. The newspaper advertisement calling upon Volunteer Teachers to submit applications for the selection of candidates for appointment as Teacher Assistants has been produced marked **1R 4**. According to the said advertisement, all applicants were required to be not less than 21 years and not more than 45 years of age as at 31-12-2005. This requirement was set as a general basic qualification which qualified anyone to apply for the advertised post. It must also be noted that the said advertisement (**1R 4**), has been published as per the instructions given in the letter dated 14-02-2007 issued by the Minister of Education as per the Cabinet Decision on 25-10-2006. The Petitioners have produced the said letter dated 14-02-2007 marked **P 5** and the 1st Respondent has produced the same letter marked **1R 3**.

The Petitioners had accordingly applied for that post and were thereafter summoned for an interview. The Petitioners have produced the letters dated 15-05-2007, marked **P 6**

(a), **P 6 (b)**, **P 6 (c)** and **P 6 (d)** which had summoned them for the said interview. It is noteworthy at the outset, that the said letters had categorically stated that the purpose of that interview was not to award appointments but to examine their qualifications.[1]

Thereafter, a list containing 270 names had been published. Those 270 candidates are those who had been temporarily recommended for appointment as Teacher Assistants. This list has been produced marked **P 7**. The said list contained the names of the Petitioners. The Petitioners however state that the 1st Respondent thereafter did not take any action to proceed with the said recommendations.

The Respondents, while admitting the list marked **P 7**, state that further proceeding thereof was suspended as per the decision made at a meeting held on 27-08-2007 which was presided over by the President and attended by the Governors and the Chief Ministers of the provinces. This is reflected in the letter dated 30-11-2007 produced marked **1R 5** which is signed by the Minister of Education and addressed to the Chief Minister of Southern Province.

On the 11th of December 2008, the Fundamental Rights application bearing No. SC/FR 580/2008 was filed by its 124 petitioners who had prayed *inter alia* for: a declaration that the respondents in that case had infringed their fundamental right guaranteed and protected under Article 12 (1) of the Constitution by failing to act in terms of the document produced marked P 7 in that case; a direction from Court to have them appointed as Teacher Assistants with effect from 01-01-2007. The Supreme Court in that case had granted Leave to Proceed.

The Petitioners in the instant case, have produced a certified copy of the petition of SC FR 580/2008 marked **P 9**. Averments in the petition of SC FR 580/2008 (**P 9**) shows that the document produced marked P 7 in that case, is the letter dated 14-02-2007 which the Petitioners in the instant case, have produced marked **P 5** (the 1st Respondent has produced the same letter marked **1R 3** in the instant application). However, it must be

[1] Vide paragraph 3 of those letters.

noted that the names of the Petitioners of the instant application were not amongst the names of the petitioners of SC FR 580/2008.

The Minister of Education placed before the Cabinet, the Memorandum dated 15-06-2012 (**1R 6**) to seek the approval of the Cabinet of Ministers to appoint Volunteer Teachers serving in the Northern Province, as Teacher Assistants. The Cabinet of Ministers having considered the said Cabinet Memorandum (**1R 6**), by its decision dated 06-06-2013, granted the approval to recruit the Volunteer Teachers serving in the Northern Province as Teacher Assistants subject to the conditions stipulated in the said Cabinet Decision. The said Cabinet Decision dated 06-06-2013, has been produced marked **1R 7**. The Cabinet of Ministers in the same Cabinet Decision (**1R 7**) also decided to extend this approval to the Volunteer Teachers serving in the Southern Province as well on the same conditions. Although the above approval was granted on four conditions, for the purpose of this case, it would suffice to set out below, only two of those conditions. The said conditions are that the candidates should:

(i) have possessed the basic qualifications required to be recruited to the Public Service; and,

(ii) be under 35 years of age at the time of joining as a Volunteer Teacher.

The above approval (**1R 7**) given by the Cabinet of Ministers was communicated to the Secretary to the Ministry of Education of Southern Province by the letter dated 18-06-2013, produced marked **1R 8**.

After collecting and compiling the necessary statistics as per the Cabinet Decision (**1R 7**), the Minister of Education, having identified in a schedule, those who have fulfilled the stipulated qualifications as per the previous Cabinet Decisions, had submitted to the Cabinet, the Memorandum dated 20-12-2013 (**1R 9**) to seek the approval of the Cabinet of Ministers to appoint the Volunteer Teachers who have requisite qualifications serving in the Southern Province, as Teacher Assistants.

The Cabinet of Ministers having considered the said Cabinet Memorandum (**1R 9**), by its decision dated 03-01-2014 granted the approval to recruit the Volunteer Teachers serving in the Southern Province as Teacher Assistants subject to *inter alia*, the conditions that the candidates to be appointed should have:

(i) served in schools in remote areas in the Southern Province for more than 20 years;
(ii) possessed the basic qualifications stipulated for recruitment as Teacher Assistants; and,
(iii) be under 35 years of age at the time of joining as a Volunteer Teacher.

The said Cabinet Decision dated 03-01-2014 has been produced marked **1R 10**.

The above was then communicated to the Ministry of Education of Southern Province by the letter dated 07-01-2014 produced marked **1R 11**.

Thereafter the Petitioners had received letters dated 08-05-2014 [produced marked **P 10 (a)**, **P 10 (b)**, **P 10 (c)** and **P 10 (d)**], which had summoned them for another interview to be held on 22-05-2014. This interview too appears to have been designed only to examine their qualifications.

Accordingly, subsequent to the examination of the requisite qualifications of the candidates, two lists were published; one containing a list of Volunteer Teachers who had satisfied all the requirements (**P 13**); another containing a list of Volunteer Teachers who had satisfied all the requirements but were above the age of 45 years (**P 14**). The Petitioners' names were included in the latter (**P 14**) as they were above the age of 45 years as at 22-05-2014 (i.e., the date on which the qualifications of the applicants were verified)

On the 11th of December 2014, the said Fundamental Rights application (SC FR 580/2008) was withdrawn on the basis that the petitioners in that application had administratively obtained the relief prayed for in that application. The Court then had terminated the proceedings in that case.

Thus, although it is not clear from the documents made available to this Court, it appears that the 1st Respondent had appointed the petitioners of SC FR 580/2008 as Teacher Assistants subsequent to the filing of SC FR 580/2008 application as they (the petitioners of SC FR 580/2008) had fulfilled the conditions as per the Cabinet Decision. The Petitioners in the instant application were not selected for appointment as Teacher Assistants as they were above the age of 45 years as at 22-05-2014.

The complaint made by the Petitioners in their petition is that the Respondents have appointed four candidates who have not fulfilled the necessary requirements. The Petitioners make a specific allegation that the candidate Ven. Thalagalle Punyasara (Interview No. VT-173) and the candidate H. T. Jayalatha (Interview No. VT-43) have been included in the list marked **P 13**, despite the fact that they were over 45 years of age. The Petitioners further allege that the candidate M. M. Indika Pujayshwari (Interview No. VT-112) had been selected despite her failure to provide her date of birth to the 1st Respondent and the candidate M. H. Nuzra (Interview No. VT-208) had been selected without even an application being submitted by her. However, it must be noted that the Petitioners have not sought any relief against the aforesaid candidates despite the allegation that the appointments of the said candidates were done arbitrarily. Moreover, the Petitioners have failed to name them as Respondents in the instant application.

Thus, primarily, it is the position of the Petitioners that although they were not selected for appointment to the posts of Teacher Assistant solely because they were over the age of 45 years, some candidates who were above the age of 45 years had been appointed to the post of Teacher Assistant. Petitioners further state that even the 6th Respondent, despite bringing their grievances to his attention, has failed to take any further step in relation to their grievances.

It is for the above reasons that the Petitioners state that the failure on the part of the Respondents not to select the Petitioners for appointment as Teacher Assistants is arbitrary, irrational, illogical, unlawful and contrary to the Petitioners' legitimate

expectations and hence would amount to an act of violation of their Fundamental Rights guaranteed under Article 12(1) of the Constitution.

It is in that backdrop that the Petitioners in this application have prayed *inter alia*, for: a dealation that one or more or all of the Respondents and/or the State have violated their Fundamental Rights guaranteed under Article 12(1) of the Constitution; a direction on the Respondents to appoint them as Teacher Assistants.

In the instant case, this Court by its order on 01-03-2016, has granted Leave to Proceed under Article 12(1) of the Constitution.

As has already been stated above, what the Petitioners have alleged in their petition to this Court is an infringement of their Fundamental Rights on the basis that the Respondents had discriminated them. The basis for the complained discrimination according to the petition is the fact that the Respondents had arbitrarily appointed the above named four candidates.

It must be borne in mind that the approval granted by the Cabinet of Ministers to appoint the Volunteer Teachers as Teacher Assistants was subject to the condition that the candidates must have fulfilled the qualifications set out in the Service Minute of Sri Lanka Teachers' Service. This decision is reflected in the Cabinet Memorandum dated 28-11-2006 (**1R 1**) and the Cabinet Decision dated 04-01-2007 (**1R 2**). Further, according to the newspaper advertisement which called upon the Petitioners to submit applications for the selection of candidates for appointment as Teacher Assistants (**1R 4**), all applicants were required to be not less than 21 years and not more than 45 years of age. It must also be noted that the said advertisement (**1R 4**) has been published as per the instructions given in the letter dated 14-02-2007 (**1R 3**) issued by the Minister of Education as per the Cabinet Decision on 25-10-2006.

Respondents have admitted the two lists produced marked **P 13** and **P 14**. The Petitioners' names are found in the list **P 14**. Thus, the Petitioners were clearly above 45 years of age as at 22-05-2014. As the Petitioners become disqualified to be appointed

under the Service Minute of Sri Lanka Teachers' Service, the Respondents could not have lawfully appointed the Petitioners as Teacher Assistants as per the relevant Cabinet Decisions.

The next question I should consider is whether the Respondents have nevertheless arbitrarily appointed the four candidates named in the petition.

The Petitioners claim that contrary to the aforementioned Cabinet Decision [**1R 10**], the Respondents have appointed four candidates who have not satisfied the requirements in **1R3.**

The 1st Respondent has satisfied this Court that there was no arbitrary appointment of four candidates whose names have been identified in the petition. The 1st Respondent has supported his stance by producing documents marked **1R 12 (a)**, **1R 12 (b)**, **1R 13**, **1R 14**, **1R 15** and **1R 16**. According to those documents it is clear that the appointment of Ven. Talangalle Punnsara Thero to the post of Teacher Assistant was cancelled by letter dated 08-11-2015 (**1R 12(b)**); the candidate H.T. Jayalatha was not appointed as a Teacher Assistant; both M.H. Nuzra and M.M. Indika Pujeshwari were appointed as they have satisfied the necessary requirements.

The Petitioners, with regard to the above assertions by the Respondents, had been content with a mere statement in their counter affidavit to the effect that they are unaware of the said position.[2] However, in view of the aforesaid documents produced by the 1st Respondent, such a statement by the Petitioners would hardly help them to substantiate the position they have advanced.

In the light of the above, I am of the view that the Petitioners have failed to prove before this Court that the Respondents have arbitrarily appointed some candidates who were above the age of 45 years to the post of Teacher Assistant, discriminating the Petitioners. I therefore hold that there is no violation of Article 12(1) of the Constitution on that basis.

[2] Vide paragraph 18 of the counter affidavit filed through motion dated 06-10-2016.

Although the learned counsel for the Petitioner had attempted to advance a case on legitimate expectation, I observe that the Petitioners had not presented their application to this Court on that basis. Thus, the case that the Respondents have met before this Court is a case on discrimination as alleged in the petition.

It is the position of the Petitioners that they had fulfilled all the qualifications as at 31-12-2005 which was the date specified in the advertisement published in the 'Dinamina' newspaper dated 26-03-2007 marked **1R 4**. Since the Petitioners were below 45 years of age as at 31-12-2005 they state that their age should have been calculated as at that date.

It appears from the sequence of events that the process of recruitment had recommenced following the filing of the afore-stated Fundamental Rights application (SC FR 580/2008) by its 124 petitioners. It was thereafter that the Respondents had published the list marked **P 13** which contained the names of Volunteer Teachers qualified to be appointed as Teacher Assistants. The Respondents had indeed subsequently appointed all of them as Teacher Assistants.[3] It must be noted here that the Respondents in this manner, had appointed not only the 124 petitioners in SC FR 580/2008 but also all Volunteer Teachers whose names were found in that list (**P 13**). Accordingly, the Petitioners in the instant application have been left out for a good reason. That is because their names had appeared only in the disqualified list (**P 14**). It was presumably on the above basis that the FR application was withdrawn on 11-12-2014 by its 124 petitioners stating that they had obtained administrative relief.

On the above material, I am convinced that the 1st Respondent after processing the applications had ensured that all candidates who had fulfilled the specified requirements, have been appointed as Teacher Assistants. Admittedly, the Petitioners' names were not in the list marked **P 13**, but in the list marked **P 14** which contains the candidates who have not fulfilled the specified requirements. This shows that the Respondents could not

[3] Vide paragraph 17 of the affidavit of the 1st Respondent submitted through motion dated 06.09.2016.

have appointed the Petitioners in the instant application as they had not fulfilled the specified requirements.

Learned Senior State Counsel had brought to the attention of this Court that the maximum age limit of a candidate for the appointment as a Teacher as per the Service Minute of Sri Lanka Teachers' Service, is 35 years.[4]

As per the Cabinet Decision dated 03-01-2014 (**1R 10**), the approval (for appointment as Teacher Assistants) had been granted by the Cabinet of Ministers only to appoint Volunteer Teachers who were below 35 years of age. This is also the criterion set out in the Service Minute of Sri Lanka Teachers' Service. Clause 7.2.2.3 therein specifies the minimum and maximum age to join the Sri Lanka Teachers Service respectively as 18 years and 35 years. The fact that the maximum age specified in the Cabinet Decision dated 03-01-2014 (**1R 10**), could be logically justified as the said scheme [**1R 1, 1R 2**] was introduced to appoint Volunteer Teachers as Teacher Assistants with a view of subsequently appointing them to Grade 3 of the Sri Lanka Teachers' service upon fulfilling the relevant requirements. Therefore, one must bear in mind that the candidates are necessarily required to come under the specified age limit set out in the Service Minute of Sri Lanka Teachers' Service, for any candidate who is above the specified age cannot subsequently be appointed as a Teacher. This was the scheme in the above-mentioned Cabinet Decision.

In the above circumstances, the complaint made by the Petitioners in their written submission that the Respondents had changed the recruitment criteria arbitrarily, is without any justifiable basis and hence cannot be accepted. In any case, as I have already stated, the Petitioners for the reasons best known to them, had only chosen to mention their argument on legitimate expectation in their final written submissions and not in the petition. Therefore, in any case, I cannot accept that legitimate expectation is part of their case before this Court. Be that as it may, as has already been stated before, the letters marked **P 6 (a)**, **P 6 (b)**, **P 6 (c)** and **P 6 (d)** had categorically stated that the

[4] Clause 7.2.2.3 of the Gazette Extraordinary No. 1885/38 dated 23-10-2014.

purpose of that interview was not to award appointments but to examine their qualifications.[5] Thus, the Petitioners in any case, cannot rely on the said letters which had summoned them for the said interview, to argue that they in any case, had legitimate expectation to be appointed as Teacher Assistants. This is more so when they particularly had not fulfilled the conditions stipulated by the authorities. Thus, in the light of the facts of this case, mere summoning of the Petitioners for an interview to check basic qualifications cannot on its own, form a basis for a case on legitimate expectation.

The Senior State Counsel who appeared for the Respondents emphasized the fact that the post of "Teacher Assistant" is not a post recognized in the Service Minute of Sri Lanka Teachers' Service.[6] It is to be noted that the said post had been created to facilitate the appointment of Volunteer Teachers to the post of Teacher Assistant which was primarily to cater to the grievances of the Volunteer Teachers who had agitated for appointments. The Cabinet Decisions read with the relevant Cabinet Memoranda make it clear that the appointment of Teacher Assistants was contemplated, planned and was to be executed in such a way that those candidates who would be appointed as Teacher Assistants should have fulfilled basic qualifications to facilitate their appointment subsequently to Grade 3 of the Sri Lanka Teacher's service as per the criterion set out in the Service Minute of Sri Lanka Teachers' Service. (Clause 7.2.2.3 states that the maximum age to join the Sri Lanka Teachers Service is 35 years).

Accordingly, I find that the Respondents have acted in compliance with the respective policy decisions of the Cabinet of Ministers and hence committed no discrimination against the Petitioners.

For the aforementioned reasons, I hold that the Petitioners have not been successful in establishing that the Respondents have violated their Fundamental Rights guaranteed under Article 12(1) of the Constitution. This application is accordingly dismissed. There will be no costs.

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[5] Vide paragraph 3 of those letters.
[6] Vide written submissions filed by the Senior State Counsel through the motion dated 22-11-2021.

There are two other matters namely SC FR 20/2018 and SC FR 21/2018 pending before this Court in relation to the same issue. The learned Counsel who represented the Petitioners in those two matters have agreed, as far as those cases are concerned, to abide by the judgment that would be pronounced by Court in SC FR 377/2015. Thus, this judgment must apply to those two cases as well.

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 under and in terms of Articles 17 and 126 of the Constitution

Dr. Chanaka Harsha Talpahewa

No. 380/56, Bullers Road,

Colombo 07.

Petitioner

SC /FR/ Application No. 378/2017

Vs,

1. Mr. Prasad Kariyawasam
Secretary to the Ministry of Foreign Affairs,
Ministry of Foreign Affairs,
Republic Building, Colombo 01.

1A. Mr. Ravinatha Aryasinha
Secretary to the Ministry of Foreign Affairs,
Ministry of Foreign Affairs,
Republic Building, Colombo 01.

2. Mr. Dharmasena Dissanayake
Chairman- Public Service Commission

2A. Hon. Justice J. Balapatabendi (retired)
Chairman- Public Service Commission

3. Prof. Hussain Ismail
Member- Public Service Commission

3A. Mrs. Indrani Sugathadasa
Member- Public Service Commission

4. Ms. Dhara Wijayatilake
Member- Public Service Commission

4A. Mrs. Shivagnanasothy
Member- Public Service Commission

5. Dr. Prathap Ramanujam
Member- Public Service Commission

5A. Dr. T.R.C. Ruberu
Member- Public Service Commission

6. Mr. V. Jegarasasingam
Member- Public Service Commission

6A. Mr. Ahamod Lebbe Mohamed Saleem
Member- Public Service Commission

7. Mr. Santi Nihal Seneviratne
Member- Public Service Commission

7A. Mr. Leelasena Liyanagama
Member- Public Service Commission

8. Mr. S. Ranuuge
Member- Public Service Commission

8A. Mr. Dian Gomes
Member- Public Service Commission

9. Mr. D. Laksiri Mendis
Member- Public Service Commission

9A. Mr. Dilith Jayaweera
Member- Public Service Commission

10. Mr. Sarath Jayatilaka
Member- Public Service Commission

10A. Mr. W.H.Piyadasa
Member- Public Service Commission

3rd to 10th Respondents all of No. 177, Nawala Road, Narahenpita.

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

Respondents

Before: **Justice Vijith K. Malalgoda PC**
Justice Murdu N. B. Fernando PC
Justice S. Thurairaja PC

Counsel: Saliya Pieris, PC with Geeth Karunaratne, for Petitioner
Dr. Avanthi Perera, SSC for Respondents

Argued on: 25.03.2021, 21.10.2021

Written Submission by the Petitioner: 19th March 2021

Further Submission by the Petitioner: 19th November 2021

Written Submission by the Respondents: 22nd March 2021

Further Submission by the Respondents: 11th November 2021

Judgment on: 21.06.2022

Vijith K. Malalgoda PC J

Petitioner to this application Dr. Chanaka Harsha Thalpahewa was an officer belonging to Grade II of Sri Lanka Foreign Service (hereinafter referred to as SLFS) at the time the instant application was filed before the Supreme Court for alleged violation under Article 12 (1) of the Constitution for failure to grant his promotion from Grade II to Grade I of the SLFS.

As revealed before this Court, the Petitioner who was placed first at the open competitive examination conducted to recruit officer to the SLFS, was recruited to Grade III of the SLFS under the Service Minute Published in 1994, with effect from 3rd January 2000.

The said Service Minute had been revied 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 Minute published in 1994 and 2001 was the promotion from Grade III to Grade II and officer should complete 10 years satisfactory service to become entitled to the said promotion. The scheme that was relevant

for the Petitioner's first promotion was the minute that was published in 2001 and Clause 7.2.1. of the said Service Minute refers to the promotion from Grade III to Grade II as follows;

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.

Accordingly, the Petitioner was promoted to Grade II of the SLFS with effect from 3rd January 2010, as borne out by the document produced marked P10 before this Court.

As revealed before us, the Petitioner's next promotion under the service minute that was published in 2001 was the promotion from Grade II to Grade I and the requirements for the said promotion were identified under Clause 7.2.2 of the said Service Minute as follows;

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.

When an officer belonging to Grade II of SLFS completes 6 years satisfactory service in the said Grade, he or she becomes eligible to be promoted to Grade I of SLFS but the requirement identified under the said Clause, "to a vacancy in Grade I" imposed an additional requirement of having a vacancy to effect such promotion. In other words, an officer belonging to Grade II of the SLFS who completed the requirements under Clause 7.2.2 of SLFS service Minute, had to remain in the same Grade until a position in Grade I falls vacant, and the said vacancy had to be fill in the order of seniority from amongst the eligible Grade II officers.

As a Grade II officer in the SLFS, the Petitioner held several positions locally and abroad including, Acting High Commissioner of Sri Lanka to the United Kingdom (Special Assignment), Acting High Commissioner of Sri Lanka to the Maldives and Director Middle East Africa Division of the Ministry of Foreign Affairs.

Whilst the Petitioner was holding the post of Director Middle East Africa Division in the Foreign Ministry, he was offered an assignment at the United Nations Human Settlement Programme in Colombo on 17th June 2016 as Head of Agency/Programme Management Officer with UN- Habitat Sri Lanka. At the time the said assignment was offered to the Petitioner, the Petitioner had completed sixteen years of satisfactory service in SLFS and also completed six years of satisfactory service in Grade II of SLFS.

In other words, the Petitioner was eligible to be promoted to Grade I of the SLFS under clause 7.2.2 of the Service Minute published in 2001 at the time he was offered the said position in UN- Habitat Sri Lanka.

The events that followed the Petitioner accepting the said offer was explained by the Petitioner as follows;

a) By letter dated 15th July 2016 the Petitioner made an application for leave under Chapter XII Section 16.1.4 of the Establishment Code to accept the said assignment
b) By letter dated 22nd July 2016 Secretary to the Ministry of Foreign Affairs recommended to the Public Service Commission that the Petitioner has completed sixteen years satisfactory service and earned all the salary increments without previously obtaining no pay leave, and the request for one year no pay leave be granted to the Petitioner. (P-17)
c) By letter dated 28th July 2016 the Secretary to the Ministry of Foreign Affairs further recommended that the Petitioner be released without loss of seniority.
d) Among several correspondents between the Public Service Commission and the Ministry of Foreign Affairs, Public Service Commission by letter dated 9th August 2016 requested information pertaining to;
    i. Any documents in relation to the release of the Petitioner on the requirements of the Government,

ii. Whether the Petitioner was appointed to the said position based on a recommendation by the Government or whether it was a personal request by the Petitioner

e) However, by letter dated 15th August 2016 Public Service Commission had approved the release of the Petitioner for the period commencing from 15th August 2016 to 14th August 2017 whilst postponing the decision, whether the period of release be considered as active service or not to be taken in due course.

f) The above decision of the Public Service Commission was communicated to the Petitioner by the Ministry of Foreign Affairs by it's letter dated 22nd August 2016 (P-28)

g) Since then, several letters were exchanged between the Ministry of Foreign Affairs and the Public Service Commission in order to resolve the question that was not addressed in the approval granted by the Public Service Commission in its letter dated 15th August 2016 (P-29 to (P-33).

h) By letter dated 18th May 2017 the Public Service Commission informed its decision to the Ministry of Foreign Affairs to the effect that the period of temporary release wherein the Petitioner was serving as Head of Agency at UN Habitat was not to be considered as part of active service in accordance with the provisions of Establishment Code and regulation of the Public Service Commission.

i) Even though the Petitioner had appealed against the said decision of the Public Service Commission, the Commission did not change its decision.

j) Whilst the decision with regard to the Petitioner's active service was pending at the Public Service Commission, the Public Service Commission by order published in Government Gazette 1996/28 dated 6th December 2016 replaced the Service Minute of Sri Lanka Foreign Service.

As observed by this Court one of the major changes introduced to the Service Minute of SLFS by the New Service Minute that was introduced in the year 2016 was the relaxation of the cadre restriction that was applicable to promotions from Grade II of SLFS to Grade I of SLFS.

Provisions with regard to the promotion from Grade II to Grade I of SLFS is identified under Clause 10.2 of the New Service Minute as follows;

10.2 Promotion from Grade II to Grade I

10.2.1. Requirements 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 from 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.

10.2.2. Scheme of Promotion:

Officers who have fulfilled the required qualifications should make a request to the Appointing Authority. The officers who are eligible will be promoted to Grade I, on verification of the qualifications by the Appointing Authority with effect from the date of fulfillment of all the relevant requirements.

Provisions of Clause 14 and 15 of the New Service Minute are also relevant in granting a promotion to an officer belonging to Grade II of SLFS and the said provision reads as follows;

14. Absorption of SLFS officers to the New system of Grades

14.1 All officers who are in the SLFS on the date of implementation of this Service Minute shall be absorbed into the Grading System as given below. There shall not be any change whosever in the salaries or in the date of increment or date of promotion into their respective Grade or the seniority of the officers due to the absorption

(i) ……..

(ii) All officers in Grade II of the SLFS on the date of implementation shall be absorbed to Grade II of the Service

(iii) …….

15. Transitional Provisions

"The transitional period will be effective for three (03) years from the date of the publication of this Minute.

15.1 During the transitional period, promotions from one Grade to another will be effected as follows;

15.1.1 ……..

15.1.2 Promotion from Grade II to Grade 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

Even though the New Service Minute was published in the Government Gazette on 6th December 2016, under Clause 1 of the said Minute the Effective Date was fixed at 12.10.2015 a date one year one month and 24 days prior to a date it was issued.

When compared the provisions with regard to promotion from Grade II to Grade I under the two Service Minutes referred to above, including the Transitional Provisions, the following major changes, were introduced by the New Service Minute

a) Six years satisfactory service in Grade II is increased to seven years satisfactory service

b) A post graduate requirement was introduced but the said requirement is applicable only to those who were recruited after 01.01.2001 (transitional provision)

c) Cadre requirement which was compulsory under the previous Service Minute had been taken away and the officer who fulfills the necessary requirement should make a request to the appointing authority for the promotion.

Grievance complained by the Petitioner

As submitted by the Petitioner, when the Petitioner made an application for leave in order to accept the offer by U.N. Habitat, Secretary to the Ministry of Foreign Affairs wrote P-17 to the Public Service Commission. In the said letter it was stated that,

> "the Petitioner has completed sixteen years of satisfactory service and earned all the salary increments" ….

In the said circumstances, the Petitioner had taken up the position that, he has fulfilled all the requirements, to be promoted to the next Grade, i.e., Grade I under the Service Minute which was operative at the time he submitted the application for leave under the provisions of the Establishment Code.

However, after his leave was approved, and prior to the decision with regard to the nature of the leave granted to the Petitioner was finalized, a new Service Minute was introduced,

a) Backdating the effective date to a date prior to the effective date of his leave period

b) Increased the service requirement from six years to seven years satisfactory service and receipt of seven salary increments for the promotion from Grade II to Grade I of SLFS;

with several others requirements under Clause 10.2.(ii)-(v), the Petitioner had already fulfilled but the Petitioner was no longer eligible to be promoted from Grade II to Grade I as the requirement of "a period of active service" would be deemed not to be satisfied.

As already referred, the Petitioner was eligible to be promoted to Grade I, according to the Service Minute that was operative at the time the leave was granted to him, but in the absence of a position in Grade I, the Petitioner had to remain in Grade II until a position became vacant. At the time the Petitioner was granted leave, more than 21 officers senior to him in Grade II of the SLFS were expecting promotions to the higher Grade and therefore Petitioner obtaining leave subject to any condition would not be an obstacle in getting the promotion, and in the said circumstance it was argued on behalf of the Petitioner that the Petitioner had a legitimate expectation based upon the policy adopted by Sri Lanka Foreign Service and given effect through the published criteria for

promotion through the Foreign Service Minute of 2001 which was in operation at the time the leave was granted to him, that he would be promoted from Grade II to Grade I when a position become vacant in Grade I.

Therefore, it was further argued that the 1st to the 11th Respondents by

a) Backdating the effective date of the new Service Minute of SLFS by which the service requirement was extended from six years to seven years to a date prior to granting of leave to the Petitioner

b) Failing to introduce a transitional provision addressing the grievance the Petitioner or any other person similarly circumstanced due to backdating of the effective date of the Service Minute, acted against the legitimate expectation of the Petitioner and thereby infringed the Fundamental Rights of the Petitioner guaranteed by Article 12 (1) of the Constitution.

Whilst objecting to any relief being granted to the Petitioner, 2nd to the 10th Respondents took up the position that,

a) In January 2006, the Ministry of Public Administration introduced a new salary structure in the Public Service through Public Administrative Circular 06/2006.

b) Thereafter, pursuant to a decision of the Cabinet of Ministers in 2011, Service Minute and Scheme of Recruitment that were in existence within the Public Service prior to the said Circular 06/2006 were required to be revised with the approval of the Public Service Commission, in terms of Public Administrative Circular 25/2011 and 25/2011 (i)

c) Accordingly, the Ministry of Foreign Affairs took steps to revise the Sri Lanka Foreign Service Minute of 2001 and new Foreign Service Minute was submitted to the Public Service Commission for its approval.

d) Under the provisions of the Service Minute of 2001, the criteria for promotion from Grade II to Grade I was contingent upon there being a vacancy in the approved cadre of Grade I and whenever a vacancy arose in Grade I of SLFS, the said vacancy was filled in the order of seniority from amongst the eligible Grade II officers.

e) The above issue was addressed in the New Service Minute that was submitted to the Public Service Commission for its approval

f) The New Service Minute was approved by the Public Service Commission on the 12th October 2015. However, several amendments were proposed to the said Service Minute, which was considered and approved by the Public Service Commission on the 28th November 2016.

g) The New Service Minute of the Sri Lanka Foreign Service was published in the Gazette on the 6th December 2016 and came into effect on the date it was originally approved by the Public Service Commission i.e., on 12th October 2015

h) In the meantime, the Petitioner had submitted an application through the Secretary, Ministry of Foreign Affairs for no pay leave to undertake a one-year assignment to serve in the post of Programme Management Officer at the United Nations Human Settlement Programme.

i) The public Service Commission by its letter dated 15th August 2016 granted approval to the Petitioner to undertake the said assignment

j) The Public Service Commission thereafter considered the material furnished on behalf of the Petitioner to consider whether there was a possibility that the Petitioner's no pay leave could be considered as "active service," but the Public Service Commission could not give a favorable reply to the Petitioner, since it was revealed that the Petitioner had obtained the assignment through an application made by him directly and not pursuant to a nomination by the Government of Sri Lanka.

k) Therefore, the Public Service Commission by its letter dated 18th May 2017 informed its decision, to the effect that "there was no basis to consider the period of no pay leave as active service" to the Ministry of Foreign Affairs.

