SRI LANKA
SUPREME COURT
Judgements Delivered
(2024)

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Judgments Delivered in 2024

20/03/24	SC (FR) Application No. 14/2017	1. N.C. Gajaweera, No. 366/15A, 3rd Lane, Dharmapala Road, Pamburana, Matara. 2. D.C. Wewitawidhane, No. 118, School Road, Gurulana, Bope, Padukka. 3. S.D. Bandusiri, 'Manel,' Elaihala, Kolonne. 4. S.A.C. Ashoka, M2, STF Quarters, Gonahena, Kadawatha. 5. D.M.U.K. Abeyratne, No. 38/2, Medagoda, Pujapitiya. 6. W.R.V.M. Abeysekera, 'Sekkuwatte,' Pannala, Kurunegala. 7. H.K.R.A. Henepola, A/3/1, STF Quarters, Biyanwila, Kadawatha. 8. W.G.A. Premasiri, No. 137/9, Old School Road, Aluwihare, Matale. 9. S.A.S.L. Bandara, No. 36, Diddeniya Watte, Dambokke, Kurunegala. PETITIONERS Vs. 1. Prof. Siri Hettige 1A. P.H. Manatunga 1B. K.W.E. Karaliyadda 1st, 1A & 1B Respondents – Chairman, National Police Commission 2. P.H. Manatunga, 2A. Prof. Siri Hettige 2B. Gamini Nawaratne 3. Savitree Wijesekara 4. Y.L.M. Zawahir 5. Anton Jeyanadan 5A. Asoka Wijetilleke 6. Tilak Collure 7. F. de Silva 7A. G. Jeyakumar 2nd, 2A – 7A Respondents are members of the National Police Commission 8. N. Ariyadasa Cooray, Secretary, National Police Commission 8A. Nishantha A Weerasinghe Secretary, National Police Commission 1st to 8A Respondents at the National Police Commission, BMICH, Bauddhaloka Mawatha, Colombo 7. 9. Pujith Jayasundara, Inspector General of Police. 9A. C.D Wickremaratne, Inspector General of Police. Police Headquarters, Colombo 1. 10. Jagath Wijeweera, Secretary, Ministry of Law and Order and Southern Development, Sethsiripaya Stage II, Battaramulla. 10A. Major General Kamal Guneratne, Secretary, Ministry of Internal Security, Elvitigala Mawatha, Colombo 5. 10B. Major General Jagath De Alwis, Secretary, Ministry of Public Security, Battaramulla. 11. R.M. Wimalaratne, No. 592/1, Moragathalanda Road, Arawwala, Pannipitiya. 12. A.P.M. Pigera, No. 309, Abaya Mawatha, Nagoda, Kalutara. 13. Y.P.P.K. Wijayasundara, No. 425/5B, Makola South, Makola. 14. H.D. Wattegedera, No. 29/C1, Centre Road, Ratmalana. 15. W.R.A.D.A.K. Ranasinghe, 'Shanthi,' Battuwatta, Ragama. 16. R.M.S. Jayatissa, N1, STF Quarters, Gonahena, Kadawatha. 17. Hon. Attorney General, Attorney General's Department, Colombo 12. 18. Hon. Justice Jagath Balapatabendi, Chairman 19. Indrani Sugathadasa 20. V. Shivagnanasothy 21. T.R.C. Ruberu 22. Ahamed Lebbe Mohamed Saleem 23. Leelasena Liyanagama 24. Dian Gomes 25. Dilith Jayaweera 26. W.H. Piyadasa 19th – 26th Added Respondents are members of the Public Service Commission 18th to 26th Added Respondents all of the Public Service Commission, No. 1200/9, Rajamalwatta Road, Battaramulla. RESPONDENTS

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20/ 03/ 24	SC APPEAL No. 09/2022	Naipanichchi Gamage Rathnayaka Indiketiya, Pelmadulla. 2nd Defendant-Respondent-Appellant Vs. Upul Nanda Kumara Kodagoda, Indiketiya, Pelmadulla. And now : Sarvodaya Road, Rilhena, Pelmadulla. Substituted-Plaintiff-Appellant- Respondent 1. Naipanichchi Gamage Nimal 2. Naipanichchi Gamage Senarathna All of Indiketiya, Pelmadulla. 1st and 3rd Defendants-Respondents-Respondents
15/ 03/ 24	SC Rule No. 06/2023	Nishan Chandima Abeywardena, Acting Head of Air Navigation Services, Airport and Aviation Services Sri Lanka (Pvt) Ltd., Bandaranaike International Airport, Katunayake. Complainant -Vs- Aruna Deepada De Silva, 145/3A, Park Road, Colombo 05. Respondent
13/ 03/ 24	SC APPEAL 105/2020	V. Watumal (Private) Limited No. 21, 2nd Cross Street, Colombo 11. Petitioner-Appellant Vs. 1. LOLC Finance PLC Registered Office No. 100/1, Sri Jayawardenapura Mawatha, Rajagirya. 1st Respondent- Respondent 2. LOLC Factors Limited Registered Office No. 100/1, Sri Jayawardenapura Mawatha, Rajagirya. Principal Business Office No. 504, Nawala Road, Rajagiriya. 2nd Respondent-Respondent
12/ 03/ 24	SC/HCCA/LA 184/2023	Believers Church No. 54, Jayasooriya Mawatha, Kandana. Plaintiff Vs. Rev. Father Paneer Selvam (Now Deceased) Believers Church No. 26, Dekinda Road, Nawalapitiya. Defendant Paneer Selvam Jenita Enriya No. 5B, Dekinda Road, Bawwagama, Nawalapitiya. Substituted Defendant THEN BETWEEN Believers Church No. 54, Jayasooriya Mawatha, Kandana. Plaintiff – Petitioner And Paneer Selvam Jenita Enriya No. 5B, Dekinda Road, Bawwagama, Nawalapitiya. Substituted Defendant – Respondent NOW BETWEEN Believers Church No. 54, Jayasooriya Mawatha, Kandana. Plaintiff – Petitioner – Petitioner Vs. Paneer Selvam Jenita Enriya No. 5B, Dekinda Road, Bawwagama, Nawalapitiya. Substituted Defendant -Respondent-Respondent AND NOW BETWEEN Believers Church No. 54, Jayasooriya Mawatha, Kandana. Plaintiff – Petitioner – Petitioner – Petitioner Vs. Paneer Selvam Jenita Enriya No. 5B, Dekinda Road, Bawwagama, Nawalapitiya Substituted Defendant – Respondent – Respondent – Respondent

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12/03/24	SC Appeal 03/2019, SC Appeal 03A/2019, SC Appeal 03B/2019, SC Appeal 03C/2019	Assistant Commissioner of Labour District Labour Office, Haputhale Complainant Vs, Stitches Private Limited, Kahagallawaththa, Udawelakotuwa, Diyathalawa Respondent And Stitches Private Limited, Kahagallawaththa, Udawelakotuwa, Diyathalawa Respondent-Petitioner Vs, Assistant Commissioner of Labour District Labour Office, Haputhale Complainant-Respondent The Hon. Attorney General Attorney General's Department, Colombo 12. Respondent And Stitches Private Limited, Kahagallawaththa, Udawelakotuwa, Diyathalawa Respondent-Petitioner-Appellant Vs, Assistant Commissioner of Labour District Labour Office, Haputhale Complainant-Respondent-Respondent The Hon. Attorney General Attorney General's Department, Colombo 12. Respondent-Respondent And now between Stitches Private Limited, Kahagallawaththa, Udawelakotuwa, Diyathalawa Respondent-Petitioner-Appellant-Appellant Vs, Assistant Commissioner of Labour District Labour Office, Haputhale Complainant-Respondent-Respondent-Respondent The Hon. Attorney General Attorney General's Department, Colombo 12. Respondent-Respondent-Respondent ...etc
12/03/24	SC Appeal 135/2016	Magret Karunasinghe, No. 16/1, Amunuwatta, Henamulla, Kurunegala. Plaintiff Vs, Jayalathge Srimathi Mangalika Jayasinghe, Amunuwatta, Henamulla, Kurunegala. Defendant And Magret Karunasinghe, (Deceased) R.P. Wijeratne, No. 16/1, Amunuwatta, Henamulla, Kurunegala. Substituted Plaintiff-Appellant Vs, Jayalathge Srimathi Mangalika Jayasinghe, Amunuwatta, Henamulla, Kurunegala. Defendant -Respondent And now between Jayalathge Srimathi Mangalika Jayasinghe, (Deceased) 1. Sunil Jayantha Amarasinghe 2. Iresha Nayomi Amarasinghe Amunuwatta, Henamulla, Kurunegala. Substituted Defendant –Respondent-Petitioner Vs, R.P. Wijeratne, No. 16/1, Amunuwatta, Henamulla, Kurunegala. Substituted Plaintiff-Appellant-Respondent
12/03/24	SC Appeal 129/2017	The Democratic Socialist Republic of Sri Lanka Complainant Vs, Arumugam Sebesthiyan Accused And Now Arumugam Sebesthiyan Accused Appellant Vs, The Hon. Attorney General Attorney General's Department, Colombo 12. Complainant Respondent And now between Arumugam Sebesthiyan Accused Appellant Appellant Vs, The Hon. Attorney General Attorney General's Department, Colombo 12. Complainant Respondent Respondent

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07/03/24	SC/APPEAL/132/2015	1. Wewegedarage Lilli 2. Wewegedarage Hemapala 3. Wewegedarage Seetha Ranjanee All of Kandangoda, Pugoda. 4. Wewegedarage Neil Chandana, Thunnana, Hanwella. Plaintiffs Vs. 1. Paseema Durage Saviya 2. Paseema Durage Gunathilaka 3. Paseema Durage Agee (Deceased) 3A. Wedikkarage Anoma Chithralatha 4. Paseema Durage Meri (Deceased) 4A. Wedikkarage Kusuma 5. Wedikkarage Podi 6. Wedikkarage Vaijiya 6A. Hapan Pedige Piyaseeli 7. Wasthuwa Durage Meri 8. Kuda Kompayalage Simo (Deceased) 8A. Kuda Kompayalage Simon Wickramarathna 9. Mannalage Rosana 10. Weerappulige Simiyon Singho 11. Wedikkarage Simon (Deceased) 11A. Wedikkarage Podi All of Kandangoda, Pugoda. Defendants AND BETWEEN 8. Kuda Kompayalage Simo (Deceased) 8A. Kuda Kompayalage Simon Wickramarathna 9. Mannalage Rosana Both of Kandangoda, Pugoda. 8th and 9th Defendant-Appellants Vs. 1. Wewegedarage Lilli 2. Wewegedarage Hemapala 3. Wewegedarage Seetha Ranjanee All of Kandangoda, Pugoda. 4. Wewegedarage Neil Chandana, Thunnana, Hanwella. Plaintiff-Respondents 1. Paseema Durage Saviya 2. Paseema Durage Gunathilaka 3. Paseema Durage Agee (Deceased) 3A. Wedikkarage Anoma Chithralatha 4. Paseema Durage Meri (Deceased) 4A. Weddikkarage Kusuma 5. Weddikkarage Podi 6. Weddikkarage Vaijiya 6A. Hapan Pedige Piyaseeli 7. Wasthuwa Durage Meri 10. Weerappulige Simiyon Singho 11. Weddikkarage Simon (Deceased) 11A. Weddikkarage Podi All of Kandangoda, Pugoda. Defendant-Respondents AND NOW BETWEEN 9. Mannalage Rosana (Deceased) Kandangoda, Pugoda. 9A. Pasimahaduragesede Chandrawathie 9B. Jayakody Premasinghe 9C. Sunethra Premasinghe All of Kandangoda, Pugoda. Substituted 9th Defendant-Appellant-Appellants Vs. 8. Kuda Kompayalage Simo (Deceased) 8A. Kuda Kompayalage Simon Wickramarathna, Kandangoda, Pugoda. 8th Defendant-Appellant-Respondent 1. Wewegedarage Lilli 2. Wewegedarage Hemapala 3. Wewegedarage Seetha Ranjanee All of Kandangoda, Pugoda. 4. Wewegedarage Neil Chandana, Thunnana, Hanwella. Plaintiff-Respondent-Respondents 1. Paseema Durage Saviya 2. Paseema Durage Gunathilaka 3. Paseema Durage Agee (Deceased) 3A. Wedikkarage Anoma Chithralatha 4. Paseema Durage Meri (Deceased) 4A. Wedikkarage Kusuma 5. Wedikkarage Podi 6. Wedikkarage Vajiiya 6A. Hapan Pedige Piyaseeli 7. Wasthuwa Durage Meri 10. Weerappulige Simiyon Singho 11. Wedikkarage Simon (Deceased) 11A. Wedikkarage Podi All of Kandangoda, Pugoda. Defendant-Respondent-Respondents

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07/03/24	SC/APPEAL/190/2011	Karunawathi Palith Liyanage, No. 283, Pasyala, Meerigama. Petitioner-Petitioner-Appellant Vs. Ratna Lakshmi Jayakodi (nee Yatawara), “Rajagaha” Balagalla, Divulapitiya. Plaintiff-Respondent-Respondent 1. Handunweerage Babynona, No. 283, Pasyala, Meerigama. (Deceased) 1A. Palith Liyanage Ariyadasa (Deceased) 2. Palith Liyanage Ariyadasa, No. 283, Pasyala, Meerigama. (Deceased) 2A. Yaspali Liyanage, 2B. Chalinda Palitha Liyanage, Both of No. 45, Sri Sugathawansa Mawatha, 2nd Division, Maradana, Colombo 10. Defendant-Respondent-Respondents
07/03/24	SC/APPEAL/131/2019	Sunil Sirimanne, Koratuhena Road, Badugama, Matugama. Applicant Vs. 1. Manager, Brave Guard Security and Investigations Services, No. 194, Sri Jayawardenapura Mawatha, Welikada, Rajagiriya. 2. Deputy Chief Security Officer, Bank of Ceylon, Kalutara Branch, Kalutara. Respondents AND Deputy Chief Security Officer, Bank of Ceylon, Kalutara Branch, Kalutara. 2nd Respondent-Petitioner Vs. Sunil Sirimanne, Koratuhena Road, Badugama, Matugama. Applicant-Respondent Manager, Brave Guard Security and Investigations Services, No. 194, Sri Jayawardenapura Mawatha, Welikada, Rajagiriya. 1st Respondent-Respondent AND NOW BETWEEN Deputy Chief Security Officer, Bank of Ceylon, Kalutara Branch, Kalutara. 2nd Respondent-Petitioner-Appellant Vs. Sunil Sirimanne, Koratuhena Road, Badugama, Matugama. Applicant-Respondent-Respondent Manager, Brave Guard Security and Investigations Services, No. 194, Sri Jayawardenapura Mawatha, Welikada, Rajagiriya. 1st Respondent-Respondent-Respondent
07/03/24	SC/APPEAL/219/2016	1. Aqua World Private Limited, Suduwella New Road, Wennappuwa. 2. Kuranage Marian Stella Rose Perera, Suduwella New Road, Wennappuwa. Plaintiffs Vs. 1. DFCC Bank, No. 73/5, Galle Road, Colombo 03. 2. Navinda Samarawickrama 3. Anuja Samarawickrama (Partners of Shockman and Samarawickrama Auctioneer) 290, Havelock Road, Colombo 05. Defendants AND BETWEEN DFCC Bank PLC, No. 73/5, Galle Road, Colombo 03. 1st Defendant-Appellant Vs. 1. Aqua World Private Limited, Suduwella New Road, Wennappuwa. 2. Kuranage Marian Stella Rose Perera, Suduwella New Road, Wennappuwa. Plaintiff-Respondents 3. Navinda Samarawickrama 4. Anuja Samarawickrama (Partners of Shockman and Samarawickrama Auctioneer) of 290, Havelock Road, Colombo 05. Defendant-Respondents
29/02/24	SC / APPEAL / 83 / 2013	Delkadura Danapala Mudiyanselage Sarathchandra Bandara, 17, Hospital Road Ratnapura. DEFENDANT – RESPONDENT - APPELLANT Vs. 1(a) Omanthage Malkanthi Fernando, 22/28, Hospital Road Ratnapura. 1(b) Pathberiya Ranasinghege Kasun Irosha Ranasinghe,1(c) Pathberiya Ranasinghege Kavidu Ashan Ranasinghe, SUBSTITUTED PLAINTIFFS – APPELLANTS – RESPONDENTS

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29/02/24	SC Appeal No. 133/12	1. Kanangara Koralage Dona Anurushhika, 2. Kanangara Koralage Don Lessly Kanangara Both of: No. 09, Siddhamulla, Piliyandala. PLAINTIFFS Vs Bank of Ceylon, Head Office, New Building, Janadhipathi Mawatha, Colombo 01. DEFENDANT AND Bank of Ceylon, Head Office, New Building, Janadhipathi Mawatha, Colombo 01. DEFENDANT-APPELLANT Vs 1. Kanangara Koralage Dona Anurushhika, 2. Kanangara Koralage Don Lessly Kanangara Both of: No. 09, Siddhamulla, Piliyandala PLAINTIFFS-RESPONDENTS AND NOW BETWEEN Kanangara Koralage Dona Anurushhika, No. 09, Siddhamulla, Piliyandala PLAINTIFF-RESPONDENT-PETITIONER Kanangara Koralage Don Lessly Kanangara. (Deceased) Vs Bank of Ceylon, Head Office, New Building, Janadhipathi Mawatha, Colombo 01. DEFENDANT-APPELLANT-RESPONDENT
29/02/24	SC Rule 03/2017	In the matter of a Rule in terms of Section 42(2) of the Judicature Act No. 2 of 1978, against Mr. Nagananda Kodituwakku, Attorney-at- Law. Nagananda Kodituwakku Attorney-at-Law 99, Subadrarama Road, Nugegoda Respondent
29/02/24	sc_appeal_36_2019	U. Don Reginold Felix De Silva No. 146/32/A, Salmal Place, Mattegoda. Defendant-Appellant-Petitioner Madduma Arachchilage Sadimenike, No. 146/32/A, Salmal Place, Mattegoda. Substituted Defendant-Appellant-Appellant Vs. Director (Land) Acquisition Officer, Road Development Authority, 9th Floor, Sethsiripaya, Battaramulla. Plaintiff-Respondent-Respondent
29/02/24	SC Appeal No: 25/2021	Mahawaduge Priyanga Lakshitha Prasad Perera No. 60, Kandawala, Katana. Carrying on business as a sole proprietor under the name and style of ‘Trading Engineering and Manufacturing Company’ Plaintiff Vs. China National Technical Import and Export Corporation No. 90, Xi San Huan Zhong Lu Genertec Plaza Beijing, China Having its local representative office at No. 445A, 3rd Floor, Galle Road, Colombo 03. Defendant AND NOW BETWEEN Mahawaduge Priyanga Lakshitha Prasad Perera No. 60, Kandawala, Katana. Carrying on business as a sole proprietor under the name and ‘Trading Engineering Manufacturing Company’ Plaintiff-Petitioner Vs. China National Technical Import and Export Corporation No. 90, Xi San Huan Zhong Lu Genertec Plaza Beijing, China Having its local representative office at No. 445A, 3rd Floor, Galle Road, Colombo 03. Defendant-Respondent
29/02/24	FR Application No. 37/2024	Mathiparanan Abraham Sumanthiran 3/1, Daya Road, Colombo 00600 PETITIONER Vs. 1. Honourable Mahinda Yapa Abeywardana Speaker of Parliament, Parliament of Sri Lanka, Sri Jayawardenapura Kotte 2. Honourable Attorney General, Attorney Genenral’s Department, Colombo 01200 RESPONDENTS

29/ 02/ 24	SC/FR/ Application No. 160/2014	Poorna Mayura Kankanige, 'Jaliya Sevana' No 363 Udupila, Delgoda Petitioner Vs 1. Police Sergeant No. 24141 Senadheera, Police Station, Bandaranaike Memorial International Conference Centre, Colombo 07. 2. Police Constable No. 70825 Jayawardena, Police Station, Bandaranaike Memorial International Conference Centre, Colombo 07. 3. Police Constable No. 77341 Ruwan Police Station, Bandaranaike Memorial International Conference Centre, Colombo 07. 4. Inspector of Police Attharagama Officer-in-Charge Police Station, Bandaranaike Memorial International Conference Centre, Colombo 07. 5. N. K. Illangakoon, Inspector General of Police Police Head Quarters, Colombo 01. 6. The Hon. Attorney General, Attorney General's Department, Colombo-12. Respondents

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29/02/24	SC/APPEAL No. 35/2016	1. Mrs. Hyacinth Sita Seneviratne of 24 Aloe Avenue, Colombo 03 (a Trustee of “The Dassanayake Trust”) (Deceased) 2. Dr. Mackingsley Gamini Dassanayake, J. C. R. 42, University Road, Highfield, Suthampton S09 5NH England (A Trustee of “The Dassanayake Trust”) by his Attorney in Sri Lanka Mrs. Hyacinth Sita Seneviratne of 24, Aloe Avenue, Colombo 03 (Deceased) 3. Sarathchandra Bandara Ehelepola Seneviratne of 4420, Hawthrone Street, Washinton D. C United States of America, (A Trustee of “The Dassanayake Trust”) by his Attorney in Sri Lanka Mrs. Hyacinth Sita Seneviratne of 24, Aloe Avenue, Colombo 03 (Deceased) Plaintiffs Vs. 1. Kader Ibrahim Mohamed Marzook 50/1, Railway Station Road, Haputale 2. Jailabdeen Jaleel 3. Nageswary Arumugam 4. Miss N. Krishasamy (full name not known) 5. N. Kumaresmoorthy (full name not known) all of No. 9, Thambipilliai Avenue, Haputale. Defendants AND Dr. Mackingsley Gamini Dassanayake of No. 24, Aloe Avenue, Colombo 03. 2nd Plaintiff-Appellant Vs 1. K. I. Mohamed Marzook of No. 50/1, Railway Station Road, Haputale 2. Jailabdeen Jaleel of No. 9, Thambipilliai Avenue, Haputale Defendants-Respondents Mrs. Haycinth Sita Seneviratne of 24 Aloe Avenue, Colombo 03 (a Trustee of “The Dassanayake Trust”) (Deaceased) 1st Plaintiff-Respondent Sarathchandra Bandara Ehelepola Seneviratne of 4420, Hawthrone Street, Washinton D. C United States of America, 3rd Plaintiff-Respondent 3. Nageswary Arumugam 4. Miss N. Krishasamy 5. N. Kumaresmoorthy all of No. 9, Thambipilliai Avenue, Haputale Defendants-Respondents AND NOW BETWEEN K. I. Mohamed Marzook of No. 50/1, Railway Station Road, Haputale. 1st Defendant- Respondent- Petitioner Vs. Dr. Mackinsley Gamini Dassanayake of No. 24, Aloe Avenue, Colombo 03. (Deceased) 2nd Plaintiff-Appellant- Respondent 2A. Thamara Kumari Ramani Dassanayake, nee Tennekoon, No. 24, Aloe Avenue, Colombo 03 2AA. Mackingsley Kushan Dassanayake, No. 24, Aloe Avenue, Colombo 03 Plaintiffs-Appellants-Respondents Jailabdeen Jaleel of No. 9, Thambipilliai Avenue, Haputale (Deceased) 2nd Defendant-Respondent Mrs. Hyacinth Sita Seneviratne of 24 Aloe Avenue, Colombo 3 (a Trustee of “The Dassanayake Trust” (Deceased) 1st Plaintiff-Respondent-Respondent Sarathchandra Bandara Ehelepola Seneviratne of 4420, Hawthrone Street, Washington D. C United States of America, 3rd Plaintiff-Respondent-Respondent 3. Nageswary Arumugam 4. Miss N. Krishasamy 5. N. Kumaresmoorthy all of No. 9, Thambipilliai Avenue, Haputale Defendants-Respondents-Respondents

29/ 02/ 24	SC Appeal No: 101/2009	Thuraiappah Nithyanandan No. 12902/1, Nawala Road, Narahenpita, Colombo 5. Plaintiff Vs. Sherman Sons Limited. No.23, Sri Sangaraja Mawatha, Colombo 10. Defendant AND BETWEEN Sherman Sons Limited. No.23, Sri Sangaraja Mawatha, Colombo 10. Defendant-Appellant Vs. Thuraiappah Nithyanandan. No. 12902/1, Nawala Road, Narahenpita, Colombo 5. Plaintiff-Respondent AND NOW BETWEEN Sherman Sons (Private) Limited. (formerly known as Sherman Sons Limited.) No.23, Sri Sangaraja Mawatha, Colombo 10. Presently of No. 194F, Nawala Road, Narahenpita, Colombo 5. Defendant-Appellant-Appellant Vs Thuraiappah Nithyanandan No. 12902/1, Nawala Road, Narahenpita, Colombo 5. Plaintiff-Respondent- Respondent
29/ 02/ 24	SC Appeal No: 141/2012	Abekoon Mudiyanselage Seelawathie Kumarihamy of Yapa Niwasa, Millawana, Matale. Through her Power of Attorney Holder Yapa Mudiyanselage Chandana Yapa Bandara of Yapa Niwasa, Millawana, Matale. PLAINTIFF -VS- Galakumburegedara Wijerathna of Madagama, Millawana, Matale. DEFENDANT AND BETWEEN Abekoon Mudiyanselage Seelawathie Kumarihamy of Yapa Niwasa, Millawana, Matale. Through her Power of Attorney Holder Yapa Mudiyanselage Chandana Yapa Bandara of Yapa Niwasa, Millawana, Matale. PLAINTIFF -APPELLANT -VS- Galakumburegedara Wijerathna of Madagama, Millawana, Matale. DEFENDANT -RESPONDENT AND NOW BETWEEN Abekoon Mudiyanselage Seelawathie Kumarihamy of Yapa Niwasa, Millawana, Matale. Through her Power of Attorney Holder Yapa Mudiyanselage Chandana Yapa Bandara of Yapa Niwasa, Millawana, Matale. PLAINTIFF -APPELLANT-APPELLANT -VS- Galakumburegedara Wijerathna of Madagama, Millawana, Matale. DEFENDANT -RESPONDENT-RESPONDENT

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29/02/24	SC Appeal No. 156/2012	Kodithuwakku Arachchilage Don Mithrasena Temple Junction, Welipanna Plaintiff VS. 1. Withanage Don Ariyarathne 2. Opatha Kankanamge Don Neetha Ranjani Both of No. 05, Kannangara Mawatha, Matugama Defendants AND BETWEEN Kodithuwakku Arachchilage Don Mithrasena Temple Junction, Welipanna Plaintiff – Appellant VS. 1. Withanage Don Ariyarathne 2. Opatha Kankanamge Don Neetha Ranjani Both of No. 05, Kannangara Mawatha, Matugama 1st and 2nd Defendants – Respondents AND NOW BETWEEN 1. Withanage Don Ariyarathne (Deceased) 1A. Vithanage Don Charith Jithendra 1B. Vithanage Dona Nethmi 1C. Vithanage Dona Sanduni All of No. 39/22A, Hospital Road, Waththawa, Matugama. 2. Opatha Kankanamge Don Neetha Ranjani (Deceased) 2A. Vithanage Don Charith Jithendra 2B. Vithanage Dona Nethmi 2C. Vithanage Dona Sanduni All of No. 39/22A, Hospital Road, Waththawa, Matugama. 1A To 1C and 2A to 2C Substituted Defendants – Respondents - Appellants VS. Kodithuwakku Arachchilage Don Mithrasena (Deceased) Temple Junction, Welipanna Plaintiff – Appellant – Respondent 1A. Tharindu Madushan Kodithuwakku 1B. Kodithuwakku Arachchige Don Sajith Madhusanka 1C. Randika Madushashi Kodithuwakku All of Temple Junction, Welipanna 1A to 1C Substituted Plaintiffs – Appellants – Respondents
29/02/24	SC/APPEAL/183/2017	Laththuwahandi Priyani De Silva Vijitha, Balapitiya. NOW AT No. 420/1, Lansiyawatta Road, Pathegama, Balapitiya. Applicant Vs. 1. W. T. Ellawala Chairman, Sinhalese Sports Club 35, Maitland Place, Colombo 07. 2. A. D. H. Samaranayake, Secretary, Sinhalese Sports Club, 35, Maitland Place, Colombo 07. 3. S. Gunawardena, Treasurer, Sinhalese Sports Club, 35, Maitland Place, Colombo 07. Respondents AND NOW 1. W.T. Ellawala Chairman, Sinhalese Sports Club 35, Maitland Place, Colombo 07. 2. A. D. H. Samaranayake, Secretary, Sinhalese Sports Club, 35, Maitland Place, Colombo 07. 3. S. Gunawardena, Treasurer, Sinhalese Sports Club 35, Maitland Place, Colombo 07. Respondents – Appellants Vs. Laththuwahandi Priyani De Silva Vijitha, Balapitiya. Applicant – Respondent AND NOW BETWEEN Laththuwahandi Priyani De Silva Vijitha, Balapitiya. NOW AT No. 420/1 Lansiyawatta Road, Pathegama, Balapitiya. Applicant – Respondent – Appellant Vs. 4. W. T. Ellawala Chairman, Sinhalese Sports Club 35, Maitland Place, Colombo 07 5. A. D. H. Samaranayake, Secretary, Sinhalåese Sports Club, 35, Maitland Place, Colombo 07. 6. S. Gunawardena, Treasurer, Sinhalese Sports Club, 35, Maitland Place, Colombo 07 Respondents – Appellants – Respondents

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29/02/24	SC Expulsion No. 02/2022	Safiul Muthunabeen Mohamed Muszhaaraff Lake View, 418, Vaathiya Road, RM Nagar, Pottuvil-27 Petitioner vs 1. S. Suairdeen Secretary General, All Ceylon Makkal Congress 2. Rishad Bathiudeen, Leader, All Ceylon Makkal Congress 3. N. M. Shaheid, Attorney-at-Law 4. M. S. S. Asmeer Ali 5. Hussein Bhaila 6. Y. L. S. Hameed 7. M. H. M Navavi 8. Hon. Ishak Rahuman 9. Dr. M. S. Anees 10. Abdullah Mahroof 11. K. M. Abdul Razzak 12. M. I. Muththu Mohamed 13. Dr. A. L. Shajahan 14. A. J. M. Faiz 15. M. N. Nazeer 16. M. A. M. Thahir 17. M. A. Anzil 18. Rushdy Habeeb, Attorney-at-Law 19. Dr. Y. K. Marikkar 20. M. R. M. Hamjath Haji 21. R. M. Anwer 22. I. L. M. Mahir 23. I. T. Amizdeen 24. Januafer Jawahir 25. S. H. M. Mujahir 26. Hon. Ali Sabry Raheem 27. All Ceylon Makkal Congress (The 1st to 27th Respondents all of No. 23/4, Charlemont Road, Colombo 06) 28. Dhammika Dasanayake Secretary General of Paliament Parliament of Sri Lanka Sri Jayewardenepura Kotte 29. Mr. Nimal Punchihewa Chairman, Election Commission Election Secretariat, P. O. Box 02, Sarana Mawatha, Rajagiriya. Respondents
29/02/24	SC Appeal No: 102/2017	P.V. Munasinghe No. 248, Old Road, Minuwangoda Plaintiff Vs. 1. A. M. Newton Kulasuriya Chairman, Urban Council, Minuwangoda 2. L. N. A. P. Kumarasinghe Superintendent of Works Urban Council, Minuwangoda Defendants AND 1. A. M. Newton Kulasuriya Chairman, Urban Council, Minuwangoda. 2. L. N. A. P. Kumarasinghe Superintendent of Works Urban Council, Minuwangoda. Defendant-Appellants Vs. P. V. Munasinghe No. 248, Old Road, Minuwangoda. Plaintiff-Respondent AND NOW BETWEEN 1. A. M. Newton Kulasuriya Chairman, Urban Council, Minuwangoda 2. L. N. A. P. Kumarasinghe Superintendent of Works Urban Council, Minuwangoda Defendants-Appellants-Appellants Vs. P. V. Munasinghe No. 248, Old Road, Minuwangoda. Currently No. 248, Pathaha Road, Veediyawatta, Udugampola Plaintiff-Respondent-Respondent

29/02/24	SC/FR Application No. 38/17	1. Jayasinghe Herath Mudiyanselage Kusum Indika Jayasinghe, No. 14, 3rd Lane, Dharmasoka Mawatha, Aruppola, Kandy. 2. Jayasinghe Herath Mudiyanselage Swetha Arundathi Jayasinghe, No. 14, 3rd Lane, Dharmasoka Mawatha, Aruppola, Kandy. Petitioners Vs. 1. Secretary, Ministry of Education, 'Isurupaya', Battaramulla. 2. I. Withanachchi, Principal, Mahamaya Girls College, Kandy. 3. Y.M.T. Kumarihamy, Principal, Sangamitta Girls School, Matale. (Chairman, Board of Appeals and Objections) 4. H.M.P.K. Nawaratne, Vice Principal, Kingswood College, Kandy. (Member, Board of Appeals and Objections) 5. K.P.C. Kurukulasuriya, Secretary, Mahamaya Girls College, Kandy. 6. S.A.R.A. Senaweera, Mahamaya Girls College, Kandy. 7. T.S. Kodikara, Agent for School Development Society, Mahamaya Girls College, Kandy. (Member, Board of Appeals and Objections) 8. S.D. Nawaratne, Member of Old Girls Union, Mahamaya Girls College, Kandy. (Member, Board of Appeals and Objections) 3rd to 8th Respondents are members of the Board of Appeals and Objections 9. C.L. Mabopitiya (minor) 10. M.S. Jayaratne (Guardian for the 9th Respondent) Both of No. 66/32A, Rajapihilla Mawatha, Kandy. 11. N.D.H. Hettiarachchi (minor) 12. G.C.H. Hettiarachchi (Guardian for the 11th Respondent) Both of No. 199 B1/1, Rajapihilla Mawatha, Kandy. 13. W.S.A.V. Abhimani (minor) 14. W.S.A.D.D. Senarathne (Guardian for the 13th Respondent) Both of No. 16/1, Tekkawatta, Tennakumbura, Kandy. 15. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents
29/02/24	SC (FR) Application No. 264/2015	K. G. I. Krishantha Kapugama No. 94/4, Kobbekaduwa, Yahlathanna Petitioner Vs. 1. I. P. Anura Krishantha, Officer-in-Charge, Police Station, Irrataperiyakulam 2. CI. Channa Abeyratne, Head Quarters Inspector, 3. SI. Wanninayake 4. SI Somaratne 5. Sergeant Seneviratne (31978) 6. PC J.M.S. Jayawardene (5786) The 2nd to 6th Respondents, of Police Station, Vauniya. 7. Inspector General of Police; Sri Lanka Police Department, Police Headquarters, Colombo 01 8. Hon. The Attorney General, Attorney General's Department, Hulftsdorp Colombo 12 Respondents
29/02/24	SC/FR Application No. 502/12	Nanayakkara Gamage Don Kashyapa Sathyapriya De Silva No. 6B, Silvan Lane, Panadura. Petitioner Vs. 1. Manoj, Police Constable (P.C. 5778), Traffic Police, Mt. Lavinia Traffic Division, Mount Lavinia. 2. J.P.D. Jayasinghe Sub Inspector of Police/Traffic, Mt. Lavinia Traffic Division, Mount Lavinia. 3. Officer in Charge, Mt. Lavinia Traffic Division, Mount Lavinia. 4. Inspector General of Police Police Headquarters, Colombo 01. 5. Hon. Attorney General Attorney General's Department, Colombo 12. Respondents