Whilst submitting the above on behalf of the 1st to the 11th Respondents, it was argued that the Petitioner could not have entertained a legitimate expectation of him being promoted to Grade I of SLFS, since there were 21 officers who were senior to him in grade II of SLFS at the time his no pay leave was approved by the Public Service Commission on 15th August 2016.

On behalf of the Respondents, it was further argued that under Clause 14 (II) of the New Service Minute, every member of Grade II of the SLFS shall be absorbed to the Grade II of the same service and all promotions thereafter will only be considered under the provisions of the New Service Minute and therefore the 7 years' service requirement is essential to implement a promotion to an officer belonging to Grade II of the SLFS.

In the said circumstance, it was submitted that the failure by the Petitioner to challenge the New Service Minute and his appeal which is contrary to the provisions of the New Service Minute estops him from claiming legitimate expectation when his appeal was refused by the Public Service Commission.

When considering the arguments placed by the two parties before us, it is clear that, at the time the Petitioner's no pay leave was approved by the Public Service Commission, the Petitioner had completed six years and eight months in Grade II of the SLFS and was eligible to be promoted to Grade I when a position falls vacant, under the Service Minute that was in operation at that time.

Backdating the effective date of the Service Minute

In the New Service Minute that was published in the Government Gazette Extraordinary 1996/20 dated 6th December 2016, the effective date had been identified as 12.10.2015 under Clause I of the said minute. When giving reasons for the decision to back date the effective date, it was submitted on behalf of the 2nd Respondent that, the New Service Minute was approved by the Public Service Commission on the 12th October 2015 but could not give effect to the said service minute due to several discussions had with the relevant authorities with regard to some proposed amendments. The final draft which was agreed upon and approved by the Public Service Commission on 28th November 2016 was published in the Government Gazette on 6th December 2016, but the effective date was fixed at 12th October 2015, the date on which the service minute was originally approved by the Public Service Commission.

However, the Respondents were silent on the proposals that were introduced to the service minute between 12.10.2015 and 28.11.2016 after having discussions with the authorities and the difficulty the Public Service Commission had faced to fix the effective date as 28.11.2016, the date on which the amended service minute was approved.

Even though the Petitioner before this Court had not challenged the legality of the service minute published on 06.12.2016, this Court is mindful of its powers under Article 126 (4) of the Constitution which reads as following;

126 (4) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any Petition or reference referred to in the paragraphs (2) and (3) of this Article.

The broad powers, given to the Supreme Court by Article 126 (4) was decided in the case of ***Nishantha and Another V. Bandula Gunawardane and Others 2012 BLR 209*** as follows;

"Particularly with regard to violations of Constitutional rights, it is well established that the Courts have broad power to grant an order that is appropriate, just and equitable. The Courts have a power to forge new tools in this regard. Appropriate relief, apart from the declaration which this Court makes must also vindicate the Constitution, and consider the maladministration by the 3rd Respondent."

In the case of ***Coral Sands Hotel (Pvt) Ltd V. Minister of Finance SC/FR/170/2015*** *SC Minute 08.12.2015* this Court held that,

"The Court under Article 126 of the Constitution has the implicit power to issue whatever direction or order necessary in a given case, including all incidental or ancillary powers required to secure enforcement of the citizen's fundamental right. The Constitution enshrines and guarantees the rule of law and Article 12 (1) is designed to ensure that each and every authority of the State, acts bona fide and within the limits of its power and when the Court is satisfied that there is an abuse or misuse of power and the jurisdiction of the Court is invoked, it is incumbent on the Court to afford justice to the affected citizen."

The legality of retrospective subsidiary legislation was decided by this Court in more than one occasion and the case of ***Rathnakumara and Others V. The Postgraduate Institute of Medicine SC Appeal 16/2014*** *SC Minute 30.03.2016* is one such instance,

In the said case the Petitioners were enrolled at the PGIM for 'MD Medicine" under prospectus 2003 commenced and completed stage I and II under the said prospectus. However New Prospectus was issued by PGIM in the year 2005 stipulating that only six attempts are permitted for the successful completion of the final MD and it applied retrospectively. i.e., with effect 01.01.2004. But there was no reference to the number of attempts under prospectus 2003. It was also observed that the prospectus 2005 neither contained any transitional provisions with regard to the candidates who registered and commenced the program under the Prospectus 2003 nor had any reference to such candidate.

The Court having considered whether

a) The subordinate legislation can be enacted with Retrospective effect and,
b) Does it violate the Legitimate expectation of the Petitioners?

held that the subordinate legislation having retrospective effect is ultra vires unless the enabling Act expressly or by necessary implication authorizes the making of retrospective subordinate legislation and also it violated the legitimate expectation of the Petitioner.

Legitimate Expectation of the Petitioner

The doctrine of Legitimate Expectation the scope and the extent of its applicability was discussed and considered in several cases decided by this Court.

In the case of ***Ariyarathne and Others V. Illangakoon, Inspector General of Police and Others, SC FR 444/2012,*** SC Minute 30.07.2019 this Court had extensively analyzed jurisprudence of various jurisdictions and observed that,

"The doctrine of legitimate expectation, as it is sometimes called, originated in Europe. To put it in the broadest terms, the doctrine envisages that a court may, in appropriate circumstances and where the public interest does not require otherwise, enforce a "legitimate expectation" [as distinct from a personal or proprietary right] of a person that a public authority will act as it has promised or held out it would. Prof. Endicott of the University of Oxford [Administrative Law 2nd ed. at p. 283] has commented that a legitimate expectation "*might be better called a 'legally protected expectation"*.

It is often said that this doctrine is an application of a court's duty to ensure fairness and certainty on the part of administrative bodies in their dealings with citizens, and also an affirmation that citizens should be entitled to repose their trust in what administrative bodies tell them and lead them to believe."

In the said decision Jayawardena (J) had also relied on the following paragraphs from ***R. V. North and East Devon Health Authority exparte Coughlan [2000] 3 AER 850,***

"The Court of Appeal [at para. 57] identified the following three ways in which a court could examine and decide a claim that a public authority's change of policy or decision had negated a legitimate expectation of the Petitioner arising from a previous assurance, policy or practice of the public authority: (a) the court may take the view that the circumstances of the case are such that it should *apply the test of WEDNESBURY unreasonableness* when reviewing the change of policy or decision; or (b) the court may decide that the previous assurance, policy or practice which gave rise to the claimed legitimate expectation *entitles the claimant to a consultation before the decision*, *policy or practice is changed in a manner which affects him*, unless there is a clear overriding reason to deny that

consultation- i.e. the 'classic' instance of a procedural legitimate expectation as described earlier; or (c) where the court considers that the public authority has given a promise or followed a practice which has caused the claimant to have a legitimate expectation of a substantive benefit and the public authority later intends to act in a different manner which will negate that substantive legitimate expectation, the court will decide whether negating the substantive legitimate expectation is so unfair that it will amount to an abuse of process and, if so, hold the public authority bound to give effect to the expectation.

Referring to the circumstances described in (c) above Lord Woolf, MR with Mummery and Sedley LJJ agreeing, formulated a 'test' to be applied in such cases when the learned Master of the Rolls stated [at para 57] "*Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too* ***the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power***." Lord Woolf, MR went on to say "…..*once the legitimacy of the expectation is established,* ***the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.***" and "…. ***the court has when necessary to determine whether there is sufficient overriding interest to justify a departure from what has been previously promised***." [emphasis added].

In the case of ***Rathnakumara and Others Vs. The Postgraduate Institute of Medicine*** (Supra) the immediate change of a Regulation without giving adequate prior notice was considered by this court as follows;

"…..any person who commences an act under a particular "Regulation" has an expectation to finish the same under the same terms and conditions stated in the said Regulations. Thus, it gives rise to a legitimate expectation for such persons to complete their actions under the same terms and conditions.

However, the regulations can be amended or rescinded by giving reasonable prior notice unless the circumstances warrant an immediate change of the regulations. In fact, keeping in line with this principle both the Prospectus contained a Clause which stated that an adequate notice will be given of any changes.

……

Therefore, imposing a restriction on the number of attempts at the MD (Medicine) without giving adequate prior notice, is a violation of the legitimate expectation of the Appellants."

The Petitioner's contention before this Court was that he had fulfilled all the requirements, to be promoted to the next Grade, i.e., Grade I of Sri Lanka Foreign Service under the Service Minute that was in operation at the time he accepted the offer by UN Habitat for the Post of Head of Mission Sri Lanka and submitted his application for leave. There were 21 officer's seniors to him in the same Grade, were also expecting promotions to Grade I and the established practice under the Service Minute published in year 2001 (which was in operation at that time) was to fill the vacancy by appointing the most senior officer among the officers in Grade II.

In the said circumstances it is clear that the Petitioner when he made the leave application in order to accept the position at UN Habitat,

a) Had fulfilled all the requirements to be promoted to Grade I of SLFS
b) By applying No pay leave his next promotion would not be affected, since he had already completed six years' satisfactory service and earned six increments in Grade II of SLFS. (P-17)
c) There were only 10 positions in Grade I of SLFS and the promotions were given only when a vacancy had occurred and the appointments were made on the seniority in Grade II
d) That there were 21 officer's seniors to him in Grade I of SLFS

The Respondents had failed to submit before court any material to establish that the Petitioner was aware of the changes proposed in the New Service Minute, and even if the Petitioner was aware of the changes that were proposed, including the change proposed to the required period of service in Grade II, he had to remain only four months and that could have easily arranged with UN Habitat to accept the post after January 2017. When all these matters considered together the only conclusion that can be arrived is that the Petitioner had entertained a legitimate expectation when accepting a position in UN Habitat after obtaining no pay leave, that it would not be an obstacle for his next promotion.

As revealed before us, the Petitioner did not challenge the legality of the New Service Minute introduced in 2016 but appealed to the Public Service Commission to consider his period of leave as active service. The Petitioner submitted several appeals both to the 1st Respondent Secretary Foreign Affairs and to the Public Service Commission. The 1st Respondent when forwarding the appeal submitted by the Petitioner to the Public Service Commission, had also answered several queries

made subsequently by the Public Service Commission, strongly recommending to consider the period of leave as active service since the services rendered by the Petitioner in his new capacity as the Head of Agency at UN Habitat is much useful to the Government of Sri Lanka. However, the Public Service Commission by its letter dated 18th May 2017 (P-34) informed the 1st Respondent it's decision, that the Petitioner's period of leave cannot be considered as active service.

During the correspondence between the 1st Respondent Secretary Foreign Affairs and the Public Service Commission it was further revealed that there were instances where temporary release of officers belonging to SLFS without their names being nominated by the Government of Sri Lanka but were also placed on active service after obtaining Cabinet approval.

The learned President's Counsel who represented the Petitioner before us submitted that, the Petitioner did not seek to quash the New SLFS minute issued in 2016, as it would have created grave consequences in SLFS and would have affected several recruitments and promotions. It was the position of the learned President's Counsel that, his client does not want to obstruct the promotions of several officers belonging to SLFS, but was only interested in resolving the grievance he had complained in the instant application.

As already discussed in my judgement, the Public Service Commission when introducing the New Service Minute for the Sri Lanka foreign Service,

a) Fixed a date retrospectively as the effective date without having any legal basis to do so.
b) The said date was a date one year one month and 24 days prior to a date it was issued and 10 months and 5 days prior to the date the leave was granted to the Petitioner.
c) Failed to introduce any transitional provision with regard to the change of the service requirement
d) Failed to explain the amendments proposed to the service minute in between 12th October 2015 and 28th November 2016

and the above conduct of the Public Service Commission is in clear violation of the equal protection guaranteed to the Petitioner under Article 12 (1) of the Constitution.

However, any decision by this court with regard to the validity of the said service minute, would affect several appointments and promotions made to the SLFS creating a controversy among the said officers in SLFS and in the said circumstance I am not inclined to make any order with regard to the

validity of the said service minute published in the Government Gazette 1996/28 dated 6th December 2016 and/or make any order as per prayer (c) and (d) of the Petition dated 23rd October 2017.

However, this court is mindful of the powers vested with this court to make an appropriate, just and equitable order under Article 126 of the Constitution when an aggrieved party established a violation of his/her Fundamental Rights guaranteed under the Constitution.

In the said circumstances I hold that 2nd to the 10th Respondents have violated the Fundamental Rights of the Petitioner guaranteed under Article 12 (1) of the Constitution.

I further direct the 2nd to 10th Respondents and/or the Public Service Commission and its Secretary to decide the period of leave approval by letter dated 16th August 2016 and 18th May 2017, be treated as active service until 3rd January 2017 and/or until the Petitioner completed 7 years active service and draws 7 salary increments in Grade II of SLFS.

I further hold that the Petitioner is entitled to be promoted to Grade I of SLFS once his leave period applied by the letter dated 15th July 2016 be convert as active service by the Public Service Commission as directed above, if he has fulfilled the other requirements referred to in Clause 10.2.1 of the Service Minute of the SLFS dated 6th December 2016.

The State is directed to pay Rs. 250 000/- as compensation and cost for litigation which is fixed at Rs. 100 000/-

Application Allowed with Cost.

Judge of the Supreme Court

Justice Murdu N. B. Fernando PC

I agree,

Judge of the Supreme Court

Justice S. Thurairaja PC

I agree,

Judge of the Supreme Court

In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

In the matter of an Application under and by virtue of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Malka Denethi
Attorney-at-Law
No. 305/11, Janatha Mawatha,
Werahera,
Boralasgamuwa.

Petitioner

SC FR Application No. 411/2021

Vs.

1. K.S.K. Rupasinghe
   Senior Superintendent of Police,
   Nugegoda Police Division,
   Nugegoda.

2. Police Officer No. 48513
   C/O Deputy Inspector General
   (Western – South),
   DIG Office – Western Province
   (South),
   Nugegoda.

3. K.G. Wijerathne

Inspector of Police,
Officer-in-Charge,
Police Station,
Boralesgamuwa.

4. Asiri Jayasooriya
   Sub-Inspector,
   Miscellaneous Complaints Unit (MO Branch),
   Police Station,
   Boralesgamuwa.

5. C.D. Wickramarathna
   Inspector General of Police,
   Sri Lanka Police Headquarters,
   Colombo 1.

6. Rajeev Amarasooriya
   Attorney-at-Law,
   Secretary,
   Bar Association of Sri Lanka,
   No. 153, Mihindu Mawatha,
   Colombo 12.

7. Dona Anushka Dilani Kannangara
   No. 192/3, 2nd Lane,
   Egodawaththa,
   Boralesgamuwa.

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

Respondents

Before: Hon. Yasantha Kodagoda, PC, J.
Hon. A.L. Shiran Gooneratne, J.

Appearance: Naveen Mahaarachchi with Chanuka Ekanayake for the Petitioner.

Varunika Hettige, Senior Deputy Solicitor General for the 1st to 8th Respondents, excluding the 7th Respondents.

7th Respondent absent and unrepresented.

Saliya Pieris, PC, President of the Bar Association of Sri Lanka appeared as amicus.

Supported on: 3rd November, 2022

Order delivered on: 22nd, November, 2022

Order of Court

The Petitioner is an Attorney-at-Law, engaged primarily in criminal practice. In his Petition to this Court, he complains that one or more of the Respondents have infringed his Fundamental Rights guaranteed in terms of Articles 11, 12(1) and 14(1)(g) of the Constitution.

Albeit brief, the Petitioner's narrative is as follows:

On 13th November 2021, the 7th Respondent sought his professional services to represent her at the Boralesgamuwa Police Station at an 'inquiry' (No. MCR 2237/21) into a 'land dispute' among her family members scheduled for the same day. The Petitioner agreed to provide his professional services. Accordingly, along with the 7th Respondent, the Petitioner proceeded to the Boralesgamuwa Police Station for the purpose of representing his client (7th Respondent) at the afore-stated 'inquiry'. He had been dressed in a white long-sleeves shirt, black trousers and had worn a black tie, which he has stated is the usual attire an Attorney-at-Law wears when going to a Police Station to perform professional services. At the Police Station, both of them had been directed to the office-room of the Officer-in-Charge of the Police Station (3rd Respondent) in which the 1st Respondent had been seated in the chair of the 3rd Respondent. The other disputant (being the mother of the 7th Respondent) had also come into the room. The 1st Respondent had inquired from the Petitioner who he was, and he had introduced himself and explained that he was representing the 7th Respondent. The 1st Respondent had immediately directed the Petitioner to move out and stay outside the room. The Petitioner refused to do so. The Petitioner alleges that from this point onwards the 1st Respondent acted in a hostile manner towards him. The Petitioner had insisted that he had a professional entitlement to represent the 7th Respondent at the 'inquiry' that was to take place. The Petitioner claims that during the ensuing interaction with the 1st Respondent, the latter (i) threatened the Petitioner that action will be taken against him for obstruction of the 1st Respondent's duties, (ii) threatened that he will be put into the cell, (iii) informed that the Police will object to his appearance in Court in related court proceedings, (iv) instructed other Police Officers to take into their possession the Petitioner's mobile phone, and (v) was abusive and hostile towards the Petitioner.

A transcript of what happened inside the room with references to what was said by the Petitioner, the 1st Respondent and some of the other Respondents, is attached to the Petition. Learned counsel for the Petitioner drew the attention of the Court to excepts

from it. The transcript emanates out of an audio recording, which the Petitioner had surreptitiously recorded using his mobile phone. When the Petition was Supported, learned Counsel for the Petitioner submitted that he agreed with Court that an Attorney-at-Law while discharging his professional services should not engage in the surreptitious recording of a conversation, notwithstanding its possible evidential value.

Learned Counsel for the Petitioner submitted that the conduct of the 1st Respondent Senior Superintendent of Police was in violation of the Petitioner's professional entitlements arising out of Rules made by the Inspector General of Police under section 55 of the Police Ordinance, published in Gazette No. 1758/36, of 18th May 2012. He further submitted that the 1st Respondent had acted in a degrading manner towards the Petitioner. He stressed that the 1st Respondent had infringed the Petitioner's Fundamental Right guaranteed in terms of Articles 11, 12 and 14(1)(g) of the Constitution.

In response to the submissions made by learned counsel for the Petitioner, learned Senior Deputy Solicitor General submitted that what the Respondent Police Officers had attempted to engage in, was an 'inquiry' into a dispute of civil nature between the 7th Respondent and her mother. She further submitted that the Police had not conducted an 'investigation' into the committing of an offence or the occurrence of a breach of the peace. She did not contest the authenticity of the transcript pertaining to the events that are alleged to have taken place inside the office-room of the Officer-in-Charge of the Boralesgamuwa Police Station. When inquired by Court, learned Senior DSG submitted that as at now, the Police do not have any legal, regulatory or administrative framework based upon which such 'inquiries' are to be conducted, though engaging in dispute resolution was aimed at preventing disputes being aggravated and resulting in the committing of offences and the occurrence of possible breach of the peace. She submitted that therefore the conduct of such 'inquiries' was most desirable, as it was aimed at the settlement of disputes.

When this matter was Supported, the President of the Bar Association of Sri Lanka was present in Court with regard to another matter. As the core allegation submitted by the Petitioner relates to the discharge of professional services by Attorneys-at-Law and the conduct of Police Officers towards Attorneys-at-Law, and as it was felt that his submissions would also be useful to enable the Court to decide on a suitable course of action to be taken with regard to the Petition, Mr. Pieris was invited to assist Court as amicus. He submitted that there were similar instances that had been brought to his attention, where Attorneys-at-Law who went to Police Stations had to encounter various forms of harassment and difficulties, which prevented or obstructed them from discharging professional duties towards their clients. He said that such obstructions resulted in the Fundamental Rights of suspects being infringed and Attorneys-at-Law being prevented from discharging their professional services which also amounts to the infringement of the Fundamental Right of such Attorneys-at-Law guaranteed under Article 14(1)(g). He submitted that in August 2022, he had the occasion to write to the Inspector General of Police calling upon him to ensure that the arrest of suspects is carried out strictly in terms of the law, and that rights of suspects arrested to have access to Attorneys-at-Law be respected and facilitated by Police Officers.

On a consideration of the submissions made by all three learned counsel and the material placed before this Court, it is observable that the 1st Respondent has acted towards the Petitioner in an offensive, improper and undignified manner and that his conduct has hampered the Petitioner from discharging his professional services on behalf of his client - the 7th Respondent.

When Court inquired from the learned counsel for the Petitioner whether his client would be content if the Inspector General of Police were to be directed to conduct an inquiry into the matter and also put in place a comprehensive, legally enforceable regulatory framework (a) with regard to the conduct of 'inquiries' into disputes between parties, (b) to ensure that persons who are called upon to participate at such 'inquiries' in the nature

of the 'inquiry' referred to in the Petition, have the entitlement to be represented by an Attorney-at-Law of their choice, (c) that would enable Attorneys-at-Law receive an appropriate opportunity of representing their clients at such 'inquiry', and (d) to ensure that Attorneys-at-Law receive an effective opportunity to make representations to the Police on behalf of suspects who are arrested and or interviewed by the Police, learned Counsel responded in the affirmative. Both the learned Senior Deputy Solicitor General and the President of the Bar Association of Sri Lanka submitted that it would be most appropriate for the Inspector General of Police to be directed to issue such a legally recognized comprehensive regulatory framework.

Court notes that the afore-mentioned Gazette notification bearing No. 1758/36 containing Rules, is also the outcome of an Order made by this Court relating to certain proceedings similar to the present Application.

In view of the foregoing, without granting leave to proceed at this stage, in the form of interim orders, the Inspector General is hereby directed to comply with the following:

(i) Conduct an independent, impartial and comprehensive inquiry into the incident referred to in the Petition, and submit such inquiry proceedings together with his findings and recommendations to the National Police Commission, for necessary action.

(ii) Report to this Court on the action taken by him with regard to the above directive and the subsequent action taken by the National Police Commission.

(iii) Establish a Committee comprising of senior Police Officers, nominees of the Honourable Attorney General and nominees of the President of the Bar Association of Sri Lanka, to formulate a regulatory framework regarding the following:

a. Conduct of inquiries into disputes (disputes specified in such framework) for the purpose of securing amicable settlement of such disputes through fact finding mechanisms such as inquiry and dispute resolution mechanisms such as mediation and conciliation, with the view to preventing the escalation of such disputes into a breach of the peace or the committing of offences.
b. Participation of Attorneys-at-Law representing disputant parties at such inquiries.
c. Permitting a suspect who is under investigation by the Police for having committed an offence and in the custody of the Police, to have access to an Attorney-at-Law while such suspect is in Police custody.
d. Providing for the entitlement of an Attorney-at-Law to ascertain from the Officer-in-Charge of a Police Station the following information pertaining to his client who is suspected of having committed an offence, and to make appropriate representations on behalf of such suspect:
    i. The allegation against his client.
    ii. If the suspect has been arrested and is in Police custody, the date, approximate time and place at which the client of the Attorney-at-Law (who is suspected of having committed an offence) is to be produced before a Magistrate.
e. Providing specific opportunity to Attorneys-at-Law to make representations on behalf of their clients to Officers-in-Charge of Police Stations / Police Investigation Officers.

(iv) The Committee should be invited to consider receiving views of the general Public and representations by concerned civil society organizations, so that their views regarding the framework to be developed by the Committee could be taken into consideration.

(v) Upon the finalization of the applicable legal and regulatory framework by the Committee and presentation of their Report to the Inspector General of Police, should the Inspector General of Police be agreeable with the recommended framework, to take necessary steps to promulgate and publish them in the form of Rules made in accordance with section 55 of the Police Ordinance.

(vi) On or before 31st March 2023, report to this Court on action taken in terms of this Order.

The Registrar is directed to forthwith forward copies of this Order to the following:

(i) Honourable Attorney General
(ii) Inspector General of Police
(iii) President, Bar Association of Sri Lanka
(iv) Petitioner and to his Counsel

The Registrar is directed to have this matter Mentioned on 3rd April 2023, at 9.45am before this bench.

Yasantha Kodagoda, PC
Judge of the Supreme Court

A.L. Shiran Gooneratne
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(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC/FR APPLICATION No: 427/2018

1. Jayasinghe Arachchilage Samantha
   Bandara Mangala Jayasinghe
   (PC 33476)
   Bomadawa Watta,
   Yogamuwakanda,
   Polgahawela.

2. Rajapaksha Mudiyanselage Chandana Kumara Rajapaksha
   (PC 22158)
   No. 37, Mellawa, Peiris Watta,
   Lihiriyagama, Pannala.

3. Ekanayake Arachchige Indika Thushara
   (PC 907)
   No. 84, Heartland Housing Scheme,
   Millennium City,
   Kotugoda.

4. Lokupotha Gamayalage

Anton Wijayakumara
(PC 18022)
No. 3, 'Sadadana',
Panduwasnuwara,
Hettipola.

5. Samarakoon Herath
Mudiyanselage Nilu
Sudarma Samarakoon
(PC 36136)
Kaduruwella,
Wadakada.

6. Thennakoon Mudiyanselage
Gamini Vijitha Abeykoon
(PC 36039)
Hitinawatta, Kudagama,
Dombemada,
Rambukkana.

7. Gamaralalage Saman
Pushpakumara
(PC 36030)
'Desi Villa', Wathura, Kegalle.

8. Dissanayake Mudiyanselage
Jayasiri Dissanayake
(PC 28003)
Jaya Mawatha, Ihala Kagama,
Maradankadawala.

9. W.D.A.K. Weerasinghe
(PC 38724)

9/200, Welampela,
Arawatta, Mahiyanganaya.

10. S.D. Jayarathne Samarasinghe
(PC 34612)
No. 165, Behind Church, New Town, Embilitpitiya.

11. Mahadewage Srilal Kumarasinghe
(PC 10083)
Aluketiya, Rathna Hangamuwa, Rathnapura.

12. Thennakoon Mudiyanselage Anura Kumara Thennakoon
(PC 33655)
No. 167, Near the school, Elapatha, Rathnapura

13. G.M. Nandana Leelarathna
(PC 38838)
No. 33/1, Malwatta, Godakawela.

14. Marasinghe Mudiyanselage Asanka Sudath Marasinghe
(PC 11115)
'Sisila', Makulugolla, Meegahakiwula, Badulla.

15. A.M. Viraj Lakmal
(PC 38854)

No. 13/D/1, Malawatta,
Godakawela,

16. W. Weerasinghe
(PC 36840)
Ulpatha Road, Alpitiya,
Godakawela.

17. Rajapaksha Mohottige Don
Pushpakumara
(PC 20527)
No. 33, Old Walpala Road,
Udawalawa.

18. Wijesundara Mudiyanselage
Asanka Madawa Jayawardena
(PC 36126)
No. 133/E/1,Warapitiya, Near the
Temple, Kahawatta.

19. D.D.G. Weerakoon
(PC 38065)
Udakula Road, Bathgangoda,
Pelmadulla.

20. P.P. Dharmasiri
(PC 35975)
Galpaya, Pallebedda.

21. Kande Ranasinghege Lalith
Rathnasiri Ranasinghe
(PC 3150)
No. 502/19A, Colombo Road,

Rathnapura.

22. Ranasinghe Arachchilage Dinesh Sumeda Ranasinghe
(PC 19125)
No. 51/B, Ulpatha Road,
Alpitiya, Godakawela.

23. Meepe Aththanage Chandana Shirantha Perera
(PC 3478)
Samodaya Mawatha, Rilhena,
Pelmadulla.

24. Wanasuriya Koralalage Samantha Wanasuriya
(PC 36923)
Halwinna,
Godakawela.

25. Ranasinghe Disanayakelage Chaminda Priyankara
(PC 7424)
Nalanda Ellawala Mawatha,
Thiriwanaketiya,
Rathnapura.

26. Piyasenage Lionel Jayathilake
(PC 38025)
F15, Police Quarters, Maradana,
Colombo 10.

27. Herath Mudiyanselage Nandana

Kumarasiri

(PC 15697)

No. 07/01, Wewelketiya, Bope,

Padukka.

PETITIONERS

-Vs-

1. Pujith Jayasundara,
   Inspector General of Police,
   Police Headquarters,
   Colombo I.

1A. C.D. Wickramarathne
   Inspector General of Police,
   Police Headquarters,
   Colombo 1.

2. Mr. P.H. Manatunga,
   Chairman,

2A. Justice Jagath Balapatabendi,
   Chairman,

3. Prof. S.T. Hettige,
   Member,

3A. Indrani Sugathadasa
   Member,

4. Savithri D Wijesekere,
   Member,

4A. V. Shivagnanasothy,
   Member,

5. B.A. Jeyanathan,
Member,

5A. T.R.C. Ruberu
Member,

6. Y. L.M. Zawahir,
Member,

6A. Ahamed Lebbe Mohamed Saleem
Member,

7. Tilak Collure,
Member,

7A. Leelasena Liyanagama,
Member,

8. Frank de Silva,
Member,

8A. Dian Gomes
Member,

8B. Dilith Jayaweera
Member,

8C. W.H. Piyadasa
Member,

The 2A, 3A, 4A, 5A, 6A, 7A, 8A, 8B and 8C RESPONDENTS all of:

The Public Service Commission,
No. 1200/9, Rajamalwatta Road,
Battaramulla.

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

RESPONDENTS

BEFORE : **S. THURAIRAJA, PC, J,**
ACHALA WENGAPPULI, J. and
ARJUNA OBEYESEKERE, J.

COUNSEL : Shantha Jayawardhana with Chamara Nanayakkarawasam for the Petitioners.
M. Gopallawa, SDSG for the Respondents.

WRITTEN SUBMISSIONS : Petitioner on 18th October 2021 and 21st January 2022.
Respondents on 31st March 2021 and 26th January 2022

ARGUED ON : 10th January 2022.

DECIDED ON : 5th May 2022

S. THURAIRAJA, PC, J.

At the time of institution of this action, all Petitioners were Police Constables. The 1st Respondent was the Inspector General of Police (IGP), the 2nd Respondent was the Chairman and the 3rd to 8th Respondents were members of the National Police Commission, all of whom have been substituted by the 1A, 2A, 3A, 4A, 5A, 6A, 7A, 8A, 8B, 8C Respondents in accordance with changes to the positions occurring subsequent to this application, as reflected by the amended caption filed by the Petitioners on 22nd

March 2021. The 9th Respondent is the Attorney General who has been made a party in compliance with the law.

The Petitioners instituted this action against the Respondents claiming a violation of the Petitioners' Fundamental Rights due to the promotion scheme adopted by the Respondents. The Court was inclined to grant Leave to Proceed in terms of Article 12(1) of the Constitution.

The Petitioners stated that they joined the Department of Police as Police Constables in the Regular Service and were serving in the same rank attached to police stations. The Petitioners' years of service as according to the Petition are such that as at 31.05.2018, the 1st Petitioner was in service for 22 years, the 2nd Petitioner for 19 years and 7 months, the 3rd,16th,22nd, 23rd Petitioners for 19 years, the 4th and 27th Petitioners for 17 years and 6 months, the 5th, 6th, 7th, 18th, 20th Petitioners for 21 years, 8th Petitioner for 28 years, 9th Petitioner for 16 years and 9 months, 10th and 17th Petitioners for 21 years and 6 months, 11th Petitioner for 17 years and 8 months, 12th Petitioner for 17 years and 5 months, 13th and 15th Petitioners for 16 years and 9 months, 14th Petitioner for 17 years and 10 months, 19th Respondent for 18 years and 11 months, 21st Petitioner for 19 years and 4 months, 24th Petitioner for 18 years and 9 months, 25th Petitioner for 18 years and the 26th Petitioner for 18 years and 11 months.

The Petitioners state that in terms of Article 155G of the Constitution, powers pertaining to appointment, promotion, transfer, disciplinary control and dismissal of Police Officers other than IGP is vested in the National Police Commission and that in regard to promotions of Police Constables, the 1st Respondent IGP is exercising the delegated powers of the National Police Commission.

The Petitioners stated that being Police constables, they were in the lowest rank of the Department and their next rank was the rank of Sergeant. During the subsistence of proceedings, it was brought to the attention of this Court that the 1st,2nd,3rd,4th,5th,8th,11th,12th,21st and 22nd Respondents were promoted to the rank of

Police Sergeant. The Learned Counsel for the Petitioners submitted that even though the abovementioned Petitioners were promoted they are contesting the effective date of the promotions. In these circumstances, objections and counter affidavits were filed before this Court.

The Petitioners state that as per their knowledge there has been no consistent criteria and policy with regard to making promotions to the rank of sergeant and mention mechanisms adopted in previous years based on an examination, interview, and subsequently for those with over 16 years of service (2006) and 20 years (2010) without interview or examination.

The Petitioners state that by RTM No. 772 dated 20.9.2016 (annexed as P3) , the 1st Respondent called for applications for promotion to the rank of Police Sergeant/ Women Police Sergeant based on period of service and merit. According to the criteria laid down in the said RTM, officers who had completed 15 years active period of service by 31.05.2016 and having unblemished service during the immediate 3 years were eligible to apply. As per the Petitioners, the said Promotion Scheme to promotions in 2016 (annexed as P4) allocated 70 marks for seniority and 30 marks for merit, the latter of which was given considering maximum of 5 marks each for the criteria of Special Educational Qualifications, Special Professional Qualifications, Service in Operational Areas prior to 01.06.2009, Special Skills, Medals, and the Interview. They state that in the maximum 5 marks of Special Professional Qualifications, 1 mark each was given for 1 year of service in 'Special Divisions', accordingly Special Divisions included 13 Divisions including the Presidential Security Division, Retired President's Security Division, Prime Minister Security Division, Ministerial Security Division, and Criminal Investigation Department.

The Petitioners state that this Promotion Scheme gave due weightage to seniority for period of service as the post of Constable is the lowest rank and that such preference for seniority is fair as otherwise officers with long periods of service would stagnate in the same lowest rank.

The Petitioners state that by RTM No. 442 dated 11.07.2018 (annexed as P5), the 1st Respondent called for applications from Police Constables/ Women Police Constables for promotion to the rank of Police Sergeant/Woman Police Sergeant. In terms of P5, the threshold qualifications for promotions included being confirmed in service, 10 years active period of service by 31.05.2018 and 3 years satisfactory service prior to 31.05.2018. This 10-year period is a reduction from the minimum period of 15 years in 2016 and 20 years in 2010.

The Petitioners state that this Promotion Scheme was also published on the Virtual Private Network (VPN) of the Police Department used by Police to distribute information within the Department through the internet.

As per the Petitioners, the Promotion Scheme adopted in 2018 (annexed as P6) allocated only 50 marks for seniority and 50 marks for merit. The former 50 marks were given by giving 4 marks for each 1 year of service, meaning that even an officer with 10 years service would be entitled to 40 of 50 marks for seniority and an officer with 12 and half years would obtain all 50 marks.

The Petitioners further state that in terms of Clause 2.2.12 of the said Scheme, maximum 10 marks were available for Special Professional Qualifications. Marks had been allocated considering 1 mark each for 1 year of service at 'Special Divisions', which consists of 19 such recognized divisions, 6 of which were not identified under the 2016 scheme.

The Petitioners state that on or about 01.12.2018 they became aware that by RTM No. 1003 dated 30.11.2018 (annexed as P7) issued by the 1st Respondent-IGP, it was informed that 1737 Police Constables have been promoted to the rank of Sergeant with effect from 31.05.2018. The said list of promotees had then been published on the VPN of the Police Department. The Petitioners state that in addition to the names of the said 1737 promoted officers, names of 46 officers who have been selected but listed in a waiting list pending the conclusion of court cases and disciplinary inquiries were also published. The Petitioners state that the Petitioners had not received

promotions to the rank of Sergeant. The Petitioners state that upon perusal of the said list of 1737 promotees, the Petitioners discovered that approximately 665 promotees are from the said 'Special Divisions' and are mainly from the Presidential Security Division, Retired President's Security Division and the Ministerial Security Division. The Petitioners state that they have become aware that most of the other promotees, though are presently serving in police stations or other divisions, have served in such Special Divisions for part of their period of service.

The Petitioners state that this scheme undermined seniority and has allowed junior officers to be promoted owing to service in Special Divisions. The Petitioners state that it is discriminatory to Police Officers serving at Police Stations and claims that the 1st- 8th Respondents have infringed the Petitioners' Fundamental Rights under Article 12(1). In terms of the date of promotions, the Petitioners sought direction of the Respondents to promote Petitioners to the rank of Sergeant with effect from 31.05.2018 and to declare the promotions granted to the rank of Police Sergeant as set out in P7 as null and void.

The Respondents agree in terms of the content of P5 and P6 but state that the Promotion marking scheme of 2016 was amended in 2018 to uplift the quality of the Police Service and introduced equal weightage to merit as well as seniority. It is stated that the Promotion Scheme was applied uniformly to ensure that officers who are not only experienced, but display knowledge and skill were promoted over those who possess only seniority, for best performance at the next rank. The Respondents state that this was a matter of Policy aimed at improving the efficiency of the Police Service.

The Respondents in their Written Submissions state that the Petitioners' claim is based solely on the promotion scheme of 2018 which the Petitioners admit to having been aware of on or about 11.07.2018. The Respondents state that as the Petitioners did not challenge the scheme until the application at Human Rights Commission on 17.12.2008, nearly 5 months from date of being aware of scheme, and as the

Petitioners did not raise objections at the stage of interviews, this application is time barred.

In this regard, The Petitioners state that the application is not time barred given that they were only aware of the preference to junior officers based on service at Special Divisions and alleged undermining of seniority upon examining the list of promotes, marked P7 on 1.12.2018. As such the Petitioners are of the view that the application has been made within the time limit given that the Petition was filed on 30.12.2018. Further, the Petitioners state that the marks allocated for the Petitioners were only disclosed upon filing this application by the document marked R annexed to the Affidavit of the 1A Respondent, which the Petitioners state was a decisive factor in the decision of Petitioners' promotions.

As this Court has previously enumerated numerous times, an application being time barred has dire consequences upon the same. As stated by the Judgement in **Demuni Sriyani De Soyza and Others v Dharmasena Dissanayake, Chairman, Public Service Commission and Others, S.C.F.R 206/2008 (S.C Minutes dated 9.12.2016)** by Hon. Justice Prasanna Jayawardena, PC:

> *"Article 126 (2) of the Constitution stipulates that, a person who alleges that any of his fundamental rights have been infringed or are about to be infringed by executive or within one month thereof apply to this Court by way administrative action may "…. Within one month thereof…." apply to this Court by way of a Petition praying for relief or redress in respect of such infringement. The consequence of this stipulation in Article 126 (2) is that a Petition which is filed after the expiry of a period of one month from the time the alleged infringement occurred, will be time barred and unmaintainable. This rule is so well known that it hardly needs to be stated here."*

In the instant case, It is to be noted that the basis of the Petitioner's application is the Promotion Scheme marked P5, which was communicated by RTM and P6 which

was published on the VPN Network of the Police Department specifically intended for use by police to distribute information within the Department. The Petitioners have only complained of unfairness of the promotion scheme following P7 wherein the Petitioners did not receive promotions. The promotion scheme has been applied uniformly to all applicants and promotions were given as according to the Scheme announced on 11.07.2018, over 4 and half months prior to the results as in P7 dated 30.11.2018. Thereafter, an additional month has elapsed in the Petitioner filing the Petition at this Court. As such, this application is time barred.

Additionally, I do not find any patent unfairness to the Promotion Scheme marked P6 as the objectives of this promotion scheme, as explained by the Respondents, are justified. Further, this Promotion Scheme has been applied uniformly to all applicants including the Petitioners.

As was stated by Hon. Sripavan CJ in **Wasantha Dissanayake and Others v Secretary, Ministry of Public Administration and others, SCFR 611/12 (SC Minutes 10.09.2015**;

> *"A scheme of recruitment once formulated is not good for ever; it is perfectly within the competence of the appropriate authority to change it, rechange it, adjust it and re-adjust it according to the compulsions of changing circumstances. The Court cannot give directions as to how the Public Service Commission should function except to state the obligation not to act arbitrarily and to treat employees who are similarly situated equally. "*

As such, the Respondents are justified in introducing a promotion scheme different to that of the past as is suited to meet justifiable goals of the Police Force to the extent that all parties are treated fairly by such mechanisms.

In terms of matters to be considered in promotion schemes, the recent Judgement in the case of **Kaluwahandi Garwin Premalal Silva and Others v K. W. E. Karaliyadda and Others, bearing No. SC FR 383/2016, (Supreme Court minutes**

dated 16th December 2021) referred to the case of **A. H. Wickramatunga and three others Vs. H. R. de Silva and fourteen others SC (FR) 551/98 decided on 31-08-2001,** in which His Lordship Justice Fernando referred to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and stated:

> *"….[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."*

As such, despite a change in the scheme, given that the requirements have stayed within the scope of seniority and merit, albeit with different weightage as required, there is no patent unfairness to this scheme.

The Petitioners received promotions soon after during the following year based upon a Scheme as suited to them on a time-based system favouring seniority as was preferred by the Petitioner. The Respondent has submitted that the 1st,2nd,3rd,4th,5th,6th ,7th , 8th, 10th, 11th, 12th, 14th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th Petitioners have subsequently been promoted to the rank of Police Sergeant with effect from 01.01.2019 under a time-based Promotion Scheme for officers in the post of Police Constable. The 16th and 17th Petitioners have been placed in the reserved list of promotees to the rank due to pending adverse reports against them. The Respondents particularly state that the promotions of the Petitioners cannot be antedated 31.05.2018 given that these promotions were granted under a Time-based Promotion Scheme as opposed to the 2018 Competitive promotion Scheme. I am inclined to agree with this view given that the Petitioners have received the promotion that they had originally claimed for by way of Petition.

To backdate the promotions and to alter promotions granted to the 1737 Police Officers who received promotions under the Scheme of 2018 would be to infringe upon the Fundamental Rights and Legitimate Expectations of those individuals, who have not even been made party to this case by the Petitioner. Additionally, The SDSG submitted before this Court that there is another Fundamental Rights Application before this Court which is severely affected if this application is granted, which has not been pleaded in the Petition.

As such, I find that the Fundamental Rights of the Petitioners as guaranteed by Article 12(1) of the Constitution have not been violated by the Respondents. I dismiss this application without costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI, 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 Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC / FR No. 429/2016

1. H.M.M. Sedara,
   No. 131/D,
   Pahala Biyanwala,
   Kadawatha.

2. K.A.P. De Silva,
   No. 25/1, Kowila Mawatha,
   Dadalla,
   Galle.

3. W.M.C. Peiris,
   No. 17/2,
   Kammala South,
   Waikkala.

4. D.D. Millaniya,
   No. 31, Kottawa Road,
   Miriswatta,
   Piliyandala.

5. R.W. Asoka Sriyani,
   No. 477/4, Batapola Road,
   Kurudugahahethakma,
   Elpitiya.

6. C.S. Gunatilaka,
   No. 58 C 2, Kanaththa Road,

Asgiriya,
Gampaha.

7. K.S. Abrew,
   No. 101/15, Bandarawatta,
   Gampaha.

8. G.G. Seneviratna,
   No. 78, Keerapana,
   Gampola.

9. M.T. Ramya Renuka,
   5B, Eral Jayawickrama Mawatha,
   Hettiveediya,
   Weligama.

10. B.G. Kumudu Nelum,
    No. 145/C,
    Meewathura,
    Peradeniya.

11. N.P. Asoka,
    No. 22, “Prabashi”,
    Kuruduwatta,
    Welipitiya
    Weligama.

12. G.G. Dayani,
    Muththettuwa Watta,
    Nadugala Road,
    Matara.

13. B.L.N. Thamalika,
    No. 447/1/D, Pitipana North,
    Moragahahena Road,
    Homagama.

14. N.B. Silva,
    No. 191, Weluwana Road,
    Dematagoda,
    Colombo 09.

15. G.D.A. Ariyaratna,
    Suhada Mawatha,
    Nagoda,
    Kalutara.

16. K.M.P.K. Kodituwakku,
    No. 239/7, Devalegawa,
    Ratnapura.

17. P.D. Sriyani,
    No. 300/7A, Old Galle Road,
    Walliwala,
    Weligama.

18. K.P. Sandaya,
    No. 216/1, Mudiyansege Watta,
    Dalugama,
    Kelaniya.

19. W.I. Mallika,
    No. 156/27, Peradeniya Road,
    Kandy.

20. H.R.S. Perera,
    Bilingahawatta Lane,
    Matugama.

21. N.B.A.N. Ratnaseeli,
    No. 600/7/A/3,
    Ihala Biyanwila,
    Mankada Road,
    Kadawatha.

22. M.T.N. Sovis,
No. 45/7 S, Station Road,
Kapuwatta,
Ja-Ela.

23. A.G. Janaki,
No. 110/15, Sri Bidhiraja Mawatha,
Polwatta,
Pannipitiya.

24. Nalinda Peiris,
No. 160/1, Kumbuka West,
Gonapola.

Petitioners

Vs.

1. Sri Lanka Tea Board,
No. 574, Galle Road,
Colombo 03.

2. Rohan Pethiyagoda,
Chairman (Former),
Sri Lanka Tea Board,
No. 574, Galle Road,
Colombo 03.

2A. W.L.P. Wijewardena,
Chairman (Former),
Sri Lanka Tea Board,
No. 574, Galle Road,
Colombo 03.

2B. Jayampathy Molligoda,
Chairman,
Sri Lanka Tea Board,

No. 574, Galle Road,
Colombo 03.

3. Upali Marasinghe,
Secretary, (Former)
Ministry of Plantation Industries,
55/75, Vauxhall Lane,
Colombo 02.

3A. J.A. Ranjith,
Secretary (Former),
Ministry of Plantation Industries,
55/75, Vauxhall Lane,
Colombo 02.

3B. Ravindra Hewavitharana,
Secretary,
Ministry of Plantation Industries,
11th Floor,
Sethsiripaya 2nd Stage,
Battaramulla.

4. N. Godakanda,
Director General (Former),
Department of Management Services,
General Treasury,
Colombo 01.

4A. Ms. Hiransa Kaluthantri,
Director General,
Room 343,
3rd Floor, Ministry of Finance,
The Secretariat,
Colombo 01.

5. K.L.L. Wijerathne,
Chairman (Former),

6. Ashoka Jayasekara,
Secretary (Former),
Both of National Pay Commission.

6A. Anura Jayawickrema,
Secretary (Former),
National Pay Commission.

7. Nimal Bandara,
8. Dayananda Vidanagamachchi,
9. J. Charitha Rathwatte,
10. Prof. Kithsiri Madapatha Liyanage,
11. Leslie Shelton Devendra,
12. Suresh Shah,
13. Sanath Jayantha Ediriweera,
14. V. Regunathan,
15. Kamal Mustapha,
16. Prof. Gunapala Nanayakkara,
17. Nandapala Wickramasooriya,
17A. S. Naullage,
18. Sujatha Cooray,
19. Gerry Jayawardena,
20. S. Thillainanadarajah,
21. Dr. Anura Ekanayake,
22. Sembakuttige Swarnajothi,
23. P.K.U. Nilantha Piyarathne,
24. N.H. Pathirana,
25. H.T. Dayananda,
26. T.B. Maduwegedara,
27. Dr. Wimal Karadagoda,
28. A. Kadirawelupillai,
28A. W. Kumarawansa De Silva

All Members of the Former National Salaries and Cadre Commission.

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

30. Upali Wijeweera,
    Chairman,
    National Pay Commission.

31. Chandrani Senarathne,
    Secretary,
    National Pay Commission.

32. Gotabaya Jayarathne,
    Member,

33. Sujatha Cooray,
    Member,

34. Madura Wehella,
    Member,

35. M.S.D. Ranasiri,
    Member,

36. Dr. Ananda Hapugoda,
    Member,

37. Sanjeewa Somarathne (High Court Judge),
    Member,

38. Ajith Nayanakantha,
    Member,

39. Ravi Liyanage,
    Member,

40. Sanath Ediriweera,
Member,

41. Prof. Ranjith Senarathne,
Member,

42. R.M. Amarasekara (Engineer),
Member,

43. Siri Ranaweera (Retired Major General),
Member,

44. W.H. Piyadasa,
Member,

32nd to 44th,
Members of National Pay Commission,
Room No. 2 – 116,
BMICH,
Colombo 07.

Respondents

Before: **Justice P. Padman Surasena**

Justice A.L. Shiran Gooneratne

Justice Achala Wengappuli

Counsel: Chamantha Weerakoon Unamboowa with O.L. Premarathne **for the Petitioners.**

S. Barrie, DSG **for the AG.**

Argued on: 25/01/2022

Decided on: **16/06/2022**

A.L. Shiran Gooneratne J.

The Petitioners to this application are presently holding the post of "Management Assistant Non - Technological" in the Sri Lanka Tea Board (hereinafter sometimes referred to as the Respondent Board) with effect from 06/06/2012.

The Petitioners were originally recruited to the Clerical and Allied Services of the Respondent Board. The 1st to 13th Petitioners were recruited to Grade II Segment B of the Clerical Service while the 14th to 19th Petitioners were recruited to Grade II as Stenographers and the 20th to 24th Petitioners were recruited to Grade I, as Data Entry Operators.

In view of Public Administrative Circular 06/2006, a new salary structure was introduced and the employment criteria was recategorized as per the task performed. This was achieved through the Department Management Services Circular No. 30 dated 22/09/2006 referred to as DMS 30/06 marked 'P5' to the Petition. In terms of Annex II of the said Circular, a new salary structure was introduced to the public sector in line with State Corporations, Statutory Boards and Fully owned Government Companies. As per the new scheme, the Petitioners were placed in the salary scale MA - 1-1-2006 (P5).

Accordingly, the Petitioners received a salary increment on the above scale to coincide with a salary increment given to the public service (P7 and P8). On 25/10/2011, in terms of the said DMS 30/06, a new Scheme of Recruitment and Promotions (SOR) marked 'P9', was introduced by the Respondent Board and accordingly, the Petitioners were absorbed as "Management Assistant-Non-Technological - Grade I". On 06/06/2012,

formal letters absorbing the Petitioners to the new Post of Management Assistant Non-Technical, was issued.

The Petitioners contend that according to the Scheme of Recruitment and Promotions which prevailed prior to the introduction of the new scheme (P3), a person holding the post of Clerk had a legitimate expectation of being promoted to the post of Staff Assistant after 5 years of service in Grade I, and to be promoted to the Executive Grade, three years thereafter. Similarly, a person who was recruited as a Stenographer had a legitimate expectation of reaching the post of Chief Stenographer and to be promoted to the Executive Grade with three years of service thereafter. The Petitioners state that in the new Scheme of Recruitment (SOR) (P9), there is no promotional path available to the Petitioners and therefore is arbitrary, discriminatory and violates their fundamental right of equality guaranteed by Article 12 (1) of the Constitution.

By application dated 30/11 2016, the Petitioners, *inter alia*, are seeking:

1. for a declaration that the 1st to 28th Respondents have violated the fundamental rights of the Petitioners guaranteed by Article 12(1) of the Constitution,
2. to issue an order directing the Respondents to provide a suitable promotional post/ path for the Petitioners and
3. to issue an order directing the Respondents to promote the Petitioners to the next promotional grade/ post provided.

This Court has granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution.

Application is time barred.

When this application was taken up for hearing, the learned DSG appearing for the Respondents raised a preliminary objection that the instant application dated 30/11/2016, is time barred.

It is contended that the Petitioners application is filed outside the time limit prescribed by Article 126 (2) of the Constitution which *inter alia*, states that an aggrieved person may come before the Supreme Court within a period of one month from an infringement. The Respondents contend that the said time bar is contingent upon one or more of the following occurrences, i.e.

1. the placement of the Petitioners in the salary scale MA-1-1-2006, assigned to Management Assistants dated 13/12/2006 (P6),
2. the introduction of the composite SOR on 25/10/2011 (P9) and/or,
3. the formal letters absorbing the Petitioners to the post of Management Assistant Non-Technical on 06/06/2012 [P11 (a) - (w)].

Since the preliminary objection relates to the jurisdiction of this Court under Article 126 of the Constitution, I would first deal with the objection raised by the Respondents.

The Petitioners were placed in the salary scale MA-1-1-2006 assigned to Management Assistant by Management Services Circular No. 30 dated 22/09/2006 (P5). The application to this Court seeking a direction that the Respondents provide a promotional post/ path to the Petitioners absorbed into the said service category, is dated 30/11/2016. Inasmuch as the 'lapse' to provide a promotional path to the Petitioners is contended to be a violation, the Petitioners do not allege that the said SOR (P9), *per se*, is discriminatory. This position is further fortified by several representations made by the Petitioners drawing attention to the said 'lapse' and requesting the Respondent Board to provide an administrative remedy to overcome the situation [P16 (a), (b), (c)]. The Respondent Board has considered the Petitioners request in their response [P17 (a), (b), (c)].

It is observed that, at the request of the Petitioners, the then Director General of the 1st Respondent Board made representations to the relevant authorities to seek an administrative remedy, which continued up to the hearing of this application. In pursuit of the said remedy, the Respondents were willing to make changes to accommodate the

Petitioners to create a special internal promotional path from Management Assistant to Junior Manager, which was rejected by the Petitioners.

Continuing Violation

The Petitioners counter argument to overcome the non-compliance of Article 126 (2), is based on continuing violation on the facts and circumstances of this case. This Petition was not presented to Court on that basis, however, was contended for the first time in the written submissions filed by the Petitioners.

The position of the Petitioners is that, the 1st to 3rd Respondents were contemplating the request of the Petitioners to grant them administrative relief and therefore no particular date is identifiable as the date when the Petitioners became aware of the omission or failure of the Respondents. It is stated that, since there is no refusal to provide a suitable promotional path, the violation continued, the Petitioners have also contended that the only date that may be fixed as the date the Petitioners became aware of the infringement is 24/06/2014 [P19 (a)], the date the HRC complaint was filed.

However, elsewhere in the Petition, it is also contended that, the Petitioners became aware of the Human Rights Commission (HRC) recommendation dated 29/08/2016 [P19 (b)], on 31/10/2016 (P22), the date the Petitioners became aware that the said recommendation was under consideration by the Department of Management Services.

In terms of Article 126 (2) of the Constitution, a fundamental rights application to be filed within one month of the alleged infringement is trite law. However, there are instances where the Court has justified exceptions to the strict applicability of one month, when manifested in the facts and circumstances in an application ***(Edirisuriya vs. Navaratnam and others, (1985) 1 SLR 100; G.S. Premachandra vs. University Grants Commission (SC FR 573/2004); Rajakaruna vs. de Silva (1997) 2 SLR 209).***

In ***Siriwardana vs. Rodrigo (1986) 1 SLR 384***, this Court held that,

> *"An application must be filed within one month from the date of the commission of the administrative or executive action which it is alleged constitutes the infringement or imminent infringement of the fundamental right relied on. Where, however, a Petitioner establishes he became aware of such infringement or imminent infringement only on a later date, the one month will run from that date".*

By document marked 'P22' dated 31/10/2016, the Petitioners were informed that their grievances were under consideration by the Department of Management Services. The Petitioners relied on 'P22' to demonstrate to Court that it should exercise its jurisdiction in the given circumstances, to grant relief on continuing violation due to the failure or omission to provide a suitable promotional path. Accordingly, the Petitioners submit that, even though no particular date is identifiable as the date when the omission or failure became known to the Petitioners, the relevant date of the infringement is 31/10/2016. Therefore, there seems to be an element of uncertainty on the part of the Petitioners to identify a date of the alleged infringement of their rights guaranteed by Article 12(1) of the Constitution.

The Petitioners position that no particular date is identifiable in the instant case, is based on the absence or a refusal by the 1st to 3rd Respondents to provide a suitable promotional path and therefore, it is contended to be an ongoing infringement.

In ***Gamaethige vs. Siriwardena (1988) 1 SLR 384***, Fernando J. delivering the majority judgment laid down three principles in regard to the operation of the time limit prescribed by Article 126 (2), where His Lordship, *inter alia,* stated that,

> *"time begins to run only when both infringement and knowledge exists. The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in exceptional cases on the application of the principle lex non cogit ad impossibilia, if there is no lapse, fault*

or delay on the part of the Petitioner, this court has a discretion to entertain an application made out of time".

For sake of completeness, I also wish to make note of the dissenting judgment delivered in ***Gamaethige vs. Siriwardana*** *(supra)*, where Seneviratne J. opined that,

"the Petitioner in making this appeal to the Secretary, Ministry of Public Administration---- has exercised a right granted to him by the Establishment Code issued under Chapter IX of the Constitution ---- a fundamental right (in the administrative sense) of appeal available to him, the determination of the period of filling this application ---- should commence from the date of the refusal of the appeal".

However, in this application, the Petitioners when seeking administrative relief, as considered in the above case, did not resort to an appeal given as of right, recognized by law.

In ***Demuni Sriyani De Soyza vs. Darmasena Dissanayake (SC FR 206/2008)***, Prasanna Jayawardena PC.J. upheld an objection raised by the Respondents that the application is time barred and dismissed the application. His Lordship observed that;

"if, upon the occurrence of an infringement of his Fundamental Rights, an aggrieved person does not file an application invoking the jurisdiction of this Court under Article 126 (1) of the Constitution but, instead, chooses to pursue other avenues of seeking relief, the time he spends perambulating those avenues will not, usually, be excluded when counting the one month he has to invoke the jurisdiction of this Court under Article 126 (1)."

The Petitioners placed much reliance in ***Demuni Sriyani De Soyza vs. Darmasena Dissanayake*** *(supra)*, wherein His Lordship, considering the applicable principles when time spent by a Petitioner in making appeals or seeking other administrative or judicial relief, stated that;

"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 constitute over a period of time. It is only the second type of infringement which can be correctly identified as a continuing infringement".

In ***Lake House Employees Union vs. Associated Newspapers of Ceylon Ltd (SC FR 637/2009)***, Marsoof J. took a similar view when he observed that;

"any complain based on a continuing violation of fundamental rights may be entertained by the Supreme Court if the party affected invokes the jurisdiction of the Court within the mandatory period of one month from the last act from the series of acts complained of".

In support of their contention of infringement based on continuing violation, the Petitioners have placed much emphasis on the refusal or omission to provide a suitable promotional path to the Petitioners, which admittedly, continued over a considerable period of time.

The Petitioners argument on continuing infringement rests on their pursuit of an administrative relief, and as such, it is contended that until a decision is made by the relevant authority, the alleged infringement is a continuing violation. In this application the Scheme of Recruitment and Promotions itself, is not challenged by the Petitioners. The introduction of the SOR on 25/10/2011, was followed by the issuance of formal letters absorbing the Petitioners to the post of Management Assistant Non-Technical on 06/06/2012. Therefore, the act of issuance of formal letters absorbing the Petitioners to the said post can be identified as a distinct act fulfilled by the Respondent Board to absorb the Petitioners to the new post and which does not relate to any subsequent acts or decisions made, to justify a continuing violation.

In ***Jayaweera vs. National Film Corporation (1995) 2 SLR 120***, Kulatunga J. held that,

> *"in the circumstances, the alleged violation of rights occurred in October 1990; pursuit of administrative remedies does not interrupt the time limit of one month".*

In the above case, having referred to ***Gamaethige vs. Siriwardana*** *(supra)*, His Lordship observed that,

> *"there was nothing to prevent the petitioners filling their applications before this court within time and then seeking administrative relief also, if so advised".*

In this application the Petitioners are not mitigating delay nor have the Petitioners identified a clear date which triggered the alleged infringement. As observed earlier, the timeline is drawn by the Petitioners from the alleged delay or failure to make a decision by the Respondents and not due to any expressed eventuality which caused a violation. Therefore, in all the above circumstances, I think it is reasonable to pose the question as to whether the alleged continuing violation is contended by the Petitioners in order to circumvent the delay in coming before this Court.

In ***Dayaratne vs. National Savings Bank (2002) 3 SLR 116,*** the Petitioners challenged the scheme of promotions and the implementation of the said scheme, *inter alia*, alleging that certain respondents did not possess the actual service requirements and that their qualifications had not been duly considered. Fernando J. upholding a preliminary objection raised by the respondents that the challenge to the scheme was time-barred, stated that;

> *"The 1st Respondent was entitled, from time to time, and in the interest of the institution, to lay down the basis on which employees would be promoted, and that became part of the contract of employment. The scheme of promotion published on 12.02.2001 was directly and immediately applicable to the Petitioners, and became part of the terms and conditions of their employment. If they did not consent to those terms and conditions, as being violative of their rights under Article 12, they should*

have complained to this court within one month. They failed to do so. Instead, they acquiesced in those terms and conditions by applying for promotion without any protest".

In the facts and circumstances of this application, the Petitioners should have become aware that there was no suitable promotional path in the new SOR, by 06/06/2012, the date on which the formal letters absorbing the Petitioners to the posts of Management Assistant Non- Technical were issued. There was certainty in that decision and a clear indication was given therein by the Respondents on the application of the SOR and the terms and conditions of their employment in the new posts. Therefore, in this case a clear last act in the process of appointment to the new post was taken by the Respondent Board on the 06/06/2012, which at that time, was amenable to complain.