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29/02/24	SC FR Application No. 449/2019	1. Centre for Policy Alternatives (Guarantee) Limited, No. 6/5, Layards Road, Colombo 5. 2. Dr. Paikiasothy Saravananmuttu No. 3, Ascot Avenue, Colombo 5. Petitioners Vs 1. Hon. Attorney General (in terms of the requirements of Article 35 of the Constitution) 1A. Maithripala Sirisena (former President of the Democratic Socialist Republic of Sri Lanka) No. 61, Mahagama Sekara Mawatha, Colombo 7. 2. Hon. Attorney General (in terms of the requirements of Articles 126(2) and 134 of the Constitution read with Supreme Court Rule 44(3)) Attorney General's Department, Hulftsdorp, Colombo 12. and others...
29/02/24	SC Appeal 72/18, SC Appeal 73/18	Nanayakkarawasam Halloluwage Sisil Dias, No. 360/1, Poddalawatta, Wakwella Road, Galle. PLAINTIFF-RESPONDENT-PETITIONER Vs Wewelwala Hewage Hemathi, No. 362, Poddalawatta, Wakwella Road, Galle. 2nd DEFENDANT-PETITIONER-RESPONDENT Kirinda Liyanarachchige Premadasa, No. 359/1, Wakwella Road, Galle. 1st DEFENDANT-RESPONDENT-RESPONDENT Nanayakkarawasam Halloluwage Sisil Dias, No. 360/1, Poddalawatta, Wakwella Road, Galle. PLAINTIFF Vs 1. Kirinda Liyanarachchige Premadasa, No. 359/1, Wakwella Road, Galle. 2. Wewelwala Hewage Hemathi, No. 362, Poddalawatta, Wakwella Road, Galle. DEFENDANTS AND Kirinda Liyanarachchige Premadasa, No. 359/1, Wakwella Road, Galle. 1st DEFENDANT-PETITIONER Vs Nanayakkarawasam Halloluwage Sisil Dias, No. 360/1, Poddalawatta, Wakwella Road, Galle. PLAINTIFF-RESPONDENT Wewelwala Hewage Hemathi, No. 362, Poddalawatta, Wakwella Road, Galle. 2nd DEFENDANT-RESPONDENT AND NOW BETWEEN Nanayakkarawasam Halloluwage Sisil Dias, No. 360/1, Poddalawatta, Wakwella Road, Galle. PLAINTIFF-RESPONDENT-PETITIONER Vs Kirinda Liyanarachchige Premadasa, No. 359/1, Wakwella Road, Galle. 1st DEFENDANT-PETITIONER-RESPONDENT Wewelwala Hewage Hemathi, No. 362, Poddalawatta, Wakwella Road, Galle. 2nd DEFENDANT-RESPONDENT-RESPONDENT
29/02/24	SC (FR) Application No. 498/2012	Punchi Hewage Ajithsena Silva, Kutukende Estate Nikadalupotha, Kurunegala. Presently, No. 22/A Mahaviara Road, Lakshapathiya, Moratuwa. Petitioner Vs. 1. Bank of Ceylon, No 4, Lanka Banku Mawatha, Colombo 01. 2. Chief legal officer, Bank of Ceylon, No 4, Lanka Banku Mawatha, Colombo 01. 3. P.A.G Weerakoon Banda Chief Manager Properties, Bank of Ceylon, No 4, Lanka Banku Mawatha, Colombo 01. 4. D.N.J Costa, Assistant General Manager Bank of Ceylon, Colombo 01. 5. S Liyanawala No. 1 No 4, Lanka Banku Mawatha, Colombo. 6. Hon. Attorney- General, Attorney General's Office, Colombo 12. Respondents
28/02/24	SC Appeal 173/2018	Ceylinco Insurance PLC 4th Floor Ceylinco House No. 69, Janadhipathi Mawatha Colombo 1 Respondent - Petitioner - Petitioner Vs. Z. O. A [Formerly Z.O.A Refugee Care Netherlands] No. 34, Gower Street Colombo 05. Claimant - Respondent - Respondent

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28/02/24	SC/CHC/APPEAL/26/2003	Dehigaspe Patabendige Nishantha Nanayakkara, No. 34/1, First Lane, Egodawatta Road, Boralesgamuwa. Petitioner-Appellant Vs. 1. Ceylon MKN Eco Power (Pvt) Ltd., No. 202, Moratuwa Road, Piliyandala. 2. Yukinori Kyuma, No. 11A, Queen's Terrace, Colombo 03. 3. Norika Kyuma, No. 11A, Queen's Terrace, Colombo 03. Respondent-Respondents
28/02/24	SC/CHC/APPEAL/81/2014	Nirmala Anura Fernando, No. 233/8, Cotta Road, Colombo 08. Presently at: No. 65/09, Wickramasinghe Mawatha, Battaramulla. 2nd Defendant-Appellant Vs. 01. Sri Lanka Savings Bank Limited, No. 110, D.S. Senanayake Mawatha, Colombo 08. Plaintiff-Respondent 02. Globe Investments (Private) Limited, No. 233/8, Cotta Road, Colombo 08. Presently at: No. 65/09, Wickramasinghe Mawatha, Battaramulla. 1st Defendant-Respondent 03. Estelita Rozobelle Dolores Fernando, No. 233/8, Cotta Road, Colombo 08. Presently at: No. 65/09, Wickramasinghe Mawatha, Battaramulla. 3rd Defendant-Respondent
28/02/24	S.C. Appeal (CHC) No. 45/2014	Seylan Bank PLC, No. 69, Janadhipathi Mawatha, Colombo 01. Presently at "Ceylinco-Seylan Towers", No. 90, Galle Road, Colombo 03. Vs. 1. Abdul Cader Mohomed Faizer, 2. Seyyed Khan Azad Khan, Both carrying on business in Partnership under the name, style and firm of "Regal Tyre House" at No. 149, Jayantha Weerasekara Mawatha, Colombo 10. Defendants AND NOW BETWEEN 1. Abdul Cader Mohomed Faizer, 2. Seyyed Khan Azad Khan, Both carrying on business in Partnership under the name, style and firm of "Regal Tyre House" at No. 149, Jayantha Weerasekara Mawatha, Colombo 10. Defendant-Appellants Vs. Seylan Bank PLC, No. 69, Janadhipathi Mawatha, Colombo 01. Presently at "Ceylinco-Seylan Towers", No. 90, Galle Road, Colombo 03. Plaintiff-Respondent
28/02/24	SC/APPEAL/179/2019	1. Sembukutti Arachchige Shanthi Siriwardena, Ingaradaula, Narangoda. (Deceased) 1A. Sembukutti Arachchige Radhika Siriwardena, Ingaradaula, Narangoda. 2. Sembukutti Arachchige Premaratne, Dambagahagedera, Yakwila. 3. Sembukutti Arachchige Piyathilaka, Ingaradaula, Narangoda. 4. Sembukutti Arachchige Dharmasena, Ambalangoda. (Deceased) 4A. Gange Lalitha De Silva (Deceased) 4B. Sembukutti Arachchige Sisira Priyankara 4C. Sembukutti Arachchige Sisira Sanoja Dilhani All of No. 5, Polwatta Municipal Houses, Ambalangoda. 5. Sembukutti Arachchige Leelawati Manike, Ingaradaula, Narangoda. 6. Sembukutti Arachchige Paulu Appuhamy, Munamaldeniya, Akarawatta. 1A, 2nd, 3rd, 4B, 4C, 4D, 5th and 6th Respondent-Respondent-Appellants Vs. Sooriya Pahtirennehelage Piyalka Weerakanthi, Ingaradaula, Narangoda. Petitioner–Appellant–Respondent

28/02/24	SC/APPEAL/153/2019	Warnakulasuriya Ludgar Leo Kamal Thamel, 'Rebeka', Play Ground Road, Wennappuwa. Plaintiff-Respondent-Petitioner-Appellant Vs. Nawarathna Tirani Deepika Damayanthi Nawarathne, 'Rebeka', Play Ground Road, Wennapuwa. Defendant-Petitioner-Respondent-Respondent
28/02/24	SC/APPEAL/23/2014	T. Leslie De Silva, No. 39, Gurudeniya Road, Ampitiya. 4A and 5th Defendant-Appellant-Appellant Vs. H.M. Bandara Menike, Nattharampotha, Polgaswela, Kundasale. Plaintiff-Respondent-Respondent 1. S.M. Dingiri Banda, Pansalawatte Road, Walamale, Ulpothawatte, Kundasale. Presently at, Ulpatthawaththa, Temple Road, Ketawala, Lewla, Kandy. 2. H.M. Biso Manike, (Deceased) 2A. D. M. Chandrasekara Banda, Both of Madanwela, Hanguranketha. 3. H.M. Punchibanda, Walamale, Ampitiya. Defendant-Respondent-Respondents
27/02/24	SC/APPEAL/144/2022	DFCC Bank PLC, No. 73/5, Galle Road, Colombo 03. 1st Defendant-Appellant Vs. Laththuwa Handi Harindu Dharshana, No. 35, Kandy Road, Kiribathgoda, Kelaniya. Plaintiff-Respondent Schokman & Samerawickreme, No. 290, Havelock Road, Colombo 05. 2nd Defendant-Respondent
27/02/24	SC/APPEAL/74/2016	Dissanayaka Mudiyanselage Senarath Bandara Dissanayaka, 16, Uplands, Kandy. Plaintiff Vs. Muthukuda Wijesuriya Arachchige Jayantha Nishantha Wijesuriya, 103, Polgolla, Kandy. Defendant AND Muthukuda Wijesuriya Arachchige Jayantha Nishantha Wijesuriya, 103, Polgolla, Kandy. Defendant-Petitioner Vs. Dissanayaka Mudiyanselage Senarath Bandara Dissanayaka, 16, Uplands, Kandy. Plaintiff-Respondent AND NOW Dissanayaka Mudiyanselage Senarath Bandara Dissanayaka, 16, Uplands, Kandy. Plaintiff-Respondent-Appellant Vs. Muthukuda Wijesuriya Arachchige Jayantha Nishantha Wijesuriya, 103, Polgolla, Kandy. Now at 16, Uplands, Kandy. Defendant-Petitioner-Respondent
27/02/24	SC Appeal No. 82/2019	Officer-in-Charge Police Station, Wellawatta. Complainant Vs. Beminahennadige Krishantha Ranmal Pieris No. 41, Mahavidana Mawatha, Koralawella, Moratuwa. Accused AND BETWEEN Beminahennadige Krishantha Ranmal Pieris No. 41, Mahavidana Mawatha, Koralawella, Moratuwa. Accused- Appellant Vs. 1. Officer-in-Charge Police Station, Wellawatta. 2. Hon. Attorney General Attorney General's Department, Colombo 12. Respondents AND NOW BETWEEN Beminahennadige Krishantha Ranmal Pieris No. 41, Mahavidana Mawatha, Koralawella, Moratuwa. Accused- Appellant- Appellant Vs. 1. Officer-in-Charge Police Station, Wellawatta. 2. Hon. Attorney General AttorneyGeneral's Department, Colombo 12. Respondent-Respoondents

27/ 02/ 24	SC (CHC) Appeal No. 23/2016	Lanka Orix Leasing Company Plc 100/1, Sri Jayawardenapura Mwatha, Rajagiriya. Plaintiff Vs. 1. Meera Mohideen Mohammadu Azar No.329, Jumma Mosque, Meerauwodai, Oddamawaddi. 2. Gopalan Kamalanathan, Visnu Kovil Road, Kiran. 3. Gopalan Padma Yogan, Kumaralaya Veethi Kiran. Defendants AND 2. Gopalan Kamalanathan, Visnu Kovil Road, Kiran. 3. Gopalan Padma Yogan, Kumaralaya Veethi Kiran. 2nd and 3rd Defendants-Petitioners Vs. Lanka Orix Leasing Company Plc 100/1, Sri Jayawardenapura Mwatha, Rajagiriya. Plaintiff-Respondent 1. Meera Mohideen Mohammadu Azar No.329, Jumma Mosque, Meerauwodai, Oddamawaddi. 1st Defendant-Respondent AND NOW BETWEEN 2. Gopalan Kamalanathan, Visnu Kovil Road, Kiran. 3. Gopalan Padma Yogan, Kumaralaya Veethi Kiran. 2nd and 3rd Defendant-Petitioner- Appellants Vs. Lanka Orix Leasing Company Plc. 100/1, Sri Jayawardenapura Mwatha, Rajagiriya. Plaintiff-Respondent- Respondent 1. Meera Mohideen Mohammadu Azar No.329, Jumma Mosque, Meerauwodai, Oddamawaddi. 1st Defendant-Respondent- Respondent
27/ 02/ 24	SC/APPEAL/ 54/19	1A. Sriya Sepalika Suludagoda of No:60/10 M, Templers Road, Mount Lavinia. 1B 1. Luwis Widanelage Gimhani Thilini Suludagoda 1B 2. Luwis Widanelage Emil Thilanga Suludagoda 1B 3. Luwis Widanelage Eshan Thiwanka Suludagoda 1B 4. Luwis Widanelage Udaya Bhathiya Suludagoda (Minor) Appearing by his next friend; Luwis Widanelage Emil Thilanga Suludagoda All of No. 60/10K, Tempers Road, Mount Lavinia. 1C. Neetha Karmani Suludagoda of No: 60/10 J, Templers Road, Mount Lavinia. 1D. Geetha Chandani Suludagoda of No: 60/10 H, Templers Road, Mount Lavinia. SUBSTITUTED PLAINTIFFS- RESPONDENTS-PETITIONERS-APPELLANTS -VS- 1. Kotagoda Mudiyanselage Seneviratne Yatigammana, 2. Kotagoda Mudiyanselage Swarnamali Yatigammana, 3. Kotagoda Mudiyanselage Yashodara Srima Kumari Yatigammana, All of No: 53/4, Sri Gunarathana Mawatha, Mount Lavinia. DEFENDANTS-APPELLANTS-RESPONDENTS- RESPONDENTS
27/ 02/ 24	S.C. Appeal No 147/2014	S.U. Dungi, No.26F, Dodanwela Passage, Kandy. 3rd Defendant – Petitioner – Petitioner – Petitioner / Appellant Vs. 1. Anita George Carey, Hunts House, West Lavington, NR, Devizes, Wiltshire, England. By her Attorney A.L.B. Britto Muthunayagam, No.50, Rosmead Place, Colombo 07. 2. William George Carey 3. Rhiannon George Carey 4. Angharad George Carey 5. Catrin George Carey 6. David George Carey All of Hunt House, West Lavington, NR, Devizes, Wiltshire, England appearing by their next friend A.L.B. Britto Muthunayagam. Plaintiff-Respondent-Respondent-Respondents 1. G.H.G.Elizabeth, No.100, Peddler Street, Galle. 2. Mirissa Gallappathige Eric Piyadarshana Udaya Kumara, ‘Somagiri’, Goviyapana, Ahangama. 4. Mohamed Ali Mubarak, No. 65D, Akuressa Road, Katugoda, Galle. Defendant-Respondent-Respondent-Respondents

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26/ 02/ 24	SC/APPEAL/ 33/2019	DFCC Bank, No. 73/5, Galle Road, Colombo 01. Petitioner Vs. Warnakulasuriya Chandima Prasad Rajitha Fernando, 'Sarani Aquarium' No. 297, Kolinjadiya West, Wennappuwa. Respondent AND BETWEEN Warnakulasuriya Chandima Prasad Rajitha Fernando, 'Sarani Aquarium' No. 297, Kolinjadiya West, Wennappuwa. Respondent-Petitioner Vs. DFCC Bank, No. 73/5, Galle Road, Colombo 01. Petitioner-Respondent AND NOW BETWEEN DFCC Bank, No. 73/5, Galle Road, Colombo 01. Petitioner-Respondent-Appellant Vs. Warnakulasuriya Chandima Prasad Rajitha Fernando, 'Sarani Aquarium' No. 297, Kolinjadiya West, Wennappuwa. Respondent-Petitioner-Respondent
22/ 02/ 24	SC/APPEAL/ 175/2014	4. Don Nichulas Clament Derrick Weerasooriya, No. 213/4, Galle Road, Kuda Payagala, Payagala. (Deceased) 6. Lekam Mudiyanselage Nimal Patricia Magdaline Alexander, 2, 1/13, Galle Road, Kuda Payagala, Payagala. 4th and 6th Defendant-Appellant-Appellants 4A. Kurukula Karunatilaka Dissanayake Don DenishaPrashani Weerasuriya 4B. Kurukula Karunatilaka Dissanayake Don Antanoch Prashanthi Dilani Weerasuriya Substituted 4th Defendant-Appellant-Appellants Vs. Warnakula Arachchiralalge Dona Annie Rita Fonseka alias Annie Seeta Fonseka, "Swarna", Kuda Payagala, Payagala. (Deceased) Plaintiff-Respondent-Respondent 1A. Hewadonsekage Prasad Annesley Fonseka, Kuda Payagala, Payagala. 1B. Hewafonsekage Sunil Stanley Remand Fonseka, Kuda Payagala, Payagala. 1C. Hewafonsekage Chandra Kumari Hyscinth Fonseka, No. 213/4, Kuda Payagala, Payagala. Substituted Plaintiff-Respondent-Respondents 1. Hewafonsekage Prasad Annesley Fonseka 2. Hewafonsekage Sunil Stanley Remand Fonseka Both of Kuda Payagale, Payagala. 3. Hewafonsekage Chandra Kumari Hyscinth Fonseka, No. 213/4, Kuda Payagala, Payagala. 5. Kurukula Karunatilleke Dissanayake Don Nichulas Clament Derrick Weerasooriya, Kuda Payagala, Payagala. Defendant-Respondent-Respondents
22/ 02/ 24	SC/APPEAL/ 31/2020	Wilson Ekanayake, Bandarawatta, Pebotuwa. Plaintiff-Appellant-Appellant Vs. 1. Negiri Kande Piyaratne, Bandarawatta, Pebotuwa. 2. Negiri Kande Nomis (Deceased) Bandarawatta, Pebotuwa. 2A. G.K. Alice Nona, Bandarawatta, Pebotuwa. 2C. Negiri Kande Anulawathie, B-E/36, Bandarawatta, Pebotuwa. 2D. Negiri Kande Soma Ranjanie, Diwulgaspitiya, Dematuluwa, Kurunagala. 2E. Negiri Kande Nimal Padmasiri, B-E/36, Bandarawatta, Pebotuwa. Defendant-Respondent-Respondents

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22/02/24	SC Appeal No: 91/2020	Muthuthantrige Rienzie alias Riyenze Jagath Cooray, No. 10, Uyana Road, Moratuwa. Plaintiff- Judgment Creditor Respondent-Petitioner Vs. 1.Sellapperumage Anne Elizabeth Fernando, No. 78/1, Koralawella North, Moratuwa. Defendant- Respondent 1. Mahamendige Ranjan Mendis 2. Werahennedige Mary Claris Shyamalie both of No.550, 3rd Lane, Koralawella, Moratuwa Petitioners-Respondents And Now Between Muthuthantrige Rienzie alias Riyenze Jagath Cooray, No. 10, Uyana Road,Moratuwa. Plaintiff- Judgment Creditor Respondent-Petitioner- Appellant Vs. 1.Sellapperumage Anne Elizabeth Fernando, No. 78/1, Koralawella North, Moratuwa. Defendant-Respondent-Respondent 1. Mahamendige Ranjan Mendis 2. Werahennedige Mary Claris Shyamalie both of No.550, 3rd Lane, Koralawella, Moratuwa Petitioners-Respondents- Respondents
22/02/24	S.C.(F.R.) Application No. 325/2013	Shreemath Muthukumara Algawatte, No.154/1, Anagiyawatte, Gabadagoda, Payagala Petitioner Vs. 1. Chamika Kulasiri, Inspector of Police, Officer-in-Charge, Payagala Police Station. 2. Wijepala, Sub-Inspector of Police Payagala Police Station. 3. Gunasiri, Police Sergeant 25317, Payagala Police Station. 4. Subasinghe, Police Constable 13429, Payagala Police Station . 5. Chamara, Police Constable 81658, Payagala Police Station. 6. Dhammika, Sub-Inspector of Police Payagala Police Station. 7. N.K. Illangakoon, Inspector General of Police, Police Headquarters, Colombo 01. 8. Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents

21/ 02/ 24	SC (FR) Application No: 457/2011	Priyankara Kamalanath Kodithuwakku, 'Wanniarachchi Janaudanagama,' Borala, Pelmadulla. PETITIONER vs. 1. B.V. Wijeratne, Assistant Superintendent of Police (Retired), Isuru Place, Paradise, Kuruwita. 2. E. Dhanapala, Assistant Superintendent of Police, Office of the Assistant Superintendent of Police, Ratnapura. 3. Senior Superintendent of Police, Office of the Senior Superintendent of Police, Ratnapura. 4. Director (Personnel), Police Headquarters, Colombo 1. 5. Director, Discipline and Conduct Division, Police Headquarters, Colombo 1. 6. Inspector General of Police, Police Headquarters, Colombo 1. 7. Secretary, Ministry of Defence, Colombo 1. 7A. Secretary, Ministry of Law and Order, Floor – 13, 'Sethsiripaya' (Stage II), Battaramulla. 7B. Secretary, Ministry of Defence, 15/5, Baladaksha Mawatha, Colombo 3. 7C. Secretary, Ministry of Law & Order and Southern Development, No. 25, Whiteaways Building, Sir Baron Jayathilake Mawatha, Colombo 1. 7D. Secretary, Ministry of Public Security, 14th Floor, 'Suhurupaya,' Battaramulla. 8. Vidyajothi Dr. Dayasiri Fernando, Chairman, Public Service Commission. 8A. Justice Sathya Hettige, PC, Chairman, Public Service Commission. 9. Palitha M. Kumarasinghe, PC 9A. S.C. Mannapperuma 9B. Indrani Sugathadasa 10. Sirimavo A. Wijeratne 10A. Ananda Seneviratne 10B. Dr. T R C Ruberu 11. S.C. Mannapperuma 11A. N.H. Pathirana 11B. Ahamed Lebbe Mohammed Saleem 12. Ananda Seneviratne 12A. S. Thillanadarajah 12B. Leelasena Liyanagama 13. N.H. Pathirana 13A. A. Mohamed Nahiya 13B. Dian Gomes 14. S. Thillainadarajah 14A. Kanthi Wijetunge 14B. Dilith Jayaweera 15. M.D.W.Ariyawansa 15A. Sunil S. Sirisena 15B. W.H. Piyadasa 16. A. Mohamed Nahiya 16A. Dr. I.M. Zoysa Gunasekera 9th, 9A, 9B, 10th, 10A, 10B, 11th, 11A, 11B, 12th, 12A, 12B, 13th, 13A, 13B, 14th, 14A, 14B, 15th, 15A, 15B, 16th, 16A are members of the Public Service Commission. 17. Secretary, Public Service Commission. 8th, 8A, 9th, 9A, 9B, 10th, 10A, 10B, 11th, 11A, 11B, 12th, 12A, 12B, 13th, 13A, 13B, 14th, 14A, 14B, 15th, 15A, 15B, 16th, 16A and 17th Respondents at No. 177, Nawala Road, Narahenpita, Colombo 5. 18. The Hon. Attorney General, Attorney General's Department, Colombo 12. 19. Prof. Siri Hettige, Chairman, National Police Commission 20. P.H. Manatunga 21. Savithree Wijesekara 22. Y.L.M. Zawahir 23. Anton Jeyanandan 24. Tilak Collure 25. Frank de Silva 20th – 25th Respondents are members of the National Police Commission. 26. Secretary, National Police Commission. 19th – 26th Respondents are at Block No. 9, B.M.I.C.H. Premises, Bauddhaloka Mawatha, Colombo 7. RESPONDENTS

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21/02/24	SC Appeal No. 68/2014	1. Vadivelu Anandasiva. 2. Vigneshwary Anandasiva. Both of No. 15, Alexandra Road, Colombo 6. PLAINTIFFS Vs. 1. Paranirupasingham Arulrajasingham, No. 22, Govt. Quarters, Bambalapitiya. 2. Subramaniam Shanmuganathan, No. 56, Vaverset Place, Colombo 6. DEFENDANTS AND BETWEEN 1. Vadivelu Anandasiva. 2. Vigneshwary Anandasiva. Both of No. 15, Alexandra Road, Colombo 6. PLAINTIFFS – APPELLANTS Vs. 1. Paranirupasingham Arulrajasingham, No. 22, Govt. Quarters, Bambalapitiya. 2. Subramaniam Shanmuganathan, No. 56, Vaverset Place, Colombo 6. DEFENDANTS – RESPONDENTS AND NOW BETWEEN 1. Paranirupasingham Arulrajasingham, No. 22, Govt. Quarters, Bambalapitiya. 1ST DEFENDANT – RESPONDENT – APPELLANT Vs. 1. Vadivelu Anandasiva. 2. Vigneshwary Anandasiva. Both of No. 15, Alexandra Road, Colombo 6. PLAINTIFFS – APPELLANTS – RESPONDENTS 1. Subramaniam Shanmuganathan, No. 56, Vaverset Place, Colombo 6. 2ND DEFENDANT – RESPONDENT – RESPONDENT
20/02/24	SC Appeal No. 249/2017	The Officer in Charge, Police Station. Ganemalwila (Thanamalwila). Complainant V. W.M. Sampath Preethi Viraj. Accused AND NOW W.M. Piyal Senadheera, Kanthoruwatta, Thalawa South, Kariyamadiththa. Registered Owner Claimant Petitioner V. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondent AND NOW BETWEEN W.M Piyal Senadheera, Kanthoruwatta, Thalawa South, Kariyamadiththa. Registered Owner Claimant Petitioner Petitioner V. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondent-Respondent
19/02/24	SC APPEAL 12/2023	Heineken Lanka Limited, (formerly Asia Pacific Brewery (Lanka) Limited) Green House No. 260, Nawala Road, Nawala. Petitioner Vs. Ajith Putha Distributors (Pvt) Ltd, Galahitiyawa, Madampe. (Company sought to be wound up) Respondent AND NOW Heinken Lanka Limited, (formerly Asia Pacific Brewery (Lanka) Limited) Green House, No. 260, Nawala Road, Nawala. Petitioner-Appellant Ajith Putha Distributors (Pvt) Ltd, Galahitiyawa, Madampe. Respondent-Respondent

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19/ 02/ 24	SC Appeal 106/2016	1. Waduge Adlin Fernando(Deceased) 2. Waduge Anni Fernando(deceased) both of No. 432, Nalluruwa, Panadura. Plaintiffs Waduge Buddhini Manel Fernando No. 24, Dibbede Road , Nalluruwa, Panadura 1.A and 2A substituted Plaintiff Vs. 1. Waduge Lionel Fernando(Deceased) 1(a) Waduge Jeewani Priya Fernando 1(b) Waduge Wasantha Kalyana Fernando 1 (c) Waduge Vijith Vishvanath Fernando 1(d) Waduge Suhaas Surendra Fernando All of “Gimhana” Nalluruwa Panadura. 2. Waduge Vijith Vishvanath Fernando “Gimhana” Nalluruwa, Panadura. 3. Waduge Suhaas Surendra Fernando “Gimhana” Nalluruwa, Panadura 4. Waduge Palitha Piyasiri Fernando No. 434, Nalluruwa, Panadura. Defendants AND NOW BETWEEN Waduge Vijih Vishvanath Fernando “Gimhana” Nalluruwa, Panadura 1A(C) and 2 Defendant-Respondent- Appellant-Appellant Vs. Waduge Buddhini Manel Fernando No. 24, Dibbede Road , Nalluruwa, Panadura 1A and 2A Substituted Plaintiff- Petitioner-Respondent-Respondent-
16/ 02/ 24	SC/SPL/L A NO:246/2022	Ms Kayleigh Frazer 972/4, Kekunagahawatta Road, Akuregoda Battaramulla Petitioner 1. Controller General of Immigration Department of Immigration and Emigration Suhurupaya, Sri Subhuthipura, Battaramulla 2. The Attorney General The Attorney General’s Office Respondents And Now Between: Ms Kayleigh Frazer 972/4, Kekunagahawatta Road, Akuregoda Battaramulla Petitioner – Petitioner 1. Controller General of Immigration Department of Immigration and Emigration Suhurupaya, Sri Subhuthipura, Battaramulla 2. The Attorney General The Attorney General’s Office Colombo 12 Respondent-Respondents

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15/ 02/ 24	SC Spl LA No: 38/2020	Sunbee Ready-mix (Pvt.) Limited, Suncity Mezzanine Floor, No. 18, St. Anthony's Road, Colombo 3. Respondent – Respondent - Petitioner 1. K.R.A. Kusumsiri, No. 54/4, Rukmale, Pannipitiya. 2. R.D.D. Sanath Priyantha, No. 467/1, Korathota, Kaduwela. 3. P.M.A. Saminda Jayashantha Siriwardena, No. 111/1, Kalapaluwawa, Kalagedihena. 4. K.K. Nimal Gunasiri, No. 596/3, Jayanthi Road, Athurugiriya. 5. M.B.A. Gamini Ariyasinghe, No. 49, Aranayaka Janapadaya, Aranayaka. 6. S.D.W.K.S. Gunasekera, No. 131/10, Nidahas Uyana, Madulawa North, Padukka. 7. M.S. Gunapala, No. E/7/A, Hathgampola West, Aranayake. 8. W.A. Athula Indika Weerasuriya, No. 21/148, 1/1, Dadagama East, Veyangoda. 9. P.A.C. Sanath Kumara, No. 1/50, Ellamulla. Pasyala. 10. L.G. Jeevendra Sanjeewa Danapala, No. 201/2, Vihara Mawatha, Radawadunna. 11. H.P. Sirisena, No. 80, Anandagama, Buruthagama, Akaravita, Avissawella. 12. Vithanage Janaka Sampath Vithanage, Panawattagama, Meegasthenna, Yatiyanthota. 13. B.Lalantha Silva, No. 19/D, Nurugala Mawatha, Weliwathugoda, Balapitiya. 14. J. Nihal, No. 418/G, Welivita), Kaduwela. 15. B.A. Amith Eranga Pandithasekera, No. 418G, Welivita, Kaduwela. 16. P.K.D. Ayuwardana, Anhettiwalawatta, Goluwamulla, Ganegoda. 17. Rajapaksha Pathirage Ravindralal, No. 616/1/1, Jayantha Road, Athurugiriya. 18. K.M. Wimal, No. 112/1, Megoda Kolonnawa, Wellamptiya. Applicants – Appellants – Respondents
15/ 02/ 24	SC Appeal No: 121/2021	Hatton National Bank PLC., No. 479, T.B. Jayah Mawatha, Colombo 10. Petitioner – Appellant – Appellant - Vs - 1. Kodikara Gedara Seetha Sriyani Kumari 2. Attanayake Mudiyanselage Malki Sumudu Attanayake 3. Attanayake Mudiyanselage Malshan Nethsarani Attanayake 4. Attanayake Mudiyanselage Hirusha Deshan Adithya Attanayake All are at, 2nd Mile Post, Morayaya, Minipe. Respondents – Respondents – Respondents
15/ 02/ 24	SC APPEAL NO.29/2023	1. P.P. Gunawardena. Sarath Gunawardena Mawatha, Wewala, Hikkaduwa. 2. Sidath Charuka Gunawardena. Sarath Gunawardena Mawatha, Wewala, Hikkaduwa. (Appearing through his Power of Attorney holder Buddhika Nilushan Ukwatta at C/FO 03 98/62, Richmmond Hill Residencies, Wekunagoda, Galle.) RESPONDENTS- APPELLANTS- APPELLANTS VS Balage Padmarupa. Near the Rail Gate, Welhengoda, Ahangama. APPLICANT-RESPONDENT- RESPONDENT

15/02/24	S.C. Appeal No. 69/2013	1. (A) Sumanasiri Harischandra 2. (B) Susila Mukthalatha 3. (C) Chithra Dharmalatha 4. (D) Liliat Chandrawathie 5. (E) Piyaseli Sarathchandra 6. (F) Jayasiri Nimalchandra 7. (G) M. Aratchilage Ariyaseeli 8. (H) Gayani Fonseka 9. (I) Pradeep Premachandra 10. (J) Dilhani Fonseka All of Keppetiwalana, Alawwa. SUBSTITUTED PLAINTIFF-RESPONDENT-APPELLANTS Vs Amarapathy Mudiyanselage M.J. Amarapathy, Ihala Keppitiwalana, Alawwa. 1(D) SUBSTITUTED DEFENDANT-APPELLANT 1. (A) Lucy Nona 2. (B) Amarapathy M. Senarathne (Deceased) 3. 1(B) Amarapathy Mudiyanselage Priyantha Padmakumari Senarathne 4. 2(B) Amarapathy Mudiyanselage Piyumi Pushpa Amarapathy 5. (C) A. M. Indra Amarapathy (Deceased) 6. 1(C) Amarapathy Mudiyanselage Jane Nona 7. 2(C) Amarapathy Mudiyanselage Premawathie 8. 3(C) Amarapathy Mudiyanselage Anulawathie 9. 4(C) Amarapathy Mudiyanselage Chandrawathie 10. 5(C) Amarapathy Mudiyanselage Wijeratne 11. (D) A.M.M.J. Amarapathy 12. (E) A.M. Jane Nona Amarapathy 13. (F) A. M. Ashoka Chandrawathie 14. (G) A.M. Wijeratne 15. (H) A.M.Premawathie 16. (I) J.T. Somawathie 17. (J) A.M.Ramulatha Sriyakantha 18. (K) A.M.Ranjith Senaratne 19. (L) A.M. Pushparaj Chaminda 20. (M) A.M. Priyantha Damayanthi 21. (N) A.M. Samantha Amarapathy 22. (O) A.M. Dhammika Amarapathy 23. (P) A.M. Wijesiri Amarapathy All of Keppetiwalana, Alawwa. SUBSTITUTED DEFENDANT-RESPONDENT-RESPONDENTS
13/02/24	SC/APPEAL/04/2023	Bulathgama Wedalage Nirasha, No. 106, Ranwala, Kegalle. By way of her Power of Attorney Holder Bulathgama Wedalage Shamith Shiwantha Bulathgama Weerasinghe, 68/3, Attanagalla Road, Dangolla Watta, Nittambuwa. Petitioner-Respondent-Appellant Vs. Rathna Bhushana Acharige Wimalasena, No. 290, Ranwala, Kegalle. 1st Defendant-Petitioner- Respondent Bulathgama Wedalage Piyasena, No. 106, Ranwala, Kegalle. Plaintiff-Respondent-Respondent Seylan Bank Limited, Ceylon Seylan Towers, No. 90, Galle Road, Colombo 03. 2nd Defendant-Respondent-Respondent
13/02/24	SC/APPEAL/107/2023	Wille Arachchige Madushani Perera or Mille Arachchige Madushani Perera, No. 231/2, School Lane, Wedamulla, Kelaniya. Plaintiff Vs. Indrani Silva, No. 99, Naramminiya Road, Kelaniya. Defendant AND Indrani Silva, No. 99, Naramminiya Road, Kelaniya. Defendant-Appellant Vs. Wille Arachchige Madushani Perera or Mille Arachchige Madushani Perera, No. 231/2, School Lane, Wedamulla, Kelaniya. Plaintiff-Respondent AND NOW BETWEEN Wille Arachchige Madushani Perera or Mille Arachchige Madushani Perera, No. 231/2, School Lane, Wedamulla, Kelaniya. Plaintiff-Respondent-Appellant Vs. Indrani Silva, No. 99, Naramminiya Road, Kelaniya. Defendant-Appellant-Respondent