The Petitioners were placed in the salary scale assigned to the new post by document dated 13/12/2006 (P6). The SOR was introduced to the 1st Respondent Board on 25/10/2011 and the formal letters absorbing the Petitioners to the post of Management Assistant Non-Technical were issued on 06/06/2012. Therefore, at least by the 06/06/2012, the Petitioners should have become aware that the terms and conditions of their employment is in violation of their rights under Article 12. The Petitioners were under no attachment, want of knowledge, influence, compulsion or any other inhibition preventing them from complaining to this Court within the said time period mandated by law. The Petitioners have failed to provide an acceptable reason to be excused for such failure. Accordingly, I hold that the alleged infringement does not constitute a continuing violation as contended by the Petitioners and the time limit of one month should commence from 06/06/2012, when the formal letters of appointment was sent to the Petitioners. The Petitioners cannot be vindicated of their failure in not filling this action within one month from that date.

Application made to the Human Rights Commission

In order to redress their grievance, the Petitioners by an application to the Human Rights Commission (HRC) dated 24/06/2014, complained about the new Scheme of Recruitment which they contended to be arbitrary and discriminatory. As submitted by the learned Counsel for the State, there is no evidence placed before this Court of the date of receipt of the said application, by the HRC.

The Petitioners complained to the HRC regarding their grievance on 24/06/2014 [P19(a)] and the Petitioners have been informed that the recommendations made by the HRC are under consideration by the Department of Management Services (P22). The date that is fixed by the Petitioners as the date when the Petitioners became aware of the violation i.e, 24/06/2014, is the date on which the alleged HRC complaint was filed.

Section 13 (1) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996 states;

> *"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 and 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 be made to the Supreme Court by such person in terms of Article 126 (2) of the Constitution".*

Therefore, in order to be within the statutory exception as contemplated in that section, firstly, the complaint has to be made to the HRC within one month from the alleged imminent infringement or infringement of a fundamental right. In the circumstances, as contained in Section 13(1), the complaint has to be made to the HRC before the expiry of one month from the time the Petitioner became aware of the alleged violation, i.e. 06/06/2012. The Petitioners have clearly exhausted that time limit prescribed by law.

Considering all the above, I uphold the preliminary objection raised by the Respondents that the application is time barred.

Application is dismissed 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

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

Thilangani Kandambi,
No.259/1A, Sethsiri Mawatha,
Panamura Road,
Koswatta,
Thalangama.

Petitioner

S.C.F.R. Application No: 452/2019

Vs.

1. State Timber Corporation,
   No.82, Rajamalwatta Road,
   Battaramulla.

2. Niluka Ekanayake,
   Chairperson (Ceased to hold office),
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

2A. U.C. Walisinghe,
   Chairman (Ceased to hold office),
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

2B. M.S. Karunarathna,
   Chairperson,
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

3. H.Y.T. Pawakumar
   Working Director (Ceased to hold office),
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

3A. H.K.M.J.H. Kumarasinghe,
   Working Director (Ceased to hold office),
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

4. D. Wijesiriwardhana (Ceased to hold office)
   Director and Senior Assistant Secretary and General Treasury,
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

4A. B.N. Gamage,
   Director (Ceased to hold office),
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

4B. S.A.C. Kulathilake,
   Director (Finance Ministry Representative),
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

5. W.A.C. Weragoda,
   Director and Conservator (Ceased to hold office),
   General of Forests,
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

5A. Dr. K.M.A. Bandara,
   Director and Conservator General of Forests,
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

6. A.M.C. Perera,
   Director (Deputy Director) (Ceased to hold office),
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

6A. G.K. Prasanna,
   Director (Ceased to hold office),
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

6B. B.T.B. Dissanayake,
   Director,
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

7. M.V. Karunaratne,
   Director (Ceased to hold office),
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

7A. B.A. Dharmarathne,
   Director (Ceased to hold office),
   State Timber Corporation,
   No.82, Rajamalwatta Road,
   Battaramulla.

7B. M.R.A.K. Bandara,
   Director,
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

8. Ranjan Fernando,
   Director and Senior Assistant (Ceased to hold office),
   Secretary,
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

8A. D.G.S. Dasanayake,
   Director,
   State Timber Corporation,
   No. 82, Rajamalwatta Road,
   Battaramulla.

8B. Chamila Samarasinghe,
Deputy General Manager (Human Resources and Administration),
State Timber Corporation,
No. 82, Rajamalwatta Road,
Battaramulla.

9. Leslie Fernando,
Secretary to Board (Ceased to hold office),
State Timber Corporation,
No. 82, Rajamalwatta Road,
Battaramulla.

8A. M.G.D. Sharika,
Secretary to Board,
State Timber Corporation,
No. 82, Rajamalwatta Road,
Battaramulla.

10. K. Siriwansa,
Former Acting General Manager,
State Timber Corporation,
No. 82, Rajamalwatta Road,
Battaramulla.

11. Ananda Tilakasiri,
State Timber Corporation,
No. 82, Rajamalwatta Road,
Battaramulla.

12. Priyani Perera,
State Timber Corporation,
No. 82, Rajamalwatta Road,
Battaramulla.

13. K. Sandamali Abeynayake,
    State Timber Corporation,
    No. 82, Rajamalwatta Road,
    Battaramulla.

14. Nimal Ruwanpathirana,
    Managing Director,
    State Timber Corporation,
    No. 82, Rajamalwatta Road,
    Battaramulla.

15. Department of Management Services,
    Ministry of Finance,
    Lotus Road,
    Colombo 01.

16. Human Rights Commission of Sri Lanka,
    No. 14, R.A. de Mel Mawatha,
    Colombo 04.

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

Respondents

Before: Murdu N. B. Fernando, PC, J.
Kumuduni Wickremasinghe, J.
Janak De Silva, J.

Counsel:

S.N. Vijith Singh for the Petitioner

M.D.J. Bandara for the 1st, 2(b), 8A and 14th Respondents instructed by Mrs. K.I. Dilani P. Kariyawasam

I. Randeny, State Counsel for the 15th to 17th Respondents

Written Submissions tendered on:

20.10.2022 and 27.12.2022 by the Petitioner

04.01.2022 by the 1st and 2nd Respondents

27.10.2022 by the 1st, 2(B), 8A and 14th Respondents

Argued on: 06.10.2022

Decided on: 14.12.2022

Janak De Silva J.

The Petitioner joined the 1st Respondent as a Clerk-Grade IV on 15.12.1983. During her more than 30 years of service, she rose through the ranks and held the position of Assistant Director (Administration) at the time of this application.

On 19.02.2016, the 1st Respondent requested internal candidates for the post of Deputy Director (Human Resources). The Petitioner presented herself for the interview on 24.03.2016. However, the 11th and 12th Respondents were selected and appointed to the post of Deputy Manager (Human Resources).

The complaint of the Petitioner is against the interview process. The Petitioner argues that she was assessed unfairly and was denied marks that prevented her from being appointed to the position.

Time Bar

A time bar objection has been raised by the 1st Respondent.

In terms of Article 126(2) of the Constitution, a fundamental rights application must be filed within one month of the infringement. In ***Gamaethige v. Siriwardena and Others*** [(1988) 1 Sri.L.R. 384 at 402] Fernando J. held:

> *"Three principles are thus discernible in regard to the operation of the time limit prescribed by Article 126(2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (e.g of other instances by comparison with which the treatment meted out to him becomes*

discriminatory), time begins to run only when both infringement and knowledge exist (Siriwardena v. Rodrigo (2). The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in exceptional cases, on the application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or, delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time."

It was submitted on behalf of the 1st Respondent that the Petitioner should have filed this application within one month of the promotions being given to the 11th and 12th Respondents. In the alternative, it was contended that the application should have been filed within one month of the date on which the report of the 16th Respondent was received by the Petitioner.

The Petitioner claims of becoming aware of the promotions of the 11th and 12th Respondents only around 3rd June 2016. This information was conveyed to her by the Shihabdeen Mohammed Faum, then Acting Deputy Manager (Sales) of the 1st Respondent. An affidavit of Shihabdeen Mohammed Faum has been annexed to the petition (P8) in which he corroborates the Petitioner's version. The 1st Respondent, other than simply denying this assertion, did not adduce any evidence to the contrary.

In these circumstances, I am inclined to accept the version of the Petitioner more so as she was admittedly working in the Kandy Regional Office of the 1st Respondent at the relevant time. Hence the one month must start from 3rd June 2016.

This application was filed on 14th November, 2019. Nevertheless, the Petitioner had filed an application with the 16th Respondent on 9th June 2016. In terms of section 13(1) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996, where a complaint is made by an aggrieved party in terms of section 14 to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which

the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution.

The Court has interpreted this provision and the jurisprudence establishes the following principles:

(a) The initial view was that mere production of a complaint made to the Human Rights Commission of Sri Lanka within one month of the alleged infringement is sufficient to get the benefit of the provisions in section 13(1) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996 [***Romesh Coorey v Jayalath*** (2008) 2 Sri.L.R. 43, ***Alles v. Road Passenger Services Authority of the Western Province***, (S.C.F.R. 448/2009, S.C.M. 22.02.2013)].

(b) However, the correct position is that a petitioner must show evidence that the Human Rights Commission of Sri Lanka has conducted an inquiry regarding the complaint or that an inquiry is pending. Simply lodging a complaint is inadequate. [***Subasinghe v. Inspector General of Police,*** SC (Spl) 16/1999, S.C.M. 11.09.2000; ***Kariyawasam v. Southern Provincial Road Development Authority and 8 Others***, (2007) 2 Sri.L.R. 33; ***Ranaweera and Others v. Sub-Inspector Wilson Siriwardene and Others*** (2008) 1 Sri.L.R. 260; ***K.H.G. Kithsiri v Faizer Musthapha,*** (S.C.F.R. 362/2017, S.C.M. 10.01.2018); ***Wanasinghe v. Kamal Paliskara and Others,*** (S.C.F.R. 216/2014, S.C.M. 23.06.2021)].

(c) A party cannot benefit from the provisions in section 13(1) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996 where the complaint to the Human Rights Commission is made one month after the alleged violation [***Alagaratnam Manoranjan v. G.A. Chandrasiri, Governor, Northern Province,*** (S.C.F.R. 261/2013, S.C.M. 11.09.2014)]

(d) The provisions of section 13(1) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996 is not available to a petitioner who has made a complaint to the Human Rights Commission only to obtain an advantage by bringing his application within Article 126(2) of the Constitution [***K.H.G. Kithsiri v Faizer Musthapha,*** (S.C.F.R. 362/2017, SCM 10.01.2018)]

In this case, the evidence establishes that the Petitioner made a complaint to the 16th Respondent on 9th June 2016 and that a recommendation was made on 16th September 2019 directing the 1st Respondent to grant the Petitioner her due promotion on or before 22nd October, 2019. As a result, the Petitioner is entitled to the benefit of subsection 13(1) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996.

Nevertheless, the 1st Respondent submitted that the application should have been filed within one month of the date on which the recommendation of the 16th Respondent was received by the Petitioner. This submission is simply untenable.

Where a party has made a complaint to the Human Rights Commission against an alleged infringement or imminent infringement within one month of the alleged infringement or imminent infringement and the Human Rights Commission has begun an inquiry, the time for the purposes of Article 126(2) of the Constitution stops running. The aggrieved party may then invoke the jurisdiction of this Court after one month from the deadline set by the Human Rights Commission for compliance with its recommendation.

Admittedly, the Petitioner received the recommendation of the 16th Respondent on 20th September, 2019. Nevertheless, the Human Rights Commission had given the 1st Respondent time until 22nd October, 2019 to implement the recommendation. There was no compulsion on the Petitioner to come before Court before the expiry of the time given to the 1st Respondent to implement the recommendation.

The 14th Respondent, General Manager of the 1st Respondent, by letter dated 17th October 2019 informed the 16th Respondent, with copy to the Petitioner, that the recommendation of the 16th Respondent cannot be implemented for the reasons mentioned. The Petitioner invoked the jurisdiction of this Court on 15th November, 2019, within one month of the date given to the 1st Respondent to implement the recommendation of the 16th Respondent and within one month of the intimation that the recommendation cannot be implemented, whichever is considered. Accordingly, I find that the Petitioner has invoked the jurisdiction of the Court within the prescribed period.

Interview Process

The affidavit of Mohammed Faum, then Acting Deputy Manager (Sales) of the 1st Respondent (P8) explains the contents of the discussion he had with the then Chairman of the 1st Respondent P. Dissanayake. This evidence supports the Petitioner's case that the interview procedure was flawed. The 11th Respondent was given the promotion as he was due to go on retirement. The 12th Respondent was given the promotion as she was making persistent requests for the promotion. This was made possible by giving both of them the full marks given for personality demonstrated at the interview. It is not common for a current employee to give evidence against the employer in support of a co-worker. I see no reason to doubt this evidence.

The 1st Respondent has failed to adduce any evidence to contrary. Neither the mark sheet nor the evidence of the interview panel was produced. Instead, the 1st Respondent has sought to establish that the service record of the Petitioner is unsatisfactory. Nevertheless, as correctly observed by the Human Rights Commission, the Petitioner has been awarded the full 15 marks for Service Evaluation. This is not possible without a satisfactory service record.

The 1st Respondent also filed several documents dated June 2016 and thereafter to try and establish misconduct on the part of the Petitioner. They are irrelevant to the matter before the Court as the interview was conducted on 24th March 2016. The Petitioner alleges that these documents were issued after she went to the Human Rights Commission in order to penalize her for doing so. There seems to be some truth in this allegation.

According to the findings of the Human Rights Commission, the Petitioner had obtained a total of 80 marks at the interview as follows:

Experience	-	30 marks (maximum 30)
Educational Qualifications	-	25 marks (maximum 30)
Service Record	-	15 marks (maximum 15)
Personality demonstrated at the interview	-	10 marks (maximum 25)

The 11th Respondent received a total of 85 marks and the 12th received a total of 84 marks. Both had ultimately received more marks than the Petitioner because of the marks they had obtained for personality demonstrated at the interview. The Petitioner obtained more marks for all the other categories than the 11th and 12th Respondents. This evidence corroborates the uncontradicted evidence of Mohammed Faum, then Acting Deputy Manager (Sales) of the 1st Respondent.

In this case, meritocracy had given way to kakistocracy. The decision to promote the 11th and 12th Respondents instead of the Petitioner has been taken on extraneous considerations and hence is arbitrary.

Accordingly, I declare that the 1st Respondent has infringed the fundamental rights guaranteed to the Petitioner in terms of Article 12(1) of the Constitution by failing to give her the due promotion.

In the exercise of the just and equitable jurisdiction conferred on Court in terms of Article 126(4) of the Constitution, I make the following directions:

(a) The Petitioner should be promoted as Deputy Manager (Human Resources) with effect from the date on which the same promotion was granted to the 11th and 12th Respondents. If the 11th and 12th Respondents were promoted on two different dates, the promotion of the Petitioner should be made effective from the earliest date.

(b) In the event that there are no cadre vacancies, the promotion of the Petitioner as Deputy Manager (Human Resources) should be made as being personal to her. There is no need for the 1st Respondent to obtain the approval of any other body to give effect to this direction of Court.

(c) The Petitioner is entitled to all the back wages and other monetary and non-monetary emoluments which is made to Deputy Manager (Human Resources).

(d) The Petitioner is entitled to all statutory dues from the date of her promotion as Deputy Manager (Human Resources).

The 1st Respondent shall in addition, pay Rs. 1,00,000/= as costs of this application to the Petitioner.

Judge of the Supreme Court

Murdu N. B. Fernando, PC, J.

I agree.

Judge of the Supreme Court

Kumuduni 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 under and in terms of Article 17 and 126 of the Constitution of the Republic.

SC/FR No. 591/2012

1. H.K.W.K.Hitibandara,
   208, Hitibandara Mawatha,
   Udawela, Ibbagamuwa.

2. N.M.A. Kumara Nawarathna,
   "Sriyawasa"
   Ginigathgala,Haldummulla.

3. G.T.K. Sampath Perera,
   59, Janatha Mawatha,
   Nawinna, Maharagama.

4. Gamunu Sujith Uduwana,
   211, Uduwana, Homagama.

5. K.K.ChampaShiromalie,
   341/C, Thannahena,
   Bengamuwa.

6. R.D.J. Udaya Rajapaksa,
   698/121, Kahagolla Waththa,
   Boralankada, Pilessa,
   Kurunegala.

7. W.R. Ranjith Prematilake,
   Thambiyagama,

Magulagama

8. J.S.N. Priyadarshana
   Dharmawardena,
   "Subhashini", Banduragoda Road,
   Naranwatta, Veyangoda.

9. M.L. Pushparani Gunasekara,
   111/D/26, Kahanthota Road,
   Malabe.

10. D.M.Nandasiri Bandara,
    64, Gangoda Arawa,
    Mari Arawa, Monaragala.

11. W.H.D.C. Prabhath Wijesooriya,
    352/A, Nilpanagoda,
    Minuwangoda.

12. Vidhana Pathiranage Lalith,
    80, Gramasanwardana Mawatha,
    Molligoda, Wadduwa.

13. Marakkala Manage Darshani,
    374/9A, Sangananda Mawatha,
    Nalluruwa, Panadura.

14. Y.G.R. Ishanthi Kulathilaka,
    "Deepani",
    Waldura.

15. Siwasamy Thanabalasinham,
    "Thanamathy Illam"

Panichchavil, Kottanthivu. (Postal Code 61252).

16. B.G.Kumari Pramalatha,
560B, Bopettha,
Getahetthta.

17. ChandraniJayawickrama,
Jayasewana, Madugata,
Neluwa.

18. Jayasampath Liyanage, Siripura,
Dodangoda,
Kaluthara South.

PETITIONERS

vs.

1. Director General,
Department of Census and Statistics,
4th and 5th Floors, Rotunda Tower,
109, Galle Road, Colombo 03.

2. Dharmasena Dissanayake, Chairman

3. Prof. Hussain Ismail, Member

4. Ms. D. Shirantha Wijeyathilaka
Member

5. Dr.Pradeep Ramanugam, Member

6. Mrs. V. Jegarasasingham, Member

7. Santi Nihal Seneviratne, Member

8. S. Ranugge, Member

9. D.L. Mendis, Member

10. Sarath Jayathilaka, Member
    The 2nd to 10th Respondents of the
    Public Service Commission,
    No. 1200/9, Rajamalwatte,
    Road, Battaramulla.

11. Secretary, Ministry of Finance and
    Planning, The Secretariat,
    Colombo 01.

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

13. Statistician's Association
    (P.O. Box 563) No. 15/12,
    Maitland Crescent,
    Colombo 07.

RESPONDENTS

BEFORE : **S. THURAIRAJA, PC, J**
A.L SHIRAN GOONERATNE, J AND
JANAK DE SILVA, J

COUNSEL : Faisz Musthapha, PC Keerthi Thillekaratne for Petitioners
M. Gopallawa, SDSG for 1st – 12th Respondents
Saliya Pieris, PC with Anjana Rathnasiri for 13th Respondent.

WRITTEN SUBMISSIONS : Petitioners on 27th January 2021

1st – 12th Respondents on 07th January 2021

13A Respondent on 04th September 2020.

ARGUED ON : 27th July 2022

DECIDED ON : 14th December 2022

S. THURAIRAJA, PC, J.

The 1st to 18th Petitioners are citizens of the Republic, attached to the Department of Census and Statistics. The Petitioners joined the said Department as Senior Statisticians, after sitting for an open competitive examination (as external candidates). The Petitioners state that they are all graduates with Honours passes from various Universities in Sri Lanka. As per the Petitioners, currently there are approximately 41 Senior Statisticians in the Department of Census and Statistics and the Petitioners were the last batch to be so appointed.

The 1st Respondent is the Director General of the Department of Census and Statistics, the 2nd to 10th Respondents are the Chairman and members of the Public Service Commission, the 11th Respondent is the Secretary of the Ministry of Finance and Planning and the 12th Respondent is the Hon. Attorney General. The 13th Respondent is the Statistician's Association.

The Petitioners filed an application under Articles 17 and 126 of the Constitution for the alleged infringement of their Fundamental Rights guaranteed under Article 12(1) of the Constitution against the 1st – 13th Respondents.

The Facts

The Petitioners state that they were appointed as Senior Statisticians, to the Department of Census and Statistics (hereinafter referred to as Department), after an

open competitive examination and interviews. As per the Petitioners, there was delay and various representations involved in their appointment.

As stated by the Petitioners, by Gazette dated 22/07/2005, applications were called from internal and external candidates for the post of Senior Statistician. The said Gazette (at Clause 8 thereof) provided for 50% of the existing vacancies to be filled by internal candidates and the Petitioners were aware that approximately 42 vacancies existed at the time. However, the Petitioners were not appointed as Senior Statisticians.

Petitioners state that examinations were held in or around February 2006, and the results were subsequently released in or around September 2006. As per the results released, they had passed and their names were on the pass list. However, the Petitioners had not been appointed as Senior Statisticians. Upon becoming aware that certain Trade Unions within the Department were objecting to external candidates being appointed, subsequently a committee was appointed by the then Director General of the Department to look into the same.

However, as the Petitioners were not appointed, they challenged the failure of the Department to appoint them as Senior Statisticians, by SC(FR) Application 431/2007, dated 06/12/2007 marked P2(a). Thereafter, by motion dated 03/04/2008 marked P2(b), (filed in the above application) the Hon. Attorney General informed the Supreme Court that the Public Service Commission (hereinafter referred to as PSC) had agreed to proceed with the open recruitment process for the post of Senior Statisticians. Therefore, in view of such undertaking, on 05/05/2008, the Petitioners withdrew the said application, and were of the legitimate expectation that their appointments would soon follow.

Petitioners state that, in or around 28/05/2009, fresh interviews were held for the post of Senior Statisticians, but appointments were delayed. On inquiry, the Petitioners were informed that the final list for appointments had been forwarded to the Ministry of Finance and Planning, but appointments could not be made pending

the hearing of SC(FR) Application 292/2005. On conducting a survey, the Petitioners of the instant case became aware that the Petitioners in SC(FR) Application 292/2005, could not be considered for appointment as Senior Statisticians, as they had not sat and passed the open competitive examination (as external candidates) held in or around February 2006 (which the Petitioners had sat for and passed). Therefore, the Petitioners sought to intervene in the aforesaid SC(FR) Application 292/2005, by Petition dated 10/09/2009 marked P2(d). However, on 18/09/2009, the Supreme Court refused leave to proceed to the Petitioners in SC(FR) 292/2005. Thus, removing any alleged obstruction to the Petitioners in the instant Application being appointed as Senior Statisticians. Thereafter, the Petitioners state that they were appointed as Senior Statisticians, and were placed in the 8th step of the SL-1-2006 Salary Scale.

Upon being appointed to the Department as Senior Statisticians, in or around October 2009, the Petitioners became aware of a move to draft a Scheme of Recruitment for Officers of the Department, by abolishing the position of Senior Statisticians, thereby considering both Senior Statisticians and Statisticians as one position. Therefore, by letter dated 25/11/2009 marked P4(a), the 1st to 13th Petitioners sought information about the proposed change, and an opportunity to be heard. By letter dated 12/03/2010 marked P4(b), the Petitioners were informed that in the new proposed Scheme of Recruitment there was provision for promotion to Deputy Director (Statistics). The said letter engendered in the Petitioners the apprehension that as they had only 6 months experience as of now, they should first acquire the necessary experience before aspiring to any promotions.

According to the Petitioners, they were of the apprehension, that between 2009 and 2010, a committee had been formed, and several discussions had been held between the Department and other stakeholders regarding the new draft Scheme of Recruitment. However, the Petitioners state that they were not privy to any such discussion, and were not permitted to make any representations therein. Therefore, by letter dated 25/02/2010 marked P5(a), several of the Petitioners sought permission to

make representations regarding the said new draft scheme. However, by letter dated 31/03/2010 marked P5(b), the Petitioners were informed, inter alia, that no such committee had been appointed.

Thereafter, the Petitioners had formed the Senior Statisticians (Open) Officers Association, a Trade Union, and through such Trade Union, sought to be included in any further discussions held. The Petitioners became aware of a subsequent move within the Department to cease further steps regarding the said new draft Scheme of Recruitment, and in lieu of the same, to draft a Service Minute.

The Petitioners further state that, on or around 21/07/2011, a meeting was held between, the 11th Respondent, and various other Stakeholders in the Department. Several Petitioners were present at the Meeting. At the said meeting it was disclosed that the new draft Scheme of Recruitment was before the PSC, however, it had been decided by the Department to stop proceeding with the same, and to draft a Service Minute instead. It was further disclosed that a committee would be appointed headed by D.C.A. Goonewardene, the then Director (Prices and Wages Division), to prepare the draft of the said Service Minute.

Accordingly, by letter dated 21/07/2011 marked P7(a), the Petitioners immediately sought to be included in any discussions conducted by the said committee, in drafting the said new Service Minute. By letter dated 22/08/2011 marked P7(b), their request was denied, as allegedly one U. Vasana Jayakody represented Senior Statisticians before the said Committee. However, the Petitioners specifically state that the said Jayakody did not sit for the open competitive examination with the Petitioners, thus had no connection to the Petitioners. She had not been elected by the Petitioners to represent them and in any event, she does not represent the views of the Petitioners. Therefore, by letter dated 31/08/2011 marked P7(c), the Petitioners objected to the same, and sought to be permitted to make necessary representations, to no avail. The Petitioners received no reply to the same.

Moreover, the Petitioners state that on or around 06/09/2011, the Petitioners were given a copy of the draft Service Minute, and their views regarding the same were immediately called for within a day. By letter dated 07/09/2011 marked P8, the Petitioners submitted their representations but received no reply to the same.

Thereafter, from January till April 2012, the Petitioners state that they were engaged in carrying out their duties in the field for conducting a Population and Housing Census. The Petitioners state that during this time, whilst in the field, by letter dated 26/01/2012 marked P9(a), the Petitioners were forwarded a copy of a new draft Service Minute marked P9(b), seeking their representations regarding the same. Due to the aforesaid Census, they were unable to properly respond, however, by letter dated 04/02/2012 marked P9(c), the Petitioners replied stating inter alia, that the seniority of the Petitioners be maintained, and drew special attention to Clause 23 of the said draft Service Minute, challenging the proposed move of placing the Petitioners in Grade III, and/or placing those currently in a lower substantive position than the Petitioners, in a higher grade (Grade II).

The Petitioners state that on making inquiries from the Department, they were informally informed that there was a move to revive the drafting of a new Scheme of Recruitment, which had previously been abandoned, and therefore, the Petitioners made several requests to be furnished with a copy of the said proposed draft to no avail. On 16/02/2012, the Petitioners submitted a complaint to the Human Rights Commission, under reference HRC 847/12, regarding inter alia, the proposed drafts.

By letter dated 11/05/2012 marked P12(a) issued by the Department, the Petitioners were informed that a Scheme of Recruitment marked P12(b), had been approved, and the Petitioners were supplied with a copy of the same. The Petitioners state that to the best of their knowledge such new Scheme of Recruitment is still not in use.

The Petitioners state the following with regard to the said new Scheme of Recruitment. According to Annexure VII (02) (b) of the said new Scheme of Recruitment, those Statisticians and Senior Statisticians, who fulfil all the relevant criteria set out in Clause 10.1.1.1 of the new scheme will be placed in Grade II, whereas those who do not, will be placed in Grade III. The said Clause 10.1.1.1 provides inter alia, that an individual must have 10 years' service period in Grade III, to be promoted to Grade II. The Petitioners state that thus Statisticians, have an opportunity to be placed in Grade II, prior to the Petitioners who are Senior Statisticians, regardless of whether those Statisticians have sat for the Senior Statisticians examination or not. Therefore, those in a lower grade than the Petitioners have the opportunity to be promoted prior to the Petitioners and thus have more promotional aspects.

By letter dated 06/05/2012 marked P13, the Petitioners were informed that as a new Scheme of Recruitment had already been approved by the PSC, there would not be a new Service Minute drafted for the Department, on the instructions of inter alia, the PSC.

The Petitioners state that to the best of their knowledge, though the new Scheme of Recruitment has not as yet been implemented, they are now aware of Gazette dated 21/09/2012 marked P14, calling for applications to fill vacancies for the post of "Statistician Executive Class III", purportedly under the new scheme. The Petitioners verily believe that steps are being taken to implement the new Scheme of Recruitment. According to the Petitioners the said Gazette does not disclose the number of vacancies available. The Petitioners are not aware whether the PSC and other authorities have approved the said new scheme.

The Petitioners state that, in the premises as hereinbefore more fully enumerated, the new Scheme of Recruitment would have several adverse consequences. These include placing those currently in positions/ grades lower to the Petitioners in a higher position/ grade. As such, the failure to consider the Petitioners'

current position/ grade and seniority, is unlawful, irrational, capricious, and a violation and/or continuous violation of their fundamental rights as guaranteed by Article 12(1) of the Constitution. Petitioners believe that the aforesaid actions of the Respondents amount to executive and/ or administrative actions within the meaning of Article 17 and 126 of the Constitution. Hence, the Petitioners prayed for an order to quash the new Scheme of Recruitment marked P12(b) in so far as it is applicable to the Petitioners who are presently holding Senior Statisticians position on the basis of the examination held in February 2006.

Objections of the Respondents

As per the preliminary objections filed by the 1st – 12th Respondents, they claim that the Petitioners were aware of the adoption of the Scheme of Recruitment and Promotion in respect of the Executive Category of the officers of the Department marked 1R1/ P12(b) at least from 06/05/2012. The Petition is filed on 09/10/2012, hence the 1st – 12th Respondents states that the Petition is filed out of time and must be dismissed in limine.

According to the Respondents the Petitioners were aware or could reasonably be expected to be aware that action would be taken to restructure the salaries and cadre in the Department pursuant to their appointment to conform to the provisions of the said Public Administration Circular No.6/2006.

Furthermore, the Respondents state that, the Scheme of Recruitment and Promotion marked 1R1/ P12(b), was formulated after entertaining and considering the views of all stakeholders in the Department and for such purpose, discussions were held with various Trade Unions. Views of the Trade Unions were consulted when the Service Minute for Sri Lanka Statistical Service was drafted prior to finalisation and submission for approval. Further, representations were received from several Trade Unions including the Trade Union representing the officers who had been recruited to the post of Senior Statistician.

Accordingly, the Respondents state that the provisions of recruitment and promotion are included in the Schemes of Recruitment that had been duly approved by the PSC on 27/01/2012 as well as the Cabinet of Ministers marked 1R8, and was since in force. It was also stated that the PSC had adopted the same standard format in its Guidelines for Schemes of Recruitment and Service Minutes prepared in accordance with the provisions of Public Administration Circular No. 6/2006.

The 1st Respondent states that the Scheme of Recruitment and Promotions in respect of the Executive category of the Department was never abandoned and that a Service Minute marked 1R7, for Sri Lanka Statistical Service was never adopted. Further, the said Scheme has been formulated in accordance with the law and upon a rational and reasonable basis.

The Respondents further state that the said Scheme was introduced in conformity with the Public Administration Circular No.6/2006, and contains a more rational and reasonable categorization of employees based on actual service and experience. It has also expanded opportunities for promotion, without compromising the service standards required by the Department. For instance, the said Scheme has introduced a time-based promotion from Grade III to Grade II (clause 10.1.1.1.(ii)), whereas promotion to the next higher post of Deputy Director was entirely dependent on the availability of cadre vacancies (which were very limited).