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12/02/24	SC/APPEAL/92/2014	1. Abdul Fareed Mohamed Malikge Nawaz 2. Abdul Fareed Mohamed Malikge Riyaz 3. Abdul Fareed Mohamed Malikge Farees All of New Lanka Stores, Trincomalee Road, Kadavediya, Horawpathana Defendant-Respondent-Appellants Vs. Indrani Bopage, Kadaveediya, Horawpathana Plaintiff-Appellant-Respondent
12/02/24	SC/CHC/APPEAL/03/2012	1. Chelliah Ramachandran and 2. Manohari Ramachandran Both of 49, Collingwood Place, Colombo 06. 2nd to 3rd Defendant-Appellants 3. Llyod Rajaratnam Devarajah 49, 6/2 Collingwood Place, Colombo 06. 4. Vadivelu Anandasiva (Deceased) 49, 1/2 Collingwood Place, Colombo 06. 5. Mrs. Karthiga Senthuran and 6. Shanmugavadivel Senthuran both of 49, 1/4 Collingwood Place, Colombo 06 and presently of P.O. Box 52, PC, 111 CPO FEEB, Oman. 7. Thuraippa Viswalingam 49, 2/1 Collingwood Place, Colombo 06. 8. Yogeswary Raveendiran 49, 2/3 Collingwood Place, Colombo 06. 9. Sabapathy Arunasalam Arumugan 49, 3/1 Collingwood Place, Colombo 06. 10. Anthonypillai Mary Joseph 49, 3/2 Collingwood Place, Colombo 06. 11. Nagalingam Santhasoruban 49, 3/3 Collingwood Place, Colombo 06. 12. Velupillai Arulanantham 49, 3/4 Collingwood Place, Colombo 06. 13. Thanabalasingham Krishnamohan 49, 4/4 Collingwood Place, Colombo 06. 14. Jacob Amaranathan 49, 4/1 Collingwood Place, Colombo 06. 15. Sivagurunathan Punithanathan 49, 4/2 Collingwood Place, Colombo 06 and presently of Le Royal Meridian Beach Resort, P.O. Box 24970, Dubai UAE. 16. Ramanathan Sivagurunathan 49, 5/1 Collingwood Place, Colombo 06. 17. Tharshini Sivagurunathan of 13331, Seattle Hill Road, Snohimish, Washington USA. 18. Kathiravelu Sarveswaram 49, 5/2 Collingwood Place, Colombo 06. 19. Dr. Selvaratnam Selvaranjan 49, 5/3 Collingwood Place, Colombo 06. 20. Subramaniam Suthershan 49, 6/3 Collingwood Place, Colombo 06. 21. Sornambikai Mahasivam of Arthisoody Veethi, Thirunelveli, Jaffna. 22. Thambiah Mahasivam 49, 6/4 Collingwood Place, Colombo 06. 4th to 23rd Added Defendant-Appellants Vs. 1. Hatton National Bank Ltd., No. 481, T.B. Jayah Mawatha, Colombo 10. Plaintiff-Respondent 2. Nadarajah Ganarajah 110, Bankshall Street, Colombo 11. 1st Defendant-Respondent
12/02/24	SC/APPEAL/75/2017	2A. M.D. Rohan Nishantha No. 64/16, Templers Road, Mt. Lavinia. 2(a) Defendant-Appellant-Appellant Vs. Maddumage Don Somaratne No. 64/15, Templers Road, Mt. Lavinia. Plaintiff-Respondent-Respondent Maddumage Don Somapala (Deceased) No. 64/15, Templers Road, Mt. Lavinia. 1st Defendant-Respondent-Respondent 1A. M.D. Swarnaseeli, No. 64/15, Templers Road, Mt. Lavinia. 1(a) Defendant-Respondent-Respondent

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09/02/24	S.C. Appeal No.14/2019	Hon. Attorney General, Attorney General's Department, Colombo 12. Complainant Hon. Attorney General, Attorney General's Department, Colombo 12. Complainant—Respondent AND NOW Kalanchidewage Suresh Nandana Presently at Remond Prison Welikada, Boralla, Colombo 08. 3rd Accused-Appellant-Appellant Vs. Hon. Attorney General, Attorney General's Department, Colombo 12. Complainant—Respondent-Respondent
09/02/24	SC Appeal No. 124/2022	Bothalayage Athula Sumanasekara Alawala, Thunthota. PLAINTIFF Vs 1. Mananalage Sumathipala 2. Dissanayake Ralalage Ajith Munaweera 3. A. Rapiel Singho (deceased) 3a. Ganthota Karagalage Nandawathie All at: Alawala, Thuntota 4. Galigamuwa Pradeshiya Sabhawa Pitagaldeniya DEFENDANTS AND THEN BETWEEN Bothalayage Athula Sumanasekara Alawala, Thunthota PLAINTIFF-APPELLANT Vs. 1. Mananalage Sumathipala 2. Dissanayake Ralalage Ajith Munaweera 3a. Ganthota Karagalage Nandawathie 4. Galigamuwa Pradeshiya Sabhawa Pitagaldeniya DEFENDANT-RESPONDANTS AND NOW BETWEEN 1. Mananalage Sumathipala DEFENDANT-RESPONDANT-APPELANT Vs. Bothalayage Athula Sumanasekara Alawala, Thunthota PLAINTIFF-APPELLANT-RESPONDANT 1. Dissanayake Ralalage Ajith Munaweera 2. A Rapiel Singho 3. Ganthota Karagalage Nandawathie All at: Alawala, Thunthota. 4. Galigamuwa Pradeshiya Sabhawa Pitagaldeniya DEFENDANT-RESPONDANT-RESPONDANTS
07/02/24	SC APPEAL 49/2016	Pilawala Pathirennehelage Upeksha Erandathi, Otharakiruwanpola, Keppitiwalana, APPLICANT vs. Dasanayake Achchilage Dammika Kumara Dasanayake, Otharakiruwanpola, Keppitiwalana. RESPONDENT AND BETWEEN Pilawala Pathirennehelage Upeksha Erandathi, Otharakiruwanpola, Keppitiwalana. APPLICANT-APPELLANT Vs Dasanayake Achchilage Dammika Kumara Dasanayake, Otharakiruwanpola, Keppitiwalana. RESPONDENT-RESPONDENT AND NOW BETWEEN Dasanayake Achchilage Dammika Kumara Dasanayake, Otharakiruwanpola, Keppitiwalana. RESPONDENT–RESPONDENT-APPELLANT Vs Pilawala Pathirennehelage Upeksha Erandathi, Otharakiruwanpola, Keppitiwalana. APPLICANT-APPELLANT-RESPONDENT
02/02/24	S.C. Appeal No. 91/2017	P. R. S. E. Corea, No. 343/14, Ranwala, Kegalle. Applicant Vs. Sri Lankan Airlines Limited, Level 19-22, East Tower, World Trade Center, Echelon Square, Colombo 1. Respondent AND BETWEEN Sri Lankan Airlines Limited, Level 19-22, East Tower, World Trade Center, Echelon Square, Colombo 1. Respondent-Appellant Vs. P. R. S. E. Corea, No. 343/14, Ranwala, Kegalle. Applicant-Respondent AND NOW BETWEEN Sri Lankan Airlines Limited, Level 19-22, East Tower, World Trade Center, Echelon Square, Colombo 1. (also of Bandaranaike International Airport, Katunayake) Respondent-Appellant-Appellant Vs. P. R. S. E. Corea, No. 343/14, Ranwala, Kegalle. Applicant-Respondent-Respondent

01/ 02/ 24	SC/APPEAL/ 202/2016	Jalathge Rathnawathy of Alugolla, Hewadeewala. Plaintiff Vs. 1. Jayathge Leelawathy 2. Jayathge Somawathy 3. Jayathge Dharmasena All of Alugolla, Hewadeewala. Defendants AND Jalathge Rathnawathy of Alugolla, Hewadeewala. Plaintiff-Appellant Vs. 1. Jayathge Leelawathy 2. Jayathge Somawathy 3. Jayathge Dharmasena All of Alugolla, Hewadeewala. Defendant-Respondents NOW BETWEEN 2. Jayathge Somawathy 3. Jayathge Dharmasena Both of Alugolla, Hewadeewala 2nd and 3rd Defendant-Respondent-Appellants Vs. 1. Jalathge Rathnawathy of Alugolla, Hewadeewala. Plaintiff-Appellant-Respondent 2. Jayathge Leelawathy of Alugolla, Hewadeewala. 1st Defendant-Respondent-Respondent
01/ 02/ 24	SC APPEAL No. 80/2022	Sudath Sugeeshwara Bamunu- Arachchi, No.28/B, Napagoda, Nittambuwa. Plaintiff Vs. Mahinda Dematagolla, No. 68/10, Kimbulhenawatta, Nittambuwa. Defendant AND BETWEEN Mahinda Dematagolla, No. 68/10, Kimbulhenawatta, Nittambuwa. Defendant-Appellant Sudath Sugeeshwara Bamunu-Arachchi, No. 28/B, Napagoda, Nittambuwa. Plaintiff-Respondent AND NOW BETWEEN Sudath Sugeeshwara Bamunu-Arachchi, No. 28/B, Napagoda, Nittambuwa. Plaintiff-Respondent-Appellant Mahinda Dematagolla, No. 68/10, Kimbulhenawatta, Nittambuwa. Defendant-Appellant-Respondent
31/ 01/ 24	SC/FR Application No. 136/2022	1. P. D. A. Panapitiya, No. 36/2, Kaduboda, Delgoda. 2. H. L. H. Gayathri Hewawasam, No. 36/2, Kaduboda, Delgoda. Petitioners Vs. 1. Mangala De Soyza Amarasekara, Chief Inspector of Police, Officer in Charge, Police Station, Kosgoda. 2. Asela Premanath De Silva, Inspector of Police, Officer in Charge, Crimes Division, Police Station, Kosgoda. 3. Wickrama Dilan Indika De Silva, Police Sergeant (9476), Police Station, Kosgoda. 4. U. M. Amarasiri, Assistant Superintendent of Police I, Officer of Assistant Superintendent of Police, Ambalangoda. 5. Y. L. Leelawansa, Senior Superintendent of Police, SSP's Office, Elpitiya. 5A. Mahesh Kumarasinghe, Superintendent of Police, SSP's Office, Elpitiya. 6. D. S. Wickramasinghe, Senior Superintendent of Police, Special Investigation Unit (SIU), Technical Junction, Colombo 10. 7. M. D. R. S. Daminda, Senior DIG Southern Province, Senior DIG's Office, Anagarika Dharmapala Mawatha, Matara. 7A. Ajith Rohana, Senior DIG Southern Province, Senior DIG's Office, Anagarika Dharmapala Mawatha, Matara. 7B. Mr.S.C. Medawatta, Senior DIG Southern Province, Senior DIG's Office, Anagarika Darmapala Mawatha, Matara. 8. C. D. Wickramarathne, Inspector General of Police, Police Headquarters, Colombo 01. 9. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents

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31/01/24	SC Appeal 46/2019, 47/2019, 48/2019, 49/2019 and 50/2019	1. Sri Lanka Transport Board, Head Office, No. 200, Kirula Road, Narahenpitiya, Colombo 05. 2. Inquiry Officer, Sri Lanka Transport Board, Kondavil (N), Jaffna. 3. Chairman Appeal Board, Sri Lanka Transport Board, Kondavil, Jaffna Respondents-Appellants-Appellants 1. A. Arunthavam, No. 112, Mill Road, Uklangulam, Vavuniya. 2. V. Tharsigan, Putthur East, Sorkathidal. 3. P. Gajamugan, Egatiyan, Karaveffy East, Karaveddy. 4. D. Noyal, 4th Cross Street, Kurthar Kovil Veethy, Keeri Mannar. 5. P. Ranjan, Kovinthapuram, Elavaalai. Applicants-Respondents-Respondents
31/01/24	SC/APPEAL/30/2022	1. Rev. E.H. Palitha Mission House, Liyanwala, Padukka. 1A. Rev. Ranjan Karunaratne Maithri Christ Church, Preeman Mawatha, Anuradhapura. 2. Raja Uswetakeiyawa No.10/1, Kotugodella Street, Kandy. 3. Cyril Piyasena Wijayahewa No.646/1 A, Henawatte Road, Gonawala, Kelaniya. 4. Dharmadasa Kumarage, No.306/47, Thalawathugoda Road, Madiwela, Kotte. 5. Munisami Nesamani Danibar Mawatha, Hatton. The Trustees of Christian Labour Brotherhood of No.39, YMBA Building, Bristol Street, Colombo 01. Plaintiff-Respondents-Appellants Vs. Kurugamage Kingsley Perera, No.10/1, Attidiya Road, Ratmalana. Defendant-Appellant-Respondent
30/01/24	SC/HCCA/LA/No. 351/2022	AND NOW BETWEEN 1. Nelundeniyalage Godwin Samarasinghe Uraulla, Ambanpitiya. 3RD DEFENDANT-APPELLANT-PETITIONER Vs. Soma Weerasinghe 1/64, Polgahawela Road, Polgahawela. PLAINTIFF-RESPONDENT-RESPONDENT 1. Nelundeniyalage Kamalawathie Kaduradeniya, Gepala Gedara. 2. Nelundeniyalage Lesly Samarasinghe (deceased) Galigamuwa Town, Ambanpitiya, Suwashakthigama. 3. Nelundeniyalage Chandra Padmini Galigamuwa Town, Abanpitiya, Suwashakthigama. 4. Nelundeniyalage Pushpa Padmini Galigamuwa Town, Labugala, Dammala. 5. Nelundeniyalage Kusuma Weerasinghe Galigamuwa Town, Labugala, Dammala. 6. Nelundeniyalage Amaris 853/3, Ambanpitiya, Uraulla. 4th, 5th and 8th to 11th DEFENDANT-APPELLANT-RESPONDENTS 1. Leela Edirisinghe 1/64, Polgahawela Road, Polgahawela. 2. Karuna Edirisinghe “Somi Kalum”, Egoda Kuleepitiya, Polgahawela. 6. Nelundeniyalage Nandawathie Galigamuwa Town, Abanpitiya, Suwashakthigama. 7. Nelundeniyalage Samarasinghe Galigamuwa Town, Ambanpitiya. 1st, 2nd, 6th and 7th DEFENDANT-RESPONDENT-RESPONDENTS

30/ 01/ 24	SC/APPEAL/ 225/2014	Mohamadu Abu Sali Son of Adapelegedara Mohamed Hasim Lebbe, 25/2, Medillethanna, Ankumbura Medillethanna, Ankumbura SC/APPEAL/225/2014 Vs. 1. Ummu Kaldun daughter of Mohomed Illas, 139, Kurunagala Road, Galewala 2. M.I.M. Falulla 13, Kalawewa Road, Galewela Defendants AND BETWEEN M.I.M. Falulla 13, Kalawewa Road, Galewela 2nd Defendant-Appellant Vs. Mohamadu Abu Sali Son of Adapelegedara Mohamed Hasim Lebbe 25/2, Medillethanna, Ankumbura Plaintiff-Respondent Ummu Kaldun Daughter of Mohomed Illas, 139, Kurunagala Road, Galewala 1st Defendant-Respondent AND NOW BETWEEN Mohamadu Abu Sali Son of Adapelegedara Mohamed Hasim Lebbe, 25/2, Medillethanna, Ankumbura Plaintiff-Respondent-Appellant Vs. 1. Ummu Kaldun Daughter of Mohomed Illas, 139, Kurunagala Road, Galewala And now M.F.M. Younis Stores, 64/A, 6/2, Waththagama Road, Madawala 1st Defendant-Respondent-Respondent M.I.M. Falulla 13, Kalawewa Road, Galewala 2nd Defendant-Appellant-Respondent
30/ 01/ 24	SC/APPEAL NO: 172/2017	Madara Mahaliyanage Bandusena, C/O Mr. M.K. Swarnapala Yakdehiwatte, Nivitigala. Petitioner-Petitioner-Appellant Vs. 1. Don Alfred Weerasekera (Deceased) 1A. Don Dharmadasa Weerasekera, Yakdehiwatte, Labungederawatte, Nivitigala. Plaintiff-Respondent-Respondent-Respondent AND 1. Gonakoladeniya Gamage Pantis Appuhamy (Deceased) 1A. Gonakoladeniya Gamage Gamini Premadasa (Deceased) 1B. Gonakoladeniya Gamage, Udayajeewa Premadasa, Kala Bhumi, Pathakada Road, Yakdehiwatte, ...
29/ 01/ 24	SC/APPEAL/ 137/2019	1. Thanippuli Achchige Seelawathie No. 127, Shantha Niwasa, Halpita, Polgasowita 2. Polgahawattage Upali Sigera No. 92, Kanatta Road, Nugegoda 3. Polgahawattage Swarna Sigera No. 92, Kanatta Road, Nugegoda 4. W.W.W.M. Shalika Prasadi No. 127, Shantha Niwasa, Halpita, Polgasowita 5. W.W.W.M. Sarika Krishadi No. 127, Shantha Niwasa, Halpita, Polgasowita 6. W.W.W.M. Chanaka No. 127, Shantha Niwasa, Halpita, Polgasowita Defendant-Respondent-Petitioners Vs. Wijesekera Weerawickrema Wickremasinghe Mudiyanselage Dharmapala 188/8, Pathiragoda Road, Navinna, Maharagama Plaintiff-Appellant-Respondent
26/ 01/ 24	S.C.(F.R.) Application No: 171/2017	L. Saman Kumara, No. 04/3, Jaya Samarugama, Kandana. Petitioner Vs. 1. Rathnakumara Collure, District Medical Officer, District Hospital, Kandana. 2. U. L. Perera, Director, Colombo Teaching Hospital, Ragama. 3. S. K. Gamage, Administrative Officer, Medical Support Division, No. 357, Baddegama, Wimalawansa Mawatha, Colombo 10. 4. D. M. C. K. Dissanayake, Director (Control) 04. 5. J. M. W. Jayasundara Bandara, Director General of Health Services. 4th to 5th Respondents all of; Ministry of Health, Nutrition and Indigenous Medicine, “Sawsiripaya”, No. 385, Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10. 6. The Honourable Attorney General, Attorney General’s Department, Colombo 12. Respondents

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24/01/24	S.C. Appeal (CHC) No. 84/2014	Kanthi Fernando, No. 10, Wijesekara Place, Kalutara South. Petitioner-Appellant Vs. W. Leo Fernando (Maddagedara) Estates Company Limited, No. 01, Castle Terrace, Colombo 08.
23/01/24	SC Appeal No: 48/2021	1. Saffany Chandrasekera also known as Sappany Chandrasekera 2. Nalini Natasha Chandrasekera Both of No. 66B/19, Sri Maha Vihara Road, Kalubowila, Dehiwala Carrying on business under the name, style and firm of Cambridge Traders at No. 22E, Quarry Road, Colombo 12. DEFENDANTS – APPELLANTS – APPELLANTS vs. Indian Overseas Bank, having its Central Office at No. 763 Anna salai, Madras (Chennai), India and having a branch at No.139, Main Street, Pe????ah, Colombo 11. PLAINTIFF – RESPONDENT – RESPONDENT
23/01/24	SC APPEAL 127/2013	Nilanthi Anula de Silva, No. 152, 6th Cross Lane, Borupana Road, Ratmalana. Presently at, No.21 A, Borupana Road, Ratmalana. Plaintiff-Respondent- Appellant Vs. Weliketigedara Kemawathie, No. 32/1, Gamini Lane, Ratmalana. 8th Defendant-Appellant-Respondent 1. Hagodage Selpi, No.34/6, Gamini Lane, Cashiya Avenue, Ratmalana 1a. Urala Ralage Francis, No.34/7, 6th Cross Street, Borupana Road, Ratmalana. 2. Hettiarachchige Carolina Abeysekara (nee Pinto Jayawardene), No.18/3, Cashiya Mawatha, Ratmalana. 3. Hettiarachchige Newlia Thilakawathie Pinto Jayawardene, No.17, Cashiya Mawatha, Ratmalana. 4. Kuruppuge Dona Rosolin, No.32, Gamini Lane, Ratmalana, (Deceased) 4a. Mahapatiranage Gnanaratna, No. 127/B, Gammana Road, Aluthgama, Bandaragama. 5. Mahapathirage Ariyapala, No.32/A, Gamini Lane, Ratmalana. 6. S. Somawathie Jayaweera Bandara, No. 199, Hill Street, Dehiwala. 7. Sinhara Sam Silva, No.20/6, Gamini Lane, Ratmalana. 9. M.G.Hemawathi, No.67, St. Rita's Road, Ratmalana. 10. Sooriya Arachchige Simon Singho, No. 75/25, Walawwatte, Nawala, Rajagiriya. 10a. Sooriya Aracchige Wimalaratne, No. 75/25, Walawwatte, Nawala, Rajagiriya. 11. Elabadage Josi Nona, No.19/12, Gamini Lane, Ratmalana. 12. A.S.Somadasa, No.19/2, Gamini Lane, Ratmalana. 13. A.H.Piyasena No. 19/2, Gamini Lane, Ratmalana. 14. A.H.Sumith, No.19/2, Gamini Lane, Ratmalana. 15. A.H.Lal, No.19/2, Gamini Lane, Ratmalana. 16. S.Waidyatilake, No.17/7, Kashiya Avenue, Ratmalana. 17. Kuruppage Don Hendri Appuhami Defendants-Respondents-Respondents
23/01/24	SC APPEAL 69/2020	Saraswathie Duraisamy, No. 22, Approach Road, Fruit Hill, Hatton. Plaintiff-Respondent-Petitioner S. Manickarasa, No. 47/8, Walls Lane, Mutual, Colombo 15. Defendant-Appellant-Respondent

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17/01/24	SC APPEAL NO. 166/2012	Bandaragama Pradeshiya Sabhawa, Bandaragama INTERVENIENT PETITIONER-APPELLANT. VS (1) Chitra Weerakkoon No. 10, Swarnadisi Pedesa, Koswatte, Nawala. (2) D.M.W. Kannangara No.12, Waragodawatte, Waragoda, Kelaniya. PETITIONER-RESPONDENT-RESPONDENTS. (1) Hon. Jeewan Kumaratunga Minister of Lands, Ministry of Lands 'Govijana Mandiraya', No. 80/05, Rajamalwatte Road, Battaramulla. (1A) Hon. M.K.A.D.S. Gunawardene, Minister of Lands "Mihikatha Medura" , Land Secretariat No. 1200/6, Rajamalwatta Avenue Battaramulla. (1B) Hon. T.B. Ekanayake Minister of Lands and Land Development, "Mihikatha Medura", Land Secretariat, No. 1200/6, Rajamalwatta Avenue Battaramulla. (1C) Hon. John Amarathunga Minister of Lands and Land Development, "Mihikatha Medura", Land Secretariat, No. 1200/6, Rajamalwatta Avenue, Battaramulla. (2) Divisional Secretary Bandaragama Divisional Secretariat, Bandaragama. (3) Secretary Ministry of Lands, "Mihikatha Medura" , Land Secretariat, No. 1200/6, Rajamalwatta Avenue, Battaramulla. RESPONDENT-RESPONDENT-RESPONDENTS
17/01/24	SC (CHC) APPEAL 46/2017	M.J.N.J. Fernando No. 290, Thoduwawa North, Thoduwawa. Carrying on registered business under the name, Style and firm of Deshan International Imports And Exports. Defendant-Appellant Vs. Freight Links International (Private) Limited Level 07, Access Towers 278, Union Place, Colombo 02. Plaintiff- Respondent
17/01/24	SC (CHC) Appeal No: 48/17	Kalutota Investment and Leasing Limited, No. 49, Hudson Road, Colombo 03. Presently at, No. 562/16, Nawala Road, Rajagiriya. Plaintiff Vs. 1. Loku Galappaththige Susantha, No. 77/5, Ranmal Place, Hewagama, Kaduwela. 2. Ariyawathi Galappaththi, No. 77/5, Ranmal Place, Hewagama, Kaduwela. AND NOW BETWEEN 1. Loku Galappaththige Susantha, No. 77/5, Ranmal Place, Hewagama, Kaduwela. 2. Ariyawathi Galappaththi, No. 77/5, Ranmal Place, Hewagama, Kaduwela. Defendants-Appellants Vs. Kalutota Investment and Leasing Limited, No. 49, Hudson Road, Colombo 03. Presently at, No. 562/16, Nawala Road, Rajagiriya. Plaintiff-Respondent

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17/ 01/ 24	SC FR Application No. 221/2021, SC FR Application No. 225/2021, SC FR Application No. 228/2021	1. Hirunika Eranjali Premachandra 507/A/18 Privilege Homes, Maharagama Road, Arangala, Hokandara North. PETITIONER Vs. 1. A. Hon. Attorney General, Attorney General's Department, Colombo 12. 1. B. Hon. Attorney General, Attorney General's Department, Colombo 12. 1. C. (Former) President Gotabaya Rajapaksa 26A Pengiriwatta Road, Mirihana. and also at 308, Malalasekara Mawatha, Colombo 07. 2. Arumadura Lawrence Romelo Duminda Silva, 40/8, Perera Mawatha, Pelawatta, Battaramulla. 3. Hon. M. U. M. Ali Sabry PC, Minister of Justice, Ministry of Justice, Superior Courts Complex, Colombo 12. 3. A. Hon. Dr. Wijeyadasa Rajapakshe, Minister of Justice, Ministry of Justice, Superior Courts Complex, Colombo 12. 4. Saliya Pieris PC, President, Bar Association of Sr Lanka, No. 153, Mihindu Mawatha, Colombo 12. RESPONDENTS 1. Sumana Premachandra A1/ F12/ U6, Treasure Trove, Dr. N. M. Perera Mawatha, Colombo 08. PETITIONER Vs. 1. Hon. Attorney General, Attorney General's Department, Colombo 12. 1. A. (Former) President Gotabaya Rajapaksa 26A Pengiriwatta Road, Mirihana. 2. Arumadura Lawrence Romelo Duminda Silva, 40/8, Perera Mawatha, Pelawatta, Battaramulla. 3. Hon. M. U. M. Ali Sabry PC, Minister of Justice, Ministry of Justice, Superior Courts Complex, Colombo 12. 3. A. Hon. Dr. Wijeyadasa Rajapakshe, Minister of Justice, Ministry of Justice, Superior Courts Complex, Colombo 12. 4. Saliya Pieris PC, President, Bar Association of Sr Lanka, No. 153, Mihindu Mawatha, Colombo 12. 5. Rajeev Amarasuriya Secretary, Bar Association of Sri Lanka, No. 153, Mihindu Mawatha, Colombo 12. RESPONDENTS 1. H. Ghazali Hussain Attorney-at-Law No. 30, Jayah Road, Colomnbo 04. PETITIONER Vs. 1. A. Hon. Attorney General, Attorney General's Department, Colombo 12. 1. B. Hon. Attorney General, Attorney General's Department, Colombo 12. 2. C. (Former) President Gotabaya Rajapaksa 26A Pengiriwatta Road, Mirihana. and also at 308, Malalasekara Mawatha, Colombo 07. 2. H. M. T. N. Upuldeniya Commissioner General of Prisons, Prison Headquarters, No. 150, Baseline Road, Colombo 09. 3. Hon. M. U. M. Ali Sabry PC, Minister of Justice, Ministry of Justice, Superior Courts Complex, Colombo 12. 4. Arumadura Lawrence Romelo Duminda Silva, 40/8, Perera Mawatha, Pelawatta, Battaramulla. 5. A. Saliya Pieris PC, President, Bar Association of Sr Lanka, No. 153, Mihindu Mawatha, Colombo 12. 5. B. Rajeev Amarasuriya Secretary, Bar Association of Sri Lanka, No. 153, Mihindu Mawatha, Colombo 12. 5. C. Isuru Balapatabendi Secretary, Bar Association of Sri Lanka, No. 153, Mihindu Mawatha, Colombo 12. 6. Hon. Dr. Wijeyadasa Rajapaksa Minister of Justice Minister of Justice, Prison Affairs and Constitutional Reforms, Superior Courts Complex, Colombo 12. RESPONDENTS
16/ 01/ 24	SC CHC Appeal 06/13	Farzana Clearing Agencies (Private) Ltd. No. F75, People's Park Complex Gas Works Street Colombo 11. Defendant-Respondent-Appellant Vs. Kala Traders (Private) Ltd. No. 151, Dam Street Colombo 12. Plaintiff-Petitioner-Respondent

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12/ 01/ 24	SC APPEAL 75/2014	1. Weerathunga Arachchige Samuel de Costa (Deceased) 1A. Weerathunga Arachchige Hema de Costa 2. Weerathunga Arachchige Albert de Costa 3. Weerathunga Arachchige Hema de Costa 4. Weerathunga Arachchige Violet de Costa 5. Weerathunga Arachchige Prema de Costa All of No. 31/2, Anderson Road, Kohuwala. Plaintiffs Vs. Polwattage Bandusena Gomez of No. 19/3, Srigal Mawatha, Kohuwala, Nugegoda. Defendant AND BETWEEN Polwattage Bandusena Gomez of No. 19/3, Srigal Mawatha, Kohuwala, Nugegoda. Defendant-Appellant Vs. 1. Weerathunga Arachchige Samuel de Costa (Deceased) 1A. Weerathunga Arachchige Hema de Costa 2. Weerathunga Arachchige Albert de Costa (Deceased) 3. Weerathunga Arachchige Hema de Costa 4. Weerathunga Arachchige Violet de Costa 5. Weerathunga Arachchige Prema de Costa All of No. 31/2, Anderson Road, Kohuwala. Plaintiff-Respondents AND NOW BETWEEN Polwattage Bandusena Gomez of No. 19/3, Srigal Mawatha, Kohuwala, Nugegoda. Defendant-Appellant-Appellant Vs. 1. Weerathunga Arachchige Samuel de Costa (Deceased) 1A. Weerathunga Arachchige Hema de Costa 2. Weerathunga Arachchige Albert de Costa (Deceased) 3. Weerathunga Arachchige Hema de Costa 4. Weerathunga Arachchige Violet de Costa (Deceased) 5. Weerathunga Arachchige Prema de Costa All of No. 31/2, Anderson Road, Kohuwala. Plaintiff-Respondent-Respondents
09/ 01/ 24	SC(HC)C.A. L.A.NO. 367/16	In the matter of an appeal for leave to Appeal to the Supreme Court under Section 54 of the Act No. 54 of 2006 1.Yoganathan Ranjithkumar 2.Wife Venitta 3.Selvarani widow of Sinnatty Christo All of Maatha Kovilady, Point Pedro Road, Kopay South, Kopay PLAINTIFFS – APPELLANTS - PETITIONERS Vs. 1. Kidinan Rajah (deceased) 2. Wife Amalaranjini 3. Mary Vijitha daughter of Sinnathurai All of Semmankundu, Matha Kovil Lane, Kopay South, Kopay DEFENDANTS – RESPONDENTS - RESPONDENTS

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08/01/24	SC. FR. NO. 50/2021	1. D. Wathsala Subhashini De Silva 78/E, Gangarama Road, Urawatte, Ambalangoda. 2. Menuwara Gedara Viheli Sehansa Devhari Samarathunga 78/E, Gangarama Road, Urawatte, Ambalangoda. PETITIONERS Vs. 1. Hasitha Kesara Wettimuni Former Principal of Dharmasoka College, C/O, Principal, Dharmasoka College, Ambalangoda. 1A. Sanuja Jayawickrama Principal, Dharmasoka College, Ambalangoda. 2. B. Anthony Secretary, Interview Board, C/o Principal, Dharmasoka College, Ambalangoda. 3. T.M. Dayaratne Member, Interview Board, C/o Principal, Dharmasoka College, Ambalangoda. 4. L.N. Madhavi Dedunu Member, Interview Board, C/o Principal, Dharmasoka College, Ambalangoda. 5. N. Channa Jayampathi Member, Interview Board, C/o Principal, Dharmasoka College, Ambalangoda. 6. Gamini Jayawardene Chairman, Appeals and Objections Investigation Board, Principal, Mahinda College, Galle. 7. Rekha Malawaraarachchi Secretary, Appeals and Objections Investigation Board, C/o, Principal, Dharmasoka College, Ambalangoda. 8. J.P.R. Malkanthi Member, Appeals and Objections Investigation Board, C/o, Principal, Dharmasoka College, Ambalangoda. 9. S.A.B.L.S. Arachchi Member, Appeals and Objections Investigation Board, C/o, Principal, Dharmasoka College, Ambalangoda. 10. Rasika Prabhoda Hendahewa Member, 4. L.N. Madhavi Dedunu Member, Interview Board, C/o Principal, Dharmasoka College, Ambalangoda. 5. N. Channa Jayampathi Member, Interview Board, C/o Principal, Dharmasoka College, Ambalangoda. 6. Gamini Jayawardene Chairman, Appeals and Objections Investigation Board, Principal, Mahinda College, Galle. 7. Rekha Malawaraarachchi Secretary, Appeals and Objections Investigation Board, C/o, Principal, Dharmasoka College, Ambalangoda. 8. J.P.R. Malkanthi Member, Appeals and Objections Investigation Board, C/o, Principal, Dharmasoka College, Ambalangoda. 9. S.A.B.L.S. Arachchi Member, Appeals and Objections Investigation Board, C/o, Principal, Dharmasoka College, Ambalangoda. 10. Rasika Prabhoda Hendahewa Member,

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

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

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant

SC Appeal 03/2019

SC SPL LA 234/2018
CA (PHC) 140/2014
HC Badulla: REV 49/2014
MC Bandarawela No. 72522L

With
SC Appeal 03A/2019
SC Appeal 03B/2019
SC Appeal 03C/2019

Vs,

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent

And

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent

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

Respondent

And

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner-Appellant

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent-Respondent

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

Respondent-Respondent

And now between

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner-Appellant-Appellant

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent-Respondent-Respondent

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

Respondent-Respondent-Respondent

SC Appeal 03A/2019

SC SPL LA 235/2018
CA (PHC) 151/2014
HC Badulla: REV 50/2014
MC Bandarawela No. 90311L

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant

Vs,
Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent

And

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent

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

Respondent

And

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner-Appellant

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent-Respondent

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

Respondent-Respondent

And now between

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner-Appellant-Appellant

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent-Respondent-Respondent

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

Respondent-Respondent-Respondent

SC Appeal 03B/2019

SC SPL LA 236/2018
CA (PHC) 152/2014
HC Badulla: REV 51/2014
MC Bandarawela No. 90690L

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant

Vs,
Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent

And

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent

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

Respondent

And

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner-Appellant

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent-Respondent

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

Respondent-Respondent

And now between

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner-Appellant-Appellant

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent-Respondent-Respondent

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

Respondent-Respondent-Respondent

SC Appeal 03C/2019

SC SPL LA 237/2018
CA (PHC) 153/2014
HC Badulla: REV 52/2014
MC Bandarawela No. 90754L

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant

Vs,
Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent

And

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent

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

Respondent

And

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner-Appellan

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent-Respondent

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

Respondent-Respondent

And now between

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner-Appellant-Appellant

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent-Respondent-Respondent

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

Respondent-Respondent-Respondent

Before: **Justice Vijith K. Malalgoda, PC**
Justice A.H.M.D. Nawaz,
Justice Achala Wengappuli,

Counsel: Upul Jayasuriya, PC with P. Radhakrishnan for the Respondent-Petitioner-Appellant-Petitioner

Suranga Wimalasena, DSG for the Complainant-Respondent-Respondent-Respondent and Respondent-Respondent-Respondent

Argued on: 03.10.2023

Decided on: 12.03.2024

Vijith K. Malalgoda PC J

The Complainant-Respondent-Respondent-Respondent (hereinafter referred to as the 'Complainant-Respondent') filed four separate certificates in the Magistrate's Court of Bandarawela under section 38 (2) of the Employees' Provident Fund Act No 15 of 1958 (as amended) against Stitches Private Limited' the Respondent-Petitioner-Appellant-Petitioner (hereinafter referred to as the 'Petitioner') for the recovery of Employees' Provident Fund dues for four separate periods referred to in those certificates.

A representative of the Petitioner Company, K.M. Samarakoon had appeared on notice along with Director Board Member Rajarathnam Vinodan and accepted the responsibility to pay the Employees' Provident Fund contribution due in all four cases in instalments. (Journal Entry dated 03.04.2007)

In case No. 72522 Magistrate's Court, Bandarawela which is presently in appeal before this court bearing No. 03/2019, Rs. 24,57,414.90 was due as EPF arrears and accordingly sum of Rupees 200,000/- had been paid by the Petitioner up to 02.10.2007. Similarly, part payments were also made in the other three cases as well. The learned President's Counsel who represented the Petitioner in all four cases and the Counsel for the Complainant-Respondent before this Court had agreed to abide

by the decision in SC Appeal 03/2019, and made submissions in the said case. I will only refer to the matters that were reflected in the arguments in the instant judgment.

As revealed before us, the Petitioner had neither made any payment nor had appeared before the court through its representative since 02.10.2007. The Court noticed the directors of the Petitioner to appear before the Magistrate's Court of Bandarawela. Later on, an application was made on behalf of one of the directors, Anthony Ruwan Sanjeewa, the Court discharged the said party from the proceedings considering that he is no longer a director of the Petitioner. After a long lapse, on 24.06.2014 the other Director Rajarathnam Vinodan appeared before the Magistrate's Court of Bandarawela and moved time to make payment. When the case was called on 05.08.2014, the Court made an order to pay all dues within a period of one year (Journal Entry dated 05.08.2014) and the matter was to be called on 30.09.2014.

However as revealed from journal entries, it appears that the party noticed had neither appeared before the Court nor paid any money as agreed before the Court. On 14.10.2014 Court issued a warrant on the party noticed and the warrant was re-called on 2014.11.17 when the said party was produced before the Magistrate's Court by the prison authorities.