Respondents state that the said Scheme has been in operation since the approval of the PSC was granted on 06/05/2012. Therefore, the 1st – 12th Respondents state that Petitioners are collaterally and belatedly canvassing the provisions of the Public Administration Circular 6/2006 and on this basis, the application of the Petitioners has been filed out of time provided by law as it has only been filed on 09/10/2012.

Time Bar

Article 17 of the Constitution read with Article 126(2) requires a fundamental rights application in respect of an infringement or imminent infringement by executive or administrative action to be filed within one month of the alleged violation. The time limit of one month prescribed by Article 126(2) has been considered by this Court on many an instance and the said provision has been treated as mandatory, as held in the case of **Gamaethige vs Siriwardana (1988) 1 SLR 384** by Hon. Mark Fernando J,

> *"The time period of one month prescribed by Article 126(2) has been consistently treated as mandatory".*

Furthermore, as held by Hon. Prasanna Jayawardane PC, J in the case of **Demuni Sriyani De Soyza and others v Dharmasena Dissanayake, Public Service Commission and others SC/FR 206/2008 (S.C. Minutes dated 9th December 2016)**,

> *"Where the time period of one month to be computed not from the date of occurrence of the alleged infringement but from the day the Petitioner becomes aware of the alleged infringement".*

Therefore, in the instant case, I find it pertinent to determine the date on which the Petitioners have knowledge of the alleged violation. As stated by the Respondents in their objections, the Petitioners became aware of the adoption of the said Scheme of Recruitment at least from 06/05/2012. This was also admitted by the Petitioners in their Petition, that they were informed that the said Scheme was approved by the PSC by letter dated 06/05/2012 marked P13.

Moreover, the Petitioners state that by letter dated 11/05/2012 marked P12(a), the Petitioners were informed that the said Scheme was approved and were supplied with a copy of the same.

On perusing the documents before me, it is clear that the Petitioners became aware of the alleged infringement during the month of May 2012, whereas, the Petition

was filed on 09/10/2012, over 4 months after the alleged violation. It was on this basis that the Respondents 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.

In the case of **Ilangaratne vs. Kandy Municipal Council (1995 BALJ Vol.VI Part 1 p.10)** Hon. Kulatunga J observed that,

> *"the result of the express stipulation of a one month time limit in Article 126(2) is that,* ***this Court has no jurisdiction to entertain an application which is filed out of time*** *– ie: after the expiry of one month from the occurrence of the alleged infringement or imminent infringement which is complained of…….. if it is clear that an application is out of time, the Court has no jurisdiction to entertain such application"*
>
> *(Emphasis added)*

> *"… the general rule that had emerged is that, this Court will regard compliance with the one-month limit stipulated by Article 126(2) of the Constitution as being mandatory and refuse to entertain or further proceed with an application under Article 126(1) of the Constitution, which has been filed after the expiry of one month from the occurrence of the alleged infringement or imminent infringement.*

The Petitioners in the instant case, has neither adduced any evidence to show that there has been an inquiry on the said Scheme pending before the Human Rights Commission nor made any attempt to explain the long delay in filing this application. The Petitioners have not given any reasons for being unable to file the application within 30 days from the alleged infringement.

Although the Petitioners have submitted a complaint to the Human Rights Commission on 16/02/2012 as it was only regarding the proposed draft of the said

Scheme and filed prior to the approval and passing of the Scheme of Recruitment this does not negate the application of time bar as enumerated above.

Thus, for the foregoing reasons, I conclude that the Petitioners have failed to file the instant application within the one-month time period stipulated in Article 126 (2) of the Constitution. Therefore, I uphold the preliminary objection raised by the Respondents that the application is time barred and proceed to dismiss this application.

Application Dismissed.

JUDGE OF THE SUPREME COURT

A.L SHIRAN GOONERATNE, 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 & 126 read with Articles 3, 4, 12, 82(6) and 125 of the Constitution.

Nagananda Kodituwakku
General Secretary,
Vinivida Foundation,
99, Subadrarama Road,
Nugegoda.

Petitioner

S.C.F.R. Application No: 205/2022

Vs.

1. Election Commission
   Elections Secretariat,
   P.O. Box 02, Sarana Mawatha,
   Rajagiriya.

2. Nimal G. Punchihewa
   Chairman, Election Commission,
   P.O. Box 02, Sarana Mawatha,
   Rajagiriya.

3. S.B. Divarathna
   Member, Election Commission,
   P.O. Box 02, Sarana Mawatha,
   Rajagiriya.

4. M. M. Mohomed
   Member, Election Commission,
   P.O. Box 02, Sarana Mawatha,
   Rajagiriya.

5. K. P. P. Pathirana
   Member, Election Commission,
   P.O. Box 02, Sarana Mawatha,
   Rajagiriya.
6. Mrs. P. S. M. Charles
   Member, Election Commission,
   P.O. Box 02, Sarana Mawatha,
   Rajagiriya.

7. Sagara Kariyawasam
   General Secretary,
   Sri Lanka Podujana Peramuna,
   1316, Nelum Mawatha,
   Battaramulla.

8. Akila Viraj Kariyawasam
   General Secretary,
   United National Party,
   400, Sirikotha,
   Pitakotte, Kotte.

9. Ranil Wickramasinghe,
   Prime Minister,
   58, Sir Earnest De Silva Mawatha,
   Colombo 7.

10. Dhammika Perera
    Member of Parliament,
    Parliament of Sri Lanka,
    Sri Jayawardenapura,
    Kotte.

11. Attorney General
    Attorney General's Department,
    Colombo 11.

Respondents

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

A.L. Shiran Gooneratne, J.

Janak De Silva, J.

Counsel:

Petitioner appears in person.

Ronald Perera P.C. with Eraj De Silva for the 9th Respondent.

Kanishka Balapatabendi DSG with I. Randeni SC for the 11th Respondent.

Supported On: 18.07.2022

Decided On : 19.07.2022

ORDER OF COURT

The Petitioner is seeking to impugn the election of the 9th and 10th Respondents as Members of Parliament from the National Lists of the United National Party and the Sri Lanka Pudujana Peramuna respectively.

The application was filed on 16th June 2022. It was referred to the Listing Judge on 20th June 2022 who made an order on the same day directing to issue notice on the Respondents and to list the application for support on 6th July 2022.

It appears that the Registry of the Supreme Court had thereafter sent the notice to the Hon. Attorney-General, the 11th Respondent, on 22nd June 2022 by hand. On the same day, a journal entry had been made by the Registry that the Attorney-at-Law has not tendered notice up to date in terms of the order dated 20th June 2022.

In fact, the Petitioner had failed to comply with the direction dated 20th June 2022 even by the time the application was taken up for support on 6th July 2022. The journal entry reflects that on that day, the Petitioner had informed Court that he had filed a motion requesting His Lordship Hon. Chief Justice to nominate a Special Bench for this application. The Court having observed that the said motion was not in the brief, directed this matter to be mentioned on 15th July 2022 to ascertain whether His Lordship Hon. Chief Justice has made an order with regard to the request made by the Petitioner to have a Special Bench nominated to hear this matter.

His Lordship Hon. Chief Justice had made order on 12th July 2022 refusing the application of the Petitioner to constitute a Special Bench and recorded his reasons for the refusal. He further directed that this matter be listed for support on urgent basis on 14th July 2022 before any Bench with notice to the Hon. Attorney-General and Other Respondents.

Thus, by 12th July 2022, there were two orders made, one by the Listing Judge on 20th June 2022 and the other by His Lordship Hon. Chief Justice on 12th July 2022, directing that, in addition to the Hon. Attorney-General, notice be served on all the other Respondents. Nonetheless, the Petitioner had failed to comply with these orders.

Notwithstanding the lack of due diligence shown by the Petitioner in failing to tender the required notices, it appears that the Supreme Court Registry had on 12th July 2022 acting pursuant to the order of His Lordship Hon. Chief Justice, prepared notices to be sent to all the Respondents. However, there is no journal entry to indicate that they were in fact dispatched.

The Hon. Attorney-General was the only party represented when the matter was taken up for support on 14th July 2022 as directed by His Lordship Hon. Chief Justice. Court was mindful of the fact that, specially in the circumstances of this case where the Petitioner is seeking interim relief staying the 9th and 10th Respondents from occupying office as duly 'elected' Members of Parliament under Article 99A and sitting and voting in the Parliament and/or in the office of the Cabinet of Ministers, it was incumbent on the Petitioner to serve notice on the 9th and 10th Respondents before seeking interim relief from Court.

In ***Ittepana v. Hemawathie*** **[(1981) 1 Sri.L.R. 476 at 483]** Sharvananda J. (as he was then) quoted with approval the following extract from Black on Judgments:

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

The fundamental rights jurisdiction of Court includes the power to make interim orders **[*Jayanetti v. Land Reform Commission and Others* [(1984) 2 Sri.L.R. 172 at 180]**. No doubt there may be instances where the Court, in exercising its jurisdiction in terms of Article 126(4) of the Constitution, may have to grant interim relief without hearing the party affected in the first instance in the interest of justice. Nonetheless, this is not such a case as the failure to serve notices on the 9th and 10th Respondents prior to supporting for interim relief occurred due to the lack of diligence shown by the Petitioner.

In these circumstances, on 14th July 2022 Court directed the Registrar to take steps to serve notices on the 1st to 10th Respondents. On that date the Petitioner moved that this matter be taken up on an urgent basis and requested that it be listed for support on 18th July 2022. However, Court pointed out that there must be sufficient time given for notice to be served on the 9th and 10th Respondents and for them to obtain legal representation and offered to list the matter for support on 20th or 21st of July. However, the Petitioner informed that he was due to proceed to UK for the graduation of his daughter and hence those two days were not suitable. He further informed that he was due to return to Sri Lanka only on 20th August 2022. Accordingly, Court fixed this matter for support on 29th August 2022.

However, the Petitioner filed a motion on the very next day, 15th July 2022, claiming that the visa interview scheduled for 14th July 2022 was cancelled due to the imposition of curfew by the Government and therefore the Petitioner's visit to UK has become uncertain. He moved that this matter be fixed for support of interim relief on 18th July 2022 and informed Court that he had taken steps to serve notices on the 9th, 10th and 11th Respondents by courier service. The Listing Judge had directed that this motion be supported on 18th July 2022.

On that day, only the 9th and 11th Respondents were represented. The learned President's Counsel for the 9th Respondent informed Court that his client had not been served with notice but had become aware of the proceedings and obtained a copy of the petition from the Attorney-General's department.

In view of the facts pleaded by the Petitioner in his motion dated 15th July 2022, Court made inquiries from the Petitioner about his proposed travel to UK and its subsequent cancellation as alleged by him as the Court was concerned about the veracity of the position outlined to Court by the Petitioner about his proposed travel to the UK. The Petitioner informed that he became aware of the cancellation of the visa interview only on 15th July 2022 after appearing in this case on 14th July 2022, and on his own volition produced his telephone to Court and drew attention to two notices received regarding the visa interview. These two notices were subsequently filed by motion by the Petitioner as directed by Court.

We observed that there was one e-mail informing of the closure of the Visa Application Centre on 14th July 2022. However, that email had been received by the Petitioner on 13th July 2022 at 6.22 p.m. Thus, it became clear that contrary to his intimation to Court, the Petitioner was aware by the time he appeared before Court on 14th July 2022 that his visa interview scheduled for 14th July was cancelled [Vide documents marked EM1 and EM2 annexed to the motion dated 18th July 2022]. His statement to Court on 14th July of his impending travel to the UK on 20th July 2022 appears to have been an attempt to obtain an early date to support this matter by misrepresenting facts. We wish to place on record that such conduct is unbecoming of any counsel and a breach of his professional obligations to Court.

Nonetheless, we permitted the Petitioner to support his application against the 9th Respondent but made it clear that we are not inclined to make any order against the 10th Respondent who was not represented before Court.

Both the learned DSG and the learned President's Counsel for the 9th Respondent raised a preliminary objection that the application of the Petitioner is time barred.

In terms of Article 126(2) of the Constitution, a fundamental rights application must be filed within one month of the infringement of the fundamental right.

In ***Gamaethige v. Siriwardena and Others*** **[(1988) 1 Sri.L.R. 384 at 402]** Fernando J. held:

> *"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 (Siriwardena v. Rodrigo). The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in exceptional cases on 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."*

According to the petition, the election of the 9th Respondent as a Member of Parliament was published in the gazette on 18th June 2021. This application was filed on 16th June 2022 nearly one year after the 9th Respondent was declared elected as a Member of Parliament. Hence the application of the Petitioner is out of time and is liable to be dismissed in limine.

However, the Petitioner contended that the violation is of a continuing nature. In response, the learned President Counsel for the 9th Respondent pointed out that there is no averment in the petition that the alleged infringement is a continuing violation. Moreover, the learned DSG submitted that the question of a continuing violation does not arise as the Petitioner had previously challenged the election of the 9th Respondent as a Member of Parliament in S.C. (F/R) Application No. 200/2021.

The Petitioner has, at paragraph 9 of the petition, disclosed that he had challenged the election of the 9th Respondent as a Member of Parliament in S.C. (F/R) Application No. 200/2021. However, he claims, at paragraphs 11 and 21 of the petition, **that the said application was never allowed to be supported**.

We examined the case record of S.C. (F/R) Application No. 200/2021 and found that on 14th October 2021, the application was dismissed as the Petitioner was absent and unrepresented. Hence it is clear that the Petitioner had suppressed and misrepresented to Court the fact that S.C. (F/R) Application No. 200/2021 had been dismissed. It is incumbent on a Petitioner in a fundamental rights application to show *uberrima fides* and disclose to all material facts to Court. Failure to do so makes the application liable to be dismissed in limine.

In ***Jayasinghe v. The National Institute of Fisheries and Nautical Engineering (NIFNE) and Others*** **[(2002) 1 Sri.L.R. 277 at 286]** Yapa J. held:

> *"Any party who misleads Court, misrepresents facts to Court or utters falsehood in Court will not be entitled to obtain redress from Court. It is a well-established proposition of law, since Courts expect a party seeking relief to be frank and open with the Court. This principle has been applied even in an application that has been made to challenge a decision made without jurisdiction. Further, Court will not go into the merits of the case in such situations."*

The Petitioner responded that he had disclosed to Court by X5 appended to the pleadings that S.C. (F/R) Application No. 200/2021 had been dismissed. X5 is a motion filed in that case. However, the mere attachment of that motion to this application is insufficient given the fact that the Petitioner had specifically pleaded at paragraphs 11 and 21 of the petition, that the said application was never allowed to be supported. The dexterity of the Petitioner, where he makes a misstatement of a material fact in the body of the petition but the true state of facts is camouflaged in an appending document to the petition, does not provide an avenue for him to claim that all material facts have been disclosed to Court. Accordingly, the application of the Petitioner is liable to be dismissed for the Petitioner had suppressed from Court the material fact that S.C. (F/R) Application No. 200/2021 had been dismissed.

The crux of the case of the Petitioner against the 9th Respondent is Article 99A of the Constitution. He submitted that in terms of Article 99A, it was incumbent on the Secretary of the United National Party to nominate a person to fill the one seat obtained by the party on the National List at the General Elections 2020 within one week of the intimation made by the Election Commission by X2 dated 7th August 2020. This was not done. It was the contention of the Petitioner that due to such failure of the United National Party, the appointment of the 9th Respondent as a Member of Parliament under Article 99A of the Constitution is ab initio void and has no force in law.

The relevant part of Article 99A of the Constitution reads:

> *"Where a recognized political party or independent group is entitled to a seat under the apportionment referred to above, the Election Commission shall by a notice, require the secretary of such recognized political party or group leader of such independent group to nominate within one week of such notice, persons qualified to be elected as Members of Parliament (being persons whose names are included in the list submitted to the Election Commission under this Article or in any nomination paper submitted in respect of any electoral district by such party or group at that election) to fill such seats and shall declare elected as Members of Parliament, the persons so nominated."*

The Petitioner conceded that the 9th Respondent is qualified in terms of this provision as his name appeared in the nomination paper of the United National Party for the Colombo District. The challenge to his election was limited to the failure to comply with the one-week time limit.

At the outset we observe that neither Article 99A nor any other provision of the Constitution sets out the consequences on the failure of a recognized political party or independent group to nominate a qualified person for National List seats obtained by such party or group within one week of the intimation by the Election Commission.

Samarakoon C.J. in ***Visuvalingam and Others v. Liyanage and Others (No. 1)*** **[(1983) 1 Sri.L.R. 203 at 214-215]** held:

> *"For the purpose of deciding whether a provision in a constitution is mandatory one must have regard also to the aims, scope and object of the provision. The mere use of the word "shall" does not necessarily make the provision mandatory. Subba Rao,J. in the case of State of U.P. vs. Babu Ram stated the position thus-"When a statute used the word 'shall', prima facie , it is mandatory , but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."*

In terms of Article 3 of the Constitution, franchise forms part of the Sovereignty of the People. The National Seat that the United National Party obtained is a direct result of the exercise of the franchise by the people. Court must opt for an interpretation that protects and advances franchise and the Sovereignty of the People rather than one which stultifies it.

It has been held that franchise is part of the fundamental rights of a citizen. In the ***Twentieth Amendment to the Constitution Bill (2017)*** **[Decisions of the Supreme Court on Parliamentary Bills (2016-2017) Vol. XIII, page 126 at 136]** Court held:

> *"Right to vote is recognised as a fundamental right and denial or restriction of exercising the franchise amounts not only to violation of Article 10 and 14(1) of the Constitution but also attracts Article 3 of the Constitution."*

In terms of Article 4(d) of the Constitution, Court is bound to respect, secure and advance such fundamental rights and it should not be abridged, restricted or denied, save in the manner and to the extent specified in the Constitution. If the Court were to accept the submission of the Petitioner and hold that the appointment of the 9th Respondent is bad in law due to failure to comply with the one-week time frame, it will amount to the abridgment of the fundamental rights of the voters who voted for the United National Party for no fault of theirs and a violation of the Sovereignty of the people who voted for the United National Party.

Moreover, if the Court is to accept the submission of the Petitioner, it would amount to Court adding words to Article 99A of the Constitution which is not permissible **[*Stassen Exports Limited v. Brooke Bond (Ceylon) Limited and Another* (1990) 2 Sri.L.R. 63 at 75, 116-117; *Walgamage v. The Attorney-General* (2000) 3 Sri.L.R. 1 at 8-9].**

Furthermore, Article 69 of the Constitution establishes the power of Parliament to act notwithstanding any vacancy in its membership. This militates against accepting the submission of the Petitioner as it is clear that even where there is a failure on the part of a recognized political party or independent group to nominate a person or persons to the seats obtained on the National List within one week as required by Article 99A of the Constitution, the Parliament has the power to act.

We hold that the time limit of one-week in Article 99A is directory and not mandatory.

For all the foregoing reasons, we see no basis to grant leave to proceed and dismiss the application.

E.A.G.R. Amarasekara

Judge of the Supreme Court

A.L. Shiran Gooneratne

Judge of the Supreme Court

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 for Leave to Appeal in terms of Section 5C (1) of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006

SC/HCCA/LA/378/17

SC/HCCA/MA Appeal No. 36/2014(F)

DC Matara Case No. L/6664

Ransegoda Wimalasiri Thero,
of Morawaka Sriwijaya Pirivena
known as Ganegoda Rajamahaviharaya,
Morawaka

Plaintiff

Vs.

Dellawa Sisiela Thero (Deceased),
of Ganegoda Rajamahaviharaya,
Morawaka

Defendent

Dellawa Suneetha Thero,
of Ganegoda Rajamahaviharaya,
Morawaka

Substituted Defendant

AND BETWEEN

Dellawa Suneetha Thero,
of Ganegoda Rajamahaviharaya,
Morawaka

Substituted-Defendant-Appellant

Vs.

Ransegoda Wimalasiri Thero,
of Morawaka Sriwijaya Pirivena
known as Ganegoda Rajamahaviharaya,
Morawaka

Plaintiff-Respondent

AND NOW BETWEEN

Ransegoda Wimalasiri Thero (Deceased),
of Morawaka Sriwijaya Pirivena
known as Ganegoda Rajamahaviharaya,
Morawaka

Plaintiff-Respondent-Petitioner

Vs.

Dellawa Suneetha Thero,
of Ganegoda Rajamahaviharaya,
Morawaka

Substituted Defendant- Appellant-Respondent

An application for substitution on behalf of the deceased Plaintiff-Respondent-Petitioner Thero

Edandukitha Gnanasiri Thero,
Sri Wijaya Piriven Wiharaya,
Morawaka

Petitioner

Vs.

Dellawa Suneetha Thero,
of Ganegoda Rajamahaviharaya,
Morawaka

Substituted Defendant-Appellant-Respondent- Respondents

Before: Jayantha Jayasuriya, PC, CJ.
L.T.B Dehideniya, J.
Murdu N.B Fernando, PC, J.

Counsels: Ranjan Suwandarthna, PC for the Plaintiff-Respondent-Petitioner
Lakshman Perera, PC with Upendra Walgampaya for Defendant-Appellant–Respondent

Argued on: 05.12.2019
Decided on:08.03.2022

L.T.B. Dehideniya, J.

Plaintiff-Respondent-Petitioner (hereinafter sometime referred to as the Plaintiff) instituted this action in the District Court seeking for a declaration, that he is the Viharadhipathi of Ganegoda Rajamahaviharaya and for an order to evict the Defendant. The District Court delivered the Judgement in favour of the Plaintiff. While the case was pending before the District Court, the

Defendant Thero passed away and the present substituted Defendant-Appellants-Respondent's (hereinafter sometime referred to as the Respondent) name was entered in the room of the said deceased Defendant.

The Respondent appealed to the High Court of Civil Appeal and the said court set aside the judgement of the District Court. The Plaintiff filed the present leave to appeal application, challenging the said decision.

The law related to the substitution of a deceased Plaintiff was amended by the Civil Procedure Code Amendment Law No. 20 of 1977 when the Administration of Justice Law was repealed and the Civil Procedure Code was re-enacted. By the said law, only a next of kin of the deceased person was permitted to be substituted. This law has been changed several times and by the Civil Procedure Code (Amendment) Act No. 08 of 2017, the requirement to be a next of kin was removed. The scope of the Section was widened and the legal representative was permitted to be substituted.

The new Section reads as follows;

Section 398

"In case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of the deceased may, where the right to sue survives, apply to the court to have his name substituted on the record in place of the deceased plaintiff and the court shall thereupon cause an entry to that effect to be made on the record and proceed with the action."

The Section 398 applies only for a substitution in original Courts. For a substitution in the Appellate Court, Section 760(A) of the Civil Procedure Code applies. Section 398 has no

relevance in such a situation. The Section 760(A) was introduced to Civil Procedure Code by Civil Procedure Code (Amendment) Act No. 79 of 1988.

The Section reads as follows;

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 supreme court may in the manner provided in the rules made by the supreme court under article 136 of the Constitution determine. who, in the opinion of the court is the proper person to be substituted or entered on the record in place of, on 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."

Under this Section there is no requirement for the legal representative to be a next of kin. The only requirement is that the Court in its opinion consider whether a person is 'proper person' to be substituted and the idea of substitution is only to prosecute the Appeal. The Appellate Court will decide the rights and entitlements of the substituted person. The Supreme Court, by Supreme Court Rules of 1990 as promulgated the Rule No. 38 in relation to the substitution.

The Rule reads thus;

" *where at any time after the lodging of an application for special leave to appeal, or an application on the Article 126, or a notice of appeal, or the grant of special leave to appeal, or a grant of leave to appeal by the Court of Appeal, the record becomes defective by reason of the death or change of status of a party to the proceedings, the Supreme Court may , on application in that behalf made by, any person interested ,or ex mero motu, require such applicant , or the petitioner or appellant, as the case may be, to place before*

the Court sufficient material to establish who 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;

Provided that where the party who has died or undergone a change of status is the petitioner of appellant, as the case may be the Court may require such applicants or any party to place such material before the Court.

The Court shall thereafter determine who shall be substituted or added, and the name of such person shall thereupon be substituted, or added, and entered on the record as aforesaid. Nothing hereinbefore contain shall prevent the Supreme Court itself ex mero motu, where it thinks necessary, form directing the a substitution or addition of the person who appears to the Court to be the proper person therefore."

The Supreme Court also ruled that a proper person be substituted. There is no requirement to be a next of kin.

In the case of ***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, solely for the purpose of prosecuting the Appeal.

The counsel for the Respondent argued that, it has been decided in the case of ***T.Pannanada Thero Vs. G. Sumangala Thero*** 68 NLR 367 that, only a lawful pupil of the deceased Viharadhipathi can be substituted. When this case was argued, Section 760(A) was not in the Civil Procedure Code. Section 760(A) initially came into operation by Section 113 of the Civil

Procedure Code (Amendment) Law No. 20 of 1977 and was later substituted by Section 50 of the Civil Procedure Code (Amendment) Act No.79 0f 1988.

At the time that the said case was argued (in 1965) Section 760(A) was not the law. It was the Civil Procedure Code even prior to the Administration of Justice Law. Under the said law, procedure in the Appellate Court was to send the case back to the District Court to enter substitution. In this case when it was sent to the District Court, the Learned Judge of the District Court has refused application for substitution on the basis that there was no legal provision which enabled the Petitioner to have himself substituted by way of summary procedure. Considering this situation, His Lordship, Justice H.N.G Fernando held that;

at p.368

"In my opinion the difficulty is met by Section 404 of the Civil Procedure Code. The title to temple property is vested by law in the controlling Viharadhipathi for the time being (subject of course to certain exceptional cases).Therefore, on the assumption that the deceased-plaintiff was the incumbent of the Vihare, then, on his death, the title to the temple property is vested by law in his successor. If, therefore, the present Petitioner is the lawful successor of the plaintiff, the title to the property, which is the subject of this action, has now vested in him. The position taken up by the petitioner, therefore, is that there has been by operation of law a creation or a devolution in his favour of interests in the lands which are the subject of this action; and if he can establish to the satisfaction of the District Court that he would be the successor in title to the incumbency upon the assumption that the deceased-plaintiff himself had been the incumbent, then the petitioner will be entitled to substitution under section 404.The

correctness of that assumption will of course have to be decided in the substantive appeal."

In the present action, the original Plaintiff in the plaint stated that the first Viharadhipathi who started the Ganegoda Rajamahaviharaya was Akmeemana Sobhitha Thero and on his demise his most senior pupil Wallakke Saddhananda Thero became the Viharadhipathi. The Saddhananda Thero had passed away in 1947 and the Plaintiff being the only pupil of the said Thero, he became the Viharadhipathi.The Petitioner's contention is that he being the most senior pupil of the deceased Plaintiff, he is entitled to be substituted.

As per the said decision in the ***T.Pannanada Thero Vs. G. Sumangala Thero,*** the Petitioner in present case is also the Thero who is entitled to be the Viharadhipathi, if the Plaintiff succeeds this action. Therefore, subject to the establishment of the correctness of the argument of the Plaintiff, the Petitioner becomes entitled to this substitution.

The Petitioner has tendered his Certificate of Higher Orientation (Declaration regarding Upasampada Bhikshu Under Section 41 of the Buddhist Temporalities Ordinance, No. 19 of 1931) marked as X7. Respondents argue that the tutor's name entered in the 7th paragraph of the said certificate is Ven. Wallakke Saddhananda Thero and the signature appearing W. Saddhananda in English characters had been placed in the certificate. Said Wallakke Saddhananda Thero had passed away in 1947 and there was no opportunity for the said Thero to sign this document. The Plaintiff also admitted that Wallakke Saddhananda Thero died in 1947 in paragraph 5 of the plaint. Therefore, if the Petitioner is relying on this Higher Ordination Certificate, he will have to establish the authenticity of the document. For the purpose of substitution, Court need not to rely on the document marked X7. The said deceased Plaintiff Thero by way of the deed No.4310 dated 10.03.2015 attested by D.A Pathma Shyamalee, Notary Public, appointed the Petitioner as the

controlling Viharadhipathi of the temple in issue. Under this circumstances the Petitioner has *prima facie* established that he is entitled to be substituted.

By considering above circumstances, I am of the view that the Petitioner is entitled to be substituted as the Substituted Plaintiff-Respondent-Appellant for the purpose of prosecuting this application. Further, after the substitution, this court orders to permit the Petitioner to file the amended caption and fix for support to Application for Leave to Appeal.

Judge of the Supreme Court

Jayantha Jayasuriya PC, CJ.
I agree

Chief Justice

Murdu N.B Fernando PC, J.
I agree

Judge of the Supreme Court

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

In the matter of an Application for Leave to Appeal in terms of Section 5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Chapter LV111 of the Civil Procedure Code from the Order/reasons of the Commercial High Court of Colombo dated 31st May 2022 consequent to an order made in the matter of an Application for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC HCCA LA 147/2022
WP/HCCA/COL/143/2022/LA
DSP/00136/22

Pattiyage Harsha Kamal Gomes
Sole Proprietor of
Vishmitha Enterprises
No.18, Turbo Houses
Pitawella Road
Boralesgamuwa

Plaintiff-Petitioner

Vs.

1. Sri Lanka Rupavahini Corporation
   P.O. Box 2204, Independence Square, Colombo 07.

2. Sonala Digath Weerawickrema.
Gunawardana
The Chairman
P.O. Box 2204, Independence
Square, Colombo 07.

Defendant- Respondents

2A. Asanka Priyanath Jayasuriya
The Chairman
P.O. Box 2204,
Independence Square,
Colombo 07.

Before	:	Jayantha Jayasuriya, PC, CJ L.T.B. Dehideniya, J A.L Shiran Gooneratne, J.
Counsel Alwis	:	Dislrukshi Dias Wickremasinghe, PC with Dilumi de and Sithari Perera instructed by Sanjay Fonseka for the Plaintiff-Petitioner Palitha Kumarasinghe, PC with Viraj Bandaranayake for the 1st and 2nd Defendant-Respondents.
Argued on	:	07.09.2022
Written Submissions filed on.	:	13.09.2022 by the 1st Defendant-Respondent 15.09.2022 by the Plaintiff-Petitioner
Decided on	:	26.09.2022

Jayantha Jayasuriya, PC, CJ

In this matter the Plaintiff-Petitioner-Appellant (hereinafter called the "appellant") invoked the jurisdiction of this Court by way of an application for leave to appeal in terms of section 5(2) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended, read with provisions of Chapter LVIII of the Civil Procedure Code.

Court heard the learned President's Counsel for the appellant, in support of granting leave to appeal. The learned President's Counsel for the respondent, while associating himself with the submissions made on behalf of the appellant, submitted that the issues raised in this matter needs early resolution as they revolve around proper administration of justice. It was further contended that the issues raised in the instant application involves practices and procedures adopted in the High Court of Western Province established under Article 154P of the Constitution, commonly referred to as the "Commercial High Court of Colombo" and vested with jurisdiction under section 2(1) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended.

Having considered the submissions of both President's Counsel, this court decided to grant leave on questions of law referred to in sub-paragraphs (a) to (h) of paragraph 18 of the petition of the appellant dated 16th June 2022. Having granted leave to appeal, this court taking into account the nature of the issue involved in this application, with the consent of learned President's Counsel for the appellant and the respondent, proceeded to hear the appeal forthwith.

The appellant in these proceedings is impugning the document produced marked 'A' - "Reasons for returning the District Court Colombo Case No. 00136/22 DSP" - made by Judge of Commercial High Court. The appellant is seeking this court *inter alia* to;

- set aside the said order / reasoning of the learned High Court Judge;

- make order directing the Learned High Court Judge to register the appellant's action in the Provincial High Court of the Western Province exercising civil and commercial jurisdiction or In the alternative make order directing the District Court Judge to register the appellant's action in the District Court of Colombo.

It is pertinent to observe that the aforesaid document signed by the High Court Judge is undated. Surprisingly it is copied to Director, Sri Lanka Judges Institute and the Secretary, Judicial Service Commission. These "reasons" are attached to a document

signed by the Registrar of the Commercial High Court addressed to the Registrar of the District Court of Colombo, dated 31 May 2022. These facts raise the issue as to whether the matter impugned is a judicial order. Nonetheless, I am of the view that the facts revealed in the course of the hearing warrants intervention of this court.

The letter dated 31 May 2022 signed by the Registrar of the Commercial High Court bears My No: KO/VANI/MAHADHI/LEKHA/2022 and Your Number: KO/DISA/ADHI/na.a.00136/22/DSP. By this letter, the registrar of the Commercial High Court informs the registrar of the District Court that the docket in the Colombo District Court Case No 00136/22 DSP is returned on directions of the High Court Judge, and the "Observations" of the High Court Judge are enclosed for the attention of the learned District Judge.

Before considering the contents of the impugned document signed by the High Court Judge it is necessary to set out all the facts and circumstances surrounding this matter to comprehend the exact issues raised before this court.

The appellant, who was aggrieved by the conduct of the respondent who terminated a commercial agreement between the two parties, initially had taken steps to institute action against the respondent in the Commercial High Court of Colombo. However, at that stage the Registered Attorney of the appellant had been informed, that the action could not be filed in the Commercial High Court as no monetary claim was sought. It is pertinent to note that no case had been registered, no case record had been constructed and no judicial order had been made by the Commercial High Court, at that stage. To utter surprise and dismay of this court it was the registrar or a clerk attached to the registry who had returned all the papers to the appellant on the basis that proceedings should be instituted in the District Court as the Commercial High Court has no jurisdiction.

The abovementioned events had resulted the appellant instituting action in the District Court, which had assigned the case number DSP 00136/2022. The appellant had claimed *inter alia* a declaration that the plaintiff is entitled to specific performance of the agreement and also had sought several injunctions against the defendant.

The learned District Judge thereafter had refused to issue an interim injunction at an *ex parte* hearing and the appellant being aggrieved by the said order had invoked the jurisdiction of the High Court of the Civil Appeals. In the High Court of the Civil Appeals, the respondent had raised an objection to the jurisdiction on the basis that the District Court had no jurisdiction to hear the matter instituted by the appellant. The Learned Judges of the Civil Appellate High Court having heard both parties by its' order dated 05.04.2022 directed the District Court to transfer the case to the Commercial High Court. It was in consequent to this order that the learned District Judge had transferred the case to the Commercial High Court and on 31.05.2022 the Registrar of the Commercial High Court had returned the case record back to the District Court with the 'observations' of the Judge of the Commercial High Court.

Learned President's Counsel for the Appellant as well as the learned President's Counsel for the respondent submit that it is the Commercial High Court which has the jurisdiction to hear the appellant's case. They contend that the judge of the Commercial High Court erred by directing the registrar of the Commercial High Court to return the case record back to the District Court. Furthermore, they submit that the procedure adopted by the Commercial High Court judge in this instance is unlawful and does not accord with the practice of the court.

It is pertinent to observe that the Commercial High Court is vested with the jurisdiction to hear and determine "civil actions and matters" as provided by the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended and the District Court was vested with such jurisdiction to hear and determine such matters prior to the enactment of the aforesaid Special Provisions Act. Chapter VII of the Civil Procedure Code sets out the mode of institution of action. Section 46(2) specifically identifies the situations in which the court, in its' discretion may refuse to entertain a plaint. While the Civil Procedure Code had made provision to take such measures, it is of immense importance that when refusing to entertain a plaint it is mandatory that the court acts as provided by section 48 of the Civil Procedure Code.

Section 48 of the Civil Procedure Code reads thus:

"Every order returning or rejecting a plaint shall specify the date when the plaint was presented and so returned or rejected, the name of the person by whom it was presented and whether such person was plaintiff or registered attorney, and the fault or defect constituting the ground of return or rejection; and every ***such order shall be in writing signed by the judge, and filed of record"****.* (emphasis added)

Therefore, a judicial order is a matter of *sine qua non* for the rejection or refusal to entertain a plaint, under the Civil Procedure Code. Leaving such process in the hands of an administrative officer – the registrar – is not only unlawful but is deplorable to say the least and such process cannot be condoned. Such process impacts on the proper administration of justice, adversely. Lawful procedures and practices should be adhered to by courts at all times and should not be compromised for convenience.

In my view, the Commercial High Court had failed to adhere to the procedure and practice as provided by law when it refused to accept and / or returned the plaint at the initial stage, which resulted in the appellant instituting action in the District Court under case number DSP 00136/2022.

Furthermore, the learned President's Counsel for the appellant submitted that the impugned document signed by the Commercial High Court judge which accompanied the letter signed by the registrar of the High Court on 31 May 2022 was made available only upon her insistence. This court observes that the said undated document signed by the judge of the Commercial High Court does not comply with section 48 of the Civil Procedure Code. Furthermore, I am surprised and fail to comprehend the reason the judge of the Commercial High Court copied this document to the Director, Sri Lanka Judge's Institute and the Secretary, Judicial Service Commission. The only inference that can be drawn from this conduct is that the judge had not being mindful of the need to pronounce a judicial order recognised by law.

Learned Civil Appellate High Court Judges in considering the appellant's appeal against the order of the District Court refusing to grant enjoining orders as prayed for by the appellant, considered the objection of the respondent on the jurisdiction of the District Court to hear the matter. Learned High Court Judges had come to the conclusion that the jurisdiction to hear the matter lies with the Commercial High

Court and had been of the view that the District Judge should have referred the matter to the Commercial High Court as provided under section 9 of the Act. Hence, the learned judges of the Civil Appellate High Court had directed the District Court to refer the matter to the Commercial High Court.

In reaching this decision the learned Civil Appellate High Court Judges had relied on the decision of this court in **Cornel and Company Ltd v Mitsui and Company Ltd and others** [2000] 1 SLR 57. Furthermore, this court in **Trans Orbit Global Logistics (Pvt) Limited, v People's Bank,** S.C. Appeal No. 92/2020, (SC minutes of 13.12.2021), also had considered the jurisdiction of the Commercial High Court.

Section 2(1) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 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 in the First Schedule to this Act if……."

First Schedule of the abovementioned Act *inter alia* reads :

"All actions where the cause of action has arisen out of commercial transactions (including causes of actions relating to banking, the export or import of merchandise, services and construction of any mercantile document) is which the debt, damage or demand is for a sum exceeding one million rupees or such other amount as may be fixed by the Minister……."

As submitted by the learned President's Counsel for the respondent Act No 10 of 1996 does not make provision for enabling the Commercial High Court to 'transfer' a case to the District Court, even though section 9 of the said Act, enables the District Court to transfer a case to the Commercial High Court depending on the value of the action. This Court in **Cornel and Company Ltd** (supra) has considered the

applicability of section 47 of the Civil Procedure Code in the context of the possibility of transferring a case filed in the Commercial High Court to the District Court along with the scope of sections 9 and 7 of Act No 10 of 1996. The Court had observed:

> *"Where an action, which should have been filed in the High Court, is filed in the District Court, section 9 compels transfer to the correct Court; it does not require or permit dismissal of the action on that ground. But the 1996 Act makes no provision for the converse case, where an action that should have been filed in the District Court is filed in the High Court: expressio unius, exclusio alterius, and so the inference would be that transfer to the District Court was not permissible. That seems even to exclude the principle recognised in section 47 of the Civil Procedure Code:……"* (at page 73)

It is pertinent to note at this stage that there is no appeal before this court arising from the aforesaid order of the Civil Appellate High Court and the instant application is not to examine the legality of the said Order. Therefore, this court will not make any pronouncement relating to the validity of the said order, in these proceedings.

Furthermore, as observed hereinbefore, there is no proper judicial order of the Commercial High Court. The impugned document signed by the High Court Judge, which is produced marked 'A' lacks attributes of a judicial order as discussed hereinbefore. Therefore, this court does not wish to examine the said document.

I am of the view that the practice and the procedure adopted by the Commercial High Court in returning and / or refusing to accept the plaint at the initial stage and the case record subsequently, is not consonant with the law and practice of court.

Therefore, we direct that:

> (a). All the judges and the registrar of the Commercial High Court of the Western Province to desist from continuing with any practice in relation to acceptance and / or rejection of plaints and / or any other pleadings, which is inconsistent or violative of relevant laws and practices, forthwith;

(b). The registrar of the Commercial High Court to recall his letter dated 31st May 2022 bearing No. KO/VANI/MAHADHI/LEKHA/2022 and accept the case record in Colombo District Court case 00136/22 DSP and register a case in the Commercial High Court, without any delay;

(c). Registrar of the Commercial High Court of Western Province to list the case registered as per direction (b) above before a Judge of the Commercial High Court of the Western Province, other than the judge who signed the document "Reasons for returning District Court Colombo Case No 00136/22 DSP", for necessary steps as provided by law, without undue delay;

(d). Registrar of the Supreme Court to take necessary steps and deliver copies of this Order to all the judges and the registrar of the Commercial High Court forthwith.

This court also wishes to note with concern the untold hardships the appellant would have had to undergo in seeking to vindicate his legal rights and therefore reiterate that all endeavours should be made for an expeditious disposal of this matter.

Chief Justice

L.T.B. Dehideniya, 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 under and in terms of Section 5(C) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 as amended read together with Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

MATRIX LIFECARE (PVT) LTD

No. 52/13A, Rubber Watta Road,
Nikape, Dehiwela.

SC/HC/LA/45/2021 **PLAINTIFF**

Commercial High Court Case No:

H.C.(Civil)/15/2021/IP

-Vs-

1. **HEALTHTRUST PHARMACEUTICALS (PVT) LTD**
   No. 78/4, Sangaraja Mawatha,
   Hunupitiya, Wattala.

2. **FAITH ONE PHARMACEUTICALS (PVT) LTD**
   No. 78/4, Sangaraja Mawatha,
   Hunupitiya, Wattala.

3. **PEER MOHAMED ABDUL RAHUMAN**
   No. 45/15, Swarna Road,
   Off Havelock Road, Colombo 6.

4. **MOHIDEEN RAMEEZ PEER MOHAMED**
   No. 45/15, Swarna Road,
   Off Havelock Road, Colombo 6.

5. **MOHAMED ZAFRULLAH MARIKKAR**
   F 23, St. Anthony's Government Flats,
   St. Anthony's Mawatha, Colombo 3.
   AND/OR
   No. 78/4, Sangaraja Mawatha,
   Hunupitiya, Wattala.

6. **SEYAD MOHAMED SITHY SHAHEENA**
   F 23, St. Anthony's Government Flats,
   St. Anthony's Mawatha, Colombo 3.
   AND/OR
   No. 78/4, Sangaraja Mawatha, Hunupitiya, Wattala.

DEFENDANTS

-AND NOW BETWEEN-

1. **FAITH PHARMACEUTICALS (PVT) LTD**
   No. 78/4, Sangaraja Mawatha,
   Hunupitiya, Wattala.

2. **MOHAMED ZAFRULLAH MARIKKAR**
   F 23, St. Anthony's Government Flats,
   St. Anthony's Mawatha, Colombo 3.
   AND/OR
   No. 78/4, Sangaraja Mawatha, Hunupitiya, Wattala.

DEFENDANTS - PETITIONERS

-Vs-

MATRIX LIFECARE (PVT) LTD
No.52/13A, Rubber Watta Road,
Nikape, Dehiwela.

PLAINTIFF – RESPONDENT

1. **HEALTHTRUST PHARMACEUTICALS (PVT) LTD**
   No.78/4, Sangaraja Mawatha,
   Hunupitiya, Wattala.

2. **PEER MOHAMED ABDUL RAHUMAN**
   No. 45/15, Swarna Road,
   Off Havelock Road, Colombo 6.

3. **MOHIDEEN RAMEEZ PEER MOHAMED**
   No. 45/15, Swarna Road,
   Off Havelock Road, Colombo 6.

4. **SEYAD MOHAMED SITHY SHAHEENA**
   F 23, St. Anthony's Government Flats,
   St. Anthony's Mawatha, Colombo 3.
   AND/OR
   No. 78/4, Sangaraja Mawatha,
   Hunupitiya, Wattala.

DEFENDANTS - RESPONDENTS

Before	:	Hon. B.P. Aluwihare PC, J Hon. L.T.B. Dehideniya, J & Hon. E.A.G.R. Amarasekara, J
Counsel	:	Geoffrey Alagaratnam, PC. With S. Ragul and Ramesh Fernando for the Defendant-Petitoners K.V.S. Ganesharajan and K. Nasikethan for the 1st, 2nd and 3rd Defendant-Respondents Dr. Harsha Cabral, PC. With Nishan Premathiratne and Migara Cabral for the Plaintiff-Respondent. for the Plaintiff - Respondent
Argued on	:	25.03.2022
Decided on	:	01.12.2022

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

This Leave to Appeal Application was made against the Order dated 07th July 2021 of Commercial High Court by which the Learned Commercial High Court Judge issued an interim injunction prayed for in the prayers (g) and (h) of the Plaint dated 02.06.2021.

When this matter was taken up for support for leave on the 25th March 2022, the Learned President's Counsel for the Plaintiff-Respondent raised two Preliminary Objections on following grounds:

a) The affidavit filed along with the Petition of the 2nd and 5th Defendant-Petitioners is bad in law as it was attested by a Commissioner for Oaths who was working at the same law office in which the Registered Attorney for the 2nd and 5th Defendant-Petitioners was working which is contrary to the Oaths and Affirmations Ordinance, and that is an incurable defect in terms of the law, and is fatal to this Application.

b) Material documents that were produced before the Commercial High Court had not been filed or provided to the Court docket. As the complete case record had not been filed, such failure is contrary to statute/ Rules of the Supreme Court/ case authorities, and so, is fatal to this Application.

In addition, Learned President's Counsel for the Plaintiff-Respondent further raised a concern about a purported motion that had been served on the Plaintiff-Respondent in a suspicious and unusual manner. However, this motion was not found when this Court perused the case record. Since this motion was not available at the time when oral submissions were made in open court to be identified by this court, it is not proper to make any comment on the purported motion that would have come to the case record after the date the parties made oral submissions. On the other hand, it appears that the said purported motion does not have a direct bearing on the objections mentioned above and further it appears that it relates to some incidents that took place after the impugned order.

In this regard, in its written submissions tendered on 18.04.2022, the Plaintiff Respondent has placed certain factual and legal positions in support of the preliminary objections raised, and the Plaintiff Respondent has brought this court's attention to the Section 12(2) of the Oaths and Affirmations Ordinance which reads as follows;

" *A Commissioner for Oaths appointed under this Ordinance may administer any oath or affirmation or take any affidavit for the purpose of any legal proceedings or otherwise in all cases in which a Justice of Peace is authorized by law so to do, and in all cases in which an oath, affirmation, or affidavit is commonly administered or taken before a Justice of the Peace; and any oath or affirmation or affidavit administered or taken by a Commissioner for Oaths shall in all legal proceedings and for all other purposes have the same effect as an oath, affirmation, or affidavit administered or taken before a Justice of the Peace; and all enactments relating to oaths, affirmations, and affidavits administered before a Justice of the Peace shall with the necessary modifications , apply thereto:*

Provided that a Commissioner for Oaths shall not exercise the powers given by this section in any proceedings or matter in which he is the attorney-at-law to any of the parties, or in which he is otherwise interested." *(Highlighted by me).*

In their written submissions the Plaintiff Respondent have further referred to certain decisions made by our Courts with appellate powers.

Seybest (Private) Limited &another Vs Thebuwanna Don Waruna Rathnasekara WP/HCCA/Col/88,89,90 and 91/2019 is a decision where Civil Appellate High Court has decided, following superior court decisions which are among the decisions cited below in this Order, that an affidavit filed along with the leave to appeal application was contrary to the proviso of aforesaid section 12(2), and is bad in Law, when it was attested by the lawyer who appeared for the petitioner in the District Court.

Seylan Bank PLC Vs Christobel Daniels CA (PHC) APN 58/2014 is a decision of the Court of Appeal where the supporting affidavit had been attested by the Legal Officer- Human Resources of the bank who also acted as its lawyer in applying certified copies for the bank. The Court found the said legal officer fell within the prohibited categories.

Airport and Aviation Services (Sri Lanka) Limited Vs Buildmart Lanka (Private) Ltd (2000) 1 Sri. L.R 292 is a decision of this Court**,** where the Attorney-at Law who attested the supporting affidavit to the leave to appeal application was employed as an assistant legal officer of the petitioner in that case, who also was present in the arbitral proceedings in that capacity and was the registered attorney for the petitioner when the matter proceeded to the High Court after the arbitral proceedings. The affidavit was rejected as it was not in compliance with the proviso to said section 12(2).

In **P M A Samantha Kumara Vs T. A. C. N. Thalangama and Others SC/SPL/LA/2021,** the Commissioner of Oaths who attested the affidavit had sent a letter to the Chairman of the Election Commission on behalf of the Petitioner and it was further revealed that he had appeared for the Petitioner in the Court of Appeal and marked his appearance in this court as well. This Court dismissed the application upholding the preliminary objection raised in terms of the said section 12(2) of the Oaths and Affirmations Ordinance.

This court observes even at the beginning of the 19th century, our courts had followed the English principle and had not to accepted affidavits sworn before one's own proctor – vide **Pakir Mohideen Vs Mohamadu Casim 4 N L R 299, Cadar Saibu V Sayadu Beebi 4 N L R 130**

Thus, the Plaintiff Respondent indicates to court that, even though, a Commissioner for Oaths is empowered by the said section 12(2) of the Oaths of Affirmations Ordinance to administer an oath or affirmation or to take any affidavit similar to a Justice of the Peace, there is a prohibition created by the Section itself not to exercise such powers in any proceedings or matter in which he is the Attorney-at-Law or in which he is otherwise interested. Therefore, the position of the Plaintiff Respondent is that, as the affidavit tendered in support of the Petition of this application is attested

by Ms. D. Nishanthani, Commissioner of Oaths who is a member of the team of lawyers in the same law office, namely KVS LAW CHAMBERS, under K V S Ganesharajan, Attorney-at-Law, is bad in law.

In this regard, the Plaintiff Respondent has referred to the screenshots of the website of KVS Law Chambers which indicates that the relevant Commissioner for Oaths is a member of one team along with the Mr. Sriranganathan Ragul AAL and Mr. KVS Ganesharajan AAL. This Court is mindful of the fact that these screenshots are not supported by an affidavit and also of the fact that the petition praying for leave to appeal has been tendered to court by said Attorney-at-Law, Sriranganathan Ragul as the Attorney-at -Law of the 2nd and 5th Defendant Petitioners' Attorney-at -Law, and the said Petition or the proxy given to the said Attorney-at-Law does not indicate that the submission of the application was done as a member of KVS Law Associates, Law firm.

However, when allowing to file written submissions on the preliminary objections raised, this Court asked the Plaintiff Respondent to file written submissions first and the aforesaid Defendant Petitioners to respond within 3 weeks from the filing of the written submissions of the Plaintiff Respondent. In response to the said allegation, in their written submissions, even though, the 2nd and 5th Defendant Respondents have stated that the relevant Commissioner for Oaths has not been/is not the registered attorney-at-law or counsel for the Defendant Petitioners or any other party, they have not denied that they work as team members in KVS Law Associates as alleged. Instead, they have admitted that the relevant Commissioner for Oaths and the registered Attorney-at-Law for them are both working in the same Law Chambers of Mr. K V S Ganesharajan, AAL – vide paragraph 8(c) and 17(ii) of their written submissions. Further, it is admitted that both the registered attorney of the 2nd and 5th Respondents and the relevant Commissioner for Oaths worked under the same Senior Lawyer- vide paragraph 17(iii) of the written submissions of the 2nd and 5th Respondents.

As per the document that contained the marking X7B, which contains written submissions tendered by the 1st,3rd and the 4th Defendants in the court below, said senior lawyer K.V.S. Ganesharajan has drafted the written submissions on behalf of the said 1st ,3rd and 4th Defendants. Mr. Ganesharajan has marked his appearance in this court too. Hence, it is clear by the admissions in the written submissions and the documents available, that both the registered attorney of the 2nd and 5th Defendant Respondents and the Commissioner for Oaths are juniors to the senior lawyer K V S Ganesharajan who is an attorney-at-law in the court below as well as in this court for some of the parties and are working in the same law chambers.

The 2nd and 5th Defendant Petitioners, in their written submissions, try to argue that the "interest" asserted or depicted by the Plaintiff Respondent is not established and there are information barriers and "Chinese Walls" set up within professional firms including law firms as well as rules of confidentiality to avoid conflict of interest and to protect client confidentiality. In this regard, they have referred to a decision reported in **[2019] EWHC 1733 (IPEC)**, namely **Glencairn IP Holdings Limited and another V Product Specialities INC and another**. The 2nd and 5th

Respondents have not tendered the full decision of the above case with their submissions but as per the decision available at http://www.bailii.org/cgi-bin/formast.cgi?doc=/ew/cases/EWHC/IPEC/2019/1733.html&query=(.2019.)+AND+(1733)+AND+(IPEC) [1], it appears that the said decision is not relevant to the matter at hand and it concerns an application of an injunction against a solicitor restraining him from acting further for the defendants in that action as said solicitor had taken part in a previous mediation where certain confidential information of the petitioner was revealed to the said solicitor.

In my view, Section 12(2) proviso is more concerned with the credibility of the affidavits that are to be tendered in Judicial Proceedings rather than for to avoid conflict of interest between different clients who come to the same law firm or a lawyer or between different parties in an action as has been argued by the 2nd and 5th Defendant Petitioners. If a person makes a statement and he himself attests that such statement is made under oath or an affirmation, there will not be any evidential value in that statement since the attestation has not emanated from an impartial or unbiased or neutral person. It will be the same if it is done before his own lawyer as he is his representative for the litigation. Similarly, if it is attested by a lawyer of another party or a lawyer who has some interest in the proceedings, such attestation may be tainted with bias and partiality. Though it may not be the same, I observe some similarity between the rule of 'Nemo Judex Causa' and the concept promulgated in the proviso to Section 12(2) of the Oaths and Affirmation Ordinance.

However, by stating internal arrangements within a professional firm including law firms in resisting the preliminary objections, 2nd and 5th Defendant Petitioners impliedly indicate what exist as KVS Law Associates/ Chambers is a law firm. In that, the relationship between two lawyers in that firm may take one of the following forms.

- They may be partners of the firm as law firms are partnerships. If so, each partner may be an agent of the other.
- The relationship may be that of one between a partner lawyer and an assistant lawyer employed for the purposes of the partnership firm.
- The relationship may be one between two assistant lawyers employed by the law firm.

Hence, irrespective of the scanned copy of the webpage of the KVS Law Chambers reproduced in the written submissions of the Plaintiff Respondent, what has been stated in the written submissions of the 2nd and 5th Defendant Petitioners indicates that the relationship between the registered attorney for the 2nd and 5th Defendant Petitioners and the relevant Commissioner for Oaths is one that falls within the above three or one of two junior lawyers under the senior named K. V. S. Ganeshrajan.

If the Senior Lawyer in the same chamber or the partnership thrives, it is for the benefit of the lawyers under him or in the partnership either in term of financial success or reputation wise. Thus, I am unable to hold that the Commissioner for Oaths who attested the affidavit to this application

[1] Visited on 11/7/2022

is one who is not otherwise interested in this application and the case before the Commercial High Court. The factual situation revealed before this court specially through the submissions of the 2nd and 5th Defendant Petitioners establishes prima facie existence of an interest of the Commissioner for Oaths in the matter. It appears that the said Defendant Petitioners take up the position that the interest of the Commissioner for Oaths has not been established. As said above, there is prima facie material to establish the interest. The real relationship existing between the Commissioner for Oaths and the lawyers of KVS Law Associates/Chambers is within the special knowledge of the Commissioner for Oaths and the said lawyers of the KVS Law Associates/ Chambers. Other than, accepting the Senior Lawyer- Junior Lawyer relationship and possible membership or employment as an Assistant Lawyer in a law firm, nothing is established to indicate that the Commissioner for Oaths practices as an independent lawyer. Even though, the lawyers of KVS Law Chambers have filed pleadings and papers in the Commercial High Court without revealing that they belong to the same law firm or Chambers, now it is established through the submissions of the 2nd and 5the Defendant Petitioners that there is a de facto relationship among them. Thus, my view is that this leave to appeal application is defective due to the fact that the affidavit is bad in law.

Now I must see whether this defect is curable. In their written submissions, 2nd and 5th Respondents try to argue that, since Section 12(2) does not state that any non-compliance with this provision will result in a nullity as in Section 2 of the Prevention of Fraud Ordinance, contravention of said Section 12(2) does not render the affidavit invalid. In this regard, they have brought the attention of this Court to section 517 of the Civil Procedure Code which provides only a punishment for not producing the will as soon as possible and also to the section 33 of the Notaries Ordinance which states that no instrument shall be invalid merely because of the failure of any notary to observe any provision of any rule set out in section 31 in respect of any matter of form. Further, they have referred to **Muthukuda V Leelawathie (CA) [2002] 1 A L R 14** to indicate that if section 2 of the Prevention of Fraud Ordinance is complied with, failure to comply with section 16 of the said Ordinance will not affect the passing of the title.

However, in **Airport and Aviation Services (Sri Lanka) Limited Vs Buildmart Lanka (Private)Ltd (2010) 1 Sri. L. R 292,** referred to above, this Court has already decided comparing section 31,32 and 33 of the Notaries Ordinance with the provisions in Oaths and Affirmations Ordinance that although there is provisions contained in the Notaries Ordinance granting relief when there is failure by the Notary to observe Rules in the Notaries Ordinance, a similar interpretation cannot be given to the proviso to Section 12(2) of the Oaths and Affirmations Ordinance in the absence of such provision to that effect.

On the other hand, proviso to section 12(2) of the Oaths and Affirmations Ordinance contain a prohibition and not merely a formality. A prohibition enacted to make that the affidavits tendered in court proceedings to be credible by making them to be attested by impartial and independent persons authorized for that purpose. If the credibility is in breach, affidavit has no value. Thus, I am unable to agree with the argument made on behalf of the 2nd and 5th Respondents that failure

to comply with section 12(2) of the Oaths and Affirmations Ordinance does not make the affidavit invalid.

The other way to cure a defect caused by an invalid affidavit is to tender a new affidavit with the permission of Court. Firstly, there was no such application when the objection was raised. Secondly, it cannot be done now since there is time bar to tender a leave to appeal application. As per section 757 (1) of the Civil Procedure Code, it has to be tendered within 14 days from the impugned order by a petition supported by an affidavit. This is a mandatory requirement. If the affidavit tendered within those 14 days is not valid, there is no valid application for leave- vide **Foreign Employment Bureau Vs Suraj Dandeniya C A L A 324/2004, C A minute dated 12.01.2004,** and **Yogaratnam V Naheem and Others [2004] 3 Sri L R 212.**

Hence, this Court has to uphold the preliminary objection raised with regard to the validity of the affidavit and the application for leave.

The other preliminary objection was raised on the premise that the material documents were not produced with the application. I do not think that this court should go into this preliminary objection since the upholding of the above preliminary objection is sufficient to dismiss the present application for leave. On the other hand, other than the impugned order itself, whether certain other documents are material or not, cannot be decided in the abstract. Whether such documents are decisive in determining the application has to be decided when the matters relating to the application are placed before the court in support of the application. Thus, this Court does not intend to decide on the second preliminary objection at this occasion.

For the forgoing reasons, this Court accepts the first preliminary objection based on the premise that the affidavit is bad in law and dismiss the application for leave with costs.

……

Judge of the Supreme Court

B. P. Aluwihare, P C. J.

I agree.

……

Judge of the Supreme Court

L.T.B. Dehideniya, J.

I agree.

……

Judge of the Supreme Court

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

In the matter of an Application for Revision against the Judgement dated 09th January 2019 by the Provincial Civil Appellate High Court (Holden in Gampaha) in terms of Article 127 of the Constitution.

Supreme Court Case No.

SC/Revision/02/2019

Gampaha Civil Appellate High Court

Case No.

WP/HCCA/GAM/64/2013(F)

Negombo DC

Case No.1740/L

Indika Roshan Francis,

No. 252/12A, Pahala Karagahamuna,

Kadawatha.

Plaintiff

Vs.

1.Bulathsinghalage Lal Cooray,

2.Rajapaksha Pathirannahelage

Priyadarshani

Both of No. 10/6,

Pahala Karagahamuna,

Kadawatha.

Defendants

And between

Indika Roshan Francis,

No. 252/12A, Pahala Karagahamuna,

Kadawatha.

Plaintiff- Appellant

Vs.

1. Bulathsinghalage Lal Cooray,
2. Rajapaksha Pathirannahelage
   Priyadarshani

Both of No. 10/6,

Pahala Karagahamuna,

Kadawatha.

Defendant- Respondents

And now between

Indika Roshan Francis,

No. 252/12A, Pahala Karagahamuna,

Kadawatha.

Plaintiff- Appellant-Petitioner

Vs.

1. Bulathsinghalage Lal Cooray,
2. Rajapaksha Pathirannahelage
   Priyadarshani

Both of No. 10/6,

Pahala Karagahamuna,

Kadawatha.

Defendant- Respondent-Respondents

Before: L.T.B Dehideniya, J.
A.L.S Gooneratne, J.
Arjuna Obeyesekere, J.

Counsels: Dinesh de Alwis with Hiranthika Sewwandi for Plaintiff- Appellant- petitioner instructed by Janak Sandakelum
S.N Vijith Singh for Defendant-Respondent-Respondents

Argued on: 09.02.2022
Decided on: 25.03.2022

L.T.B Dehideniya, J.

Plaintiff- Appellant-Petitioner (hereinafter sometime referred to as the Petitioner) instituted an action by plaint dated 05th February 2010 against the 1st and 2nd Defendant- Respondent-Respondents (hereinafter sometime referred to as the Respondents) seeking for a Declaration of title and ejectment and damages for the premises described in the schedule to the Plaint. The Petitioner contested that the Respondents were in unlawful possession of the said premises. The District Court of Gampaha delivered the judgement dated 09th October 2013 in favour of the Respondents, dismissing the plaint, holding that the Petitioner has failed to prove the case and granted relief prayed for in the Answer. Being aggrieved by the said judgement, the Petitioner preferred a Final Appeal against the said judgement to the Western Provincial Civil Appellate High Court (Holden in Gampaha). By the Judgement dated 09th January 2019, the Appeal of the Petitioner was dismissed and reaffirmed the judgement of the District Court by the Civil Appellate High Court.