In the meantime, four applications were filed before the Provincial High Court of the Uva Province holden in Badulla invoking the revisionary jurisdiction of the said Court challenging the orders made by the learned Magistrate Bandarawela in the four connected matters including Magistrate's Court, Bandarawela Case No. 72522.

When invoking the revisionary jurisdiction of the Provincial High Court of Uva Province the Petitioner took up the position that under the provisions of the Employees' Provident Fund Act No 15 of 1958 (as amended), the Commissioner of Labour is not empowered to file a certificate in the Magistrate's Court under section 38 (2) of the Act in the 1st instance without having first proceeded under sections 17 and 38 (1) of the Act. The Petitioner sought interim relief preventing the Magistrate from proceeding with the cases filed before the Magistrate's Court, which was initially granted but was later revoked with the dismissal of the revision applications filed before the said Court.

The Petitioner challenged the said decisions of the Provincial High Court of Uva holden in Badulla before the Court of Appeal, but the said applications were dismissed by the Court of Appeal.

The instant applications seeking special leave were filed challenging the decisions of the Court of Appeal and this Court having considered the applications filed, had granted special leave on the following questions of law.

1. Did the Court of Appeal err in law in holding that directors of a defaulting company are liable under section 38 (2) of the Employees' Provident Fund Act No 15 of 1958 (as amended)?
2. Did the Court of Appeal err in law penalizing the directors for the improper exercise of discretion by the Commissioner?
3. At what state, the directors of a company will become liable for the nonpayment of the Employees' Provident Fund by a company, of which they are directors under the Employees Provident Act No. 15 of 1958 as amended..?

When placing material before this Court the learned President's Counsel for the Petitioner developed an argument on two main issues. Firstly, the Petitioner heavily relied on the decision in the case *of* ***K A Dayawathie Vs D S Edirisinghe***[1] and argued that the Commissioner of Labour cannot institute an action in the Magistrate's Court in the very first instance according to the provisions of the Employees' Provident Fund Act, (as amended) whilst challenging the ambit of discretionary powers vested with the Commissioner of Labour in deciding as to how he is going to recover EPF dues under the Act.

Secondly, the learned President's Counsel argued that the learned Magistrate did not have the jurisdictions under section 38 (2) to substitute the directors in place of the defaulting company named in the certificate filed under section 38 (2) of the Act.

There are 3 sections under which default contribution could be recovered under the Employee's Provident Fund Act; namely sec 17, 38(1) and 38(2),

> *Sec 17 - Any moneys due to the Fund shall be recoverable, as a debt due to the State, by an action in which proceedings may be taken by way of* ***summary procedure****. The provisions of the Civil Procedure Code relating to actions of which the procedure is summary shall apply to an action under this section*
>
> *Sec 38(1) - Where an employer makes default in the payment of any sum which he is liable to pay under this Act and the Commissioner is of opinion that recovery under section 17 of the Act*

[1] [S.C. (FR) No. 241/2008; S.C.M. 01.6.2009]

is impracticable or inexpedient, he may issue a certificate to the ***District Court*** *and ....the court shall thereupon direct a writ of execution to issue to the Fiscal authorising and requiring him to seize and sell all the property, movable and immovable, of the defaulting employer, or such part thereof as he may deem necessary for the recovery of the amount so due, and the provisions of sections 226 to 297 of the Civil Procedure Code shall, mutatis mutandis, apply to such seizure and sale.*

Sec 38(2) -Where an employer makes default in the payment of any sum which he is liable to pay under this Act and the Commissioner is of opinion that it is impracticable or inexpedient to recover that sum under section 17 or under subsection (1) of this section or where the full amount due has not been recovered by seizure and sale, then, he may issue a certificate containing particulars of the sum so due and the name and place of residence of the defaulting employer, to the ***Magistrate having jurisdiction****, which the sum shall be deemed to be a fine imposed by a sentence of the magistrate.(Emphasis added)*

When considering the procedures identified under the Act to recover dues from the defaulting employers, it appears that the three procedures referred to are distinct remedies available to the Commissioner.

When the recovery procedure is initiated under Section 38(2), the sum due from a defaulting employer is considered a fine, and the failure to pay the fine results in imprisonment in accordance with Section 291 of the Criminal Procedure Code Act. The procedure provided in Section 38 (2) differs from the procedures prescribed in Sections 17(1) and 38(1) as the procedure prescribed in Section 38(2) is deterrent and speedy because of the punishment with imprisonment to the defaulters.

However, when looking at the ambit of the discretion available for the Commissioner of Labour in deciding the procedure available for recovering EPF dues under the said provisions, there appears to have been deference of opinion taken by Appellate Courts. One being the dicta of Thilakawardene J. in *Dayawathie's case*.[2]

The above three procedures are not alternative procedures for recovery. The legislature very clearly has sets out the scheme step by step as to how the Commissioner becomes entitled to use the procedures set out in Section 38(2) of the said Act. The 3rd Respondent has no

[2] Ibid.

> *jurisdiction or power under the said statute to file a certificate in the Magistrates Court in terms of Section 38(2) of the EPF Act without first proceeding under Section 17 and thereafter under Section 38(1) of the said Act*. [pg 8]

On the other side, there are several cases where the weight of authority of the Supreme Court is clearly in favour of giving the Commissioner of Labour discretion on the procedure to be followed in between sections 17, 38(1), and 38(2) of the Act.

In ***Jewelarts Limited v. The Land Acquiring Officer and others***[3] Sriskandarajah J. held that the Commissioner of Labour has discretion in deciding between the procedures set out in sections 17, 38(1) and 38(2) of the Act. Similarly in ***Messrs Narthupana Tea & Rubber Co Ltd v. The Commissioner of Labour***[4] Wimalaratne J. and Colin Thome J. held that there is no necessity for the Commissioner to have first resorted to the other two remedies provided in sections 17 and 38(1) before he instituted the proceedings in the Magistrates Court.

In Dayawathie's case, the Supreme Court did not consider the provisions in section 38(4) of the Act which states that the provisions of that section shall have effect notwithstanding anything in section 17 of the Act. Sub-section 4 to Section 38 was introduced by Act No. 24 of 1971. In amending section 38, as referred to above the legislature quite clearly states that the new section takes effect notwithstanding the provisions in section 17.

When looking at sections 17,38 (1), 38(2) and section 38(4), it is quite clear that there is no necessity at all for the Commissioner General of Labour to resort to Section 17 of the Act before filing a certificate under Section 38(2) of the EPF Act. The said provisions are very clear, and it is for the Commissioner to form an opinion that it is impracticable or inexpedient to recover the sums due under Section 17 or Section 38(1) of the EPF Act. It is not for the defaulter to decide the required statutory provisions under which the Commissioner is expected to proceed and recover the amount in default.

[3] [C.A./Writ/App/No.1126/2004; C.A.M. of 28.01.2009]
[4] [SC Appeal 510/74; S.C.M. 13.03.1978]

In ***Chinthananda* v. *Assistant Commissioner of Labour*,**[5] the Commissioner of Labour filed a certificate in terms of Section 38(2) of the Act in the additional Magistrate Court of Matara for recovery of EPF dues. After an inquiry, the Magistrate ordered that the sum due is deemed to be a fine imposed on the employer. An appeal has been made to the Provincial High Court of the Southern Province, *inter alia*, on the ground that the certificate had been filed under Section 38(2) without initially resorting to Section 17 and Section 38(1). In this case, the High Court agreed with the decision of the Court of Appeal in *Agro Trading Lanka (Pvt) Ltd*[6] with regard to the option available to the Commissioner for recovery of EPF dues. In the *Chinthananda* case, while delivering the judgment, the High Court observed that "*…..the decision in the Dayawathi case is not binding and decisions in Narthupana and Agro Trading Lanka (Pvt) Ltd provide binding precedence on the issue*."[7]

Special leave was sought from the Supreme Court against the decision of the High Court on the basis that the High Court had erred in law by concluding that it was unnecessary for the Commissioner to resort to Sections 17 and 38(1) before invoking the jurisdiction of the Magistrate Court in terms of Section 38(2). The Petition of the Employer further stated that the High Court had erred in law by not taking cognizance of the law set out in *Dayawathi's* case. However, TIlakawardane J. [with Sripavan J. (as he then was) and Ekanayake J. agreeing] refused special leave to appeal. [8] This refusal of special leave to appeal itself can be regarded as a decision which affirmed the discretionary power of the commissioner of labour as per ***People's Bank vs Kasthuriarachchi***[9] which expressed the view that the refusal of leave itself is a decision.

A related question that would be raised in this situation is whether there is a need for the Commissioner of labour to ascertain the practicability of recovering the alleged dues under Section 38(1) of the EPF Act before acting under Section 38(2). The EPF Act gives the option to the Commissioner to decide whether it is *impracticable or inexpedient* to recover the defaulting EPF dues under sec 17 or sec 38(1). However, the provisions do not clearly state whether the opinion should be a well-founded opinion or an opinion based on assumption.[10]

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[5] S.C Spl.L.A No. 277/2012.
[6] C.A.(Rev) No 1/2010
[7] High Court Appeal No. 188/2008 (Matara).
[8] SC (Special) l.A. 277/2012; S.C.M. of 04.04.2013
[9] 2011 BLR 62.
[10] A Reflection on the Recovery Procedure of Contributions to Employees' Provident Fund and Employees' Trust Fund- A. Sarweswaran -pg 3

In answering an identical issue raised in the Court of Appeal,[11] Anil Gooneratne J. held that;

> *We find that on a perusal of the above provisions that there is no necessity at all for the Commissioner General of Labour to resort to Section 17 of the Act prior to filing a certificate under Section 38(2) of the Statute. The above provisions are very clear and it is for the Commissioner to form an opinion that it is impracticable or inexpedient to recover the sums due under Section 17 or under Section 38(1) of the Employees' Provident Fund Ac.*

In ***Yahala Kelle Estates Company (Pvt) Ltd*** case, [12]Gooneratne, J. commented on the EPF Act as "*This is a piece of social legislation enacted to grant superannuation benefits for employees, and not a statute enacted to delay the process and defeat the intention of the legislature.*" Therefore, Courts should not interfere with the formation of the opinion of the Commissioner unless the Commissioner has formed the opinion with *malafides* or ulterior motives. [13]

The certificate filed before the learned Magistrate was issued under the name of the body corporate. Since in this case 'employer named in the certificate' was only the Stitches Pvt Ltd and not the directors, the question arises as to who is liable for the failure of the company to act in accordance with the EPF Act and if the liability could be imposed upon directors at what stage would the directors' become liable.

Sec 10 of the EPF Act states as follows;

> *an employee to whom this Act applies shall, in respect of each month during which he works in a covered employment, be liable to pay to the Fund a contribution of an amount equal to eight per centum of his total earnings from that employment during that month.*

Sec 40 of the EPF Act states as follows;

> *Where an offence under this Act is committed by a body of persons, then—*
>
> *(a) if that body of persons is a body corporate, every director and officer of that body corporate,*
>
> *(b) if that body of persons is a firm, every partner of that firm, and*

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[11] CA. 234/2013 (Writ) C.A.M. of 13/12/2013

[12] CA. 234/2013 (Writ) C.A.M. of 13/12/2013

[13] A Reflection on the Recovery Procedure of Contributions to Employees' Provident Fund and Employees' Trust Fund (n 10).

(c) if that body of persons is a trade union, every officer of that trade union shall be deemed to be guilty of that offence: Provided that a director or an officer of such body corporate, or a partner of such firm or an officer of such trade union, shall not be deemed to be guilty of such offence if he proves that such offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

The definition of the 'Employer' in terms of Section 47 of the Act reads as, "Any person who employs or on whose behalf any other person employs any workman and includes a body of employers (whether such body is a firm, company, corporation or trade Union)

The offences under the said EPF Act are contained in Sec 34 of the Act and the punishment for the offence can be found in Sec 37.

Section 34: *Any person who—*

(a) contravenes any provision of this Act or of any regulation made thereunder;

(b) furnishes, for the purposes of this Act, any information which is, or any document the contents of which are, or any part of the contents of which is, to his knowledge untrue or incorrect;

(c) wilfully delays or obstructs the Commissioner or any other officer in the exercise of his powers under section 32; or

(d) contravenes any direction made by the Commissioner in the exercise of his powers under section 27,

shall be guilty of an offence under this Act

Section 37:

Every person who is guilty of an offence under this Act shall be liable, on conviction after summary trial before a Magistrate, to a fine not exceeding one thousand rupees or to imprisonment of either description for a term not exceeding six months or to both such fine and imprisonment, and shall, in addition, be liable to a fine not exceeding fifty rupees for each day on which the offence is continued after conviction.

It is important to consider the rules of interpretation in determining whether petitioners are liable, qua directors of the offending company, to be summoned before a court in proceedings under section 38 (2) of the Act and sentenced to pay the sum in default by way of fine and serve a term of imprisonment in lieu, if the fine remains unpaid.

The precise meaning of a provision can only be ascertained when the Statute is studied in its entirety and not parts of the same in isolation. Therefore, to determine the purpose of the legislature, it is necessary to have regard to the Act as a whole and not to focus attention on a single provision to the exclusion of all others. In ***Brett v Brett***[14] Sir John Nicholl stated that '*to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context in the statute: it is to be viewed in connection with its whole context.*'

The preamble to EPF Act states that *"An act to establish provident fund for the benefit of certain classes of employees and to provide for matters connected therewith or incidental thereto."* However, if the court were to hold directors of a body corporate do not fall within the ambit of the employer in Section 38(2) of the EPF Act, then the establishment of the provident fund would be redundant. Further, such an interpretation, would defeat the purpose of the Act and lead to absurdity.

In ***Ranasinghe and another v. The Commissioner of Labour and others***[15] Sisira De Abrew J. noted that:

> *If the employer is a body corporate and if it does not comply with section 38(2) of the EPF Act, how is the Magistrate going to implement the default sentence. In short, the question that must be considered is: if the employer is a body corporate and the amount ordered by way of a fine is not paid, who is going to be sent to jail. Obviously, the Magistrate cannot send the body corporate to jail. If the contention that the directors of a body corporate cannot be sent to jail as they have not committed an offence is accepted, then the amount set out in the certificate cannot be recovered. Was this the intention of the legislature when it enacted Section 38(2) of the EPF Act? Should Courts interpret Statute to frustrate the intention of the legislature and the purpose of the Statute? The answer is clearly no.*

[14] 162 ER 456.

[15] [CA(PHC) 69/2009; C.A.M. 27.01.2011]

In ***Colombo Apothecaries Ltd. and others v. Commissioner of Labour***[16] Ranaraja J. held that,

> *A default in making payments due as EPF contributions, makes the 'employer' at the relevant time, liable for contravening the provisions of section 10 of the Act. As an alternative to prosecution for such an offence under section 41 of the Act or civil proceedings under section 17 of the Act, the Commissioner is empowered to institute proceedings against the defaulting employer for the recovery of contributions due under the provisions of section 38 (2). The petitioners are thus liable, qua directors of the offending company, to be summoned before court in proceedings under section 38 (2) of the Act and sentenced to pay the sum in default by way of fine and serve a term of imprisonment in lieu, if the fine remains unpaid.*

A statute is a communication between the parliament and the public and therefore it is very important to identify the context even when the words are clear because there could be issues in delivering the message. As statutory law is never enacted in a vacuum, when construing a legislations, courts are entitled to consider the legal, social, economic aspects of the society in which the legislation operates.

The historical setting of passing this Act can be traced back to the social and political changes that took place in the country after gaining independence from the British colonial rule in 1948. One of the major changes that occurred during that time was the emergence of strong labour movements that demanded better working conditions, social security and economic democracy for the workers. These labour movements were led by trade unions, political parties and progressive intellectuals who advocated for a welfare state and a mixed economy

The EPF Act was introduced by T. B. Ilangaratne, who was the Minister of Labour and Social Services who was also a prominent trade unionist who championed the cause of the working class. The Act was passed by the Parliament on 15 April 1958 and came into effect on 1 June 1958. The Minister noted in his speech while presenting the Bill "*the scheme has been conceived primarily as a means of providing retirement benefits to the employees at the time when due to advanced age, they are unable to work*."[17]

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[16] [(1998) 3 Sri LL.R. 320 at 330]

[17] 60th Anniversary Commemorative Volume of the Central Bank of Sri Lanka: 1950 – 2010 < www.cbsl.gov.lk > accessed 23 October 2023

As correctly points out by Prof. Sarveswaran in his article, '***A Reflection on the Recovery Procedure of Contributions to Employees' Provident Fund and Employees' Trust Fund'*** sometimes, the employers who fail to make contribution to the EPF Fund may prefer to be imprisoned rather than attempting to make the contributions to the Funds whereas the employees will prefer recovery of their dues under the Fund to the imprisonment of their employers.

Moreover the imprisonment of employers without recovery of their contributions will defeat the objective of the legislation which it was passed- that is providing social security to the employees after their retirement. In this context, it could be observed that the utmost importance lies in the ability of the state to be able to recover the dues from such defaulters rather than imposing sanctions of punitive nature.

In the circumstances, it is clear that the Act had provided to add directors as parties to a proceeding that is pending before a Magistrate's Court under Section 38 (2) of the Act. Further, could be seen that the directors of the company are liable to pay the amount in question if it is not recoverable from the defaulting company.

For the above reasons, I hold that 'employer' in Section 38(2) of the EPF Act includes directors of a body corporate and it is lawful for the Magistrate to order the directors of a body corporate to pay the amount set out in the certificate filed in terms of Section 38(2) of the EPF Act if it is not recoverable from the Body Corporate.

The facts revealed that in the instant case, the plaint had never been amended to include the Directors of the Petitioner Company and it is the director who came before the Magistrate's Court and accepted the liability to pay EPF dues to the employees of the Petitioner Company. Since then, a representative was permitted to represent the Petitioner Company and when the Petitioner Company abundant the case and defaulted to make the balance payment, the court notified the Director who had already accepted the liability before the Magistrate's Court. As per the Journal Entries, the director had once again accepted liability and moved time to make payments. It is at this stage only the learned magistrate ordered to recover the dues as a fine from the director of the Petitioner Company.

In the circumstances I answer all 3 questions of law as follows;

1. No
2. No
3. When it is not possible to recover from the company or the company defaults making the payment

Appeal dismissed.

Accordingly, SC Appeals 3A, 3B, 3C also dismissed. No costs.

Judge of the Supreme Court

Justice A.H.M.D. Nawaz,

I agree,

Judge of the Supreme Court

Justice Achala Wengappuli,

I agree,

Judge of the Supreme Court

<u>IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA</u>

Bulathgama Wedalage Nirasha,
No. 106, Ranwala, Kegalle.

By way of her Power of Attorney
Holder Bulathgama Wedalage
Shamith Shiwantha Bulathgama
Weerasinghe,
68/3, Attanagalla Road,
Dangolla Watta, Nittambuwa.
<u>Petitioner-Respondent-Appellant</u>

SC APPEAL NO: SC/APPEAL/04/2023
SC LA NO: SC/HCCA/LA/222/2020
HCCA KEGALLE NO: SP/HCCA/KAG/05/2019/LA
DC KEGALLE NO: 148/C

<u>Vs.</u>

Rathna Bhushana Acharige
Wimalasena,
No. 290, Ranwala, Kegalle.
<u>1st Defendant-Petitioner-
Respondent</u>

Bulathgama Wedalage Piyasena,
No. 106, Ranwala, Kegalle.
<u>Plaintiff-Respondent-Respondent</u>

Seylan Bank Limited,
Ceylon Seylan Towers,
No. 90, Galle Road, Colombo 03.
2nd Defendant-Respondent-
Respondent

Before: Hon. Justice S. Thurairaja, P.C.
Hon. Justice Mahinda Samayawardhena
Hon. Justice K. Priyantha Fernando

Counsel: Jagath Wickramanayake P.C. with Pujanee De Alwis for the Petitioner-Respondent-Appellant.
Sapumal Bandara with Gangulali De Silva Dayarathna for the 1st Defendant-Petitioner-Respondent.
Lahiru Welgama for the Plaintiff-Respondent-Respondent.
Chamath Jayasekera for the 2nd Defendant-Respondent-Respondent.

Written Submissions:
By the Petitioner-Respondent-Appellant on 27.02.2023
By the 1st Defendant-Petitioner-Respondent on 09.05.2023 and 02.08.2023

Argued on: 27.06.2023

Decided on: 13.02.2024

Samayawardhena, J.

In the execution of the decree in Case No. 6482/L of the District Court of Kegalle, the appellant together with her family was ejected by the fiscal on 07.12.2016. The appellant filed a separate application in the District Court of Kegalle (148/C) under section 328 of the Civil Procedure Code

within fifteen days of dispossession by way of petition and affidavit with supporting documents seeking to restore her to possession. At the inquiry into this application, the judgment-creditor (the 1st defendant-petitioner-respondent) raised a preliminary objection to the maintainability of the application on the basis that the appellant ought to have made the application in the main case (6482/L) rather than in a separate case. The learned District Judge by order dated 31.01.2019 overruled this preliminary objection emphasizing that there is a serious matter to be looked into (which I will advert to later) and fixed the main application for inquiry.

The judgment-creditor filed an appeal with leave obtained in the High Court of Civil Appeal of Kegalle against the said order of the District Court. The High Court by its judgment dated 10.07.2020 set aside the order of the District Court on the basis that a separate action cannot be filed seeking relief under section 328 of the Civil Procedure Code.

This Court granted leave to appeal against the judgment of the High Court on the following two questions of law as formulated by the appellant:

(a) Did the Provincial High Court of Civil Appeal err in law by failing to appreciate that the petitioner's application under section 328 of the Civil Procedure Code is in compliance with all the requirements of the provisions of law?

(b) Did the Provincial High Court err in law in deciding that the application by the petitioner under section 328 of the Civil Procedure Code being registered as a separate action of claim without being registered under the main action where the decree has been entered, is not a mere technicality but a fundamental error of procedure on the part of the petitioner,

> when in fact the petitioner had sufficiently complied with all the requirements in section 328 of the Civil Procedure Code?

In the first place, the High Court could not have entertained the leave to appeal application in view of the positive bar in section 329 of the Civil Procedure Code which states:

> *No appeal shall lie from any order made under section 326 or section 327 or section 328 against any party other than the judgment-debtor. Any such order shall not bar the right of such party to institute an action to establish his right or title to such property.*

If there is no right of appeal, there is no right for leave to appeal. However, the invocation of revisionary jurisdiction remains unaffected.

As the learned District Judge has stated, a serious miscarriage of justice appears to have occurred in the execution of the decree.

Section 328 of the Civil Procedure Code reads as follows:

> *Where any person other than the judgment-debtor or a person in occupation under him is dispossessed of any property in execution of a decree, he may, within fifteen days of such dispossession, apply to the court by petition in which the judgment-creditor shall be named respondent complaining of such dispossession. The court shall thereupon serve a copy of such petition on such respondent and require such respondent to file objections, if any, within fifteen days of the service of the petition on him. Upon such objections being filed or after the expiry of the date on which such objections were directed to be filed, the court shall, after notice to all parties concerned, hold an inquiry. Where the court is satisfied that the person dispossessed was in possession of the whole or part of such property on his own account or on account of some person other than*

> *the judgment-debtor, it shall by order direct that the petitioner be put into possession of the property or part thereof, as the case may be. Every inquiry under this section shall be concluded within sixty days of the date fixed for the filing of objections.*

In this case the appellant by her petition tendered to the District Court *prima facie* established that she has been in possession of the property on her own account by virtue of a deed from an independent source. Her possession had nothing to do with the judgment-debtor. In Case No. 6482/L, the judgment-creditor was declared the owner of the property. Before this declaration was made, the judgment-creditor had obtained a loan from Seylan Bank mortgaging this property. Due to his failure to pay the loan, the Bank had sold the property by a public auction in terms of the provisions of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 and issued the Certificate of Sale marked P4 with the section 328 application. Thereafter the Bank sold the property to the appellant by deed marked P2.

As seen from the first paragraph of page 13 and the second paragraph of page 14 of the judgment in Case No. 6482/L, the District Court refused to stop the said public auction and expressly stated that the judgment has no effect on the rights of the Bank. At the time the fiscal ejected the appellant and handed over the property to the judgment-creditor, the latter was not the owner of the property. In point of fact, the judgment-creditor lost ownership to the property long before the judgment in Case No. 6482/L.

Section 328 does not expressly state that an application under that section must be filed in the main case, although it would have been prudent to make the application in the main case itself given the nature of the inquiry contemplated under this section.

Section 344 quoted below is applicable to "the parties to the action". The appellant was not a party to Case No. 6482/L.

> *All questions arising between the parties to the action in which the decree was passed, or their legal representatives, and relating to the execution of the decree, shall be determined by order of the court executing the decree, and not by separate action.*

In any event, a blatant miscarriage of justice cannot be suppressed by technicalities. The procedural laws are there not to thwart justice but to facilitate justice.

The two questions of law on which leave was granted are answered in the affirmative.

I set aside the judgment of the High Court and restore the order of the District Court dated 31.01.2019.

The District Court is directed to conclude the inquiry within sixty days of the receipt of this judgment.

The judgment-creditor shall pay Rs. 200,000 to the appellant as costs of this appeal and the appeal of the court below.

Judge of the Supreme Court

S. Thurairaja, P.C., J.

I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.

I agree.

Judge of the Supreme Court

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

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

1. Kodagoda Buddhisena Alfred (deceased)

1(a). Upul Nanda Kumara Kodagoda,
Indiketiya,
Pelmadulla.

Substituted-Plaintiff

SC APPEAL No. 09/2022
SC/HCCA/LA/Appn No. 211/2018
SP/HCCA/RAT No. 17/2017 [FA]
D.C. Ratnapura Case No. 12640/Land

Vs.

1. Naipanichchi Gamage Nimal
2. Naipanichchi Gamage Rathnayaka
3. Naipanichchi Gamage Senarathna

All of Indiketiya,
Pelmadulla.

Defendants

AND BETWEEN

1(a). Upul Nanda Kumara Kodagoda,
Indiketiya,

Pelmadulla.

**Substituted-Plaintiff-
Appellant**

Vs.

1. Naipanichchi Gamage Nimal
2. Naipanichchi Gamage Rathnayaka
3. Naipanichchi Gamage Senarathna

All of Indiketiya,
Pelmadulla.

Defendants-Respondents

AND NOW BETWEEN

Naipanichchi Gamage Rathnayaka
Indiketiya,
Pelmadulla.

**2nd Defendant-Respondent-
Appellant**

Vs.

Upul Nanda Kumara Kodagoda,
Indiketiya,
Pelmadulla.

And now :
Sarvodaya Road, Rilhena,
Pelmadulla.

**Substituted-Plaintiff-Appellant-
Respondent**

1. Naipanichchi Gamage Nimal
2. Naipanichchi Gamage Senarathna

All of Indiketiya,
Pelmadulla.

1st and 3rd Defendants-Respondents-Respondents

Before : **S. Thurairaja, PC, J**
Arjuna Obeyesekere, J
K. Priyantha Fernando, J

Counsel : Mr. Anuruddha Dharmaratne for the 2nd Defendant-Respondent-Appellant.

F.Z. Hassim for the 1st and 3rd Defendants-Respondents.

Argued on : 22.01.2024

Decided on : 20.03.2024

K. PRIYANTHA FERNANDO, J

1. The instant appeal stems from the judgment of the High Court dated 24.05.2018. The 2nd Defendant-Respondent-Appellant (hereinafter referred to as the appellant) in this case seeks that the judgment of the learned High Court Judges be set aside and that the judgment of the learned District Court Judge be affirmed on the basis that the corpus has not properly been identified.

2. The Plaintiff-Appellant-Respondent (hereinafter referred to as the respondent) in the instant case, filed action in the District Court of *Ratnapura* in case no. 12640/L against the 1st, 2nd and 3rd Defendants-Respondents-Appellants seeking a declaration that the respondent (original plaintiff) is the permit holder of the land by the name of *'Indiketiya'* described in

schedule A to the amended plaint dated 20.01.2011, ejectment of the defendants from the said land and damages.

3. The learned District Judge by his judgment dated 17.11.2016 decided that the appellant cannot be ejected from the land depicted in the Commissioner's plan [P-2], as the corpus has not been properly identified. It was the finding of the learned District Judge that the respondent has failed to prove that the land referred to in the permit marked [P-1] issued in terms of the Land Development Ordinance is the same land depicted in the Commissioner's plan [P-2].

4. Being aggrieved by the said judgment of the District Court, the respondent preferred an appeal to the High Court of Civil Appeal *Ratnapura*. At the argument of the appeal, both parties have agreed to dispose the appeal by way of written submissions. The learned Judges of the High Court set aside the judgment of the District Court, holding that the land described in the permit marked [P-1] has been properly identified by the Commissioner's plan marked [P-2] and granted relief as prayed by the original plaintiff (respondent) in his amended plaint. In that, for the reasons stated in the judgment, the learned Judges of the High Court concluded that the corpus has in fact been properly identified. Being aggrieved by the judgment of the learned Judges of the High Court, the appellant preferred the instant appeal.

5. At the hearing of the appeal, this Court granted leave to appeal on the questions of law set out in sub paragraphs (i), (ii) and (iii) of paragraph 18 of the petition dated 04.07.2018.

Questions of law

18 (i) Have the learned Judges of the High Court of Civil Appeals erred in law by arriving at the finding that there is sufficient evidence to identify the land in question granted under the said permit marked 'P-1', is the same as Lot No. 313 of the Final Village Plan No. 196?

(ii) Have the learned Judges of the High Court of Civil Appeals erred in law by arriving at the finding that the land described in the permit marked 'P-1' can be identified in the survey plan marked 'P-2', and it is the same land described in the schedule 'A' to the amended plaint?

(iii) Have the learned Judges of the High Court of Civil Appeals erred in law by failing to appreciate and consider that the documents marked P6 to P8 and P10 is insufficient proof to arrive at the finding that the land described in the permit given to the plaintiff and Lot No. 313 of the Final Village Plan No. 196 are one and the same?

6. As all three questions of law relate to the identification of the corpus, all three questions of law will be discussed together.

7. Although notices were issued on the respondent (Substituted-Plaintiff-Appellant-Respondent) on several occasions, the respondent neither appeared in Court nor was he represented by Counsel. The learned Counsel for the appellant filed written submissions and made submissions at the hearing of this appeal and the learned Counsel for the 1st and 3rd Defendants-Respondents-Respondents associated with the same.

8. The learned Counsel for the appellant submitted that, the boundaries and extent of the land referred to in the schedule A to the amended plaint dated 2011.01.20 is different to the boundaries and extent of the land referred to in the permit marked [P-1]. It was further submitted that, as per the schedule A to the amended plaint, the land referred to in [P-1] is 0.150 hectares in extent, however according to the subsequent survey, Lot No. 313 is 60 perches in extent.

9. It was the submission of the learned Counsel for the appellant that, the respondent in his evidence (at pages 148 and 149 of the brief) clearly admits that the boundaries of P-1 are different to the boundaries of P-2.

10. It was further submitted by the learned Counsel for the appellant that, in an attempt to settle the matter between the parties, the respondent has made a request to the Divisional Secretary of *Pelmadulla.* Upon this request, the Divisional Secretary has sent the letter marked [P-6] to *L. Piyadasa* provincial surveyor, stating that the portion of land described in Lot 49 of F.V.P. 196 which is 0.150 hectares in extent had been given to *Kodagodage Buddhisena* (respondent) and to prepare a report showing the boundaries of the same. *L. Piyadasa* kachcheri surveyor, had prepared a tracing and sent it to the District Court by the Divisional Secretary. This however has not been marked at the trial. In his written submissions, the learned Counsel for the appellant stated that the tracing had been prepared according to the boundaries of Lot 313 of F.V.P 196 and the schedule A of the amendment plaint has also been prepared according to this tracing. Despite the kachcheri surveyor being directed to prepare the tracing using the boundaries of Lot 49 of F.V.P 196, the surveyor has disregarded the same and has not identified Lot 49 in F.V.P 196.

11. It was the position of the learned Counsel for the appellant that the learned District Judge was correct in arriving at his finding as to the corpus not being properly identified.

12. It was also his position that, the learned Judges of the High Court have erred in setting aside the judgment of the learned District Judge and arriving at the finding that there is sufficient evidence to state that the land in question which was granted to the respondent under the said permit is similar to the land described in the schedule to the amended plaint in light of the documents marked [P-6], [P-7], [P-8], [P-10]. He submitted that, the boundaries and the extent of the land as described in the permit is in no way comparable to the boundaries and extent of the land as described in the schedule A to the amended plaint.

13. The learned Counsel for the appellant further submitted that, in a *rei vindicatio* action, there is a burden on the plaintiff to identify the corpus. In stating so, the learned Counsel made

reference to the cases of ***Fernando V. Somasiri [2012] B.L.R. 121*** at page 124 and ***Jamaldeen Abdul Latheef V. Abdul Majeed Mohamed Mansoor and another [2010] 2 S.L.R. 333.***

14. The main issue in the instant appeal was, as to whether the boundaries and extent of the land in question by the name of *'Indiketiya'* as set out in the schedule A to the amended plaint dated 20.01.2011 tallies with the boundaries and extent of the permit marked [P-1]. Simply put, does the permit marked [P-1] relate to the land as described in the schedule A to the amended plaint dated 20.01.2011.

15. In ***Fernando V Somasiri [2012] B.L.R 121*** it has been stated that,

    "…In a vindicatory action it is necessary to establish the corpus in a clear and unambiguous manner. …"

16. Further, in the Court of Appeal case of ***Hettiarachchi V. Gunapala CA 642/1995***, His Lordship Justice *Ranjith Silva* stated that,

    "Thus the question is whether the Defendant is occupying a portion of the land which the Plaintiff claims under the aforesaid permit. This fact should be considered only after the Plaintiff established his rights to the extent of land with specific metes and bounds. In other words it is imperative that the Appellant should first prove the permit marked P1 and then identify the corpus with the land described in the said permit marked P1, as the Respondent denied the title of the Plaintiff to the said land."

17. In light of the above, the burden is clearly on the respondent in the instant case (original plaintiff) to prove the extent of the land and establish the corpus with specific metes and bounds in a clear and unambiguous manner. The authenticity of the permit marked [P-1] is not in dispute. Therefore, it is on the respondent in the instant case to prove that the specific metes

and bounds of the land in question that the respondent claims which has been described in the schedule A to the amended plaint tallies with the permit marked [P-1].

18. The learned District Judge has clearly set out a diagram which concisely yet comprehensively sets out the metes and bounds of the land as set out in the permit [P-1], the schedule A to the amended plaint, and the Commissioner's Plan [P-2]. I have taken the liberty to reproduce this diagram below.

	ඉඩම	ප්‍රමාණය	උතුර	නැගෙනහිර	දකුණ	බස්නහිර
පැ 1 අ අවසර පත්‍රය	අගපි 196 ලොට් 49	හෙක්ටයාර් 0.150	ලොට්156	ලොට්156, පාර	පාර	ලොට්156, පාර
සංශෝධිත පැමිණිල්ල අනුව	අගපි 196 ලොට් 313	පර්චස් 60	අගපි 196 හි ලොට් 314	අගපි 196 හි ලොට් 29 1/2 දරණ පියසේනගේ ඉඩම	ඉදිකැටිය සිට කහවත්ත දක්වා පාර	පාර
පැ 2 පිඹුර	අගපි 196 ලොට් 313	රූඩ් 01 යි පර්චස් 9.4	අගපි 196 හි ලොට් 314	අගපි 196 හි 29 1/2 දරණ පියසේනගේ ඉඩම	ඉදිකැටිය සිට කහවත්ත දක්වා පාර අගපි 196 ලොට් 287	පාර අගපි 196 ලොට්: 289

19. When considering the diagram that has been set out, it is clear that although the metes and bounds of the schedule A to the amended plaint dated 20.01.2011 and the metes and bounds of the commissioner's plan seem to tally with each other, the metes and bounds of the subject matter as described in the schedule A to the amended plaint does not tally with the permit marked [P-1]. The Commissioner's Plan P-2 has been made in respect of Lot No.313 of F.V.P. 196. Further, the schedule A to the amended plaint has also been made based on the Commissioner's Plan [P-2] which refers to Lot No. 313 of F.V.P. 196. However, the permit marked [P-1] is in reference to Lot No. 49 of F.V.P. 196.