Being aggrieved by the said judgement, the Petitioner filed the instant revision application in this Court and sought to revise the said judgement of the Civil Appellate High Court. This is a matter where Petitioner has invoked the revisionary jurisdiction of the Supreme Court in terms of Article 127 of the Constitution. When the Application was taken up for argument, the learned counsel for the Respondents raised a preliminary objection regarding the maintainability of this Revision Application, contending that there is no legal provision which enables the Petitioner to file such an Application in the Supreme Court. In other words, it was the submission that Supreme Court has no jurisdiction to exercise revisionary powers under the existing law.

The question before this Court is that, whether the revisionary powers are vested in the Supreme Court. The Petitioner's submissions are based upon the ground that the inherent powers of the Supreme Court can be used to correct errors which were demonstrably and manifestly wrong and where it was necessary in the interests of justice to correct matters in situations such as in the instant Application where there is a serious miscarriage of justice.

According to the Article 138 (1) of the Constitution, power to exercise Revisionary Jurisdiction is vested upon the Court of Appeal.

Article 138 (1)

> *"The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance..."*

Under the Administration of Justice Law, No.44 of 1973, the Supreme Court is vested with the Revisionary Jurisdiction. Under **Section 11**, where it was expressly provided that, jurisdiction for the correction of all errors in fact or in law committed by any subordinate court by way of revision is vested in the Supreme Court.

Section 11

> *"The Supreme Court shall be the only superior court of record and shall have, subject to the provisions of this Law, jurisdiction for the correction of all errors in fact or in law committed by any subordinate court, and sole and exclusive cognizance by way of appeal, revision and restitutio-in-integrum of all actions, proceedings and matters of which such subordinate court may have taken cognizance, and such other jurisdiction as may be vested in the Supreme Court by law. In the exercise of its jurisdiction, the Supreme Court may, in accordance with law, affirm, reverse or vary any judgment or*

order, or give directions to such subordinate court, or order a new trial or a further hearing. It may, if necessary, receive and admit new evidence additional to, or supplementary of, the evidence already taken in such subordinate court: Provided that no judgment or order pronounced by any subordinate court shall on appeal or revision be reversed or varied on account of any error, defect or irregularity in the proceedings which shall not have prejudiced the substantial rights of either party or occasioned a failure of justice."[Emphasis added]

Even so, according to the present constitution in 1978, the revisionary powers vested in the Supreme Court by the Administrative Justice Law was removed to the Court of Appeal by the Article 169(2) of the Constitution.

Article 169(2) provides that;

"the Supreme Court established by the Administration of Justice Law, No.44 of 1973, shall, on the commencement of the Constitution, cease to exist and accordingly the provisions of that Law relating to the establishment of the said Supreme Court, Shall be deemed to have been repealed. Unless otherwise provided in the Constitution, every reference in any existing written law to the Supreme Court shall be deemed to be a reference to the Court of Appeal."

Further, According to the Article 169(3) of the Constitution, all the appellate proceedings including proceedings by way of revision, case stated and restitutio in integrum pending in Supreme Court established under the Administration of Justice Law, No.44 of 1973, on the day preceding the commencement of the Constitution, shall stand removed to the Court of Appeal and Court of Appeal shall have jurisdiction to take cognizance of and to hear and determine the same, and the judgements and the orders of the Supreme Court aforesaid delivered or made before the commencement of the Constitution in appellate proceedings shall have the same force and effect as they had been delivered or made by the Court of Appeal.

Looking back at some of the case law that were decided before the enactment of the present Constitution in 1978, the Court has been held that Revisionary Jurisdiction is vested in the Supreme Court of Sri Lanka in appropriate circumstances.

In the case of ***Sinnathangam v. Meera Mohideen*** (60 NLR 394) *T. S. Fernando J.* stated as follows;

> *"The Supreme Court possesses the power to set aside, in revision, an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated on the ground of non-compliance with some of the technical requirements in respect of the notice of security."*

A similar view was expressed in the case of ***Attorney General v. Podisingho*** (51 NLR 385) and it was held that, the powers of revision of the Supreme Court are wide enough to embrace a case where an Appeal lay but was not taken. In such a case, however, an Application in revision should not be entertained save in exceptional circumstances, such as, where there has been a miscarriage of justice.

The discretionary power of the Supreme Court in exercising the revisionary jurisdiction is discussed in ***Rustom Vs Hapangama*** (1978/79) 1 Sri L.R 352 *Ismail J* observed that the general rule is that while the power of revision available to the Supreme Court is a discretionary power the courts have consistently refused to exercise this power when an alternative remedy which was available to the applicant was not availed of before the applicant sought to avail of a remedy by way of revision. Nevertheless, in a series of decided cases the courts have indicated that this was not an invariable rule and in certain instances where exceptional circumstances are shown the Court would exercise this discretionary power even when an alternative remedy which is available has not been availed.

According to the Article 127 of the Constitution, the Supreme Court shall be the final Court of Civil and Criminal appellate jurisdiction for and within 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. Even though the said Article has expressly provided Appellate Jurisdiction to the Supreme Court, there is no specific provision relating to the Revisionary Jurisdiction of the Supreme Court. The Petitioner refers to this situation as a lacuna in the Constitution. In determining whether the Supreme Court has the power to exercise revisionary jurisdiction under such legal circumstances, statutory law and case law must be carefully analysed.

Nevertheless, when carefully considering the Article 169(2) of the present Constitution, it appears that the Petitioner's contention regarding the unavailability of an express provision as to the revisionary powers of the Supreme Court which amounting to a lacuna in the Constitution has no sustainability before the Article 169(2).

Accordingly, the revisionary powers are explicitly vested in the Court of Appeal by the present Constitution, not in the Supreme Court. Therefore, in light of the statutory provisions discussed above, it is clear to this court that, the views expressed on the Supreme Court's revisionary jurisdiction in cases decided in the era before the enactment of the present Constitution in 1978, cannot be applied to the present Application.

It is a question with great importance before this Court that, whether the Supreme Court as the apex of the Sri Lankan Judiciary could have the authority to revise the judgements of a lower court, even though no law has expressly vested such powers in the Supreme Court.

In the case of ***Peoples Merchant PLC v. Udaya Saman Subasinghe*** (SC CHC Appeal No. 14/2014, decided on 23-06-2021) Padman Surasena J. analysed the application of the Revisionary Jurisdiction of the Supreme Court. (At p.8-9)

> *"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, <u>this Court has not been vested with such power by any law</u>. 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****. [1996] 1 Sri L.R 70" [emphasis added]*

In the case of ***Mahesh Agri Exim (Pvt) Ltd Vs. Gaurav Imports (Pvt) Ltd and Others*** *(SC Revision No. 02/2013 Decided on 30-07-2019), 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.*

"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." [Emphasis added]

In light of the well-established legal context discussed above, it is apparent that the Supreme Court has not vested Revisionary Jurisdiction under the existing law.

As per the submissions tendered by the Petitioner, it is contended that the inherent powers of the Supreme Court have been used to correct errors which were demonstrably and manifestly wrong and where it was necessary in the interests of justice to correct matters in situations where there is a serious miscarriage of justice. In the eyes of the law a serious miscarriage of

justice occurs when a grossly unfair outcome is made in a criminal or civil proceeding and refers to as a failure of a court or judicial system to achieve a just conclusion. The miscarriage of justice is taken into consideration in the case of ***Attorney General v. Podisingho*** (51 NLR 385) per Dias S.P.J, even though the revisionary powers should not be exercised in cases when there is an Appeal and was not taken, revisionary powers should be exercised only in exceptional circumstances such as miscarriage of justice, where a strong case for interference of the Supreme Court is made out for.

In ***Lakshaman Ravendra Watawala v. Chandana Karunathilake*** (SC Appeal 31/2009 and SC Appeals 35/2009-78/2009, decided on 06-07-2018) at p. 9 per Priyantha Jayawardena J.,

> *"...However, our Courts entertain Revision Applications if a grave prejudice has been caused to a litigant even if there is an ouster clause..."*
>
> at p. 12
>
> *"Therefore, it is evident that, in appropriate instances, the Court has entertained Revision Applications <u>when there was no right to appeal</u>." [emphasis added]*

However, it is noteworthy that, the present Application is not a matter where the Petitioner is inviting the Supreme Court to interfere in a Revision Application when there was no right to appeal. This is an instance where there was a right to appeal available for the Petitioner, nevertheless, the Petitioner did not act in due diligence to comply with it. In the context of the present Application there was a right to appeal in terms of Supreme Court Rules and Section 9(a) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990. According to the reasons set out in the Petition, the Petitioner states that, he was unable to file an Application for Leave to Appeal in this Court within the due period of time for the reason of ill health. A closer look at the submissions reveals that, the Petitioner's reasoning for non- compliance with the right of appeal is not credible enough to justify a miscarriage of justice. Therefore, it is

clear to this court that the Petitioner has failed to establish compelling evidence as exceptional circumstances to accept a Revision Application.

By considering above circumstances, I am of the view that in an instance where the Petitioner did not act in due diligence to comply with his right of appeal and where Supreme Court has not been vested revisionary power by any law, it is not possible to intervene and consider the Petitioner's Revision Application as this Court has no jurisdiction to entertain such Application. I proceed to dismiss this Revision Application.

Judge of the Supreme Court

A.L.S Gooneratne 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 for Special Leave to Appeal in terms of Article 127 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka.

Complainant

SC Appeal No: 184/2019
SC (SPL) LA Application No: 210/2018
CA Appeal No: CA 122-123/2007
High Court: Kandy 161/1995

Vs.

Kotuwe Gedara Sriyantha Dharmasena

Accused

And Now

Kotuwe Gedara Sriyantha Dharmasena

Accused-Appellant

Vs.

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

Respondent

And Now Between

Kotuwe Gedara Sriyantha Dharmasena

Accused-Appellant-Petitioner

(Presently incarcerated in Welikada Prison)

Vs.

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

Complainant-Respondent-Respondent

Before: **Justice E.A.G.R. Amarasekara**
Justice A.L. Shiran Gooneratne
Justice Janak De Silva

Counsel: Indica Mallawartchy for the **Accused-Appellant-Petitioner.**

Dilan Ratnayake, SDSG with Sajith Bandara, SC for the **Complainant-Respondent-Respondent**.

Argued on: 27/09/2022

Decided on: **04/11/2022**

A.L. Shiran Gooneratne J.

The Accused-Appellant-Petitioner (hereinafter referred to as the Appellant) along with two others (the 2nd and 3rd Accused) were indicted before the High Court of Kandy for committing an offence punishable under Section 296 of the Penal Code. At the conclusion of the trial, the learned trial judge convicted the Appellant on the said count and was sentenced to death. Being aggrieved by the said Judgment, the Appellant preferred an appeal to the Court of Appeal. By Judgment dated 06/06/2018, the said appeal was dismissed and the death sentence was affirmed. The 2nd and the 3rd Accused whose convictions were affirmed by the Court of Appeal have not canvassed their convictions or the sentence imposed before the Supreme Court. This Court is called upon to decide the legality of the Judgment of the Court of Appeal in relation to the Appellant who stood as the 1st Accused before the High Court.

This Court by its order dated 03/12/2019, granted Special Leave to Appeal to the question of law in paragraph 10(e) of the petition of appeal dated 16/07/2018, as well as another question of law suggested by the learned Counsel for the Appellant and permitted by this Court, set out below as;

1. Have the judges of the Court of Appeal failed to consider that, the learned trial judge had totally failed to apply the principles governing circumstantial evidence when evaluating the evidence against the 1st Accused.
2. Has the prosecution proved the case against the 1st Accused-Appellant beyond reasonable doubt based on the circumstantial evidence.

According to the evidence led by the prosecution, the Deceased was 23 years of age at the time of the incident and was a new entrant to the Peradeniya Medical Faculty. It was revealed in evidence that on 04/01/1994, in anticipation of attending the faculty on the following day, the Deceased had gone to sleep in the front room of his abode. In the morning of 05/01/1994, the Deceased was not found in his room and later in the day

the body was discovered in an abandoned well in the vicinity. The 1st post mortem examination revealed that death was caused due to insecticide poisoning and possible drowning. The body was exhumed after several days and the 2nd post mortem examination held, revealed, that death was due to forcible introduction of an organo-phosphate containing pesticide into the body through the mouth.

The conviction and sentence against the 2nd and 3rd Accused was primarily based on the confessions made before the learned Magistrate of Kandy under Section 127 of the Code of Criminal Procedure Act. The prosecution tendered in evidence the said confessions against the Accused.

At the commencement of evaluation of evidence, the learned trial judge has arrived at a precise conclusion that this case rests on the confessions made by the 2nd and 3rd Accused and the circumstantial evidence available. The Court noted that inducement, threat, or promise was not present and having regard to all the circumstances which the evidence was obtained held, that the confessions were made voluntarily and admitted it as evidence against the 2nd and 3rd Accused.

Evaluation of evidence against the Appellant (1st Accused) -

The prosecution case was entirely based on circumstantial evidence and accordingly the Court must be satisfied that the chain of circumstances is complete and unbroken.

When evaluating the confessions made by the 2nd and 3rd Accused, the learned trial judge was mindful of the statutory compass of Section 30 of the Evidence Ordinance, as to the use of a confession against a co-accused, when he observed that the confessions made by the 2nd and 3rd Accused cannot be used against the 1st Accused (page 399). Same was reckoned later in the Judgment at page 402. However, it is noted that in contrast to the said observation, the learned trial judge made use of the said confessions as evidence against the Appellant. (Page 391-396, page 398, 400-403).

The principle embodied in Section 30 of the Evidence Ordinance was indicated in a Full Bench of the Supreme Court in **Rex vs. Ukku Banda, (1923) 24 NLR 327**, where Bertram C J. stated that;

"Section 30 relates solely to confessions made before the actual trial and tendered in evidence at the trial by the crown against the prisoner. It relates to confessions which are "proved" in the case. The word 'proved' in Section 30 must refer to a confession made beforehand."

A clear distinction was made to the above-stated principle in **King vs. Ferdinands et al. (1944) 45 NLR 450 at p. 451**, where Wijeyewardene J. observed that;

"Under our law a confession made by an accused in the ***witness box*** *affecting himself and his co-accused is not shut out by Section 30 of the Evidence Ordinance".* (Emphasis is mine)

It is in this context that the learned Counsel for the Appellant submitted that both the trial court and the Court of Appel fixed culpability upon the Appellant without a shred of evidence which now stands for scrutiny before this Court. It was further submitted that the circumstantial evidence available in this case, would raise a mere suspicion at its best and not establish the guilt of the Appellant.

In the light of the afore-stated findings of the trial judge, I will initially deal with the circumstantial evidence held against the Appellant and thereafter with the Appellants evidence in defence.

The circumstantial evidence relied upon by the learned trial judge -

The learned trial judge in his deliberations did not compartmentalize the evidence led against each Accused. The learned Judge considered the available circumstantial evidence in totality and came to a finding that on the date prior to the incident, all three Accused had been seen at a boutique making purchases, had spent the afternoon consuming liquor, and therefore concluded that there exists a probability that the

Appellant had spent the night prior to the incident together with the 2nd and 3rd Accused. In order to establish the said probability, the learned trial judge read in conjuncture the confessions made by the 2nd and 3rd Accused and the dock statements, to incriminate liability on the Appellant.

The prosecution has relied on the Appellant's subsequent conduct by drawing inference to his unusual expression of grief at the funeral house of the Deceased. It is revealed that the prosecution witness, Kodithuwakkuge Dickson who testified to such behaviour of the Appellant is an accused in the murder trial of the Appellant's brother, which took place prior to this incident. In the circumstances, the learned Counsel for the Appellant submitted that Dickson may have had an agenda to implicate the Appellant.

There is no evidence that the Appellant had entertained any animosity towards the Deceased nor towards the deceased family. To the contrary, the family members of the Deceased speak of the cordial relationship the Appellant had with the deceased family and the Appellants assistance to them at the funeral house with the funeral arrangements.

Placing the Appellant at the scene of the crime.

The Deceased was last seen alive on 04/01/1994, around 9.00 PM. The following morning the body was discovered in an abandoned well. According to the evidence of the mother of the Deceased, the Deceased accompanied by his family members had met the Appellant on the road around 3.00 PM on 03/01/1994. Considering the time gap when the Appellant parted company with the Deceased last seen alive, and the recovery of the body of the Deceased, a strong inference could be drawn of the possibility of any other person being responsible for the crime and that possibility was not totally excluded. There is no other evidence to connect the Appellant from there onwards to the place of occurrence. The learned trial judge noted that the Appellant was at the house of the 2nd Accused in the company of the 2nd and 3rd Accused on 04/01/1994, to incriminate liability on the Appellant.

"In order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt" (The Principles of Circumstantial Evidence, by William Wills - 3rd Ed. page 149 - Rule No. 4, Applicable to Circumstantial Evidence.)

In other words, all facts or circumstances proved by the prosecution must inevitably and exclusively point to the guilt of the Accused and there should be no circumstances, which may reasonably be considered consistent with the innocence of the Accused.

In **Junaiden Mohamed Haaris, vs. Hon. Attorney General, SC Appeal 118/17 SC** (SC minutes 09/11/2018), the Supreme Court observed that;

"the prosecution relied entirely on circumstantial evidence to establish the charges, for the reason that there were no eyewitnesses to substantiate any of the charges against the Accused-Appellant. Thus, it was incumbent on the prosecution to establish that the 'circumstances' the prosecution relied on, are consistent only with the guilt of the accused-appellant and not with any other hypothesis."

In the afore-stated Judgment Aluwihare, PC. J., referred to *"a set of principles and rules of prudence, developed in a series of English decisions, which are now regarded as settled law by our courts."*

The two basic principles referred to are-

(i) "The inference sought to be drawn must be consistent with all the proved facts, if it is not, then the inference cannot be drawn.

(ii) *The proved facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct* (per Watermeyer J. in **R vs. Blom 1939 A.D. 188**)

The rule regarding the exclusion of every hypothesis of innocence before drawing the inference of guilt was laid down way back in 1838 in the case of ***R vs. Hodges (1838 2 Lew. cc.227)****. The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt."*

In the absence of any incriminating evidence stemming from the dock statements made by the 2nd and 3rd Accused against the Appellant, the learned trial judge made use of the said unsworn statements to compare, and contradict the evidence given by the Appellant to fix culpability. The learned trial judge also made use of the unsworn statements made by the said Accused to fill in the gaps to strengthen the prosecution case.

Even if there was evidence which implicated the Appellant, *"a statement made by an accused person from the dock implicating a co-accused is not admissible in evidence against the latter."* **[Rex vs. Ukku Banda (Supra)].**

A similar decision was taken in **Monis Appu vs. Heen Hamy et al. (1924) 26 NLR 303**, in a situation where an unsworn statement made by a co-accused from the dock implicating another, Bertram C. J. declared;

"If one prisoner makes a statement implicating himself, this is an admission which may be taken into account. But if one prisoner standing in the dock makes an unsworn statement implicating the other, this is not evidence. It has no more effect than an ejaculation uttered by an auditor in Court."

The 2nd and 3rd Accused opted to make dock statements. Though the Appellant testified in Court, he was not bound to offer an explanation. In his testimony the Appellant having denied any involvement with the death of the Deceased was consistent in his stand when he stated that he was in the company of the 2nd and 3rd Accused at the house of the 2nd Accused around 4.00 PM on 04/01/1994, had consumed liquor and thereafter proceeded to his house around 6.00 PM. The trial judge did not make any pronouncement on the strength or on the infirmities of the Appellants evidence or of the dock statements made by the 2nd and 3rd Accused.

Considering the question of evaluation of a dock statement made by an Accused, Sisira De Abrew, J. in **Priyantha Lal Ramanayake vs. Hon. Attorney General [SC Appeal No. 31/211]**, (SC Minutes dated 27/01/2020), cited with approval the case of **Queen vs. Kularatne (1968) 71 NLR 529**, where it was held;

1. If they believe the unsworn statement, it must be acted upon.
2. If it raises a reasonable doubt in their minds about the case for the prosecution the defence must succeed.

In the afore-stated case, His Lordship made the following guidelines as to how the evidence given by an Accused person should be evaluated;

1. If the evidence of the Accused is believed by court it must be acted upon.
2. If the evidence of the Accused raises a reasonable doubt in the prosecution case, the defence of the Accused must succeed.
3. **If the Court neither rejects nor accepts the evidence of the Accused, the defence of the Accused must succeed.**
   (Emphasis is mine)

It is observed that the trial court or the Court of Appeal did not appear to have evaluated the evidence of the Appellant or the dock statements made by the 2nd and 3rd Accused with due judicial caution on credibility, admissibility, or relevancy of the evidence.

Having being mindful that making use of the confession made by the 2nd and 3rd Accused against the Appellant is obnoxious to Section 30 of the Evidence Ordinance, the learned trial judge has clearly made inroads to consider the facts and circumstances of the confession, to arrive at an irresistible conclusion that the Appellant committed the offence in question. To make use of the said item of circumstantial evidence to base the said conviction, does not in any manner conform to the settled principles of law applicable to the evaluation of circumstantial evidence.

At the commencement of the oral submissions, the learned Deputy Solicitor General upholding the highest traditions of the Attorney General's Department submitted that in the interest of justice he concedes to the issues of law raised by the learned Counsel for the Appellant and as such contended that the conviction and sentence against the Appellant should be set aside.

In view of the above finding, I am of the view that the conviction and sentence imposed on the Appellant cannot be permitted to stand and accordingly, the questions of law No. 1 and No. 2 are answered in favour of the Appellant.

Therefore, the Judgment of the High Court of Kandy dated 27/08/2007 and the Judgment of the Court of Appeal dated 06/06/2018 are set aside. The appeal of the 1st Accused-Appellant is allowed.

Appeal 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 Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka in respect of the violations of Article 12(1) and14(1)(g) of the Constitution

CASE NO. SCFR 18/2020

1. Dola Mullage Gunarathna,

   No.24, 4' Cross Road,

   Walpola, Matara

2. Mallika Arachchige Lakshman

   No. 2/1, Police Officers Quarters,

   Jayathilaka Place,

   Maligawatta, Colombo 10.

PETITIONERS

VS.

1. K. W. E. Karalliyadda,

   Chairman,

   National Police Commission

1 a. Hon. Justice Jagath Balapatabendi

Chairman,

Public Service Commission

2. Savithree D. Wijesekera

Member.

National Police Commission

2a. Indrani Dugathadasa

Member, Public Service Commission

3. Y.L.M. Zawahir

Member, National Police Commission

3a. V. Shivagnanasothy

Member, Public Service Commission

4. Tilak Collure

Member, National Police Commission

4a. T.R.C. Ruberu

Member, Public Service Commission

5. Gamini Navarathne,

Member National Police Commission

5a. Ahamod Lebbe Mohamed Saleem,

Member, Public Service Commission

6. Ashoka Wijethilaka

Member, National Police Commission

6a. LeelasenaLiyanagama

Member, Public Service Commission

7. J. Jeyakumar

Member, National Police Commission

7a. Dian Gomes

Member, Public Service Commission

7b. Dilith Jayaweera

Member, Public Service Commission

7c. W.H. Piyadasa

Member, Public Service Commission

8. Nishantha A. Weerasinghe

Secretary, National Police Commission

All of at Office of the National Police Commission,
Block No.09-BMICH Premises
Bauddhaloka Mawatha, Colombo 07

8a. M.A.B.D. Senarath

Secretary, Public Service Commission

All of la, 2a, 3a, 4a, 5a, 6a, 7a, 7b, 7c and 8a at office of the Public Service Commission,
No. 1200/9, Rajamalwatte Road, Battaramulla

9. C.D. Wickramarathne

Inspector General of Police
Police Head Quarters,
Colombo 01

9A. C.D. Wickramarathne

Former Acting Inspector General of Police
Police Head Quarters,
Colombo 01

10. Hon. Attorney General

Attorney Generals Department
Colombo 12.

11. M.L.D.W.K. Jayasekara
Inspector of Police,
Crime Division,
Torrington Square,
Colombo 07

RESPONDENTS

BEFORE : PRIYANTHA JAYAWARDENA, PC, J

P. PADMAN SURASENA, J AND

S. THURAIRAJA, PC, J.

COUNSEL : Mr. Chamith Senanayake and Mr. Ruvendra Weerasinghe Instructed by Mr. Jagath Thalgaswattage for the Petitioners.

V. Hettige SDSG for the 1st – 10th Respondents

Ian Fernando with Sumudu Rathnayake and Chavindra Perera instructed by Derek Fernando Associates for the 11th Respondent

WRITTEN SUBMISSIONS : Petitioners on 28th June 2021
Respondents 5th October 2021
11th Respondent on 20th July 2021

ARGUED ON: 15th November 2021**.**

DECIDED ON: 7th September 2022.

S. Thurairaja, PC, J

The Petitioners of this instant case filed Petition dated 29/01/2021 alleging that the 11th Respondent was promoted to the rank of an Inspector of Police contrary to the guidelines and alleged a violation of the fundamental rights of the Petitioners. On 26/03/2021 this Court granted Leave to Proceed on the alleged infringement of Article 12 (1) and 14(1) (g) of the Constitution.

Dola Mullage Gunarathna (Hereinafter referred to as the 1st Petitioner) joined the Sri Lanka Police Service as a Police Constable under the Regular Officer cadre on 20/10/1985. He was promoted to Police Sergeant on 12/12/1993. He was subsequently promoted as a Sub-Inspector (SI) on 01/01/2006 and thereafter by order of seniority and merit was promoted to Inspector of Police (IP) with effect from 31/05/2016. The 1st Petitioner is currently attached to the Police Station of Matara.

Mallika Arachchige Lakshman (Hereinafter referred to as the 2nd Petitioner) joined the Sri Lanka Police as a Police Constable under the Regular Officer cadre on 26/03/1986 and was promoted to Police Sergeant on 01/12/1993. Subsequently he was promoted as a Sub Inspector (SI) on 01/01/2006 and thereafter by order of seniority and merit was promoted as an Inspector of Police (IP) with effect from 31/05/2016. The 2nd Petitioner is currently attached to the Senior Deputy Inspector General's (Administration) Office.

The 1st – 8th Respondents are the Chairman, members, and Secretary of the National Police Commission (NPC) established in terms of the Constitution of Sri Lanka, which is empowered *inter alia* to effect/approve promotions to the Police Officers. The 9th Respondent is the Inspector General of Police (IGP) while the 10th Respondent is the Hon. Attorney General; made party to the application as a matter of the Constitution. The 11th Respondent is an Inspector of Police.

The Petitioners stated that the 11th Respondent was promoted to the rank of IP on 04/12/2019 with effect from 01/01/2019 and the promotion of the 11th Respondent as an IP was backdated to 08/02/2010 by IGP's communique dated 18/12/2019 bearing No 699 of the RTM marked as P2. The Petitioners stated that P2 is done without proper evaluation or following the guidelines laid down in the letter dated 22/01/2018 marked P9. Further, they stated that the backdating of this promotion has been done wrongfully and in an ad hoc manner.

The Petitioners states that they became aware of RTM No 699 marked P2 in the second week of January 2020 reasoning the fact that the individual promotions are given less attention in periodic meetings and in practice the RTMs are not issued to Officers in Charge of District, Stations, Headquarters and Inspectors; examples marked R9 (1) – R9 (4), P3A, P3B and P5.

The Petitioners stated that the 11th Respondent is lower in seniority and has less experience in the police department compared to the Petitioners. The Petitioners filed the instant application challenging the above promotion of the 11th Respondent amounted to a violation of the fundamental rights of the Petitioners guaranteed under Article 12 (1) and 14(1) (g) of the Constitution. Hence, the Petitioners prayed for an order to quash the said decision of backdating the promotion.

The Facts

In 2016, by IGP's communique bearing no. RTM 769 dated 20/09/2016 marked P3A, applications were called for promotions to the rank of IP from eligible SIs including the Petitioners. Subsequently upon an interview process, 539 SIs were promoted including the Petitioners to the rank of IP with effect from 31/05/2016. The 11th Respondent was not eligible to apply for the promotion of IP since he has not completed the mandatory service period of 10 years. RTM 112 (CRTM 251) dated 04/12/2019 marked P5 supports the fact that 474 SIs who had not been granted promotions for a considerable period of time were promoted to the rank of IP purely

based on service periods which took effect from 01/012019 and the 11th Respondent was also promoted under this scheme.

The Petitioners provided that on 20/01/2020, in response to an application made under Right to Information Act, the Petitioners received the report of the recommendations made by the then Acting IGP (9A Respondent) to the National Police Commission dated 01/10/2019 marked P8 recommending not to backdate the promotion of the 11th Respondent and furthermore recommended to quash such order. The 6th Respondent too had recommended not to backdate the promotion of 11th Respondent in the same manner.

Subsequently the 11th Respondent was promoted as an SI in 2007 and this promotion was backdated to 22/12/2001 pursuant to CRTM 1582 dated 26/07/2019 marked P6. The Petitioner states that the promotion of the 11th Respondent to the rank of SI under "special" scheme effected by P6 also is done without proper evaluation or following the guidelines laid down in the letter dated 22/01/2018 marked P9.

The Petitioners further stated that the 11th Respondent cannot backdate his promotion subsequent to the terms of the letter issued by the NPC dated 31/05/2019 marked P4 and P4A which provides six conditions to approve a promotion under **'time based promotion scheme'** and one such condition is that "*no officer shall be entitled to backdate his/her promotion granted under this time based promotion scheme.*" The Petitioners stated, claiming eligibility to backdate the promotion of SI of the 11th Respondent to 22/12/2001 on an alleged 'Special' basis cannot be granted under any time based promotion scheme.

A number of SIs who were affected by the promotions of the 11th Respondent has also filed a fundamental rights application bearing No. SC/FR 333/2019. It was further submitted to this Court in the Petition that the Petitioners preferred appeals to the NPC and also made complaints to the Human Rights Commission in Sri Lanka

(HRCSL) on 16/01/2020. The Petitioners stated in their Petition that to date, no response has been received in respect of the appeals made to the NPC and the HRCSL.

The Petitioners stated in their written submissions that they appealed to the IGP and the NPC to rectify these anomalies. They state that the IGP properly evaluated the seniority, merits and services of the Petitioners and the 11th Respondent. Thereafter, the IGP arrived at a determination to make recommendations to the NPC to backdate the IP promotions of the Petitioners to be effective from 08/02/2010 marked P10. However, to date, the recommendations of the IGP have not been implemented and the Petitioners alleged that, the failure of the Respondents to implement the said recommendation of the regular and properly evaluated promotion is equivalent to denying their legitimate expectation in respect of their career progression.