20. Further, the respondent in his evidence (at pages 148 and 149 of the brief) has clearly admitted that the boundaries of P-1 are different to the boundaries of P-2.

21. When considering the above, it is apparent that the corpus in the instant case has not properly been identified with the land described in the permit [P-1].

22. Thus, the approach taken by the learned Judges of the High Court cannot stand. The learned Judges of the High Court have in fact erred in holding that the corpus is identified based on the evidence as set out in documents marked [P-6], [P-7], [P-8], [P-10]. This is primarily due to the fact that the tracing which has been prepared by *L. Piyadasa* the kachcheri surveyor has not been marked and produced in evidence at the trial.

23. Thus, as the corpus in the instant case has not properly been identified with the land described in the permit [P-1], all three questions of law are answered in the affirmative.

24. The judgment of the learned Judges of the High Court is set aside and the judgment of the learned District Judge is affirmed.

The appeal is allowed

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA, PC.

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 for Appeal to the Supreme Court from the Order dated 2nd October 2020 in Case No. CHC 02/2019/CO in the High Court of the Western Province exercising its Civil Jurisdiction.

Heineken Lanka Limited,
(formerly Asia Pacific Brewery (Lanka) Limited)
Green House
No. 260,
Nawala Road,
Nawala.

Petitioner

SC APPEAL 12/2023

SC HC LA No. 101/2020
CHC Case No. 02/2019/CO

Vs.

Ajith Putha Distributors (Pvt) Ltd,
Galahitiyawa,
Madampe.
(Company sought to be wound up)

Respondent

AND NOW

Heinken Lanka Limited,
(formerly Asia Pacific Brewery (Lanka) Limited)
Green House,

No. 260,
Nawala Road,
Nawala.

Petitioner-Appellant

Ajith Putha Distributors (Pvt) Ltd,
Galahitiyawa,
Madampe.

Respondent-Respondent

Before : **Murdu Fernando, PC,J**
Yasantha Kodagoda, PC, J
K. Priyantha Fernando, J

Counsel : Chandaka Jayasundera, PC with Chinthaka Fernando instructed by Sundaralingam Balendra for the Petitioner-Appellant.

Argued on : 31.01.2024

Decided on : 19.02.2024

K. PRIYANTHA FERNANDO, J

1. The Petitioner-Appellant (hereinafter referred to as the 'appellant') instituted proceedings in the Commercial High Court of the Western Province holden in *Colombo* seeking for an order to wind up the company named *'Ajith Putha Distributors (Pvt) Ltd'* (hereinafter referred to as 'respondent'). The learned High Court Judge by his order dated 02.10.2020 dismissed the application of the appellant. Being aggrieved by the said order of the learned High Court Judge, the appellant preferred the instant appeal. This Court granted leave to proceed on the

questions of law raised in paragraph 13 (c) and (e) of the petition dated 19.10.2020. The said questions of law are;

Paragraph 13

(c) Has the learned High Court Judge misdirected himself in law and facts in holding that "**P13**" amounts to a valid denial of the debt in question by the Company?

(e) Has the learned High Court Judge misdirected himself in law and facts in holding that the Company sought to be wound up has disputed the debt and therefore, the Petitioner has failed to establish the fact the Company is unable to pay its debts?

2. This Court issued notices on the respondent company on several occasions. However, the respondent was absent and unrepresented. At the hearing of this appeal, the learned President's Counsel for the appellant made submissions. This Court has carefully considered the proceedings in the High Court including the order of the learned High Court Judge, the written submissions filed on behalf of the appellant and the submissions that were made on behalf of the appellant.

<u>Facts in brief</u>

3. The appellant has appointed the respondent company by way of an agreement to distribute the products of the appellant since the year 2010. This agreement was periodically renewed. The products that the appellant supplied were sold at the outlets of the respondent company. The agreement that subsisted between the appellant and the respondent has been marked as [P-5]. The appellant has sent the statutory demand marked [P-12] to the respondent company demanding that Rupees 40,779,052.24 which was owed by the respondent. As the respondent failed to pay the outstanding amount as per the statutory demand marked [P-12], the appellant made a winding up application to the High Court.

4. It is the contention of the learned President's Counsel that the learned High Court Judge erred when he held that the document marked [P-13] amounts to a valid denial of the debt in question by the respondent.

5. In reply to the statutory demand P-12, the letter P-13 has been sent to the appellant on 31.10.2018 under the signature of *P.Rasiah*. The learned High Court Judge in his judgment referring to P-13 has taken the view that it amounts to a valid denial of the debt by the respondent.

6. It is the contention of the learned President's Counsel that when P-13 is read in its entirety, there is no denial of the debt. The learned President's Counsel further contended that, P-13 has been sent by *Rasiah* in his personal capacity and it does not amount to a denial of the debt by the company. P-13 is merely a statement by *Rasiah* as the Chairman of the company seeking to have him released from the proceedings and therefore, it cannot be construed as a document disputing the debt.

7. The issues arising from the letter P-13 are two-fold. First, whether the letter P-13 can be considered as amounting to an act and deed of the respondent company. Secondly, whether there is a denial of the debt by P-13. As per the contents of P-13, there is an admission by *Rasiah* that the respondent accepted products from the appellant for distribution. There is a further admission by *Rasiah* that the appellant has forfeited the sum of Rupees 6,000,000.00 that was deposited as security, to recover the monies due to the appellant from the respondent. The grievance of *Rasiah* as per P-13 is the failure on the part of the appellant to inform him of the goods received by his daughter and his son-in-law who acted in the capacity of directors of the respondent company. It is clear that, P-13 is a personal request of *Rasiah* to get himself released from the responsibility.

8. Further, it is pertinent to note that, according to the agreement P-5, the name of the respondent company is ***'Ajith Putha Distributors (Pvt) Ltd'.*** However, the letter P-13 has not been written on a letterhead of

the respondent company. The name of the company referred to in the letterhead [P-13] is 'AJITH PUTHA (PVT) LTD. AJITH PUTHA TOURS AND TRAVELS'. The rubber stamp underneath the signature of P. *Rasiah* also states 'AJITH PUTHA (PVT) LTD'. This further confirms that the letter [P-13] is not an act and deed of the respondent company, but of *P. Rasiah* in his personal capacity. This has escaped the mind of the learned High Court Judge.

9. As submitted by the learned President's Counsel for the appellant, it was held in the case of ***M/S***. ***Sampat Trading & Company V. M/S Talayar Tea Company Ltd,*** In the High Court of Judicature at Madras dated 22.01.2009, that Court must confirm the veracity of the defence of the company to ensure that the dispute of the debt is a genuine dispute.

   In [1978] vol. 48 Company Cases page 378 (Bomb.)- ***United Western Ltd***, In re., the High Court of Bombay set out the underlying principles on winding up of companies as follows;

   > *"On a petition under section 483 of the Companies Act, 1956, where the defence is that the debt is disputed, the court has to see first whether the dispute on the face of it is genuine or merely a cloak to cover the company's real inability to pay just debts. The inability is indicated by its neglect to pay after a proper demand and a lapse of three weeks. Such neglect must be judged on the facts of each case. Merely seeking to raise certain disputes for putting off liability for payment of the debt or creating a kind of defence to the claim will not make the debt a disputed one. Disputes which appear to have been created or manufactured for the purpose of creating pleas to cover up the liability for payment of the debt can never be considered to be bona fide and will be of no avail in resisting a winding-up petition."*

   The above was cited with approval in *Sampat Trading Company(supra).*

10. In the proceedings before the High Court, one Periyasamy Ramasamy Harishchandra Kumara, who is a director of the respondent company has filed an affidavit dated 15.07.2019. The alleged debt was not

denied in that affidavit. However, he has taken up a preliminary objection stating that this dispute has to first be referred to arbitration as per the contract P-5. This objection has been rightly rejected by the learned High Court Judge with reasons. Therefore, in the instant case, it is clear that the defence taken up by the respondent company is not a genuine one.

11. In the above premise, I answer both the questions of law raised by the appellant in the affirmative. The order of the learned High Court Judge dated 02.10.2020 is set aside. I direct the learned High Court Judge to order the winding up of the respondent company and take such further action in that regard in terms of the Companies Act.

The Appeal is allowed.

JUDGE OF THE SUPREME COURT

JUSTICE MURDU FERNANDO

I agree

JUDGE OF THE SUPREME COURT

JUSTICE YASANTHA KODAGODA

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.

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

S.C. Appeal No.14/2019

SC/SPL/LA No. 125/2014
Court of Appeal Case No.
C.A.95/2011 A.B.C.
H.C. Avissawella No. 58/2006

Vs.

1. Singappuli Arachchilage Rumesh Sameera Dissanayake alias Gaminige Kolla
2. Baduwala Wahampurage Podinona,
3. Kalanchidewage Suresh Nandana

Accused

And

1. Singappuli Arachchilage Rumesh Sameera Dissanayake alias Gaminige Kolla
2. Baduwala Wahampurage Podinona,
3. Kalanchidewage Suresh Nandana

1st, 2nd, and 3rd Accused-Appellants

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant—Respondent

AND NOW

Kalanchidewage Suresh Nandana

Presently at

Remond Prison Welikada,

Boralla, Colombo 08.

3rd Accused-Appellant-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant—Respondent-Respondent

BEFORE : P. PADMAN SURASENA, J.
ACHALA WENGAPPULI, J.
MAHINDA SAMAYAWARDHENA, J.

COUNSEL : Anil Silva P. C. with Amaan Bandara for the 3rd Accused-Appellant- Petitioner-Appellant
Rohantha Abeysuriya P.C. A.S.G. for the Hon. Attorney General

ARGUED ON : 21st January, 2022

DECIDED ON : 09th February,2024

ACHALA WENGAPPULI, J.

The 3rd Accused-Appellant-Appellant (hereinafter referred to as "the Appellant") was indicted along with 1st and 2nd Accused-Appellants-Petitioners (Petitioners of SC Spl. LA No. 126/2014 and hereinafter referred to as the 1st and 2nd accused) before the High Court of *Avissawella* for committing attempted murder on *Thotapitiya Arachchilage Kusumawathie* and, in the course of same transaction, committing murders of *Hetti Arachchige Susantha* and *Hetti Arachchige Swarna* on or about 26.10.2003. All three accused elected a trial without a Jury. After the ensuing trial, during which the Appellant as well as the 1st and 2nd accused made statements from the dock denying any involvement with the offences to which they were accused of, the High Court found three of them guilty on all counts contained in the indictment.

In relation to the 1st count of attempted murder the High Court imposed a term of 20-year Rigorous Imprisonment along with a fine of Rs 50,000.00 on each of the accused, coupled with a default term of imprisonment, whereas the Court imposed death sentence on them in respect of the 2nd and 3rd counts.

All three accused have individually preferred appeals against the Judgment of the High Court in appeal No. CA 95/2011 (A, B and C) and the Court of Appeal by its consolidated Judgment dated 19.06.2014, affirmed the convictions entered against them and along with the sentences imposed by the High Court, before proceeding to dismiss their appeals.

Thereupon, the Appellant had sought Special Leave to Appeal from this Court against the said Judgment of the Court of Appeal. When the said application for Special Leave bearing No. SC SPL. LA No. 125/2014 was supported on 09.01.2019, this Court thought it fit to grant Special Leave to Appeal on the questions of law, as set out in sub paragraphs 12(b), 12(c) and 12(d) of his Petition dated 25.07.2014. The joint application of the 1st and 2nd accused seeking Special Leave to Appeal under application No. SC SPL LA No. 126/2014, against the dismissal of their appeals by the Court of appeal too was taken up for support on the same day but, they were unable to persuade this Court to grant leave.

The three questions of law, on which special leave to appeal was granted in relation to the impugned Judgment of the Court of Appeal, are as follows;

(b) Did the Learned Judges of the Court of Appeal fail to appreciate that the entirety of the evidence led at the trial in the High Court do not justify the conviction of the Appellant of the offences set out in 1st, 2nd, and 3rd charges of the Indictment?

(c) Did the Learned Judges of the Court of Appeal fail to appreciate the items of evidence in favour of the Appellant which tends to negative his participation in the incidents which culminated in causing hurt to *Thotapitiya Arachchilage Kusumawathie* and causing the deaths of *Hettiarachchige Susantha* and *Hettiarachchige Swarna*?

(d) Did the Learned Judges of the Court of Appeal misdirect themselves in holding that the Appellant's convictions in respect of the murders of *Hettiarachchige Susantha* and *Hettiarachchige Swarna* is correct inasmuch as there is no direct or circumstantial evidence connecting the Appellant with the said murders?

At the hearing of the appeal, the learned President's Counsel for the Appellant, submitted that even if the testimony of the injured *Thotapitiya Arachchilage Kusumawathie* is accepted as a whole and the prosecution case is placed at its best, still there was insufficiency of evidence, either in the form of direct or circumstantial evidence, in order to justify drawing an irresistible and necessary inference as to his guilt to the count of attempted murder. He further contended that the prosecution had failed to establish that the Appellant's participatory presence to the attempted murder of *Kusumawathie* to the required degree of proof. Similarly, the learned President's Counsel stressed on the point that there was no evidence at all to establish that the Appellant was even merely present when the two murders were committed, and that factor had effectively negated justification of any inference drawn by the Court on his complicity to the said murders. Therefore, the learned President's Counsel contended that the appellate Court had fallen into grave error in affirming the Appellant's convictions to the count of attempted murder as well as to the two counts of murder.

Learned Additional Solicitor General resisted the appeal of the Appellant and contended that the High Court as well as the Court of Appeal were satisfied with the available evidence in direct and

circumstantial forms and thereby sought to justify the affirmation of the conviction entered against the latter.

In view of the very nature of the legal principles that are associated with the contention advanced by the learned President's Counsel, which should be considered along with the issue of sufficiency of evidence, it would be helpful if reference is made to the case that had been presented before the trial Court by the prosecution. This would facilitate the task of consideration of the contention advanced by the Appellant, against the backdrop of the three questions of law in which leave was granted.

The injured *Kusumawathi* is a married woman of 45 years at the time of the incident who lived with her husband and their two children *Susantha* and *Swarna.* She had another daughter who had settled elsewhere after marriage. The 2nd accused is *Kusumawathi's* husband's half-sister. The 1st accused is the only son of the 2nd accused, who also had a daughter. The 3rd Appellant was to marry the 2nd accused's daughter and was in the habit of regularly visiting the 2nd accused's house. Both these families lived on a commonly owned rectangular piece of land in an extent of about ½ an acre and had their houses built on it. The two houses were only about ten feet apart and were facing a pathway which commenced from the main road and leading up to a stream called *Gomala Oya.* This pathway provided the only access to the main road to both families. *Kusumawathi* did depend on *Gomala Oya* for supply of water and, as such, had to regularly walk pass the 2nd accused's house.

Describing the incident, during which *Kusumawathie* had sustained serious injuries to her head and her son and daughter were

killed, she testified that it happened on the evening of 26.10.2003. It was a Sunday. She had returned home at about 4.15 in the afternoon from *Ratnapura* Hospital after visiting her husband, who was receiving in-house treatment for the past two weeks. Her 24-year-old son *Susantha,* who was employed as a field officer in a Government Institution, had left home in the morning to attend some official work and not returned home by then. Daughter *Swarna,* a 22-year-old unmarried girl at the time of her death, was reading for a diploma conducted by *Kelaniya* University. She too had left in the morning and not returned home. *Kusumawathie,* after returning from the hospital and after having attended to some household chores, had gone to the stream and washed her laundry and had left them there drying. At about 6.00 in the evening she returned to the stream in a hurry, going past the accused's house, in order to bring back her clothes as a huge storm was brewing this time.

On her way back she saw the 1st accused, who was now standing in front of his house, approaching her with a sword in his hand. Upon seeing him and sensing an impending danger, she had frozen where she was. *Kusumawathie* had her laundry in one hand and, in the other, a cake of soap. The 1st accused was not alone but was flanked by the 2nd accused and the Appellant, who too had emerged from the doorway following the 1st accused. The 2nd accused and the Appellant had clubs in their hands.

The 1st accused, without making any utterance, had struck her with the sword on her hand**.** She fell down when he struck her with his sword for the second time. The 2nd accused had thereafter hit her with a club. The Appellant too had attacked her with a club. It was a sustained

attack by all three of them and their attack concentrated on her head and legs. After the attack, all the accused had dragged her up to the stream and left her there. She did not see who it was as she was dragged face down.

After about five minutes since the three attackers of *Kusumawathie* left leaving her near the stream, she heard her daughter *Swarna* repeatedly calling out "අම්මේ". This was about 6.15 p.m. Due to multiple injuries *Kusumawathie* already had suffered, she could not move or call out for her daughter for help. At that point of time, the rain started. It was a heavy downpour and she fainted where she was. When she regained consciousness after some time, which she estimates to be about one and half hours, she made an attempt to stand up. She could not hold her head up due to injuries and started dragging herself along the pathway towards her house, with the hope her son would have returned home by then. Having reached in front of her house, she saw the bookcase and the water bottle of her daughter lying in the front garden of their house. After seeing some blood on their main door and realising that her daughter too had been attacked, *Kusumawathie* had then inched towards the main road and came across the body of her son *Susantha*. It was lying on the pathway leading to their house. He had fallen on his umbrella. She had eventually managed to reach the main road and called out for help from one of her neighbours, *Jayasinghe,* who lived in a house bordering main road.

According to *Jayasinghe*, after the heavy rain had eased off, he heard a woman's call of distress and, on enquiry, saw *Kusumawathi* lying on the ground in front of his house with bleeding injuries on her head. When questioned as to what happened, she had said "ගාමිණිගෙ

කොල්ල ගෑනුව" referring to the 1st accused. *Jayasinghe* had then asked one *Jayaratne* to take the injured to hospital, however, the latter had fainted after seeing the nature of injuries on *Kusumawathie's* head. She was then rushed to *Eheliyagoda* Hospital by one *Premalal*, where she was treated initially, before being transferred to *Colombo* National Hospital for specialised medical care.

The first information over the incident was received by *Eheliyagoda* Police Station on the same day at 7.40 p.m. and SI *Medawatta* who visited the crime scene observed a body of a male lying on a pathway about a distance of five feet away from the main road and about 20 meters away from the house of *Kusumawathie*. The deceased was dressed in a shirt, a pair of trousers and shoes. There was an umbrella underneath his body. Several deep cut injuries were noted by the officer on the head of the deceased. This was the body of *Susantha.* The body of his sister, *Swarna,* was discovered about nine meters away towards their house and lying on an embankment of about 6 feet above from the pathway. She was dressed in a blouse and a skirt. Her books were strewn in the front garden and one of her shoes was found near the house. She too had suffered several cut injuries to her head and face. The Officer also noted several blood-like patches in the back garden of the house. The 1st and 2nd accused were at their home. They were arrested on the following day by the Police along with the Appellant. The Police thereupon recovered a sword, upon being pointed out the place by the 1st accused, where it was lying concealed in a shrub.

Post-mortem examination of *Susantha's* body revealed that he had suffered multiple cut injuries to his head, inflicted by a heavy sharp weapon like a sword. His death was due to an injury which had severed

several major blood vessels of the neck along with neck muscles and caused damage to cervical vertebrae. That particular injury was classified as a necessarily fatal injury by the expert witness. The deceased also had defensive wounds on his arms. The death of *Swarna* was also due to multiple necessarily fatal cut injuries to her head, inflicted by a sharp heavy weapon, similar to a sword. She also had several injuries which the medical officer, who testified on his autopsy findings, had described as defensive injuries, in addition to several abrasions which may have caused due to a fall.

The medical evidence presented by the prosecution also revealed that *Kusumawathie* had lost her middle and ring fingers due to an attack using a heavy sharp cutting weapon. She also had suffered a fracture of her *ulna,* upon being hit by a blunt weapon, similar to a club. She also had suffered multiple cut injuries to her head, which the Consultant JMO, who examined her in the hospital after she was treated for those injuries, expressed his opinion that they could have endangered her life.

Thus, it is not a surprise that the learned President's Counsel opted to place reliance on the contention that there was no direct or circumstantial evidence to conclude that the Appellant had participated in the attack on *Kusumwathie* along with his other contention that the available evidence only points to him being merely present during the attack on *Kusumawathie,* although being armed with a club at the time of causing injuries to the elderly woman by the other two. It is also clear that the learned President's Counsel had heavily relied on the total absence of any direct or circumstantial evidence, according to him which even fail to suggest the Appellant's mere presence, during the attack on the two deceased.

In this context, it is also relevant to note that the prosecution relied on Section 32 of the Penal Code, in order to impute criminal liability vicariously on the 2nd accused and the Appellant, in view of the fact that the main striker was the 1st accused, who used a sword to repeatedly inflict serious cut injuries on all of his victims, in the course of same transaction, resulting in causing life threatening injury to *Kusumawathie* and necessarily fatal injuries to her two children.

Before I turn to consider the validity of the conviction of the Appellant entered against him by the High Court and affirmed by the Court of Appeal in relation to the second and third counts of murder, it is convenient to consider the legality of his conviction to the count of attempted murder, in this part of the judgment, particularly in view of the fact that the prosecution presented an eyewitness account, in support of that count.

Admittedly, the only source of direct evidence available to the prosecution to establish the count of attempted murder was *Kusumawathie* herself, who provided an eye-witness account to the sequence of events that resulted in causing a life-threatening injury to her. The trial Court as well as the appellate Court relied on her evidence to sustain the convictions entered against the three accused. Hence, a brief reference should be made on the issue of the testimonial trustworthiness of that eyewitness before I proceed any further.

During her cross-examination, learned Counsel who represented all three accused before the High Court, was unable to mark a single contradiction or an omission against the testimony of *Kusumawathie***.** Learned Counsel only suggested to the injured that she was the aggressor who harassed the 1st and 2nd accused and, at times, threatened

them with violence, over the dispute regarding the land. Continuing with this line of questioning, the witness was also suggested by the learned Counsel that prior to this incident she had chased after the 1st accused, while being armed with a sword. *Kusumawathie* totally denied occurrence of such an incident and consistently maintained her position, that it was the 1st and 2nd accused who wanted her family out of the land, on which they lived for a long period of time. However, the issue was not probed beyond that particular suggestion.

Importantly there was no suggestion made to the witness to the effect either that she had falsely implicated the 1st, 2nd accused, upon being motivated by the animosity she had entertained against them. Also, there was no suggestion made on behalf of the Appellant either on the basis that she had falsely accused him because he was merely associated with the household of the 1st and 2nd accused or at least that he was never involved in the attack.

The trial Court considered these aspects in detail and, having found that *Kusumawathie's* evidence was corroborated by medical evidence, decided to accept her evidence as a credible and truthful account of the incident. In affirming the conviction of the two accused and the Appellant to the count of attempted murder, the Court of Appeal too was satisfied with the said conclusion reached by the trial Court, as it found it safe to act on her evidence. I am in agreement with the said decision of the Court of Appeal to treat *Kusumawathie's* evidence as truthful account. Understandably, learned President's Counsel for the Appellant did not challenge that finding of fact. Hence, his contention that even if one were to take her evidence its best, it would only reveal that the Appellant was "*merely present*" at the scene

and nothing more, and thereby falling short of establishing he had a participatory presence in the commission of attempted murder.

In these circumstances, her narration of the sequence of events had to be taken as an uncontested account of an eyewitness, in relation to the count of attempted murder and also provided several important items of circumstantial evidence, in relation to the two counts of murder.

Returning to the contention advanced before this Court by the Appellant, it must be noted that the three counts contained in the indictment had been presented to the High Court on the premise that the three accused committed the several offences in the course of same transaction, citing Section 32 of the Penal Code. With that citation, the prosecution sought to impute vicarious criminal liability on each of the three accused for criminal acts committed by any one of them, and therefore each one of them was made liable for the attempted murder and murders in the same manner as if it were done by each one of them individually. As such, it was the burden of the prosecution to establish beyond reasonable doubt that the three accused have acted in furtherance of their common murderous intention, in the commission of the offences they were charged with.

The collective wisdom, as found in multiple judicial precedents that had been pronounced over the years by the superior Courts, in which the applicable principles of law on Section 32 of the Penal Code in the imputation of criminal liability on several accused, was encapsulated by this Court in the Judgement of ***Indrawansa Kumarasiri and Others v Kumarihamy, Chief Registrar Colombo and the Attorney***

General (SC TAB Appeal No. 2 of 2012 – decided on 02.04.2014), in the following manner;

a. The case of each Accused must be considered separately;

b. The Accused must have been actuated by a common intention with the doer of the act at the time the offence was committed;

c. Common intention must not be confused with same or similar intention entertained independently each other;

d. There must be evidence either direct or circumstantial, of prearrangement or some other evidence of common intention;

e. It must be noted that common intention can be formed on the "*spur of the moment*";

f. The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention;

g. The question whether a particular set of circumstances establish that an accused person acted in furtherance of common intention is always a question of fact;

h. The Prosecution case will not fail if the Prosecution fails to establish the identity of the person who struck the fatal blow provided common murderous intention can be inferred.

i. The inference of common intention should not be reached unless it is a necessary inference deducible from the circumstances of the case.

The underlying principle of law contained in Section 32 of the Penal Code, in imputing criminal liability on a person for the criminal act of another, is evident from the words; "*accused must have been actuated by a common intention with the doer of the act at the time the offence was committed*". Dr. *Gour* in his book Penal Law of India (11th Edition), (at p. 314), states that in order to impute criminal liability under Section 34 of the Penal Code of India (which is the counterpart provision to our Section 32) "the *essence of Section 34 is that the person must be physically present at the actual commission of crime. This must be coupled with actual participation*." With the imposition of the requirement of the person, on whom the liability under Section 32 is sought to be imputed, must be present at the actual commission of crime, the principle of law quoted above in (f) becomes relevant in view of the contention advanced by the learned President's Counsel in relation to the count of attempted murder. The said principle of law states "mere *fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention*."

Thus, the core contention of the Appellant, in impugning his conviction for the offence of attempted murder, is that his mere presence at the place of the incident, without any other evidence indicating that he did take any active part in the attack on the injured *Kusumawathie*, clearly insufficient for the trial Court to impute him with any criminal liability under Section 32 of the Penal Code. Clearly this

contention is based on the pronouncement made by *Basnayake* CJ in the case of ***The Queen v Vincent Fernando and two others*** (1963) 65 NLR 265, (at p. 272) that "*a person who merely shares the criminal intention or takes a fiendish delight in what is happening but does no criminal act in furtherance of the common intention of all is not liable for the acts of the others*."

In view of this pronouncement, if the Appellant were to be afforded an exemption from criminal liability under Section 32, on account of his "*mere presence*" at the crime scene, the evidence must indicate that he did not do any "*criminal act in furtherance of the common intention of all.*" If the words of *Basnayake* CJ, as appear in the quoted segment of the judgment of the Court of Criminal Appeal, taken in isolation ignoring the rest of his Lordships reasoning, then it could lead to a mistaken notion that the "*act or acts*" that are attributed to the accused, on whom criminal liability sought to be imposed under Section 32, should be done along with or at the same time, with the act or acts of the other accused that had resulted in the commission of that particular offence. If this notion is accepted as a correct principle of law in relation to imposition of criminal liability under Section 32, then the timing of the act or acts attributed to the accused becomes material as it is the contention of the Appellant that he was merely present, when the others attacked and caused injuries to *Kusumawathie.* This contention seems to indicate that he placed reliance on the factual position that during the time period within which the said attack was carried out by the others, there was no evidence at all to indicate that he did anything to injure the woman.

In the same Judgment, *Basnayake* CJ effectively negates validity of such a notion. His Lordship stated (at p. 272) "*By virtue of the definition of 'act' in Section 31 of the Penal Code the application of the Section also extends to a series of criminal acts done by several persons in furtherance of the common intention of all. There are more cases which fall within the extended application than within the un-extended*." Thereupon, his Lordships further stated thus; "*… where a series of criminal acts is done by several persons, each act would be done either jointly or severally. But whether the criminal acts in the series of criminal acts are done jointly or severally if each criminal act is done in furtherance of the common intention of all each of the persons sharing the common intention and doing any act in the series of criminal acts is not only liable for his own act but is also liable for the acts of the others in the same manner as if it were done by him alone."*

More importantly, having referred to the often-quoted words of Lord *Sumner* in the Privy council judgment of ***Barendra Kumar Gosh v. Emperor*** (1925) A. I. R. Privy Council (at p. 1), that "*they also serve who only stand and wait*", *Basnayake* CJ offered an important clarification to that statement by stressing the point that the words of Lord *Sumner* has to be regarded "*… as applying not to a bystander who merely shares mentally the criminal intention of the others but to a person whose act of standing and waiting is itself a criminal act in a series of criminal acts done in furtherance of the common intention of all*."

The Appellant, however, does not claim that he was present there as a mere bystander and simply watched the proceedings. Neither did he claim that he *merely shares the criminal intention* and did nothing "*in furtherance of the common intention of all"* nor derived a fiendishly delight

from the criminal act of the others. In his statement from the dock, the Appellant only pleaded that he had no knowledge of the incident.

While the judgement of ***The Queen v Vincent Fernando and two others*** (supra) speaks of an accused, who, by way of an act or a series of criminal acts done in furtherance of the common intention of all persons, each sharing a common intention with the others and doing any act in that series of criminal acts is not only made liable for his own individual act but also made liable for the acts of the others in the same manner as if it were done by him alone, the Privy Council judgment of ***Mahbub Shah v Emperor*** AIR (32) 1945 Privy Council 118, *Nair* J stated that " … *common intention within the meaning of the Section implies a pre-arranged plan, and to convict the accused of an offence applying the Section it should be proved that the criminal act was done in concert pursuant to a pre-arranged plan"*.

This principle of law was referred to in the case of ***The King v Asappu et al*** (1948) 50 NLR 324, (at p.329) by *Dias* J and restated the underlying principle as follows;

> *"… in order to justify the inference that a particular prisoner was actuated by a common intention with the doer of the act, there must be evidence, direct or circumstantial, either of pre-arrangement, or a pre-arranged plan, or a declaration showing common intention, or some other significant fact at the time of the commission of the offence, to enable them to say that a co-accused had a common intention with the doer of the act, and not merely a same or similar intention entertained independently of each other."*

Thus, the requirement considered by the Privy Council, for the purpose of imposition of criminal liability on an accused under Section 32 in relation to the said appeal, was the presence of a pre-arranged plan. The requirement of evidence as to a pre-arranged plan, as considered in the judgment of ***Mahbub Shah v Emperor*** **(**supra), was further expanded by the judgment of ***The King v Asappu et al*** (supra), with the pronouncement that a Court could infer existence of common intention on evidence as to *"… pre-arrangement, or a pre-arranged plan, or a declaration showing common intention".* The Court also highlighted yet another factor in the said judgment, when it stated that in order to establish criminal liability under Section 32 a Court could also infer existence of common intention in an accused based on "… *some other significant fact at the time of the commission of offence*".

In this context, I think it is important to highlight another important aspect in this regard. The prefix "*pre*" is generally taken to connote an event that had occurred prior to, in relation to another event that had followed the first event. Similarly, when that prefix appears in the phrase "*pre-arranged plan*", it also gives an impression to a general reader what that particular phrase might mean is that the arrangement to commit the offence was agreed upon by the accused must have taken place well in advance to the time of actual commission of the offence. However, *Basnayake* CJ, in the judgment of ***The Queen v Mahatun and another*** (1959) 61 NLR 540, clarified that ambiguity by making the authoritative pronouncement (at p. 546) that *"to establish the existence of a common intention it is not essential to prove that the criminal act was done in concert pursuant to a pre- arranged plan. A common intention can come into existence without pre-arrangement. It can be formed on the spur of the moment. To hold that 'common intention' within the meaning of the Section 32*

necessarily implies a pre-arranged plan would unduly restrict the scope of the Section and introduce an element which it has not."

Thus, in a given time scale, which has its starting point placed at the occurrence of the meeting of the accused in their physical form and its terminal point set at the time of the actual commission of the offence, the event of common meeting of minds in the form of a pre-arranged plan or pre-arrangement could occur at any point of time between the said two points within that time scale, either spontaneously and alongside with the commission of the offence, or prior to the actual commission of the crime, and thereby making it indeed a "*pre-arranged plan*".

It is noted earlier on, in relation to the count of attempted murder, that the prosecution presented an eyewitness, who in turn had provided direct evidence regarding details of the violent attack that had been unleashed upon her, by the three accused. In ***Wasalamuni Richard v The State*** (1973) 76 NLR 534 at p. 549, *HNG Fernando* CJ made the following observation after considering a long line of judicial precedents; *"In Ceylon the principle in Mahbub Shah's case has been applied in cases of direct evidence. Invariably in such cases the material question is whether or not there was evidence of a pre-arranged plan among the assailants, where the facts disclose that the assailants set upon their victim and assaulted him in pursuance of which he was injured or received fatal injuries."*

Since the count of attempted murder is based on direct evidence, it is necessary to test the validity of reasoning adopted by the High Court in order to convict him to that count, as well as the reasoning of the appellate Court, adopted in the affirmation of that conviction,

against the backdrop of the legal principles that are referred to in the preceding paragraphs.

The trial Court, in its consideration of the evidence had observed that the injured *Kusumawathie* could not recall exactly what the Appellant did to her during the attack. The Court also noted that, despite her inability to recall a specific act of the Appellant during the attack, she had, however, implicated all three of the accused for mounting an attack on her. She was not challenged by the Appellant for the role attributed for him in the attack. The question as to what particularly the Appellant did during the attack was answered by the injured by stating that "*I cannot recall, all three came and attacked*" (" මතක නැහැ, තුන් දෙනාම ආවා, ගැහුවා"). She distinctly remembered that the Appellant had a club in his hand and also asserted that she was struck with clubs multiple times. The trial Court was satisfied that the Appellant had attacked the injured woman along with the other two and had thereafter got involved with them in carrying *Kusumawathie* up to the stream. Therefore, the Court concluded that the Appellant shared a common intention with the other accused, in relation to the attack on *Kusumawathie*, during which the injured woman sustained an injury may have been caused her death in the ordinary course of nature. This conclusion was reached by the trial Court after satisfying itself that it is the necessary inference that could be drawn after consideration of the material placed before it. The Court of Appeal too, in affirming the said conviction after undertaking a detailed analysis of the evidence, also was of the view that the "*material placed before the trial Court is totally consistent with the guilt of the accused and proves and establish circumstances which guilt safely confirm of all three accused*."

If there was material to reasonably conclude that the three accused, including the Appellant, had acted in furtherance of a common intention of all, in launching the attack on *Kusumawathie,* not merely to hurt her, but to cause her death or such bodily injuries as were likely to cause her death, and that they did so by carrying out a "*pre-arranged plan*", then there is no question as to the validity of imposition of vicarious criminal liability on the Appellant, for the commission of the offence of attempted murder, despite the fact the injury that had endangered her was inflicted by the 1st accused and the Appellant was "*merely there*", with a club in his hand.

It is significant to note when *Kusumawathie* made a general accusation against the Appellant, that he, along with the others, had attacked her and there was no challenge made by him on that specific accusation. Thus, her claim that the Appellant too had attacked her, despite the fact that it remains bereft of any specific details of the manner in which that attack was carried out, supported the prosecution case, and thereby enabling the trial Court to answer the question; whether the material presented before it is indicative of a "*pre-arranged plan*" in the affirmative, which in turn established the common intention entertained by each of the accused.

The trial Court had made a reference to this aspect of a pre-arranged plan as it related the evidence indicating a strong motive entertained by the 1st and 2nd accused in order to secure the land only to themselves. It had therefore inferred that the only obstacle that prevented them achieving that objective was the continued occupation of the land by *Kusumawathie's* family and the accused made an attempt to remove that obstacle by mounting the said attack on her family. In

the circumstances, it is helpful if the gist of her evidence touching on this particular aspect is referred here in more detail, although I have already devoted some space earlier on this Judgment in reproducing her evidence.

The injured was attacked by the three accused, when she was returning from the stream in a hurry after collecting her laundry. She had already gone past the house of the 2nd accused to do her laundry and returned home. This was the second time she had gone past that house in that afternoon to the stream. On her hurried return, before the onset of the heavy downpour, she came to pass the entrance to the 2nd accused's house. Then only the 1st accused emerged out from the house with a sword in his hand and was flanked by the 2nd accused and the Appellant, each carrying clubs. The 1st accused struck *Kusumawathie* with his sword once on her right hand, severing her middle and ring fingers and when he struck for the second time, she fell down. The 2nd accused then struck her with a club and the attack by the accused, using the sword and clubs, continued for some time. Thereafter she was dragged down to the stream and dumped there. None of the accused ever uttered a single word in the entirety of the whole sequence of events.

The above narration does not speak of any recent act by which the pre-existing animosity between the two families over the possessory rights of the land was rekindled. The suggestion that *Kusumawathie* had made an attempt to attack the 1st accused with a sword was merely for the purpose of negating her assertion that the aggressor was the 1st accused. The Learned Counsel did not connect that suggestion to the incident during which *Kusumawathie* sustained serious injuries. The

denial of the witness of this suggestion was not probed any further and there was no evidence elicited by the Appellant to substantiate that suggestion. In the circumstances, what transpires from the available evidence is that there was no recent incident that triggered the violent attack on *Kusumawathie* and her children.

In fact, there could not have been any spare time for *Kusumawathie* during her short stay at home on that day to allowing her to challenge the 1st and 2nd accused as her husband was receiving inhouse treatment at a hospital for the past two weeks and she was busy with the tasks of managing the house, preparing and taking meals to her sick husband whilst attending to the needs of her children. There was no indication of an imminent threat of violence that would be unleashed anytime soon on any member of her family, as the mother and the two siblings have attended to their regular activities, as if there was absolute peace that exists between the 1st or 2nd accused, despite the continuing resentment over the land.

Even on the day of the incident, the evidence is that *Kusumawathie* had returned from hospital only in the mid-afternoon and was thereafter busy with her daily household chores since then. There was no indication to *Kusumawathie* of any acts of animosity directed towards her by any of the accused on that particular day. Her actions clearly indicate that she did not anticipate any of the events that had taken place in that very evening. She had once gone past the accused's house to do her laundry without an incident. She then returned home to prepare dinner for her children who are expected to return anytime that evening itself. Then for the third time too, she had gone past the accused house, that time in a hurry, in order to pick her laundry up

before the onset of rain. None of the accused were seen in the open at that point of time. Only on her return journey for the third time, the first sign of trouble emerged as she was prevented proceeding any further by the three accused, who had come out of their house, and formed a human barricade blocking the pathway. Upon seeing that the 1st accused was armed with a sword while the 2nd accused and the Appellant had clubs, *Kusumawathie* immediately realised that she was in mortal danger. After her fall due to the sustained attack, the accused, probably due to her appearance with the bleeding injuries to her head and showing no signs of life, had taken her to be dead and thereafter brought her down to the stream to be left there.

This sequence clearly indicative of the fact that the three attackers were waiting patiently until *Kusumawathie* returned from the stream for the second time to mount their surprise attack on her. The fact that the 1st accused suddenly emerged out of his door armed with a sword, being flanked by the 2nd accused and the Appellant with clubs, is indicative that they have timed well to launch their attack and were determined to carry out a decisive attack on the unsuspecting woman. As already noted, this attack was not due to any provocative act done on the part of the injured, by which she had re-ignited the animosity that had subsided for some time. It is also not an instance where the victim was attacked by the attackers during an incident that erupted spontaneously and acting under the heat of passion using whatever they could lay their hand on or had picked up from their surroundings to be used in the attack. The three attackers were already armed with a sword and clubs, when they emerged from the front door of their house.

One striking feature that could be observed from these circumstances is that no one of the trio had issued any directions or commands on the other two members as the attack proceeded on and, each of them, by their conduct indicated that they knew exactly what each of them were supposed to do individually. After the attack and while the injured woman lay motionless, the accused knew the next step is that she should be carried away to the exact place, where she was eventually taken. The task of carrying *Kusumawathie* down to the stream, obviously an unusual course of action by any standard, was carried out by them without any instructions issued by the 1st accused, who spearheaded the attack.

The only probable reason for the accused to adopt such a strange move would have been to erase any indication of violent attack on *Kusumawathie*, from the pathway as her children were due to return home at any moment in that evening. It was essential for the attackers not to leave any room for suspicion, so that they could have an edge over the unsuspecting victims *Swarna* and *Susantha,* by mounting similar surprise attacks on them, when they were least prepared. What is important to note here is, not particularly the reason why they took her there, but the fact that the decision to carry *Kusumawathie* down to the stream was not taken at the place and time where she was attacked. The act of carrying her down to the stream had been a result of an act of prior understanding reached between the three attackers. It obviously would have been reached even before the actual attack was launched, and its timing shifts to a point even prior to their emergence from the doorway, as *Kusumawathie* walked back from the stream. In this regard, the fact that the washed clothing and the cake of soap which *Kusumawathie* had in her hands at the time of her attack, that should be

lying at the place of attack, had disappeared from the scene is a very relevant and significant factor indicative of the degree of preparedness.

The attack on the injured was carried out by all three accused, whilst maintaining a stoical silence in its entire duration, and therefore the intentions entertained by each of them at that point of time had to be inferred from the available items of evidence and also of any inferences that could reasonably be drawn from those items of evidence.

It was observed by the Privy Council in ***Mahbub Shah v Emperor*** (supra - at p. 120) in fulfilling its task of consideration of the evidence, the Court must bear in mind that "*… it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases, it has to be inferred from his act or conduct or other relevant circumstances of the case*." In the Judgment of ***Sirisena and six others v The Queen*** (1969) 72 NLR 389, the Court of Criminal Appeal quoted the Judgment of the Supreme Court of India in ***Afrahim Sheik v. The State of West Bengal*** 3 A. I. R. 1964 S.C. 1263 at 1268, which stated; "*A person does not do an act except with a certain intention ; and the common intention which is requisite for the application of S. 34 is the common intention of perpetrating a particular act. Previous concert which is insisted upon is the meeting of the minds regarding the achievement of the criminal act … and Section 34 then makes the responsibility several if there was a knowledge possessed by each of them that death was caused as a result of the beating.* "

The Court of Criminal Appeal observed in ***Regina v Somapala et al*** (1956) 57 NLR 350 (at p. 353), the that the word "*act*", as found in Section 32 of the Penal Code, have been authoritatively explained quoting Lord Sumner in ***Barendra Kumar Ghosh v Emperor*** (supra) " …

the whole action covered by the unity of criminal behaviour which results in something for which an individual would be punished if it were all done by him alone ", and liability is imputed to each individual socius criminis not merely for his own acts but for the totality of the acts committed by his confederates in furtherance of their common intention. Vicarious or collective responsibility attaches in such a situation for the result (e.g., death) of their united action. But S. 32 certainly does not, in addition, constructively impute to one socius criminis the guilty knowledge of another. In order to decide whether an accused person, to whom liability is imputed for another person's criminal acts has committed an offence involving guilty knowledge, the test is whether such guilty knowledge has been established against him individually by the evidence."

The factors referred to in the previous paragraph makes it very clear that there was indeed a "*pre-arranged plan*", that had agreed upon between the three accused for the purpose of causing death of *Kusumawathie* or to cause her an injury that would be sufficient to cause death in the ordinary course of nature, with which the three accused had agreed upon before launching their attack on her.

In relation to the manner of the attack on *Kusumawathie,* the fact that all three emerged from their door already armed with a sword and clubs and that too when only the injured had reached their house, are all indications of prior planning. Neither the Appellant nor the 2nd accused had to think on their feet to align their individual actions to coincide with that of the 1st accused, who acted as the main striker during the entire episode. The three accused knew exactly what each one of them was supposed to do with passing of each phase of the attack. This factor becomes explicit when one takes the sequence of events that took place after *Kusumawathie*, being repeatedly struck on

her head by the 1st accused with a sword coupled with repeated club blows aimed at her by the other two, had collapsed in the same spot and was lying motionless. The accused took that as an indicator that she had died. It was the 1st accused who inflicted the injury that could be termed as a fatal in the ordinary course of nature.

However, none of the remaining partners to the attack neither expressed their dismay or remorse for the fate of the victim, indicating the actions of the 1st accused had far exceeded what they had anticipated for. It is a factor that gives rise to an inference what they saw was what exactly they wanted to see. They executed the said "*pre-arranged plan*" to a total completion by mounting a violent surprise attack on *Kusumawathie*, resulting in an injury that would be sufficient to cause her death in the ordinary course of nature, and finally disposing of their victim, under the mistaken belief that she was dead.

There is no material which might point to any other innocent hypothesis in favour of the Appellant either from the prosecution evidence or from his own evidence, which confined to a pleading ignorance of the attack, taken up at the last minute, and was rightly rejected by the trial Court. Thus, all these factors point to the irresistible conclusion that when the Appellant did emerge through that doorway, being armed with a club and alongside the 1st accused and 2nd accused, to obstruct *Kusumawathie* who was merely returning home with laundry, he had entertained a common murderous intention shared with them to cause her death or to cause such bodily injuries as were sufficient to cause her death.

The Court of Criminal Appeal, in its judgment of ***The King v Piyadasa et al*** (1947) 48 NLR 295 (at p.297), followed the reasoning of

Howard CJ in the judgment of ***King v. Herashamy*** (1946) 47 N. L. R. 83, in which it was held that (at p.89), " *… to convict all of the accused of the offence of attempted murder each one of them at the time of the assault was actuated by a common intention not only to beat but also to cause his death or such bodily injuries as were sufficient to cause his death*". In the instant appeal, the High Court was convinced that the evidence presented by the prosecution satisfied these requirements and the offence of attempted murder was complete and the Court of Appeal concurred with that conclusion. These two conclusions reached by the Courts below, which I find to be correct in both law and in fact as they were reached after taking into consideration of the circumstances referred to above in its totality. Hence, even if this Court were to accept the contention of the learned President's Counsel that, in the absence of any specific act attributed to him during the attack, other than being merely present with a club in his hand, as opposed to confirming his participatory presence, that fact alone does not suffice to absolve him of the criminal liability for the attempted murder of *Kusumawathie* vicariously, because the evidence clearly point to a necessary inference that there was indeed a "*pre-arranged plan*" to which he too was a party and therefore his presence at the commission of that offence could be taken a participatory presence.

A similar approach was taken by the Court of Criminal Appeal in ***The King v Marthino et al*** (1941) 43 NLR 521, where several employees of one bus Company had mounted an attack on the employees of a rival Company, over transporting passengers between *Matale* and *Anuradhapura*. The appellants are the employees of one company, who had caused the bus of the rival company to stop in front of their garage by obstructing the road with several of their own buses and then

launching an attack on the driver and conductor of the other Company and another person, who was travelling in that bus and injuring them.

During the appeal, in challenging the conviction by the Jury, particularly on the 9th accused, it was contended that the evidence indicated that he had not taken part in the attack on the employees of the rival company but was waiting lawfully at a halting place and therefore he did not entertain common intention with the other attackers. *De Krester* J rejected that contention after considering the propriety of him being there at the bus halt. His Lordship stated;

> *"That may be so if he is taken apart in that way. But once all the other circumstances point to a plan of attack it is difficult to believe that he alone of the Mant Bus Co. was ignorant of the plan or disapproved of it. The conductor of his bus and the runner were both accused. He gave no evidence explaining how he happened to be there or that he was unaware of any plan and in the circumstances of this case, he should have given evidence if he had anything to say for himself."*

Having dealt with the sustainability of the conviction that had been entered against the Appellant on the count of attempted murder by the High Court and its affirmation by the Court of Appeal in the preceding paragraphs, I shall now turn to consider the validity of the conviction entered by the trial Court in respect of the remaining two counts, i.e., the murders of *Swarna* and *Susantha.*

The available evidence against the Appellant in relation to these two counts, as correctly pointed out by the learned President's Counsel, are necessarily of circumstantial in nature. Therefore, I agree with the learned President's Counsel on the point, that the question whether the

Appellant had a participatory presence with shared common intention to commit the two murders with the others at the time of its commission, will have to be decided upon consideration of the totality of the available items of circumstantial evidence, although, in relation to the count of attempted murder the prosecution presented an eyewitness account.

The primary contention of the learned President's Counsel in respect of the convictions for murders is, by affirmation of the conviction of the Appellant on them, the Court of Appeal had fallen into grave error as it failed to hold that the items of circumstantial evidence presented by the prosecution in respect of the said two counts are wholly inadequate even to infer his mere presence at the crime scene and therefore incapable of offering any justification to the drawing of an inference of guilt, which should be the necessary and inescapable inference under the circumstances.

In view of the said contention advanced by the Appellant in challenging the validity of his conviction to the two counts of murder, it is incumbent upon this Court to assess that contention both in its legal and factual aspects, in relation to the questions of law that had been formulated and accepted by this Court. Therefore, as the first step, I intend to examine the basis on which the trial Court found the Appellant guilty to the two counts of murder, which would be followed by an examination of the approach adopted by the Court of Appeal, in affirming the said conclusion reached by the original Court.

The trial Court, in its 50-page Judgment summarised its process of reasoning and the conclusion reached on the evidence presented before it in the following manner (at page 45 of the Judgment);

> *"මෙම ඉඩම තුල පදිංචිව සිටින අනික් එකම පාර්ශවය චූදිත පාර්ශවයයි. විනාඩි 5 ක් වන කෙටි කාලයකදී දියණියට පහරදීමක් සිදු කිරීමට චූදිතයන් හැර වෙනත් පුද්ගලයෙක් එම ස්ථානයට පැමිණියායි සිතීම උගහටය. මන්දයත් පැමිණිලිකරුවන් ඉඩමෙන් ඉවත් කිරීමේ චේතනාව තිබුණේද චූදිතයන් හටය. මෙම අපරාධ ස්ථානය සම්බන්ධයෙන් සළකා බැලීමේදී මෙය පුද්ගලික ඉඩමක් වන අතර, තුවාලකාරියට චූදිතයන් පහර දුන්නේද දරුවන් දෙදෙනාගේ මෘත ශරීරයන් සොයාගනු ලැබුවේද ආසන්න කාලයක් තුල එකම ඉඩමක පිහිටි ආසන්න ස්ථාන වලදීය. ඒ අනුව මුල් අපරාධය එනම් තුවාලකාරියට පහරදීමෙන් පසු තුවාලකාරියගේ දියණිය සහ පුතාගේ මරණයන් දෙකත් සිදු වී ඇත්තේ එකම ස්ථානයේ ය. එනම්, තුවාලකාරිය සහ 1, 2 චූදිතයන් පදිංචි ඉඩම තුලය. ඊට අමතරව මරණකරුවන් දෙදෙනාගේ දේහයන් තිබුණේද එකම ස්ථානයේ වන බැවින්, එකම පුද්ගලයන් විසින් මෙම අපරාධ තුනම සිදු කල බවට සාධාරණ අනුමිතියකට එලඹීමේ හැකියාව ඇත."*

It is clear from the above quoted paragraph, that the trial Court was of the considered view that it could reasonably draw an inference that the three offences were committed by the same set of persons, who attacked *Kusumaswathie* and they committed the two murders, in the course of same transaction, as the prosecution alleged in the indictment. In page 46, The trial Court re-iterated its conclusion already reached by stating (at p.46) *"ඊට අමතරව තුවාලකාරියගේ සහ මරණකරුවන් ගේ තුවාල පිහිටා ඇත්තේ හිසේ සහ දෙඅත්වලය. ඉන් මාරාන්තික තුවාල සිදු කර ඇත්තේ සියළු දෙනාගේම හිස ප්‍රදේශයේ වීමද සුවිශේෂී කරුණකි. ඒ අනුව එකම චේතනාවකින් සහ එකම ආකාරයේ ආයුධයකින්, එකම ආකාරයේ අපරාධ ක්‍රියාවන් සිදු කිරීමට එකම පුද්ගලයන් මගින් පැ. සා. 1 තුවාලකාරිය සහ මරණකරුවන් දෙදෙනා හටම තුවාල සිදු වී ඇති බව පැහැදිලිවම පෙනී යයි."*

Then the trial Court referred to an inference it had drawn in stating (at p. 46) that " *මේ අනුව සියළුම සාක්ෂි එක්ව සලකාබලන කල එනම් සමාන ආකාරයේ තුවාල එකම ස්ථානයකට (හිසට) එකම ආකාරයේ ආයුධයකින් තුවාල සිදු කිරීම මෙම චූදිතයන් මිස වෙනත් කිසිවකු මගින් සිදු විය නොහැකි බවට සාධාරණ අනුමිතියකට එලඹීමේ හැකියාව ඇති බව නිගමනය කරමි*" and excluded the probability of a third party committing the two murders, as it states (at p. 48) " *ඉහත සඳහන් සියළුම කරුණු සහ සාක්ෂි සළකා බැලීමේදී මෙම අධිචෝදනා පත්‍රයේ 1, 2, 3 චෝදනාවන්ගෙන් දැක්වෙන අපරාධයන් සිදු කර ඇත්තේ මෙම චූදිතයන් තිදෙනා මිස වෙනත් අයෙකු විසින් නොවන බවට වන අනුමිතිය මිස වෙනත් අනුමිතියකට එළඹීමට හැකියාවක් නොමැති බව තීරණය කරමි."*

It is evident from the nature of injuries suffered by both the deceased, that their deaths were due to the seriousness of multiple cut injuries that had been inflicted on them. These injuries were inflicted with repeated attacks on their heads using a heavy sharp cutting weapon similar to a sword. Each of the deceased suffered at least one necessarily fatal injury to their heads which resulted in instantaneous death. The evidence indicates it was the 1st accused, who used a sword in the initial attack on *Kusumawathie,* while the 2nd accused as well as the Appellant had clubs in their hands.

The trial Court had thereafter taken note of the time interval of mere five minutes between the attack on *Kusumawathie* and the attack on *Swarna* along with the fact that the three offences were committed within the confines of the same compound and in close proximity to each other. The Court was satisfied that the possibility of a third-party involvement in the two murders was highly unlikely, owing to these factors. The Court also considered the uncontradicted evidence of *Kusumawathi,* that the 1st and 2nd accused had entertained a strong motive against her family, and there was no material even to suggest that there were others, who similarly entertained such motives, strong enough to launch such an attack against the three victims. The trial Court was of the view this is the factor that reduced the likelihood of a third-party intervention in the commission of the three offences to a mere possibility.

In addition, the segments that are reproduced from the Judgment of the trial Court in the preceding Section of this Judgment also indicate that, in arriving at the final conclusion as to the guilt of the Appellant and his co-accused on the two counts of murder, the trial Court concluded that they did commit the said two offences in the course of

same transaction that commenced with the commission of the offence of attempted murder on *Kusumawathie.*

The approach that had been adopted by the trial Court could be attributable to the reason that there was no direct evidence available to arrive at a finding that the Appellant had participated in the commission of two murders with a shared common intention with the others. The prosecution sought to fill this factual gap in its case by placing reliance on the several items of circumstantial evidence and inviting the trial Court to draw an inference of guilt against the Appellant.

The trial Court, being mindful of the requirement to satisfy itself as to the necessity of drawing an inference of guilt, if it is the inescapable and necessary inference under the given set of circumstances. The trial Court, in order to exclude any reasonable hypothesis as to his innocence and to reach the conclusion that the items of evidence before Court are sufficient to impute criminal liability under Section 32 on the Appellant for the two counts of murder, had acted on the unchallenged evidence of *Kusumawathie* as well as the evidence of other witnesses along with the opinions of experts.

The conclusion reached by the trial Court, that the two murders were committed by the same three accused and those offences were committed within the course of same transaction, which commenced with the commission of attempted murder, is in turn based on several inferences drawn on the combined effect of its consideration of direct evidence, the several items of circumstantial evidence, the presumptions of fact and the inferences the Court had drawn on them. The Court of Appeal too, in its part, concurred with the approach of the

trial Court in drawing such presumptions of fact and inferences, when it affirmed the finding of guilt entered against the Appellant by the original Court.

In determining the appeal preferred by the Appellant, where he advanced the identical contention that had been placed before this Court, the Court of Appeal held that "*the material placed before the trial Court is totally consistent with the guilt of the accused and proves and establish circumstances which guilt safely confirm all three accused*". Then the Court added that "*the circumstantial evidence which surface from the testimony of the main witness, taken its entirety and collectively establish the guilt of all the Accused on the murder charge as well*" and, highlighted its approval of the conclusion referred to in page 48 of the Judgment of the High Court, by making a direct reference to same. In addition, the appellate Court also observed that the "*items of direct evidence taken collectively fortify circumstantial evidence to establish the two counts of murder*."

Thus, the concurrence of the Court of Appeal with the conclusion reached by the trial Court by approving the manner in which the original Court considered the circumstantial evidence, the facts in issue it had presumed and the inferences drawn on them. When the trial Court concluded that it was the same three accused who committed attempted murder were also responsible for the two murders as well, it had obviously excluded the proposition that the Appellant had simply walked away from the scene after committing attempted murder, as the learned President's Counsel surmised during his submissions before this Court, and instead concluded that he was present with the other two accused, when *Swarna* and *Susantha* were killed. In other words, in order to conclude that the two murders were committed by the same

three accused who committed the attempted murder, the trial Court had acted on the presumption of fact that after the attack on *Kusumawathie,* same three accused were present when *Swarna* was attacked and continued to be present when *Susantha* was attacked as well. In effect, the appellate Court had approved the several inferences drawn by the trial Court, which in turn acted on presumptions of fact that the persons who were present at the time of committing attempted murder were present at the time of committing the two murders as well.

I intend to revisit this finding of the trial Court, that the two murders were committed during the course of same transaction that began with committing attempted murder, further down in this Judgment, where the consideration of the said finding in yet another perspective. But at this point of time, I shall confine myself only to one particular factor, namely the trial Court's decision to act on the presumptions of fact it had drawn upon evidence and drawing inferences on them.

In these circumstances, it is necessary to devote some space in this Judgment considering the legal validity of such presumptions of fact and, in the same process, must also examine whether the trial Court had acted within the its legally permissible limits, in presuming existence of certain facts in issue, for this aspect will undoubtedly have a direct bearing on the legality of the guilt of the Appellant to the two counts of murder.

In relation to the two counts of murder, the prosecution presented a case based on circumstantial evidence. *Coomaraswamy*, (supra) states (p. 17 of Vol. I) in contrast with direct evidence,

circumstantial evidence is where " … *any fact from which a fact in dispute may be inferred.*" He then adds (ibid) , " *[I]n criminal law, it would mean evidence as to the existence of all collateral facts and circumstances from which the commission of an offence by the accused can reasonably be inferred*. The judgment of ***Chakuna Orang v. State of Assam*** (1981) Cri. L. J. 166, by *Lahiri* J, also compared a case based on direct evidence with a one based on circumstantial evidence, whilst specifically highlighting the underlying principle on which the Courts have acted on such situations.

His Lordship states that circumstantial evidence "… *ordinarily means a fact from which some other fact is inferred, whereas, 'direct evidence' means testimony given by a person as to what he has himself perceived by his own senses*" and therefore the *"… evidence which proves or tends to prove the factum probandum indirectly, by means of certain inferences or deduction to be drawn from its existence and its connection with other 'facta probantia' …*". This Judgment of the Indian Supreme Court was cited by this Court in ***Rajapakse and Others v AG*** (2010) 2 Sri L.R. 113.

In this context, as already noted above, the contention advanced by the learned President's Counsel that the items of circumstantial evidence, as adduced by the prosecution, are insufficient to draw an inference that the Appellant was even present at the places where the two murders were committed. He therefore seeks to challenge the validity of the determination of the trial Court as to his participatory presence, which essentially is a question of fact, based on the inferences drawn from several items of circumstantial evidence. In effect, this contention is based on highlighting a significant gap found in the narration of events presented by the prosecution as to what the Appellant did after *Kusumawathie* was dumped by the stream. Whether

the Appellant did continue with others to the place where the murders were committed, in order to participate in the attacks or whether he had simply withdrawn from the company of the other two accused after the attack on *Kusumawathie* by allowing them to proceed to the next phase of the attack by simply walking away from them, as the learned President's Counsel contended.

There was no direct evidence presented by the prosecution pointing to either of these possibilities. There was no explanation forthcoming from the Appellant either, despite the strong *prima facie* case against him in relation to the count of attempted murder nor did he even suggest that position to the injured. In my view, considering the totality of the evidence presented by the prosecution in this particular instance, the said factual gap that exists in the prosecution case in relation to the presence of the Appellant where the two murders were committed, as pointed out by the learned President's Counsel, need not necessarily be filled out by means of direct evidence. The prosecution, as alleged in the indictment, sought to fill this gap in its case by presenting evidence seeking to establish that the three offences were committed by the same three accused, and they did so during the course of same transaction.

This situation, that resulted in due to a factual gap in a narrative, was aptly described by the then Chairman, Law Commission of *India*, Justice *Mathew,* in his report on proposed law reforms dealing with Dowry Deaths, dated 10.08.1983. This report was referred to by the Supreme Court of *India*, in its judgment of ***State of West Bengal v Mir Mohammad Omar & Others*** (2000) 8 SCC 382 and reproduced a certain part therein. Relevant part of Justice *Mathew's* statement (at paragraph

1.4 of the said report) in relation to the situation under discussion is as follows;

> *"Speaking of the law of evidence, it may be mentioned that one of the devices by which the law usually tries to bridge the gulf between one fact and another, where the gulf is so wide that it cannot be crossed with the help of the normal rules of evidence, is the device of inserting presumptions*."

In the circumstances, this Court must examine whether the presumptions of fact as to the Appellant's presence at the time of committing the two murders, as drawn by the trial Court, so as to "*bridge the gulf*", could legally and factually be justified, upon the available items of evidence both direct and circumstantial before it, as did by the Court of Appeal in determining his appeal.

Courts, in determining cases presented before them, do come across similar situations on a regular basis. In such situations, the Courts could turn to a provision where the Evidence Ordinance itself had provided to cater to such situations. I have ventured to adopt this course of action, in view of the pronouncement made by Lord *Reid* in the case of ***Benmax v. Austin Motor Co***.(1958) 1 A. E. R. 320, to the effect "*where the point in dispute is the proper inference to be drawn from proved facts, an Appeal Court is generally in as good a position to evaluate the evidence as the Trial Judge, and ought not to shrink from that task*." This statement was referred to and acted upon by *HNG Fernando* J, (as he then was) in ***The Attorney General v Gnana-Piragasam and another*** (1965) 68 NLR 49 (at p. 58), where the matter before their Lordships was to determine the validity of the finding of fact as decided by the trial Court, whether the gold bars were made in this country to the order placed by the first Plaintiff, who sought a declaration from Court

that he is entitled to eight bars of gold which were seized by the Collector of Customs, Northern Province, and forfeited in pursuance of Sections 45 and 106 of the Customs Ordinance, read with certain provisions of the Exchange Control Act No. 24 of 1953.

The original Court accepted the plaintiff's position that he purchased items of old jewelry by utilising profits made from a smuggling business and were subsequently converted into gold slabs. The Attorney General, who preferred an appeal against the said finding of fact, contended before their Lordships that the said determination of fact reached by Court was made neither on a perception of the oral evidence nor was it reached based upon credibility or demeanour of witness, but was referable solely to inferences and assumptions. It is in these circumstances the appellate Court had made the pronouncement reproduced above.

Before I proceed to consider the question of justifiability of reaching such a presumption drawn on the given set of circumstances presented by the prosecution in the form of direct and circumstantial evidence before the trial Court, it is important to examine as to the nature of the discretion conferred on Courts by Section 114 of the Evidence Ordinance, within which a Court could legally draw presumptions of fact.

Section 114 states that it confers a discretion on Courts, to presume the existence of any fact which the Court thinks likely to have happened, having regard to the common course of natural events, human conduct and public and private business, in their relations to the facts of the particular case. The Section also indicates it is a discretion conferred on the Courts, which it may or may not exercise.

Coomaraswamy, in his treatise on Evidence Ordinance, states (p. 340 of Vol II Book 1) that "… *wherever the ordinary course of human events and the general tendency of human character render it probable under the circumstances of the case that a thing is true, the Court is at liberty to presume its truth …*" and, in addition allows a Court "…*to exempt the party asserting it from the necessity of proof in the first instance …*". The Court could also impose the burden of rebutting that such a presumption, as to the existence of any fact is not true, upon the party who denies it. Learned author then adds that "*whether, in a particular case, it is safe to do so, is a question which the Judge must decide for himself according to his judgment*". Thus, indeed a wide discretion had been conferred on Courts by Section 114, which it may or may not decide to exercise, depending on the facts of each case. The inclusion of this particular Section in the Evidence Ordinance is a mere codification of a principle of law in England.

In the case of ***R v Burdett*** (1814-1823) AER Rep. at p.84, decided in 1820, *Best* J stated "*[W]hen one or more things are proved from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen as well in criminal as in civil cases.*" Holroyd J concurred with this pronouncement by stating "*[C]rimes of the highest nature, more especially cases of murder, are established, and convictions and executions thereupon frequently take place for guilt most convincingly proved by presumptive evidence only, and the wellbeing and security of society much depend on the receiving and giving due effect to such proofs.*"

The purpose of recognising a legally sanctioned presumption of fact was described by *Monir* in his *Principles and Digest of the Law of Evidence,* 6th Ed, Vol 2 (at p. 1188), where the learned author states that;

> *"The term "presumption of fact" is used to designate an inference, affirmative or dis-affirmative of the existence of some fact, drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed, or admitted, or established by legal evidence to the satisfaction of the tribunal."*

He then adds the modality in drawing such presumptions of fact by stating (ibid);

> *"when inferring the existence of a fact from others, Courts of justice do nothing more than apply, under the sanction of law, a process of reasoning which the mind of any intelligent being would, under similar circumstances, have applied itself; and the force of which rests altogether in the experience and observation of the course of nature, the constitution of the human mind, the springs of human action, and the usage habits if society. The sources of presumption of fact are, (i) the common course of natural events, (ii) the common course of human conduct, and (iii) the common course of public and private business."*

Illustration (a) to Section114 of the Evidence Ordinance indicates (obviously to illustrate the point) that the said Section confers a discretion on Court to presume, a man in whose possession stolen goods were found soon after the theft, is either the thief or has received the goods knowing them to be stolen. In the words of *Howard* CJ in ***The King v William Perera*** (1944) 45 NLR 433 (at p.438), *"the law is, that if, recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called up to account for the possession, that is, to give an explanation of it which is not unreasonable or improbable. The strength of the presumption, which arises from such possession, is in*

proportion to the shortness of the interval which has elapsed. If the interval has been only an hour or two, not half a day, the presumption is so strong, that it almost amounts to proof; because the reasonable inference is, that the person must have stolen the property. In the ordinary affairs of life, it is not probable that the person could have got possession of the property in any other way. And juries can only judge of matters, with reference to their knowledge and experience of the ordinary affaire of life."

The scope of Section 114, particularly in its practical aspect, was considered by the superior Courts on numerous occasions. But the majority of those instances, the Courts have dealt primarily with the aspect of recent possession of stolen goods, as per illustration (a) to that Section, in order to decide over the question whether, in the circumstances presented in those instances, the presumption could be extended to hold that the accused, who possessed stolen goods recently, had committed the offence of theft as well.

However, it is important to note that the scope of presumptions of fact that could be drawn under Section 114 were not confined only to the cases of theft or of retention of stolen property. This statement is in accord with the view expressed by the author of the Indian Evidence Act as well as the Ceylon Evidence Ordinance No. 12 of 1864, *Sir James Fitz-James Stephen.* In his book titled *An introduction to the Indian Evidence Act,* (2nd Impression), after dealing with the topic of conclusive presumptions, learned author then makes the following statement in relation to Section 114, (at p. 181), that "… *the Court may* ***in all cases whatever*** *draw from the facts before it* ***whatever inferences it thinks just***" (emphasis added).

On a similar note, *Wijewardene* J (as he then was), in ***Cassim v Udaya Manaar*** (1943) 45 NLR 519, quoted *Tayler on Evidence* 12th Ed, para 142, where it is noted that the *"… presumption is not confined to cases of theft but applies to all crimes even the most penal. Thus, on an indictment for arson proof that property which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner has been held to raise a probable presumption that he was present and concerned in the offence. A like inference has been raised in the case of murder accompanied by robbery, in the case of burglary and in the case of the possession of a quantity of counterfeit money".* His Lordship then added a caution in drawing such presumptions of fact by laying emphasis on the aspect that (at p. 520), *"… the Court has to consider carefully whether the maxim applies to the facts of the case before it"* because a presumption under Section 114 is not a presumption of law but only a presumption of fact.

Having undertaken an exhaustive analysis of the judicial precedents both local and foreign and considered the authoritative texts on the nature of the discretion conferred on Courts to presume facts under Section 114, *Amaratunge* J, in the Judgment of ***Ariyasinghe and Others v Attorney General*** (2004) 2 Sri L.R. 357, stated (at p.399) that the *"… categories of offences in respect of which a presumption under Section 114 may be drawn are not restricted or closed. The Courts are left with an unfettered discretion in all cases to presume, if so advised, 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".* I am in respectful agreement with said statement made by *Amaratunge* J on Section 114, in view of the material I have reproduced in the preceding paragraphs.

In comparatively a recent judgment, the Supreme Court of *India* expressed its view on this issue, where *Thomas* J, in the judgment of ***State of West Bengal v Mir Mohammad Omar & Others*** (supra), stated thus;

> *"In this case, when prosecution succeeded in establishing the afore narrated circumstances, the Court has to presume the existence of certain facts. Presumption is a course recognised by the law for the Court to rely on in conditions such as this. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the Court exercises a process of reasoning and reach a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the Court to presume the existence of any fact which it thinks likely to have happened. In that process Court shall have regard to the common course of natural events, human conduct etc., in relation to the facts of the case."*

Therefore, the presumption of fact under Section 114 of the Evidence Ordinance is a legally sanctioned method, which permits a Court of law to use its discretion conferred by the said Section, to infer the existence of a fact from either a proved fact or set of proved facts, which were established by credible evidence. Despite the presumption of fact of a mental state of the accused is presumed in direct evidence

cases, generally, the necessity to draw presumptions of fact makes out an important function in the judicial reasoning in cases that are based on circumstantial evidence. According to *Lahiri* J, in ***Chakuna Orang v. State of Assam*** (supra), circumstantial evidence, being *"… evidence which proves or tends to prove the factum probandum indirectly, by means of certain inferences or deduction to be drawn from its existence and its connection with other 'facta probantia', it is called. The force of the evidence does not depend merely on the credit attached to the 'factum probandum' but to the result which by a process of reasoning it indirectly establishes in the mind of the Judge. It is sometimes styled as collateral evidence or presumptive evidence. When we infer or presume things from the collateral circumstance the nature of the evidence is styled as collateral evidence."*

In the circumstances, it is helpful to consider the manner in which the Section 114 had been put to use by the superior Courts and utilised same to draw certain presumptions of fact. In that respect, I wish to refer to the case of ***Perera, Inspector of Police v Mohideen*** (1970) 73 NLR 393, first. This is an instance where the accused was charged under Section 3(3)(b) of the Betting on Horse-racing Ordinance for unlawfully accepting a bet on a horse named *St. Mungo*, expected to run at a race meet in England. The prosecution presented the chit by which the bet was placed on by a decoy and accepted by the accused, in addition to presenting a news sheet titled *"Grand sporting News"*, containing the name of a horse *St Mungo* among the names of horses set down to run at a race in *England.* It was necessary for the prosecution to establish the fact that the horse *St Mungo* did run in the race held in *England*. This news sheet was tendered to Court along with two issues of *London Times,* published prior to the bet and on the day of the bet, indicating that the horse named *St Mungo* did run at *Thirsk* Race on both these

days. These were produced by the prosecution in order to substantiate the contents of the chit, which only had *St Mungo* scribbled on it, in addition to few digits indicating the value of the bet.