In the aforesaid circumstances, the Petitioners stated that the 11th Respondent gained an unfair advantage by the promotion backdated to 08/02/2010 that took effect from 01/01/2019. The Petitioners further state that the 11th Respondent is able to claim seniority over the Petitioners in the IP rank if the promotion becomes valid. Subsequent to filling this application, the 11th Respondent was also promoted to the rank of Chief Inspector (CI) with effect from 08/02/2020 marked P11 as a result of the promotions to the rank of IP and SI being backdated. Therefore, the Petitioners state that this will entitle the 11th Respondent to claim priority in promotions to the next ranks and the Petitioners will be placed lower in seniority as their promotion to the rank of IP was effected from 31/05/2016.

The Petitioners prayed the Court to direct any order or judgment on the recruitment and promotions of Police Officers In view of the 20th Amendment to the Constitution and in terms of the Police Ordinance read with the Constitutional provisions in relation to the NPC and now the Public Service Commission (PSC) that made 1a, 2a, 3a, 4a, 5a, 6a, 7a, 7b, 7c and 8a Respondents as parties to this application respectively.

This Court granted leave to proceed on the alleged infringement of Article 12 (1) and 14 (1) g of the Constitution and made an order suspending RTM 699 dated 18/12/2019 marked 'P2' from taking effect till the final determination was in order.

Objections and written submissions of the Respondents

The 11th Respondent filed his preliminary objection in relation to the petition on 09/03/2021. Written Submissions on behalf of the 1a, 2a, 3a, 4a, 5a, 6a, 7a, 7b, 7c, 9 and 10th Respondents was filed. The Respondents established their position based on two factors; the Petition is time barred and the Promotion of the 11th Respondent has not violated any fundamental rights of the Petitioners in terms of Article 12(1) and 14(1) (g) of the constitution.

In order to establish the fact that the Petition is time barred, the 11th Respondent and 1-10th Respondents stated that, pursuant to Article 126(2) of the Constitution, the fundamental rights application should have been filed by the Petitioners within the stipulated time period of one month.

The 11th Respondent stated that the 2nd Petitioner is a co-worker who works with him in the same office of S/DIG Administration since 2016 and it is unbelievable that the two Petitioners only became aware of the decision of the promotion of the 11th Respondent or the RTM No 699 marked P2 around the second week of January. The 11th Respondent further contends that the Petitioners are holding back the exact date they became aware of the P2 document is to deceitfully accommodate their Petition within the required legal time frame.

Prior to the aforesaid RTM No 699 marked P2, the Acting Inspector General of Police sought the approval of the commission to promote the 11th Respondent to the rank of IP with the recommendation for the promotion to take effect from 08/02/2010 marked R1. The commission (1stto 8th Respondents) considered the contents of R1 and

approved the promotion to the rank of IP on the letter dated 05/08/2019 marked R2. The letter marked R2 received at the Police Head Quarters on 06/08/2019.

In relation to the aforementioned circumstance, the 11th Respondent stated that the Petitioners had an ample time of five months to commence a proceeding under the same course of action whereas the Petitioners had failed to do so, thus the Petitioners has deliberately avoided disclosing the acknowledged R2 in their Petition.

Moreover, the 11th Respondent states that the P2 document is a RTM (Routine Telephone Message) used for general purposes of communication, common to all officials and offices. In the abbreviation RTM, the word "Routine" indicates that such communications are done in routine basis and all such documents are accessible to all the police officers since they are generally used for administrative purposes. He further submits that the common circulation of RTMs is such that all ranks at the receiving end becomes aware of the contents particularly when it relates to a promotion or a matter of common interest of Police officers.

Secondly, the 11th Respondent states that the fundamental rights of the Petitioners in terms of Article 12(1) and 14(1) (g) of the constitution were not violated given the circumstances of the case.

The 11th Respondent stated that he was recommended for a special promotion to the Rank of SI by the Staff DIG in the year 2001 and that whilst this special promotion was pending, in 2007 he was promoted to the rank of SI under the Merit and Seniority Scheme 2007 marked P10. After this promotion was granted, the 11th Respondent stated that he made an appeal to the Senior DIG Western Province and FFHQ to backdate his promotion. Consequent to the appeal, the Senior DIG Western Province and FFHQ has recommended to backdate his promotion to the rank of SI marked R5 dated 05/07/2011 based on the special promotion scheme.

In pursuing this special recommendation for special promotion, the 11th Respondent stated that he made an appeal to the 9A Respondent to backdate his promotion in the rank of SI and to promote him from the post of SI to IP on a basis of timely promotion from the date of issuance of the promotion orders. The 9A Respondent has made his observations in favour of the 11th Respondent by the letter dated 17/07/2019 marked R3. In an attempt to rectify the position marked at P8, the report of the recommendations made by the 9A Respondent to the National Police Commission dated 01/10/2019, the 9A Respondent submitted a letter dated 07/12/2019 marked R6 seeking further instructions to restore the backdating of the promotion of the 11th Respondent to the rank of IP. The 11th Respondent contested that, in response to P8, NPC referred to the 9A Respondent to act according to the contents of R2 dated 05/08/2019. Hence, NPC approved the claim of restoration to the rank of IP by the letter marked R7 dated 13/12/2019 and he was granted the entitlement for the promotion via RTM No: 699 dated 18/12/2019.

The 11th Respondent stated that the decision made by the Commission cannot be alleged as arbitrary or ad hoc since all the seven members of the Commission are personally involved in every decision made by the Commission.

The 11th Respondent stated that the documents marked P2 and P6 by the NPC follows the due process laid down in the guidelines marked P9 dated 22/01/2018. He further submits that the documents marked P4 and P4A dated 31/05/2019 have no relevancy to the backdating of his promotion since the matter is dealt with separately outside the instructions in P4 and P4A. However, the 11th Respondents also admits that he was not eligible to apply for the promotions called for the rank of IP in the year 2016 marked P3A since he had not completed the mandatory period of 10 years of service.

Pursuant to RTM No: 252 marked R11 dated 08/02/2010, the 11th Respondent argued that the 1st and 2nd Petitioners' promotion as an IP cannot be backdated to

08/02/2010 because both the Petitioners may not have completed the required period of eight years as an SI from the date of dating. Thus, they may lack nearly four years to be eligible for the promotion of IP whereas the 11th Respondent have completed the required period by 08/02/2010. Therefore the 11th Respondent contests that both the Petitioners cannot be treated equally in terms of Article 12(1) and 14(1) (g).x

Furthermore, the 11th Respondent stated in the objections that career progression in the police force entirely depends on performance, knowledge, discipline, initiative and the commitment of every individual officer rather than seniority in service or age alone.

Time Bar objection

Article 17 and Article 126(2) of the constitution requires a fundamental rights application to be filled within one month of the alleged violation and the time limit set out in Article 126(2) is mandatory; **Edirisuriya v Navaratnam (1985 1 SLR 100 at p.105 – 106)**. This court quoted in the case of **Demuni Sriyani De Soyza and others v Dharmasena Dissanayake, Public Service Commission and others SC/FR 206/2008 (S.C.M – 9th December 2016)**, that:

> *"Where the time period of one month to be computed not from the date of occurrence of the alleged infringement but from the day the Petitioner becomes aware of the alleged infringement – in the decision cited by De Alwis J, namely, SIRIWARDENE V RODRIGO, Ranasinghe J, as he then was held [at p.387] "Where however, a Petitioner establishes that he became aware of such infringement, or the imminent infringement, not on the very day the act complained of was so committed, but only subsequently on a later date, then, in such a case, the said petition of one month will be computed only from the date on which such petitioner did in fact become aware of such infringement and was in a position to take effective steps to come before this court.*

This principle has been reiterated time and again. It should be added here that, if the facts and circumstances of an application make it clear that, a Petitioner, by the standards of a reasonable man, should have become aware of the alleged infringement by a particular date, the time limit of one month will commence from the date on which he should have become aware of the alleged infringement".

In the instant case, I find it pertinent to determine the date on which the Petitioners had knowledge of the alleged infringement. The Respondents stated in their objection that the approval letter backdating the promotion of the 11th Respondent received to the Police Headquarters on 06/08/2019 marked R2 and specified further that the Petitioners had knowledge of the promotion letter. When I perused the document marked R2, it was apparent that P2 was a directive order sent by the Acting IGP as then to the NPC approving the backdating of the promotions of the 11th Respondent. Thus, it makes it clear that the Petitioners may not have access to those letters and only the relevant authorities would be privy to its contents.

Further, the Petitioners stated in their Petition that they became aware of the RTM No 699 dated 18/12/2019, marked P2 around the second week of January. The Petitioners should have invoked the jurisdiction of this court within one month from the RTM No 699 dated 18/12/2019, by which the backdating of the promotion of the 11th Respondent was communicated. In this regard, I find it relevant to point out that the Petitioners ought to have had knowledge of the circulation of RTM orders since such documents are general communications between all officials and officers. Hence, by the standards of a reasonable man, the Petitioners should have become aware of the alleged infringement by a particular date.

In **Illangaratne v Kandy Muncipal Council (1995) BALJ Vol.VI Part-1 p.10**, Kulatunga J held that:

"... it would not suffice for the Petitioner to merely assert that he personally had no knowledge of the discriminatory act, if on an objective assessment of the evidence he ought to have had such knowledge."

An exception to this rule, however, is found in the Human Rights Commission of Sri Lanka, Act No 21 of 1996. This Act empowers the Human Rights Commission of Sri Lanka to entertain complaints in respect of violations of fundamental rights guaranteed by the Constitution.

Section 13(1) of the Act reads as follows:

"Where a complaint is made by an aggrieved party in terms of section 14 to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the commission shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution."

In the light of this section, the Petitioners can avoid the time bar, if the application to the Human Rights Commission was made within one month of the alleged infringement. By virtue of the aforesaid provision time would not run during the pendency of proceedings before the Commission. This view was fortified in the case of **Romesh Cooray vs. Jayalath, Sub-Inspector Of Police And Others, (2008) 2 SLR 43**

Accordingly, the Petitioners have lodged a complaint to HRCSL as evidenced by the document marked P7C. Pursuant to P13 the complaints made to HRCSL have been acknowledged and HRCSL has requested the Petitioners to refer the complaint to the NPC to seek relief. However, the Petitioners have filed their petition at the Supreme Courts two days before the response received from the HRCSL.

The dates that are material to ascertain the time bar objection are follows; date of the RTM No 699 marked P2 is 18/12/2019, the date of filing the complaint before the HRCSL by the 1st Petitioner is 16/01/2020 and the date of acknowledgement by the HRCSL is 31/01/2020 and the date of fundamental rights Application to the Supreme Court is 29/01/2020. Thus, it is evident that the Petitioners have filed the complaint before the HRCSL within 30 days from the date of release of the RTM No 699 which is exactly two days to one month from the date of filing the action before the HRCSL.

The premise that the complaint was filed on the 16/01/2020, which is a date that falls within the second week of January, stipulates that the Petitioners should have become aware of the alleged infringement on that particular date. Hence, the time freezes pursuant to provision 13(1) of the Human Rights Commission Act No 21 of 1996. Therefore, I'm of the view that the Petitioners have filed the fundamental rights application before this Court within the required time frame in terms of Article 126(2) and I overrule the preliminary objection raised by the Respondents.

Backdating the Promotion of the 11th Respondent

In the objections filed before this court, the position of the 11th Respondent is that on 17/07/2019 marked R3, the 9A Respondent has recommended to backdate the promotion of the 11th Respondent to the rank of SI to 21/12/2001 and the Petitioners' contention is that on 01/10/2019, the 9A Respondent has strongly recommended not to backdate the 11th Respondent's SI promotion pursuant to the elucidations provided in P8.

On perusing the documents before me, I find it relevant to discuss the contents of R3 in relation to P8. The 9A Respondent specified in R3 that the special promotion of the 11th Respondent recommended by the Staff DIG in the year 2001 marked D4 was not approved by the then IGP Mr. Lucky Kodithuwakku due to his demise. Further, in 2011, the Senior DIG Western Province and FFHQ, Mr. Ashoka Wijetilleke,

recommended a special promotion in this respect which was also not approved by the former IGP Mr. Mahinda Balasuriya as he resigned following the death of a person during a protest at the Katunayake Free Trade Zone. Therefore further action was not taken on approving the special promotion of the 11th Respondent in the year 2011.

In consideration of all the above reasons, the 9A Respondent has backdated the promotion of the 11th Respondent to the rank of SI taking effect from 22/12/2001. Also, it is established in the enumerated facts of this case that the NPC has approved the claim of restoration of the 9A Respondent marked R7 rectifying the position stated in P8. I further validate the fact that, the NPC is the proper authority to rectify the position of the 11th Respondent as it stood before Article 55(4) of the 17th Amendment to the Constitution. The case of **Abeywickrama v Pathirana (1986) 1 Sri LR 120** stated in its judgement as 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 recognized under Article 55(1). Matters relating to public officers 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 of service."*

Further, the Sri Lanka Police Orders A5 part IV of the Special Promotion of the Police Department provided in the document marked R15 defines that;

> *"any police officer who deserves to be promoted on the basis of special skills such as heroism, special status, honour to the country and special reputation that brings him more fame in the police service, then he should be promoted to the rank of service or skill appropriate to the matter, at the discretion of the Inspector General"*

As per the 19th Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka, Article 155G (1) (a) provides;

> *"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."*

In consideration of the documents presented by both the counsels in this regard, it is clear that the 11th Respondent has obtained the approval of backdating the promotion of the rank of SI through a special promotion at the discretion of the IGP (9A Respondent) and the commission has exercised its powers in consultation with the IGP pursuant to Article 155G (1) (a). The decision of the commission was based on the commendations given to the 11th Respondent and the special promotion was granted by the Inspector General pursuant to the Sri Lanka Police Orders A5 part IV.

Furthermore, I find that the backdating of the promotion of the 11th Respondent to the rank of SI does not fall within the ambit of P4 and P4A. Subsequently to address the contention made by the Petitioners in relation to CRTM 1582 marked P6, paragraph 07 of R3 is corresponding to the principle 02(I) of P9 which provides that the 11th Respondent has earned two special increments in special IGP compliments in five occasions during his 27 years of service as a police officer. P6 abides by Paragraphs 02 (III) and 02 (IV) of P9 as already established in the aforementioned analysis.

Further, the principle stated in paragraph 02 (II) of P9 is provided in section 30 and 31 of the procedural rules promulgated by the Public Service Commission. It states as follows;

'the date of the letter of appointment or the date on which the officer assumes duties, whichever comes later, shall be the effective date of the appointment. No appointment, for whatever reason, shall be ante-dated.'

However, section 188 of chapter XVII provides that,

'Notwithstanding the provision contain in Section 31 , in the case of the grade to grade promotion in service is made belatedly owing to some unavoidable circumstances and where it appears to the Appointing Authority that the Public Officer is in no way responsible for such delay and on perusal of eligibility it is proved that the officer has qualified himself for promotion in all respects, the Appointing Authority shall promote the officer with effect from the due date despite the fact that the officer may no longer in service or is retired or dead.'

On perusing the facts stated by the 9A Respondent in the contents of R3, it is evident that the 11th Respondent's special promotion was belated due to plausible reasons and therefore the NPC had to promote the 11th Respondent to the rank of SI with effect from the due date pursuant to the above-mentioned section 188. Thus, in totality I agree that the special promotion of the 11th Respondent is being granted following the clear and definite criteria pursuant to 02 (V) of P9. Hence, backdating of the SI promotion of the 11th Respondent on an alleged special scheme is valid.

I would now turn to examine the backdating of the promotion of the 11th Respondent to the rank of IP. The 11th Respondent's stance is that, his promotion to the post of SI was granted on 22/12/2001 and therefore his promotion to the post of IP was backdated to 08/02/2010 granted under time-based promotion scheme. In these circumstances, I find it pertinent to discuss the main issue, when backdating the promotion of the 11th Respondent to the rank of IP, the service performed by the 11th Respondent as an SI is appreciated twice under two promotion schemes; the special promotion scheme and the Merit and seniority scheme.

The question that arises before this court is that whether a police officer can benefit under two promotion schemes for the same position in the first place. In the case of **The Public Services United Nurses Union v Montague Jayawickrama, Minister of Public Administration and others (1988) 1 Sri LR 229**, the decision of Cabinet of Ministers to award two increments to the nurses who were members of the rival trade union was challenged by the Petitioner under Article 12 (1) of the constitution. Wanasundara J was of the view that, an increment in the public service has to be earned by a public officer by satisfactory work and conduct during a specified period of time and any stoppage, postponement or deprivation of an increment has to be a penalty consequent to the disciplinary action taken against the public officer; and held awarding a particular public officer with two increments, places the other officers at a disadvantage and goes against the legitimate expectation of the public servants whose expectations are based on the principles of the Administrative Regulations.

The Supreme Court of India in the case of **Govind Dattatray Kelkar v Chief Controller of Imports [1967] 2 S.C.R. 29** held that;

> *"There can be cases where the differences between the two groups of recruits may not be sufficient to give any preferential treatment to one against the other in the matter of promotions, and in that event a Court may hold that there is no reasonable nexus between the differences and the recruitment."*

On the review of the above, it is evident that even awarding satisfactory work with two increments to a specific individual goes against the legitimate expectation of another. Similarly, the 11th Respondent satisfying the requirements under two different promotion schemes cannot be extended to gain the advantages of a particular promotion twice when the majority of the candidates received such benefits only once in a lifetime. In **Surendran v University Grants Commission and Another [1993] 1 SLR 344** it was observed that when two sources are clubbed together, the courts have

considered such a source to be as one source of medium leading to the ultimate objective. Herein the instant case, the purpose of both the schemes under which the 11th Respondent was promoted leads to one nature of work and therefore the differences between the two sources cannot be justified by the facts and circumstances of this case.

The case of **Weligodapola v Secretary, Minister of Women Affairs and teaching hospital and others 1989 2 SLR 63**, held that

> *"The law recognizes that the principles of equality does not mean that every law must have universal application' for all persons who are not, by nature, attainment or circumstances in the same position. What is required is that persons who by nature, attainment or circumstances are similar are treated alike. If there is a classification which deals alike with those who are similarly situated, someone who is different cannot be allowed to complain that he has not been treated equally; for being different, he must necessarily expect to be treated differently.*

The Petitioners right to equality must be protected in all stages of service and it is noteworthy that several channels can serve as a medium for a promotion to a position and any candidate can be eligible for a promotion under two different schemes but cannot compete through two mediums, to be promoted twice for the same position. Allowing such an opportunity to one individual may create disparities among the others' individual rights.

The case of **Ganga Ram v Union of India [1970] 1 S.C.C. 377** emphasized that;

> *"The equality of opportunity takes within its fold all stages of service from initial appointment to its termination including promotion but it does not prohibit the prescription of reasonable rules for selection and promotion, applicable to all members of a classified group."*

Our courts in **Perera and Another v Cyril Ranathunga, Secretary Defence and others (1993) 1 SLR 39** cited the case of **Jaisinghani v Union of India 1967 AIR (SC) 427** in which it was held;

> *"the concept of equality in the matter of promotions can be predict only when the promotes are drawn from the same source. If the preferential treatment of one source in relation to the other is based on the differences between the said two sources, and the said differences have a reasonable relation to the nature of the office or offices to which recruitment is made, the said recruitment can legitimately be sustained on the basis of valid classification."*

The court upheld the scheme for recruitment from two sources and stated that the objective of such classification is to fill the posts with officers with first rate experience and those who possess a high degree of ability to serve in the Income Tax Service. Herein the instant case before our court, I emphasize the fact that even such officers referred in the case of **Jaisinghani v Union of India** would not be given the opportunity to be promoted twice from two different sources to the same position although both the sources have a reasonable connection to the nature of the office.

The right to equality of opportunity in matters of public employment expressly provided by Article 16(1) of the Indian Constitution is implicit in Article 12 of the Sri Lankan Constitution that is in par with the concept of the rule of law. Hence, on the survey of all the decisions of the above judgments, I'm of the opinion that the Petitioners can have a legitimate grievance in that aspect.

Determination

The objection of the Respondents providing the fact that that the Petition is time barred is overruled. However, the special promotion is cumbersome because such sudden backdating of positions allows persons who do not have adequate training and expertise to hold posts whereby the police services will suffer. Therefore, the procedure of the NPC is not up to satisfaction and is detrimental to the police service.

If inexperienced officers are promoted on technical grounds, the expectation of the public is not fulfilled. Therefore, under this situation the backdating of the 11th Respondent of the promotion to the rank of IP in 01/01/2019 to 08/02/2010 is invalid.

Considering all, I hold that the Fundamental Rights of the Petitioners enshrined under Article 12(1) and Article 14(1)(g) have been violated. Accordingly, I quash the communication dated 18/12/2019 bearing RTM No.699 marked as P2.

Application Allowed.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PC, J
I agree.

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA, J
I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application made under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka for Special Leave to Appeal against the Judgement dated 21st September 2020 of the Honourable Court of Appeal

Sri Lanka Telecom PLC,

Telecommunication Headquarters Building,

Lotus Road,

Colombo 01

SC/SPL/LA/No.224/2020

Case No. CA/WRIT/387/2014 **Petitioner**

Vs.

1. Jagath P. Wijeweera,

Director General of Customs,

Sri Lanka Customs Department

No.40, Main Street, Colombo 11.

1B.Chulananda Perera,

Director General of Customs,

Sri Lanka Customs, Head Office,

Bristol Street, Colombo 01.

1C. P.S.M. Charles,

Director General of Customs,

Sri Lanka Customs, Head Office,

Bristol Street, Colombo 01.

1D. Rtd. Major General G.V. Ravipriya,
Director General of Customs,
Sri Lanka Customs, Head Office,
Bristol Street, Colombo 01.

2. M. Paskaran,
Director General of Customs,
Sri Lanka Customs Department
No.40, Main Street, Colombo 11.

3. Saman de Silva,
Deputy Director of Customs,
Sri Lanka Customs Department
No.40, Main Street, Colombo 11.

4. D.K.S. Ravindra,
Deputy Superintendent of Customs,
Sri Lanka Customs Department
No.40, Main Street, Colombo 11.

Respondents

AND NOW BETWEEN

Rtd. Major General G.V. Ravipriya,
Director General of Customs,
Sri Lanka Customs, Head Office,
Bristol Street, Colombo 01.
Presently at
Sri Lanka Customs
No.40, Main Street, Colombo 11.

Respondent- Petitioner

Vs.

1. Jagath P. Wijeweera,
   Former Director General of Customs,
   Sri Lanka Customs Department
   No.40, Main Street, Colombo 11.
2. Chulananda Perera,
   Former Director General of Customs,
   Sri Lanka Customs, Head Office,
   Bristol Street, Colombo 01.
3. P.S.M. Charles,
   Former Director General of Customs,
   Sri Lanka Customs, Head Office,
   Bristol Street, Colombo 01.
4. M. Paskaran,
   Director General of Customs,
   Sri Lanka Customs Department
   No.40, Main Street, Colombo 11.
5. Saman de Silva,
   Deputy Director of Customs,
   Sri Lanka Customs Department
   No.40, Main Street, Colombo 11.
6. D.K.S. Ravindra,
   Deputy Superintendent of Customs,
   Sri Lanka Customs Department
   No.40, Main Street, Colombo 11.

Respondent- Respondents

Sri Lanka Telecom PLC,
Telecommunication Headquarters Building,
Lotus Road,
Colombo 01.

Petitioner- Respondent

Before : L.T.B. Dehideniya J.
Kumudini Wickremasinghe, J

Counsels : Sumathi Dharmawardena PC, ASG with Manohara Jayasinghe DSG for the Petitioners.
Sanjeewa Jayawardena PC with Lakmini Warusavithana instructed by Vidanapathirana Associates for the Petitioner- Respondent.

Argued on : 14.11.2022

Decided on : 18.11.2022

L.T.B. Dehideniya J,

The Respondent- Petitioner filed this application before this court impugning the judgement of the Court of Appeal dated 21st September 2020. The matter came up for support for special leave to appeal on 14th October 2022. Prior to it been supported, the learned President Counsel Sumathi Dharmawardane ASG submitted to court that the Petitioner has failed to tender a copy of the impugned order of the Court of Appeal with the application and therefore made an application to submit a certified or uncertified copy of said judgement to this court prior to support.

The learned President Counsel Sanjeewa Jayewardane appearing for Petitioner-Respondent objected to the application on several grounds. One of such ground is that the petitioner has failed to reserve his right in the Petition to tender the copy of the judgment at a later stage. Another objection is that the Petitioner making this application after 2 years and 18 days of institution of this action.

The rule 2 of the Supreme Court Rules 1990 published in the Gazette extraordinary No. 665/32- Friday, June 7th, 1991 reads thus;

> *"Every application for special leave to appeal to the Supreme Court shall be made by a petition in that behalf lodged at the, Registry, together with affidavits and documents in support thereof as prescribed by rule 6, and a certified copy, or uncertified photocopy, of the judgment or order in respect of which leave to appeal is sought. Three additional copies of such petition, affidavits documents, and judgment or order shall also be filed; Provided that if the petitioner is unable to obtain any such affidavit, document, judgment or order, as is required by this rule to be tendered with his petition, he shall set out the circumstances in his petition, and shall pray for permission to tender the same, together with the requisite number of copies, as soon as he obtains the same. If the Court is satisfied that the petitioner had exercised due diligence in attempting to obtain such affidavit, document, judgment or order, and that the failure to tender the same was due to circumstances beyond his control, but not otherwise, he shall be deemed to have complied with the provisions of this rule".*

Under this rule tendering a copy of the judgement was made mandatory.

The rule reads that a certified copy or uncertified photo copy of the judgement or order, which is impugned, shall be filed together with the affidavit. By this rule the petitioner is further directed to tender the requisite number of copies of the said judgement or order. The rule has made it mandatory to tender the said documents at the time of filing the affidavit.

The counsel for the Petitioner submits that the Petitioner and Respondent both are aware of document, therefore, even if it is not tendered with the application, there will be no adverse effect to the Respondent. In an application for leave to appeal against a judgment or order of

the Court of Appeal, it is obvious that both parties are aware of the judgement or order. The application to the Supreme Court is to set aside the said order. Therefore it is very material for the petitioner to tender the copy of the order or judgement to the Supreme Court; otherwise this court not will be able to ascertain the correctness/ legality of the said order. When a Petitioner filling such an application to the Supreme Court, the procedure has to be adapted was regulated by these rules. It is mandatory to act as per rules in filing an application.

In the case of ***Mary Nona v. Fransina*** [1988] 2 Sri L R 250 Ramanathan. J. cited with approval the case of ***Mohomad Haniffa Ali v. Khan Mohomad Ali*** where Wanasundara J had considered the rule 46 whether it is a mandatory rule or not held that;

> *The question is whether Rule 46 is mandatory was considered by the Supreme Court in the case of Mohamed Haniffa Rasheed Ali v. Khan Mohamed Ali and another (2). The majority of the Judges appeared to be of the view that Rule 46 is mandatory. Wanasundera, J. delivering the majority judgment stated thus: "While I am against mere technicalities standing in the way of this Court doing justice, it must be admitted that there are rules and rules. Sometimes courts are expressly vested with powers to mitigate hardships, but more often we are called upon to decide which rules are merely directory and which mandatory carrying certain adverse consequences for non-compliance. Many procedural rules have been enacted in the interest of the due administration of justice, irrespective of whether or not a non-compliance causes prejudice to the opposite party. It is in this context that Judges have stressed the mandatory nature of some rules and the need to keep the channels of procedure open for justice to flow freely and smoothly".*

In the case of ***Ceylon Electricity Board and Others vs Ranjith Fonseka*** [2008] 1 Sri LR it was held that;

> *Rule 2 of the Supreme Court Rules, 1990 thus states quite clearly that an application for Special Leave to Appeal should be made by way of a petition. A petition for the said purpose therefore is a mandatory requirement and to fulfill such requirement, it is necessary for the petition to be a valid petition. A petition with an incorrect title therefore would not be acceptable for the purpose of making an application for Special Leave to Appeal in terms of Rule 2 of the Supreme Court Rules 1990, and thereby it is apparent that there had been non-compliance with the said Rule.*

Even the Hon. Attorney General, if he becomes a party, has to act according to the rules. In the case of ***Attorney General Vs Williams Silva*** [1992] 1 Sri LR 44 it has been held that Even the Attorney-General must comply with Rule 46 of the Supreme Court Rules. Non-compliance is fatal. The Attorney-General may not be able to file an affidavit and this may not be necessary where the question is one of law and not of fact. But he must file the documents and relevant proceeding in the absence of a satisfactory explanation for not doing it.

Under these circumstances I hold that the procedure prescribed in this rule are applicable to the Attorney General too.

If a party is facing a hardship beyond his control the rules have provided a relief to such a party. The rules have provided to file the documents at a later stage if the Petitioner is unable to obtain such document as required by the rules. In such a situation the Petitioner shall pray for permission to tender them as soon as he obtain them. Then if the court is satisfied that the Petitioner has exercised due diligence in attempting to obtain the said documents and due to

the circumstances beyond his control unable to file them he can be permitted to tender them later.

In this leave to appeal application the Petitioner has not prayed for permission to tender a copy of the said order at a later stage. The petitioner in his petition gives marking to the affidavit, counter affidavit, written submissions and further written submissions filed in the Court of Appeal. But he refers to the judgement without giving a marking to it as a document.

The petitioner in this petition stated that he will be filing additional document at a later stage. The copy of the judgement of the Court of Appeal cannot be considered as an additional document. It is one of the main document that the petitioner has to tender with the application. If is unable to tender it, he must act in according to proviso and pray for permission to tender the specific document at the later stage. The general application to tender additional document is not complains of the requisite of the proviso.

Under these circumstances I hold that the Petitioner has not made that an application under the proviso to the rule 2 to tender the copy of the judgement or order at a later stage.

The Petitioner had not tendered some of the marked documents with the affidavit when he filed the application, but by way of motions dated 29th October 2020, 06th January 2021 and 22nd October 2022 has tendered the entire set of document that he has pleaded in the Petition. The copy of the order or judgement of Court of Appeal is not pleaded as a document and not tendered with said documents. There is no evidence to establish that the Petitioner had exercised due diligence in attempting to obtain the copy of the order or judgement and on reasons beyond his control he was unable to obtain them.

The petitioner has taken 2years and 18 days to make the application to tender the copy of the judgement. This is an extra ordinary delay where the court cannot accommodate.

The learned Presidents' Counsel for the Petitioner argue that the Attorney General Department was unable to function normally because of the Covid pandemic situation prevailed in the country and thereafter the political unrest that the country had to meet. Any of these difficulties could not have an effect on pleading permission to file the copy of the order/judgement later. With all these problems, the Petitioner was able to file all other documents except the copy of the order/judgment. Therefore I do not think that the pandemic situation or the political unrest had any effect in not filing these documents.

Under these circumstances, I uphold the preliminary objection and dismiss the application.

Judge of the Supreme Court

K.K.K. Wickramasinghe J.

I agree

Judge of the Supreme Court