The trial Court held that the reports published in *London Times* cannot be taken as lawful proof of the fact that the horse *St Mungo* was a runner in the race referred to in the charge, in relation to the disputed fact in issue, as it disqualifies as hearsay. In consideration of the material available before the trial Court, *HNG Fernando* CJ held that, in the absence of any evidence or inference to the contrary, Section 114 made the trial Court entitled to presume that a horse named *St Mungo* did run in a race on the date of the offence. This conclusion was reached by his Lordship on the reasoning that;

> *"In the language of s. 114 of the Evidence Ordinance, when regard is had to 'the common course of human conduct and private business' in relation to the practice of betting on horse-races, it is surely 'likely to have happened' that St. Mungo did run in the particular race. To think otherwise would be to think quite unreasonably that the London Times perpetrates on its readers either stupid pranks or fraudulent deceptions".*

In view of the above, it is quite clear that the conclusion reached by the trial Court, over the question of fact that whether the Appellant was present at the place where two murders were committed as they were committed in the course of same transaction which began with the commission of attempted murder, is a legally sanctioned presumption of fact, if it could be drawn "*in relation to the facts of the case*" that had been presented before it, as per the only qualification imposed by Section 114. The Court of Appeal was therefore correct in accepting the

legality of the said conclusion in this particular respect. However, in the circumstances, it is now incumbent upon this Court to consider whether such a conclusion, as to the presence of the Appellant at the place where murders were committed, is justified and reasonable in relation to the facts of the case placed before the trial Court.

Clearly the trial Court had, having considered the evidence in totality, had acted on certain inferences it had drawn upon established facts. These include the inferences that the Appellant had shared common murderous intention with the other two accused and has had participatory presence at the time of committing the two murders, in order to find the Appellant guilty to the two counts. The necessity to draw such inferences to determine these facts in issue before the trial Court arose as *Kusumawathie's* evidence indicate that none of the accused, including the Appellant, did ever utter a word during the entire duration of the attack or at least when they carried her up to the stream, betraying their minds.

In addition to the acts attributed to the attackers by *Kusumawathie* in her evidence, the trial Court must then satisfy itself as to the intentions entertained by each of them in doing those acts and that too to the required degree of proof, in order to determine whether those acts were done whilst sharing common murderous intention or an intention to cause a life threatening injury to the injured. In respect of the two murders, the Court had to arrive at a similar finding that the attackers shared a common intention to commit murder and the Appellant was present with the others during the attack. In the absence of any utterances attributed to the three accused by *Kusumawawathie* that were made during the attack, indicating what they had in mind or

what they intended to achieve by carrying out the attack, it was necessary for the trial Court to draw inferences from the established facts as to the existence of the requisite mental element on each of the accused, in addition to their participation in the acts.

Hence, before I embark upon the task of assessing the justifiability and reasonableness of the inference of the Appellant's presence at the time of committing the murders in the given set of circumstances, it is helpful, if I pause for a moment to investigate the difference between the terms '*presumptions*' and '*inferences*' that could be drawn over facts, as the first step, in the context of a judicial inquiry. At this juncture, it is of interest to refer to basic classification introduced by *Stephen* himself on the methodology and the nature of inferences employed in judicial investigations *vis a vis* scientific investigation, which he described as follows (supra - at p.53);

1. Inferences from an assertion, whether oral or documentary, to the truth of the matter asserted,
2. Inferences from fact which, upon the strength of such assertions, are believed to exist, to facts of which the existence has not been so asserted.

He then clarifies the difference between outcome of the two inferences in the following manner (at p. 55); ,

> "*Let the question be whether A committed a crime. The facts which the Judge actually knows are that certain witnesses made before him a variety of statements which he believes to be true. The result of these statements is to establish certain facts which show that either A or B or C must have committed the crime, and neither B or C did commit it. In this case that facts before the*

> *Judge would be inconsistent with any other reasonable hypothesis except that A committed the crime. This would be commonly called a case of circumstantial evidence; yet it is obvious that the principle on which the investigation proceeds as in the last case is identically the same. The only difference is in the number of inferences, but no new principle is introduced."*

The word "inference" is defined in the Black's Law Dictionary 9th Ed, (p.847) as "*a conclusion reached by considering other facts and deducing a logical consequence from them." Basnayake* CJ echoed this position in the judgment of ***The Queen v Ekmon and Others*** (1962) 67 NLR 49, by observing that (at p.62), a *"… presumption is not the same as inference. In presumption the presumed fact is taken to be true or entitled to belief without examination or proof unless and until it is disproved while inference is the conclusion drawn from one or more proved facts or a combination of them".*

A limitation to the extent to which the existence of a fact could be presumed by Court, in the exercise of discretion under Section 114 of the Evidence Ordinance, was expressed by *Stephens* in his book, published in the year 1872. The rationale for the recognition of such a limitation was due to the reason that in such cases most probably an injustice will be done to the accused if "*… the principal fact has to be inferred from circumstances pointing to it*" (supra – at p. 67). Learned author then states "*[T]his is the foundation of the well-known rule that the corpus delicti should not in general in criminal cases be inferred from other facts but be proven independently."* This principle was strictly applied in situations where a person accused of murder, but no dead body was found enabling the prosecution to establish the death of the deceased and its cause.

However, over the years, the Commonwealth jurisdictions have consciously departed from this view and adopted a more pragmatic approach by taking the view that insisting on the said rule. This is because insisting of direct and positive evidence of death, in the absence of a dead body would result in "… *many crimes would occasionally go unpunished*". This was explicitly stated by *Gour,* in his work *Penal Law of British India,* 5th Ed, (at p.1019); "… *the absence of the body is not fatal to the trial of the accused for murder, though a material circumstances to be considered. Any other view would place in the hands of the accused an incentive to destroy the body after committing the murder and thus secure immunity for his crime. A rule to the contrary is impossible practically.*" *Coomaraswamy* (supra – Vol 1, pgs. 31,32) too states the "… *position would be the same in Sri Lanka as in India in view of the definition of 'proved'*" and accordingly "*[I]n law, the fact that the corpus delicti has not been found or traced cannot make any difference, if there is sufficient reliable evidence, direct or circumstantial, that murder has in fact been committed.*" It would be clear from these citations, a Court could even infer a principal fact regarding a crime, provided there is sufficient and reliable evidence, direct or circumstantial, that a crime has in fact been committed, despite the apprehensions of *Stephens.*

Thus, having considered the legal permissibility of drawing presumptions of fact, in order to examine the factual validity of the facts presumed by the trial Court, and to determine whether there was sufficient material that had been placed before the trial Court to reasonably presume the facts it did presume, I find the evidence relating to the timing of the attacks on *Swarna* and S*usantha* is a convenient point to embark upon that task.

The three counts contained in the indictment against the Appellant and other two accused were presented on the sequence of committing attempted murder of *Kusumawathie* as the first count, followed by the counts on committing the murder of *Susantha* and *Swarna* as the 2nd and 3rd counts, respectively. It was stated in the indictment that the 2nd and 3rd counts were committed by the three accused sharing common intention and in the course of same transaction that begun with commission of the offence referred to in the 1st count. But the evidence indicated that the attack on *Swarna* preceded the attack on *Susantha.*

In the circumstances and for convenience in dealing with the factual situation in chronological order, I prefer to follow the sequence of the three incidents, in which they occurred, as revealed in the evidence. Therefore, it is proposed to consider the evidence in relation to *Swarna's* murder first before I proceed to evidence relating to the murder of *Susantha.*

The evidence presented by the prosecution particularly in relation to the death of *Swarna* commences with *Kusumawathie's* evidence which revealed that, after about 5 minutes she was dragged down to the stream by the accused and dumped there, she had heard her daughter calling out "අම්මේ" at least twice. The time was about 6.15 in the evening. Then she lost consciousness. She regained her senses after about 1 ½ hours and she only heard the sound of water gushing down in the stream. Thereupon, *Kusumawathie*, having failed to stand up and walk upright due to her injuries, had dragged herself towards her house with difficulty. She saw the bookbag of *Swarna*, lying on the front garden of her house. She also saw blood patches on the wall near the kitchen. She did not see her daughter's body anywhere near her

house but instead came across her son's body, lying on an umbrella, as she continued to drag herself along the pathway towards the main road.

It is evident that *Swarna* had reached home that evening having returned from her class, a few minutes before her brother did. Her mother was not at home. She then called out for her mother. She would obviously have thought, as usual, her mother would have gone to the stream to do some washing. She called out for her mother "අම්මේ". This was not a call of distress, as denoted by the common usage of "අම්මෝ". At that particular point of time, she had no threat of any violence and therefore had no apparent cause to be alarmed.

The fact that *Swarna's* bag and the books were strewn in the garden indicate that, after calling out for her mother, she had to flee in a great hurry, probably after being terrified over some incident which happened to her at that point of time. The blood patches that were seen by *Kusumawathie* and the police officer indicate that the said incident is a violent one and the degree of its violence extends to causing physical harm to her. This incident is clearly referable to a surprise attack mounted on *Swarna* by an attacker armed with a cutting weapon, due to which she had sustained one or more bleeding injuries. The blood patches could not be attributed to the injuries of *Swarna's* brother, since he was killed even before reaching anywhere near their house. *Kusumawathie* did not go inside the house and she merely had a passing glance of her house, whilst dragging herself along the pathway with the intention of seeking help. There was no evidence to indicate that any of the accused including the Appellant had suffered any bleeding injury to leave such blood patches. Clearly the blood patches were of *Swarna,*

who suffered at least one bleeding injury during the brief period she was inside the house.

Swarna, with this surprise attack on her, would have realised that she was faced with an imminent threat to her life. Being injured and terrified by this unexpected violent attack by her own relative, she then ran out of her house, as a desperate attempt to save her life. In the process, she dropped her bag containing books and lost a shoe. Obviously, she needed to get to safety in a great hurry.

Placed in such a situation, the most natural and probable course of action for *Swarna* to take was to run along the pathway to reach the main road and to call out for help, as her mother did. This is the pathway she had taken a few minutes before to reach home. But strangely her body was found on an embankment and it was above 6 to 7 feet from the level of the pathway. She had climbed this embankment, which is even taller than her own body height, whilst fleeing for safety, despite her attacker was closing in armed with a sword. In view of the medical evidence, her death had been an instantaneous one due to the seriousness of the injuries caused to her head. She died where her body was eventually recovered. The fact that *Swarna* had only two abrasions, which were possibly due to fall, positively indicate she was not dragged to the place where her body was found, but she had collapsed there after the attack on her head.

Then a question arises as to what made her to climb up on a ridge or an embankment (කණ්ඩිය) of about 6 to 7 feet above from the level of the pathway which caused her to lose valuable time in the process and thereby giving an advantage to her pursuer armed with a deadly weapon, who then struck multiple sword attacks on her head, causing

already referred to necessarily fatal injuries resulting in an instantaneous death.

The answer to this question could be found, if another scenario, that could reasonably be deduced from these circumstances, is considered. *Swarna's* apparent irrational conduct, could easily be explained, if one were to infer a situation where that pathway she had to take, was already been obstructed by someone blocking her escape route, and thus compelling *Swarna* to take the most difficult route as the only available alternative for her safety.

If that is the case, then who did obstruct *Swarna* from running along the pathway?

Clearly it was not the 1st accused, as he was chasing after her from behind. Then it must be others who were present. The Appellant and the 2nd accused were right there, only several feet away from the place where *Swarna's* body was found, barely five minutes ago, according to *Kusumawathie*. Then the strong inference could be drawn that it was the Appellant and the 2nd accused who prevented *Swarna* running along the pathway. If it was only the 2nd accused who was preventing *Swarna* taking the pathway, she would have had a chance of escaping her fate by overpowering the elderly woman. But apparently *Swarna* had no choice. It appears that she was forced to take the more difficult escape route as the only available option. In the circumstances, it is highly probable that the Appellant too was present there, in order to effectively prevent her escape.

It need not be emphasised that it would have been impossible for *Swarna* to overpower the Appellant, a grown-up male, who is in the prime of his youth. If this was the sequence of events that led to *Swarna*

suffering a necessarily fatal cut injuries that resulted in her instantaneous death, then the 2nd accused, and the Appellant would most certainly have shared a common murderous intention with the 1st accused, who carried on the fatal attack and therefore have participated in the murder by facilitating the 1st accused. There are no other circumstances that exist to point any other conclusion.

What is more important to note from the set of circumstances that had been established by the prosecution is that there were sufficient materials before the trial Court on which it could reasonably presume the fact that while the initial attack on *Swarna* was being carried out by the 1st accused, the Appellant and the 2nd accused were present at the crime scene and facilitated the 1st accused, to complete their already agreed plan of attack.

Susantha's body was found just five feet away along the pathway from the point it connected to the main road. The body was facing up and was lying on an umbrella. *Susantha* had his lower left arm bent from the elbow from the upper arm, which remained raised. His face was heavily disfigured with several serious cut injuries. The distance between the bodies of *Susantha* and his sister was about nine meters.

The expert witness who performed the autopsy on the body of *Susantha* observed multiple deep and long cut injuries on his face totaling to nine. The 10th 11th and 12th injuries, classified as defensive injuries, were also seen on his left arm, in addition to an abrasion found on his forehead. The witness was of the opinion that the 1st to 9th injuries would have been inflicted on the deceased using a sharp cutting weapon, similar to a sword, and could well have been inflicted by using the one and the same weapon. The 9th injury was a long one, cutting

into cervical vertebrae, major bold vessels and nerves of the neck and, therefore, termed as the necessarily fatal injury.

Thus, the conclusion reached by the trial Court as to the guilt of the Appellant on the two murders, was obviously based on several presumptions and inferences drawn from the facts that are already established through direct evidence and in addition the presumptions of facts, likely to have happened according to ordinary human conduct. In view of this particular factor, it is of interest to examine as to how the superior Courts, in the past, have dealt with similar situations that were presented for its determination.

In this respect, I shall first refer to the judgment of the Court of Criminal Appeal in ***Rex v Wijedasa Perera et al*** (1950) 52 NLR 29. This judgment was pronounced on the appeal preferred by the accused who sentenced to death for the murder of one *John Silva.* The Section I wish to highlight refers to the 6th accused, who was charged for conspiracy to rob cash collection of Ceylon Turf Club, committing robbery, conspiracy to commit murder of *John Silva* and abetment to commit murder of *John Silva*. He was found guilty by the Jury to the 1st and 2nd counts.

The facts related to the involvement of the 6th accused are as follows. The 1st to 8th accused have conspired that the cash collection of the Turf Club be robbed, whilst in transit. The Turf Club usually transported its cash collection in a vehicle hired from a particular establishment in Colombo. The 5th and 6th accused have hired a car from the same establishment especially for the purpose of committing the robbery. Usually, the cash collection is transported in the personal

custody of one of its employees, who had the protection of an escorting police officer.

John Silva was the unfortunate driver, who was assigned to drive the car, that was hired by the 6th accused and his partner, who paid for the hire. The 6th accused, an ex-policeman and the 5th accused, an ex-Army driver were *John Silva's* passengers. It had already been agreed between the conspirators, that the 6th accused was to impersonate as an Inspector of Police during the hold-up of the vehicle transporting cash of the Turf Club, scheduled for the next day and the 5th accused were to drive *John Silva's* car to the place of planned heist.

Other accused have followed *John Silva's* car in another smaller car and after stopping for refreshments at Puttalam, have left in advance. Near the culvert No. 13/4 along Puttalam-Anuradhapura Road, a lonely and an isolated place, the 5th accused, feigning a stomach upset and, as agreed with the others earlier on, halted the car driven by *John Silva,* under the pretext of relieving himself. The 7th and 8th accused, who had already arrived there and hiding in the jungle, were awaiting for the arrival of the car driven by *John Silva*. They had a gas mask and a rope with them. The 6th accused remained in that car while the others have lured the unsuspecting *John Silva* to walk with them into the jungle, under some pretext.

After a lapse of a few days, *John Silva's* body was recovered in highly decomposed state. It was tied to a tree in the jungle and had a gas mask placed over its head. His death was due to suffocation, which resulted in due to squeezing of the tube that admitted air, which enabled the wearer to breath in, with the mask on.

In appeal, it was contended before the Court of Criminal Appeal on behalf of the 6th accused, that he was not physically present at the place where the murder of *John Silva* was committed and did not abet the latter's murder either.

The Court rejected this contention. The reasoning of the Court is indicative from the following paragraph quoted below;

> *"We are unable to distinguish the case of the 6th accused from that against the other three appellants. It is true that he was physically not present at the time the deceased man was murdered but we are of opinion that having regard to all the facts and circumstances he was an abettor of this murder, and as such equally liable with his co-conspirators. His learned Counsel conceded that the 6th accused was privy to the tying up of the deceased in the jungle. It is clear that not only was it the intention of the robbers to tie up the deceased man in the jungle but it was also the intention to kill him there, and, therefore, the 6th accused is equally guilty with his co-conspirators in everything they did in order to give effect to their common plan. We agree with the submissions of the Attorney-General with regard to the 6th accused. He knew that the deceased had to die. He gave no evidence at the trial. He is an ex-police officer and with true police caution he did not like to be seen carrying the incriminating suitcase in which the uniform which he was to use the following day was packed. We do not think the fact that the 6th accused was on the road by the car while the others murders the deceased makes any difference to his case. Somebody had to be by the big car. This is a main road and any passer-by who saw a large car standing unattended on a lonely forest*

road, might be tempted to stop and make inquiries which would be extremely inconvenient for those who were murdering the deceased in the jungle. Therefore, the 6th accused, or some other person had to be by the car. The Attorney General argues that if his companions told him that they had merely tied the deceased to a tree, the 6th accused as an ex-police officer would never have kept quiet for his own safety, because if John Silva remained alive he would indubitably have given evidence against the 6th accused whom he saw in circumstances in which he would have been able to identify him."

However, it must be noted that in the case referred to above, the charge was abetment of murder following conspiracy. In that respect this case differs from the instant appeal as it is based on common intention and not on a charge of conspiracy. But what is relevant to the appeal before this Court is that in the said Judgment their Lordships had made several presumptions of fact, based on common course of natural events and human conduct, in their relation to the fact of the case presented before the original Court. These presumptions of fact and the inferences that were drawn by the Court of Criminal Appeal are relevant to the determination of the appeal before us, indicating the extent to which a Court could utilise presumptions of facts and inferences drawn upon them in determining the guilt or innocence of an accused. The Court of Criminal Appeal had drawn several inferences from the already established facts presented by direct evidence and also on the presumed facts, in coming to the conclusion that the 6th accused was equally guilty to the offence of abetment of murder, in rejecting his contention that he remained in the car and therefore had no hand in the commission of murder that had taken place elsewhere. The judgment of

Rex v Wijedasa Perera et al (supra) is another among many instances where Courts had relied on presumptions of facts and inferences drawn from the established facts, in order to determine the validity of the imposition of criminal liability to capital offences. Similarly, in the instant appeal, the question to be answered by this Court too is whether the inference of guilt entertained by the lower Court is a reasonably drawn inference on the available material or not.

The judgment of ***Attorney General v Seneviratne*** (1982) 1 Sri L.R. 302, is another such judgment. The appeal before the Supreme Court was a situation where the accused was charged for robbery and murder of two persons. The prosecution case was that the deceased couple, who lived all by themselves in a house situated in their 22-acre property, had a large stock of pepper, was murdered by the accused while committing robbery. Investigators found blood-stained footprints of the accused on a newspaper bearing the same date as of the date of murder along with his fingerprints. Witness *Arnolis* said the accused hired his vehicle to transport several gunny bags of pepper from a place near *Pinwatta* bend. There was a trail of pepper that commenced from the deceased's house and ended where pepper bags were loaded into *Arnoli's* vehicle. Essentially the case against the accused was a one based on several items of circumstantial evidence.

When the learned Counsel for the accused contended before this Court as to the unexplained 3 ½ hour gap between the hearing of the cries of the deceased and loading of gunny bags into the car, the Court had drawn certain inferences based on presumptions of fact. The Court stated that *"there is evidence that there was a trail of pepper from the house of*

the deceased to the bend on the road. This path was not motorable. Therefore, whoever carried the bags of pepper would have had to do so on foot and it would have taken him at least ten to fifteen minutes to walk this distance. He would have had to walk this distance to and for twelve times. The time gap is therefore easily explained."

The Court then added *"It is significant that on the evidence of Arnolis the conclusion that the robbery was well planned is inescapable. On the first occasion that the accused invited Arnolis to bring his hiring car to transport the bags of pepper, Arnolis was unable to accede to his request. That night not only was there no robbery, but there were no murders as well. However,on the following day when Arnolis brought his hiring car to the Pinwatte bend the 6 bags of pepper had been removed from the bedroom of the deceased. It was on this same night that the deceased persons were done to death. On the evidence there is no doubt that the accused had been involved in the attack on the couple, for otherwise his footprints could not been stained with blood. It would have been a strange coincidence that the couple had already been done to death at the time the accused came to remove the bags of pepper."*

These selected segments of the Judgments that I have reproduced above in length clearly illustrative the extent to which the Courts exercised its discretion to presume facts from the established facts and had drawn inferences upon both these categories of facts, in order to reach the conclusion as to the guilt or the innocence of accused.

Returning to the conclusion reached by the trial Court on the inference it had drawn upon the material that the murders of *Susantha* and *Swarna* were committed during the course of same transaction by the 1st, 2nd accused and the Appellant that commenced with the

commission of attempted murder, to my mind a question necessarily arises whether the trial Court, in the same process of reasoning concluded that the pre-arrangement that existed between the three of them, in relation to the commission of the offence of attempted murder on *Kusumawathie,* could also be extended to include to commit the deaths of her two children as well. If there was such a pre-arranged plan and if it did include the murder of the two deceased, then that fact coupled with the presumed act of the Appellant of being present in the execution of that part of the said pre arrangement, would undoubtedly justifies imposition of vicarious criminal liability on him.

This requirement of the existence of a pre-arranged plan to commit murders, could be satisfied if the evidence presented by the prosecution supports such a reasonable inference to that effect.

Even on a superficial consideration of the set of circumstances that were enumerated in the preceding paragraphs, one could immediately observe many a similarity in the series of violent attacks that were carried out on *Kusumawathie* and her family members. The 1st and 2nd accused, being the immediate neighbours and close relatives of the victims, had sufficient familiarity with the routine activities and movements of *Kusumawathie's* family at that point of time. Clearly the attack was carried out by selecting a day in which only one member of the victim family was present at each point of time.

Of these three attacks, the most notable feature is the element of surprise in the attacks carried out on each of the unsuspecting victims. The injured had no reason even to suspect that she would be attacked by her own relatives, when she ran out to the stream in a hurry to collect her laundry prior to the onset of the heavy downpour in that

evening. She was surprised to see the 1st accused armed with a sword. Without any utterance, the 1st accused struck her with a sword. Similarly, when *Swarna* innocently called out for her mother, the 1st accused probably made the first move by striking the unsuspecting woman with his sword. In the case of *Susantha* too, the way his body was lying indicate that he had little or no opportunity to suspect, even faintly, of the impending attack. Each one of the two murder victims virtually had no opportunity of knowing what happened to the other family member when they were attacked, as care was taken to prevent them realising of what happened to the other, thus keeping the element of surprise intact.

The medical evidence before Court indicated that it is very likely that the same heavy cutting weapon was used in the three incidents. The cut injuries sustained by all three victims were primarily concentrated to their heads. The attack on them were carried out swiftly and decisively. Except for *Kusumawathie,* who survived the attack in spite of her head injury and did not move after collapsing on the ground, other two victims had sustained necessarily fatal injuries and died at the place where they were attacked.

Particular care was taken to retain the surprise element on the subsequent victims by clearing any tell-tale evidence from the scene of the previous attack. *Swarna* did not see any of the laundry, carried by her mother up to the 2nd accused's house, when she was attacked on the pathway. This feature also explains the selection of the place of attack on *Susantha,* because, if he did reach home and notice his sister's belongings and blood patches, he would have realised something sinister had taken place. That would in turn prompt him to take adequate precautions to defend himself. If he was alerted to the nature

of imminent danger he would soon be exposed to, it would have made the execution of the last phase of the planned attack a total failure. Hence, it was important to mount a surprise attack particularly on *Susantha* when he least expected of such an attack. The distance from the main road to the body indicate that *Susantha* had just got off bus and that too in the rain. He had his umbrella with him. The sun had already set, and the time was few minutes after 6.30 p.m. with the dark rain clouds still looming in the sky. Limited availability of light also contributed to the surprise element of the attack. *Susantha* had no time to react even to the instinctive response of fight or flight, at least by making an attempt to run away from the attackers unlike his sister but, instead was done to death on the spot with repeated attacks, numbering nine, concentrated to his head, using a sword.

The other reason for the extension of the prearrangement made in respect of *Kusumawathie* to include *Susantha* and *Swarna* as well, is the motive. It is uncontested that there was a dispute over the land they all lived on and the 2nd accused and her son, the 1st accused, wanted *Kusumawathie* and her family out of it. The Appellant was to marry the 1st accused's sister and that would have made him to participate in the planned attack, because he too could someday be a beneficiary. It is therefore clear that the motive entertained by the two accused and the Appellant does not confine to elimination of *Kusumawathie* but also it should logically extend to her children as well. Wanting the land in its entirety, being the compelling reason to mount an attack on *Kusumawathie*, there was no logic in sparing her children, who would assert their rights over the land. If *Susantha* and *Swarna* too were not eliminated, then it would render the already 'completed' act of elimination of *Kusumawathie,* absolutely a meaningless exercise. It

would also pose the additional danger of leaving witnesses to a possible criminal prosecution against the perpetrators of the attack.

As the Court, in the case of ***Rex v Wijedasa Perera et al*** (supra), inferred that *John Silva*, the innocent driver of the hiring car, was killed in order to facilitate the accused's plan to commit the robbery and also to wipe out a vital witness for the prosecution, in the instant appeal too, the three of the accused including the Appellant would have decided that both *Susantha* and *Swarna* should not live on that land anymore and they too must die. In consideration of the manner in which the attacks were carried out, the attackers could not have decided the fate of each of their victims whilst on their feet and being actively engaged in the attack. Both the murder victims, *Susantha* and *Swarna,* were expected to return home at any moment of time when they mounted the attack on *Kusumawathie.* Thus, it is clear that what should become of each of the three victims were already decided by the trio, even before they stepped out of their house, in order to confront *Kusumawathie*.

It was disclosed before the trial Court that the attempted murder and two murders were committed within a time span of little over one hour. *Kusumawathie* was attacked at about six in the evening and the learned Counsel for the three accused who defended them before the trial Court clarified from Dr. *Wijepala Bandara* whether he agrees with the position that the deaths of the deceased would have occurred between 6.30 p.m. to 7.30 p.m. of that evening, the expert witness answered the question in the affirmative. The assertion of *Kusumawathie* that she regained her senses after about one and half hours does not cut across this position and *Swarna* obviously had died sometime after 6.15 p.m. upon her return to their house, followed by her brother's death. The time duration of the three incidents was

extended to last over an hour not due to a reason within the accused's control but owing to the fact that the two of the remaining victims had returned home at different time intervals.

In the circumstances, it is evident that the course of action that commenced when the 1st and 2nd accused along with the Appellant coming out from the entrance of the 2nd accused's house with a prior arrangement, in order to confront *Kusumawathie* who was returning from the stream after collecting her laundry, had continued thereafter with the killing of her two children as per the said arrangement entertained and executed to the full by the three of the accused. Thus, the said course of transaction had unquestionably been extended to the attacks on *Swarna* and *Susantha* resulting in their deaths.

When viewed against the backdrop of these circumstances, the finding of the trial Court that the two murders were committed in the same transaction which commenced with the attempted murder is indeed a reasonable inference to draw. In this context, it is necessary, at least by making a superficial consideration of the term "same course of transaction", because it will have a bearing on the validity of the conviction in relation to the offences of murder.

The phrase "*same transaction*" is used in Section 180 of the Code of Criminal Procedure, enabling the prosecution to charge all persons concerned in committing an offence together in one and the same indictment, as in the instant appeal. The operative words used in the Section are "*when more persons than one, are accused of jointly committing the same offence or of different offence committed in the same transaction … may be tried together or separately if the Court thinks fit*." It was noted earlier on that the indictment on which the Appellant was tried on, was

presented on that basis and no challenge to its validity was made by any of the three accused before the original Court. A helpful description of what that term means could be found in the Judgment of the Indian Supreme Court ***Mohan Baitha and Others v State of Bihar and Another*** (2001) 4 SCC 350, where it is stated that;

> "*The expression 'same transaction' from its very nature is incapable of an exact definition. It is not intended to be interpreted in any artificial or technical sense. Common sense and the ordinary use of language must decide whether on the facts of a particular case, it can be held to be in one transaction. It is not possible to enunciate any comprehensive formula of universal application for the purpose of determining whether two or more acts constitute the same transaction. But the circumstances of a given case indicating proximity of time, unity or proximity of place, continuity of action and community of purpose or design are the factors for deciding whether certain acts form parts of the same transaction or not. Therefore, a series of acts whether are so connected together as to form the same transaction is purely a question of fact to be decided on the aforesaid criteria*" (emphasis added).

The trial Court, in page 45 of its Judgment, as evident from the Section reproduced above, used the identical consideration in arriving at the conclusion that the two murders were committed in the same transaction that commenced with the attempted murder on *Kusumawathie.* The trial Court, although mindful of the requirement to satisfy itself as to the existence of common intention and participatory presence of the Appellant to found him guilty to the two offences, did not specifically referred to them in its conclusion. Instead, it used the

term that the three accused committed the three offences they were charged with in the same transaction. But undoubtedly the Court would have considered them, when it considered the "*continuity of action and community of purpose or design*" in arriving at the said conclusion.

The relatively later pronouncement made by the ***Mohan Baitha and Others. v State of Bihar and Another*** (supra) perfectly in line with the test applied by *Wijeyewardene* J in the case of ***Jonklaas v Somadasa et al*** (1942) 43 NLR 284 (at p. 285), where his Lordship held that "*… the substantial test for determining whether several offences are committed in the same transaction is to ascertain whether they are so related to one another in point of purpose or as cause and effect or as principal and subsidiary acts as to constitute one continuous action. While the fact that offences are committed at different times and places need not necessarily show that the offences are not committed in the same transaction, yet these are matters which cannot be ignored altogether.*"

In relation to the evidence presented before the trial Court, I am of the view that the principle enunciated in the judgment of ***The King v Pedrick Singho*** (1946) 47 NLR 265, by *Howard* CJ by stating that if the facts are so interwoven to constitute a series of facts, then such a situation could be regarded as a one transaction, applies to the instant Appeal as well and, as such, the finding of the trial Court that the three offences were committed in the same transaction is well justified.

Even if the evidence clearly supports a reasonable conclusion that the three attacks were carried out by the same three accused during the course of same transaction, this Court, however, must satisfy itself as to legality of the criminal liability imposed at least on the Appellant, if not

on each of the other accused. This aspect needs further consideration with citation of a few applicable principles.

Lord *Sumner* in ***Barendra Kumar Ghosh v Emperor*** (supra) stated *"… liability is imputed to each individual socius criminis not merely for his own acts but for the totality of the acts committed by his confederates in furtherance of their common intention. Vicarious or collective responsibility attaches in such a situation for the result (e.g., death) of their united action.* In ***Regina v Somapala et al*** (1956) 57 NLR 350 at p. 353, the Court of Criminal Appeal observed that Section *32* of the Penal Code "… *does not, in addition, constructively impute to one socius criminis the guilty knowledge of another. In order to decide whether an accused person, to whom liability is imputed for another person's criminal acts has committed an offence involving guilty knowledge, the test is whether such guilty knowledge has been established against him individually by the evidence."* This requirement could be satisfied if the evidence presented by the prosecution supports a reasonable inference of the existence of a pre-arranged plan, as the Privy Council, in its judgment of ***Mahabub Shah v Emperor*** (supra) stated (at p.120) " … *common intention within the meaning of Section implies a pre-arranged plan, and to convict the accused of an offence applying the Section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan"* or as in ***The King v Asappu et al*** (supra), *"… in order to justify the inference that a particular prisoner was actuated by a common intention with the doer of the act, there must be evidence, direct or circumstantial, either of pre-arrangement, or a pre-arranged plan, or a declaration showing common intention, or some other significant fact at the time of the commission of the offence, to enable them to say that a co-accused had a common intention with the doer of the act, and not merely a same or similar intention entertained independently of each other."*

In ***Sirisena and six others v The Queen*** (1969) 72 NLR 389, the Court of Criminal Appeal quoted the Judgment of the Supreme Court of *India* in ***Afrahim Sheik v. The State of West Bengal*** 3 A. I. R. 1964 S.C. 1263 at 1268, which stated; " *A person does not do an act except with a certain intention; and the common intention which is requisite for the application of S. 34 is the common intention of perpetrating a particular act. Previous concert which is insisted upon is the meeting of the minds regarding the achievement of the criminal act*."

In determining the course of action it had taken, the trial Court, particularly in order to decide on the question of fact whether the Appellant had a participatory presence during the attack on *Swarna* and *Susantha*, had aided itself with the presumption of fact that it had arrived at after a consideration of the totality of the material, that the Appellant was present with the other two, when the two murders were committed upon the pre-arrangement which all three had shared from the commencement of the series of attacks on their victims. The Court arrived at this finding on the premise that they were committed within the course of same transaction that commenced with the commission of the offence of attempted murder and continued thereafter with that of committing the two murders. There was no alternative version available for the Court to consider. The Appellant in his short statement from the dock denied any knowledge of this incident but did not put across any suggestions as to what he did and, more importantly what he did not, thereby left *Kusumawathie's* evidence without a challenge with an alternative narration.

In my view the phrase "*in the course of same transaction*" was used by the trial Court, in a sense that it had the components of common intention and participation of each accused, incorporated into it, as

these factors are continued to be present from the initial criminal act to the next criminal act, if it could be taken as such. Despite the fact that the conviction entered against the Appellant by the trial Court without specifically referring to some of these individual components, when it decided that it was committed in the course of same transaction as fulfilment of a prior arrangement, it was obviously mindful of the existence of these requirement, as evident from several references that were made to them in the course of its judgment.

When viewed in the light of the above, the Appellant's presence during the attack on *Kusumawathie* and thereafter on her children could not be taken as a mere by stander who simply watched what was happening due to his curiosity. Neither the Appellant's conduct could be accepted as "*who merely shares the criminal intention*" nor as a person who derived "*fiendishly delight in what is happening*" as per ***The Queen v Vincent Fernando and two others*** *and* ***Mir Mohammad Omar & Others*** (supra). In the context of consideration of any other reasonable hypothesis that might accrue in favour of the Appellant, the trial Court had considered the probability of a third-party involvement in the commission of the two murders. None of the accused or the Appellant had made any suggestion to the prosecution witnesses in that regard. The prosecution evidence also does not provide any basis for such a proposition. Nonetheless, the trial Court considered this hypothesis and then decided to exclude same on the basis such an involvement of another party is highly unlikely, given the fact that the two murders were committed by the three accused in the same transaction with the motive attributed to them.

The process of reasoning adopted by the trial Court to exclude a third-party involvement in the commission of the two murders runs

parallel to the process of reasoning adopted by *Sir Stephen,* when he stated (supra - at p 55);

> *"Let the question be whether A committed a crime. The facts which the Judge actually knows are that certain witnesses made before him a variety of statements which he believes to be true. The result of these statements is to establish certain facts which show that either A or B or C must have committed the crime, and neither B nor C did commit it. In this case that facts before the Judge would be inconsistent with any other reasonable hypothesis except that A committed the crime."*

Learned author, in his attempt to illustrate the manner in which a Court could prefer to accept one hypothesis among several other by accepting same and discarding others, adopted a process of logical reasoning in the selection of that particular hypothesis against the others. If this example is adopted with certain modifications to suit the circumstances of the instant appeal then it should read thus; if certain facts which show that the three accused together or a third party must have committed the crimes, and the established facts before the Judge points to the fact that no third party involvement, then the *"facts before the Judge would be inconsistent with any other reasonable hypothesis except that the three accused committed the crime."* Then the remaining question would be the liability of the Appellant, in the commission of the murders.

The decision of the Court of Appeal, in affirming the conviction entered by the trial Court upon the said inference, adopted the reasoning of the judgment of the Court of Criminal Appeal in ***King v Gunaratna et al*** (1946) 47 NLR 145, which dealt with a case of

circumstantial evidence. *Cannon* J, referring to the contention by the appellant before that Court stating that the evidence related to circumstances that are only of suspicion against him, stated (at p.149) *"… each fact, taken separately, may be so termed, but the question for consideration is whether, taken cumulatively, they are sufficient to rebut the presumption of innocence".* The conclusions reached by the trial Court as well as the appellate Court could not be faulted, in view of the considerations I have already referred to in this Judgment, taken along with the pronouncement in the Judgment of ***Attorney General v Seneviratne*** (supra) that *"The Jury, who are judges of fact, are entitled, as they did in the present case, to conclude that where murder and robbery form part of the same transaction, the person who committed the robbery committed the murder also"* which I reformulate in relation to the instant appeal to denote that the trial Court, being the tribunal of fact, is entitled to conclude that the persons who committed the attempted murder also committed the two murders where the attempted murder and the two murders form part of the same transaction,

However, in ***Don Somapala v Republic of Sri Lanka*** (1975) 78 NLR 183, Thamotheram *J* held the view (at p.188); *"… Court may presume that a man who is in possession of stolen goods, soon after the theft, is either a thief, or has received goods knowing them to be stolen, unless he can account for its possession. This is a presumption which a Court may or may not draw depending on the circumstances of the case. There is no " similar " presumption that a murder committed in the same transaction was committed by the person who had such possession. There is no presumptive proof of this. The burden still remains to prove beyond reasonable doubt that the person who committed the robbery did also commit the murder. All that the prosecution has established is that the accused was present at the time of robbery."*

This statement of *Thamotheram J* was considered by a divisional bench of five Judges of this Court in ***Attorney General v Seneviratne*** (ibid), and *Weeraratne* J, with concurrence of *Sharvananda* J (as he then was) and *Zosa* J, held that "… *the ruling in Somapala's case should be confined to the special facts of that case and has no application to the facts disclosed in the instant case. The Jury, who are judges of fact, are entitled, as they did in the present case, to conclude that where murder and robbery form part of the same transaction, the person who committed the robbery committed the murder also. The validity of such a conclusion depends on the facts of the transaction*." I respectfully follow the pronouncement made by *Weeraratne* J that "… *the ruling in Somapala's case should be confined to the special facts of that case*" and hold that it does not lay down a general principle. I fortify my view on that statement with the wording found in Section 114 itself to the effect that the Court may presume existence of any fact which it thinks likely to have happened having regard to common course of natural events, etc. "***… in their relation to the facts of the particular case***" (emphasis is added), as observed by *Amaratunge* J in ***Ariyasinghe and Others v Attorney General*** (supra).

In this regard, it must be noted that the indictment, upon which the 1st accused, 2nd accused and the Appellant were tried on, too had been presented before the trial Court on that very basis. It is not necessary to highlight the fact that the participatory presence of the Appellant in the commission of the three offences is built into the said conclusion reached by the trial Court and affirmed by the Court of Appeal, and I have no reason to term it as an unreasonable inference reached on the available material.

Learned President's Counsel placed his contention solely upon the factor that there was no sufficient evidence to support a conviction on attempted murder and there was none to support the conviction on murders. In view of the reasons already stated in the preceding part of this judgment, it is my considered view that the inference reached by the trial Court is a reasonable inference that could be drawn upon, having regard to the totality of the circumstances presented before that Court and therefore could also be termed as a necessary inference, in the absence of any material to the contrary. I find the following statement of *De Kretser* J in ***The King v Marthino et al*** (supra, at p.524) is apt in relation to the instant appeal, since the evidence presented by the prosecution clearly forms *"… a substantial compact mass and to disintegrate the evidence into fragments and to examine each fragment is hardly to do justice to the evidence as a whole*."

The Court of Criminal Appeal, in its judgment of ***Wasalamuni Richard and two Others v The State*** (1973) 76 NLR 534, had held thus (at p.552);

> *"The question whether a particular set of circumstances establish that an accused person acted in furtherance of a common intention is always a question of fact and if the jury's views on the facts cannot be said to be unreasonable, it is not the function of this Court to interfere. In* ***Rishideo v. State of Uttar Pradesh****, (1955) A. I. R. 331, (at p.335), the Supreme Court of India has expressed this principle on following terms;*
>
> > *'After all the existence of a common intention said to have been shared by the accused person is, on an ultimate analysis, a question of fact. We are not of opinion that the*

inference of fact drawn by the Sessions Judge appearing from the facts and circumstances appearing on the record of this case and which was accepted by the High Court was improper or that these facts and circumstances were capable of an innocent explanation".

In this instance, the conclusion reached by the trial Court that the Appellant had shared a common murderous intention with the other two accused to commit murder, in addition to him sharing a common intention to commit either the murder of *Kusumawathie* or to cause life threatening injury to her could easily be termed as a reasonable inference that had been reached upon consideration of the set of circumstances that were presented before Court. Therefore, I concur with the affirmation of the said conclusion by the Court of Appeal.

Accordingly, I proceed to answer the three questions of law, on which the instant appeal was heard, in the following manner;

(b) Did the Learned Judges of the Court of Appeal fail to appreciate that the entirety of the evidence led at the trial in the High Court do not justify the conviction of the Appellant of the offences set out in 1st, 2nd, and 3rd charges of the Indictment? No.

(c) Did the Learned Judges of the Court of Appeal fail to appreciate the items of evidence in favour of the Appellant which tends to negative his participation in the incidents which culminated in causing hurt to *Thotapitiya Arachchilage Kusumawathie* and causing the deaths of *Hettiarachchige Susantha* and *Hettiarachchige Swarna*? No.

(d) Did the Learned Judges of the Court of Appeal misdirect themselves in holding that the Appellant's convictions in respect of the murders of *Hettiarachchige Susantha* and *Hettiarachchige Swarna* is correct inasmuch as there is no direct or circumstantial evidence connecting the Appellant with the said murders? No.

In view of the fact that the answers of this Court on all the questions of law are found to be in the negative, the conviction entered by the High Court against the Appellant on all three counts in the indictment and the judgment of the Court of Appeal dismissing the appeal of the Appellant by affirming the said conviction should not be disturbed. The judgment of the Court of Appeal and the judgment of the High Court are accordingly affirmed, along with the sentences imposed on the Appellant.

The appeal of the Appellant is accordingly dismissed.

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA, J.

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J.

I agree.

JUDGE OF THE SUPREME COURT

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

H.M. Bandara Menike,
Nattharampotha, Polgaswela,
Kundasale.
Plaintiff

SC APPEAL NO: SC/APPEAL/23/2014
SC LA NO: SC/HCCA/LA/385/2011
HCCA KANDY NO: CP/HCCA/733/2005A (F)
DC KANDY NO: P/11663

Vs.

1. S.M. Dingiri Banda,
   Pansalawatte Road,
   Walamale, Ulpothawatte,
   Kundasale.
2. H.M. Biso Manike,
   Madanwela, Hanguranketha.
3. H.M. Punchibanda,
   Walamale, Ampitiya.
4. Tanthirige Wilfred De Silva,
   No. 39, Gurudeniya Road,
   Ampitiya.
5. T. Leslie De Silva,
   No. 39, Gurudeniya Road,
   Ampitiya.

Defendants

AND BETWEEN

4. Tanthirige Wilfred De Silva, (Deceased)

4A/5. T. Leslie De Silva,
Both of No. 39,
Gurudeniya Road,
Ampitiya.
Defendant-Appellants

Vs.

H.M. Bandara Menike,
Nattharampotha,
Polgaswela,
Kundasale.
Plaintiff-Respondent

1. S.M. Dingiri Banda,
Pansalawatte Road,
Walamale, Ulpothawatte,
Kundasale.
2. H.M. Biso Manike,
Madanwela, Hanguranketha.
3. H.M. Punchibanda,
Walamale, Ampitiya.

Defendant-Respondents

AND NOW BETWEEN

T. Leslie De Silva,
No. 39,
Gurudeniya Road,
Ampitiya.
4A and 5th Defendant-Appellant-Appellant

Vs.

H.M. Bandara Menike,
Nattharampotha, Polgaswela,
Kundasale.
Plaintiff-Respondent-Respondent

1. S.M. Dingiri Banda,
Pansalawatte Road,
Walamale, Ulpothawatte,
Kundasale.
Presently at,
Ulpatthawaththa,
Temple Road,
Ketawala, Lewla,
Kandy.
2. H.M. Biso Manike, (Deceased)
2A. D. M. Chandrasekara Banda,
Both of Madanwela, Hanguranketha.
3. H.M. Punchibanda,
Walamale, Ampitiya.
Defendant-Respondent-Respondents

Before: Hon. Justice Priyantha Jayawardena, P.C.
Hon. Justice A.L. Shiran Gooneratne
Hon. Justice Mahinda Samayawardhena

Counsel: Dr. Sunil Coorey with Sudarshani Coorey for the 4A and 5th Defendant-Appellant-Appellant.
Panchali Ekanayaka for the Plaintiff-Respondent-Respondent.
Chanaka Kulathunga for the 1st Defendant-Respondent-Respondent.

Argued on : 26.10.2021

Written submissions:

by the 4A and 5th Defendant-Appellant-Appellant on 04.04.2014 and 02.11.2021.
by the 1st Defendant-Respondent-Respondent on 02.10.2019, 05.07.2021 and 01.11.2021.

Decided on: 28.02.2024

Samayawardhena, J.

The plaintiff filed this action to partition the land described in the schedule to the plaint among the plaintiff and the 1st and 2nd defendants in equal shares, each being entitled to a 1/3 share of the land. After an uncontested trial in which only the evidence of the plaintiff was led, the judgment dated 15.07.1992 was entered allotting the shares as previously mentioned.

The District Court refused the 4th defendant's application for intervention after the judgment was delivered. Thereafter the Court of Appeal made order dated 07.06.2000 directing the District Court to add the 4th defendant as a party and to allow him to place evidence of his interests in the land and to amend the interlocutory decree accordingly. Upon this direction, the District Judge allowed further evidence to be led and made order dated 05.12.2005 whereby it was decided to divide the 1/3 share originally allotted to the 1st defendant between the 1st and 4th defendants equally, i.e. each being entitled to a 1/6 share. No change was made in respect of the 1/3 share each allotted to the plaintiff and the 2nd defendant. On appeal, the High Court set aside this order and restored the previous judgment of the District Court dated 15.07.1992. This appeal by the 4th defendant is against the judgment of the High Court.

Heen Banda was at one time owner of the land to be partitioned by deed No. 500 dated 22.10.1942 (P2). According to the deed, he became entitled to "*One undivided third part or share of and all that land called Ulpathewatte of three amunams in paddy sowing extent*". Heen Banda had plan No. 262 dated 09.11.1945 (P3) prepared to depict this land. According to this plan, the extent of the land is 1 acre, 2 roods and 3/4 of a perch. Heen Banda transferred undivided 2 roods to the 2nd defendant by deed No. 287 dated 17.12.1974 (P5), and another undivided 2 roods to the plaintiff by deed No. 288 (P4) executed on the same date by the same notary. After the execution of these two deeds, Heen Banda was left with only 2 roods and 3/4 of a perch. These facts are not disputed.

Thereafter, Heen Banda transferred an undivided extent of one *pela* paddy sowing area to the 4th defendant by deed No. 4390 dated 17.03.1977 (5D5) and another same extent of land to the 1st defendant by deed No. 4392 (1D1) executed on the same date by the same notary.

According to traditional Sinhala land measurements as reported in *Ratnayake v. Kumarihamy* [2002] 1 Sri LR 65 at 81, 1 *pela* of paddy sowing extent is equivalent to 2 roods and 20 perches. After the execution of deeds P4 and P5, it is undisputed that Heen Banda did not have rights on the land to transfer one *pela* each to the 1st and 4th defendants. As I stated previously, he had only 2 roods and 3/4 of a perch left. Therefore, after the transfer of his remaining rights to the 4th defendant by deed 5D5, Heen Banda did not have any rights to alienate to the 1st defendant by deed 1D1.

However, the 1st defendant claims priority over the 4th defendant's deed by prior registration. Although the 4th defendant's deed is prior in date of execution, it is not prior in date by registration. The 1st defendant's deed was registered at the Land Registry before the 4th defendant's deed was

registered there. This is the crux of the matter on this appeal. The contest of this appeal is only between the 1st defendant and the 4th defendant. There is no issue with regard to the 1/3 share each of the plaintiff and the 2nd defendant.

In terms of section 7(1) of the Registration of Documents Ordinance, No. 23 of 1927, as amended, an instrument affecting land is void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which is duly registered under the Ordinance. If A sells his land to B by a notarially executed deed and after some time sells the same to C in the same way, the second sale overrides the first sale, if C registers his deed before the first deed is registered. Section 7(2) enacts that fraud or collusion in obtaining such subsequent instrument or in securing the prior registration thereof shall defeat the priority of the person claiming thereunder.

However, registration is not indispensable for the validity of a deed. Want of registration does not make an otherwise perfect title imperfect. An unregistered deed may be considered void when compared to a registered one, but it remains valid and enforceable for all other purposes.

Three main requisites need to be satisfied for the doctrine of priority by registration to operate:

(1) Both deeds shall proceed from the same source.
(2) The interests sought to be conferred shall be adverse, creating a clash of interests.
(3) The conveyance shall be for valuable consideration.

There is no dispute that the 1st defendant's deed and the 4th defendant's deed originate from the same source for valuable consideration. But the issue is whether the interests sought to be conferred by Heen Banda by

those two deeds are adverse, creating a clash of interests. The deeds must conflict with one another to claim priority by registration.

A. St. V. Jayewardene, *The Law Relating to the Registration of Deeds* (1919), page 80 states:

> *Instruments may be said to be adverse when the rights dealt with by them are inconsistent or antagonistic, but not when the rights dealt with by one, do not interfere with, or infringe the rights dealt with, by the other.*

In *Samaranayake v. Cornelis* (1943) 44 NLR 508 at 511 De Kretser J. states:

> *The argument that the competing deeds must come from the same source is quite correct if properly understood. It does not mean that they must come from the same person or persona. As de Sampayo J. put it in Bernard v. Fernando [16 N. L. R. 438], "The truth, I think, is that the expression 'adverse interest' refers only to cases where two persons claim interests traceable to the same origin", i.e., the lines of title must not be parallel but must intersect at some point and so produce the clash of interests.*

In *Wijewardena v. Lorenzu Perera* (1880) 4 SCC 9, the plaintiff took a secondary mortgage of a piece of land, and his mortgage expressly recited that the land was subject to the claimant's primary mortgage. The plaintiff registered his secondary mortgage prior to the registration of the claimant's primary mortgage. The Supreme Court held that the plaintiff's priority of registration did not give his mortgage priority over the claimant's mortgage. Cayley C.J. states at pages 9-10:

> *[The Ordinance] renders void a prior unregistered deed as against parties claiming an adverse interest thereto by virtue of a*

subsequent deed which has been duly registered. But in the present case there is no conflict of adverse interests in the deeds. The same interest is not dealt with by the two deeds. The plaintiff's deed purports to creates a secondary mortgage, and the claimant's primary mortgage is expressly recited in the plaintiff's deed. It is clear that the intention of the parties was that the plaintiff's mortgage should be subject to the claimant's. The two mortgages are not adverse one to other, but the second one hypothecates such interest only as the mortgagor had left to him in the land after the first mortgage was effected.

In the case of *Mohamad Ali v. Weerasuriya* (1914) 17 NLR 417 the Court impressed upon the requirement of "adverse interest" as an indispensable one for a successful plea for priority by registration.

In *Jayawardena v. Subadra Menike* (SC/APPEAL/32/2009, SC Minutes of 04.03.2010) it was held:

It is quite clear that in terms of section 7(1) of the Registration of Documents Ordinance, an instrument becomes void if it is not duly registered, provided that there is an adverse claim against the said instrument by virtue of a subsequent instrument, which is duly registered.

In Jinaratana Thero v. Somaratana Thero (1946) 32 NLR 11, Jayetileke J. held that "*To interpret a deed, the expressed intention of the parties must be discovered.*"

On the facts and circumstances of this case, it is evident that Heen Banda did not intend to dispose of the same portion of land to two different people dishonestly or otherwise. According to the schedules of the two deeds, Heen Banda transferred "*An undivided extent of **one pela** paddy sowing towards the **West***" of the land to the 4th defendant by deed No.

4390 dated 17.03.1977 (5D5) and "*An undivided* ***one pela*** *paddy sowing towards the* ***North***" of the land to the 1st defendant by deed No. 4392 (1D1) executed on the same date by the same notary. The deeds 5D5 and 1D1 are not competing deeds and there is no clash of interests. The argument of learned counsel for the 1st defendant that since no divided portions were transferred, both deeds convey "*some adverse or inconsistent interest*" in the land to attract the applicability of the statutory principle of priority by registration is unacceptable.

Section 7(4) of the Registration of Documents Ordinance states that registration of an instrument under the Ordinance shall not cure any defect in the instrument or confer upon it any effect or validity which it would not otherwise have except the priority conferred by the section. Prior registration does not confer title on the holder of the prior registered subsequent deed.

There is no ambiguity as to what was intended to be conveyed by the said two deeds by Heen Banda. He wanted to convey equal shares to both the 1st and 4th defendants but from different parts of the larger land. If there is any ambiguity, the court can look for extrinsic evidence to resolve the ambiguity.

It was held in the Supreme Court case of *Appuhamy v. Gallella* (1976) 78 NLR 404:

> *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 the instant case, after Heen Banda had executed the two deeds, the 1st defendant entered into possession of the northern portion of the land and the 4th defendant entered into possession of the south-western portion of the land. The preliminary plan and the report clearly confirm this. The buildings of the northern portion of the land including the house marked D were claimed by the 1st defendant before the surveyor and the house marked F in the south-western boundary was claimed by the 4th defendant. There is no dispute over these improvements. The house claimed by the 1st defendant is in lot 1 in the preliminary plan whereas the house claimed by the 4th defendant is in lot 2 in the same plan and the two lots are separated by a "ගල් වැට". These circumstances amply demonstrate the intention of not only the transferor Heen Banda but also the 1st and 4th defendants.

In *Dingiri Naide v. Kirimenike* (1955) 57 NLR 559 it was held that "*Where several deeds form part of one transaction and are contemporaneously executed, each deed must speak only as part of the one transaction.*"

Hence I hold that the doctrine of priority by registration is inapplicable in this instance.

The District Court correctly analysed the evidence from the proper perspective and gave effect to the intention of Heen Banda. Accordingly, the remaining interest of Heen Banda was divided equally between the 1st and the 4th defendants (each receiving a 1/6 share). However, the High Court took the view that there was "no sufficient material available to arrive at such finding" by the District Court, despite there being, as I previously explained, sufficient material to support that conclusion.

The main argument of learned counsel for the 1st defendant is that the Court of Appeal did not set aside the original judgment of the District Court dated 15.07.1992 whereby the entire land was divided equally among the plaintiff and the 1st and 2nd defendants, but only allowed the 4th defendant to place evidence of his interests in the land before the District Court and the amendment of the interlocutory decree, if necessary. His argument is that since the Court of Appeal did not set aside the original judgment of the District Court, the 4th defendant's appeal must necessarily fail as the District Court could not have altered its own judgment. If that argument is accepted, the Court of Appeal order allowing the 4th defendant to lead evidence to establish his rights to the land and to amend the interlocutory decree accordingly is meaningless. I reject that argument unhesitatingly.

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

(a) *Did the High Court err in holding that the intention of Heen Banda in executing deeds 1D1 and 5D5 was to convey equally to the 1st and 4th defendants his balance 1/3 share, was not relevant?*
(b) *In terms of the contents of the schedules of the said two deeds should those two deeds be read together?*
(c) *Are the said two deeds only one transaction although contained in two separate documents?*
(d) *Did the High Court err in holding that deed 1D1 gets priority by prior registration over deed 5D5?*

I answer the questions of law in the affirmative and set aside the judgment of the High Court dated 23.08.2011 and restore the order of the District Court dated 05.12.2005 and allow the appeal with costs payable by the 1st defendant to the 4(a) defendant.

Judge of the Supreme Court

Priyantha Jayawardena, P.C., J.

I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Supreme Court

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

In the matter of an application for leave to appeal in terms of Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with the provisions of the Civil Procedure Code

SC Appeal No: 25/2021

H.C. (Civil) Case No: CHC/745/2018/MR

Mahawaduge Priyanga Lakshitha Prasad Perera
No. 60, Kandawala,
Katana.

Carrying on business as a sole proprietor under the name and style of 'Trading Engineering and Manufacturing Company'

Plaintiff

Vs.

China National Technical Import and Export Corporation
No. 90,
Xi San Huan Zhong Lu Genertec Plaza
Beijing, China

Having its local representative office at No. 445A, 3rd Floor, Galle Road, Colombo 03.

Defendant

AND NOW BETWEEN

Mahawaduge Priyanga Lakshitha Prasad Perera
No. 60, Kandawala,
Katana.

Carrying on business as a sole proprietor under the name and 'Trading Engineering Manufacturing Company'

Plaintiff-Petitioner

Vs.

China National Technical Import and Export Corporation
No. 90,
Xi San Huan Zhong Lu Genertec Plaza
Beijing, China

Having its local representative office at
No. 445A, 3rd Floor, Galle Road,
Colombo 03.

Defendant-Respondent

Before : Priyantha Jayawardena PC, J
Yasantha Kodagoda PC, J
Arjuna Obeyesekere, J

Counsel : Sanjeewa Jayawardena PC with Ruwantha Cooray and Rukshan Senadeera for the Plaintiff-Appellant

Chandaka Jayasundera PC with Shivan Kanag-Ishvaran and Rukmal Cooray for the Defendant-Respondent

Argued on : 13th February, 2024

Decided on : 29th February, 2024

Priyantha Jayawardena PC, J

The instant appeal was filed by the plaintiff-appellant (hereinafter referred to as the "appellant") seeking to set aside the judgment of the Commercial High Court dated 7th of December, 2020, where the plaint was dismissed consequent to a preliminary objection raised by the defendant-respondent (hereinafter referred to as the "respondent").

The Plaint

The appellant instituted action in the Commercial High Court on the 19th of October, 2018 against the respondent, claiming, *inter alia,* a sum of Rs. 602,298,639/10 with legal interest.

The appellant stated that he is a Sole Proprietor carrying on business as a Civil Engineering Contractor, under the name and style of "Trading Engineering and Manufacturing Company", and the respondent is a company duly incorporated under the laws of the People's Republic of China.

In his plaint, the appellant stated that the respondent has its local representative office, **the contract sought to be enforced was entered into,** and/or **the cause and/or causes of action** set forth in the plaint arose within the local limits of the jurisdiction of the Commercial High Court. It was further stated that the Commercial High Court has jurisdiction to hear and determine the matter under and in terms of the provisions of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

The appellant further stated that on the 11th of June, 2010 the respondent entered into a contract with the Road Development Authority for the construction of the Southern Transport Development Project bearing reference No. RDA/STDP/CEXIM/P-K4. Thereafter, on the 3rd of November, 2011 the respondent entered into a Sub-contract with the appellant bearing No. STDP/CNTIC/TEAM/2011/10/3 (hereinafter referred to as the "Sub-Contract"), which was produced as part and parcel of the plaint marked as 'P2'. The appellant stated that, as per the terms in the said Sub-Contract, he completed the work and handed it over to the respondent on the 22nd of September, 2013.

The appellant further stated that later, certain disputes arose from the said Sub-Contract with the respondent. However, as they were unable to settle the said disputes amicably, the said disputes were referred to arbitration in terms of Clause 17 of the said Sub-Contract by Notice of Arbitration dated 2nd of April, 2014. (The said Notice of Arbitration was signed by the appellant as the Managing Director of Trading Engineering Manufacturing Company.) However, the respondent denied the claim by reply dated 30th of April, 2014 and included a counterclaim in the said reply.

The appellant stated that it was later found out that, **by mistake, his business was named as a company incorporated under the Companies Act of Sri Lanka in the said Sub-Contract and in the Notice of Arbitration**, whereas it was in fact a Sole Proprietor and not an incorporated company under the Companies Act No. 7 of 2007. Further, the Registration No. (AA) 4726, referred to as the company registration number in the said Sub-Contract, is the business registration number given to the Sole Proprietorship registered by him.

Hence, a new Notice of Arbitration was sent to the respondent by the appellant's Attorney-at-Law on the 20th of June, 2014 informing the respondent that the initial Notice of Arbitration dated 2nd of April, 2014 is withdrawn and that the new Notice of Arbitration should be considered as the correct Notice of Arbitration. In the said Notice of Arbitration, the appellant was named as the claimant to the dispute referred to arbitration. Furthermore, the appellant included additional claims in the second Notice of Arbitration.

The appellant further stated that the respondent objected to the jurisdiction of the Arbitral Tribunal on the basis that the Notice of Arbitration dated 20th of June, 2014 refers to the appellant as a Sole Proprietor, whereas the said Sub-Contract was entered into between the respondent and a company said to be duly incorporated in Sri Lanka, namely Trading Engineering Manufacturing Company. Thus, there was no agreement between the appellant and the respondent to arbitrate the disputes referred to in the Notice of Arbitration.

After hearing the submissions of the parties, the Arbitral Tribunal delivered its Order on the said objection raised by the respondent and terminated the proceedings of the said Arbitration on the basis, *inter alia,* that the said Sub-Contract is not a valid contract and therefore there is no valid arbitration agreement between the parties to refer the alleged disputes to arbitration. Further, it was held that, as the Arbitral Tribunal derives its jurisdiction from the Notice of Arbitration issued under the arbitration clause and as the said Sub-Contract is *void ab initio*, both Notices of Arbitration have no force or effect in law.

Being aggrieved by the said Order of the Arbitral Tribunal, the appellant filed an application on the 20th of November, 2014 in the High Court in terms of section 11 of the Arbitration Act No. 11 of 1995 praying, *inter alia,* to set aside the said Order and seeking a declaration that there is a valid and binding arbitration agreement between the parties to refer the disputes to arbitration under and in terms of the said Sub-Contract.

After hearing the parties, the said application was dismissed by the learned High Court Judge by his judgment dated 5th of June, 2017 on the basis that the High Court has no jurisdiction to entertain the said application as there is no provision in the Arbitration Act to appeal against an Order where an Arbitral Tribunal has ruled on its jurisdiction. The appellants, instead of appealing against the said judgment, instituted the action under reference in the Commercial High Court on the 19th of October, 2018 praying *inter alia*;

"(a) Judgment and Decree be entered in favour of the Plaintiff in a sum of Rs. 88,794,135/74 together with legal interest from 05th November 2013 up to the date of Decree and thereafter further interest on the aggregate amount of the Decree until payment in full in respect of the First Cause of Action;

(b) Judgment and Decree be entered in favour of the Plaintiff in a sum of Rs. 30,110, 210/88 together with legal interest from 03rd April 2014 up to the date of Decree and thereafter further interest on the aggregate amount of the Decree until payment in full in respect of the Second Cause of Action;

(c) Judgment and Decree be entered in favour of the Plaintiff in a sum of Rs. 142,666,236/86 together with legal interest from 03rd April 2014 up to the date of Decree and thereafter further interest on the aggregate amount of the Decree until payment in full in respect of the Third Cause of Action;

(d) Judgment and Decree be entered in favour of the Plaintiff in a sum of Rs. 272, 088, 384/97 together with legal interest from 18th October 2014 up to the date of Decree and thereafter further interest on the aggregate amount of the Decree until payment in full in respect of the Fourth Cause of Action;

(e) Judgment and Decree be entered in favour of the Plaintiff in a sum of Rs. 15, 824, 792/89 together with legal interest from 18th October 2014 up to the date

of Decree and thereafter further interest on the aggregate amount of the Decree until payment in full in respect of the Sixth Cause of Action;

(g) **A Declaration that the Plaintiff has duly completed the works under the Sub-Contract on 23rd September 2013 and notified the same to the Defendant;**

(h) **A Declaration that the Plaintiff is entitled to the issue of a Completion Certificate/Acceptance Certificate under and in terms of Clause 13.4 of the said Sub-Contract;**

(i) Costs; and

(j) Such other and further relief as this Court may seem meet to be granted."

[emphasis added]

Answer

The respondent filed its answer and prayed *inter alia* for a dismissal of the plaint on the basis that the appellant cannot maintain the said action as the appellant is not a contracting party to the contract ('P2') sought to be enforced.

Proceedings before the Commercial High Court

The trial commenced before the Commercial High Court by marking admissions and raising issues. Thereafter, the respondent had moved court to have the following issues tried as preliminary issues of law in terms of section 146 of the Civil Procedure Code as amended;

"23
(a) Is the Plaintiff a party to the Sub-contract Agreement marked P2 to the Plaint?
(b) If the above issue is Answered in the negative, does the Plaintiff have no locus standi to institute this action?
(c) If the above issues are answered in favour of the Defendant has a cause of action accrued to the Plaintiff against the Defendant?

(d) Is the action of the Plaintiff misconceived in law and contrary to the provisions of the of section 43 of Civil Procedure Code?

24. if one or more of the above issues (a), (b), (c) and (d) are answered in favour of the Defendant, should this action be dismissed in limine?

25. Does any purported relationship between the Plaintiff and the Defendant necessarily arise from any purported work and labour done on behalf of the Defendant by the Plaintiff?

26. Is any cause of action for work or labour done prescribed in term of Section 08 of the Prescription Ordinance?"

Thereafter, the learned High Court judge heard the parties on the said issues and directed them to file written submissions in respect of the same.

Judgment of the Commercial High Court

The learned Commercial High Court Judge delivered his judgment dated 7th of December, 2020 and held that the contract produced marked as 'P2' is not a valid contract. Accordingly, he dismissed the plaint filed by the plaintiff.

Appeal to the Supreme Court

Being aggrieved by the said judgment of the Commercial High Court, the appellant filed an appeal in the Supreme Court, and the court granted leave to appeal on the following questions of law;

"b. At all times during the execution of P2 has the Defendant duly acted on the basis of the plaintiff being a person engaged in the business as a sole proprietor?

d. In all the circumstances, is the Defendant effectively estopped from denying substantive status and character of the Plaintiff?

f. If the Plaintiff is left without a remedy on the basis of the purported objection, will the plaintiff be grievously prejudiced as a result of being non suited?

g. Did the commercial high court place an undue and rigorous reliance on a patently erroneous issue of nomenclature and failed to see the true nature, character and status of the Plaintiff?

h. Given the inherent and intrinsic character of the plaintiff as an individual or as a person engaged in business as a sole proprietor; is he entitled to have and maintain the action maintained in the Commercial High Court?

k. Did the High Court err by concluding that the issues which were taken as preliminary issues were pure questions of law that could dispose of the action in its entirety?

l. Did the High Court err by holding that the sub contract P2 was void and/or was entered into by an entity or person known to law?"

Did the High Court err by holding that the Sub-Contract P2 was void and/or was entered into by an entity or person known to law?

The main issues that need to be considered in this appeal are whether;

(i) the appellant had the capacity to enter into the said Sub-Contract produced marked as 'P2',

(ii) there was an agreement between the parties to enter into the said contract (meeting of minds), and

(iii) the appellant is entitled in law to institute the action under reference in the Commercial High Court after the Arbitral Tribunal held that the sub-contract ('P2') is *void ab initio.*

Moreover, it is pertinent to note that the issues raised by appellant, *inter alia;* stated;

"1. Does the Plaintiff have **Locus Standi** to institute, have and maintain the above styled action?"

Thus, it appears that both parties have raised the jurisdictional issue before the High Court. Hence, it is necessary to consider the jurisdictional issue in the first instance, as it goes to the root of the case.

The law of contract requires at least two parties to form a contract. Further, the parties to a contract must, *inter alia,* have the capacity to enter into a contract. It is pertinent to note that the incapacity of one or more of the contracting parties will result in a contract being void or voidable.

The said Sub-Contract was entered into between China National Technical Import & Export Corporation and 'Trading Engineering and Manufacturing Company a company duly incorporated under the laws of the Democratic Socialist Republic of Sri Lanka and registered under Company Registration No. AA4726 in terms of the provisions of the Companies Act No. 07 of 2007, and having is registered office at No. 317/A, Thelwatta Junction, Colombo Road, Negombo, Sri Lanka.' In the said Sub-Contract the parties are named as follows;

> "**CHINA NATIONAL TECHNICAL IMPORT & EXPORT CORPORATION,** a company duly incorporated in the People's Republic of China having its principle office at No. 90 Xi San Huan Zhong Lu Genertec Plaza, Beijing, China (hereinafter referred to as "**CNTIC**" which terms and expression shall mean and include the said China National Technical Import & Export Corporation and its successors, assigns, administrators and liquidators) of the **ONE PART**
>
> **AND**
>
> **TRADING ENGINEERING AND MANUFACTURING COMPANY**, a company duly incorporated under the laws of the Democratic Socialist Republic of Sri Lanka and registered under Company Registration No. AA4726 in terms of the provisions of the Companies Act No. 07 of 2007, and having is registered office at No. 317/A, Thelwatta Junction, Colombo Road, Negombo, Sri Lanka, (hereinafter referred to as "**TEAM**" which term and expression shall mean and include the said TEAM and its successors, administrators and liquidators) of the **OTHER PART**"
>
> [emphasis added]

It was submitted by the learned President's Counsel for the appellant that the appellant was mistakenly referred to as a company duly incorporated under and in terms of the Companies Act in the said Sub-Contract. This position is also stated in averment 12 of the plaint.

However, it was submitted by the learned President's Counsel for the respondent that the appellant attempted to correct the said mistake only when the second Notice of Arbitration was given on the 20th of June, 2014, i.e., 3 years after entering into the said Sub-Contract in the year 2011.

The elements required to form a valid contract is set out in *The Law of Contracts,* Volume 1 at page 84 by C.G. Weeramantry which states as follows;

"(a) agreement between the parties

(b) actual or presumed **intention to create a legal obligation**

(c) due observance of prescribed forms or modes of agreement, if any

(d) legality and possibility of the object of the agreement

(e) **capacity of parties to contract**"

[emphasis added]

Capacity to enter into a contract

The law only recognises natural persons and juristic persons as having the capacity to enter into contracts. A juristic person is considered as having a separate legal personality in law. Thus, it is necessary to consider whether the appellant can be considered as a juristic person.

Section 3 of the Companies Act No. 7 of 2007 specifies the types of companies that can be incorporated under the said Act;

"(1) A company incorporated under this Act may be either—

(a) a company that issues shares, the holders of which have the liability to contribute to the assets of the company, if any, specified in the company's articles as attaching to those shares (in this Act referred to as a "limited company"); or

(b) a company that issues shares, the holders of which have an unlimited liability to contribute to the assets of the company under its articles (in this Act referred to as an "unlimited company"); or

(c) a company that does not issue shares, the members of which undertake to contribute to the assets of the company in the event of its being put into liquidation, in an amount specified in the company's articles (in this Act referred to as a "company limited by guarantee").

(2) Where a limited company is incorporated as a private company or as an off-shore company, the provisions of Part II or Part XI shall apply respectively, to such a company."

However, in his plaint filed in the Commercial High Court, the appellant referred to his business as a sole proprietorship. A sole proprietorship is the simplest form of business that is owned and managed by one person. On the other hand, a company incorporated under the Companies Act No. 7 of 2007 is owned by the shareholder/s of the company, while the directors manage the operations of the company. Further, a sole proprietorship has no separate legal personality of its own, and thus, in law, the business and its owner are viewed as a single entity. Hence, it is not possible for a sole proprietor to sue and to be sued by his business registration name. Thus, all actions filed by or against a sole proprietorship should be in the personal name of the sole proprietor carrying on business under the name of the sole proprietorship. In contrast, a registered company is a person in the eyes of the law, distinct from its shareholders. Further, as a company has a separate legal personality, it can, *inter alia,* enter into contracts, sue, and be sued in the name of the company.

A similar view was held in ***Solomon v Solomon & Co. Ltd.*** **[1897] AC 22,** where it was held that the proceedings were not contrary to the true intent and meaning of the Companies Act 1962; that the company was duly formed and registered and was not the mere "alias" or agent of or trustee for the vendor; and that he was not liable to indemnify the company against the creditors' claims.

Further, it was common ground that there was no company incorporated under the Companies Act No. 7 of 2007 by the name of Trading Engineering and Manufacturing Company. Moreover, the number referred to as the company registration number in the said Sub-Contract is incorrect, as there is no such company in existence. Further, a Sole Proprietorship does not have a registered office, as stated in the said Sub-Contract.

Moreover, the said Sub-Contract was entered into by Chinese National Technical Import & Export Corporation and Trading Engineering and Manufacturing Company, which is said to be incapacitated under the provisions of the Companies Act. As the said Trading Engineering and Manufacturing Company was not a company incorporated under the Companies Act, it did not have the capacity to enter into a valid contract. Moreover, the aforementioned description given to the Trading Engineering and Manufacturing Company is incorrect and misleading.

In *The Law of Contracts,* Volume I at page 532 by C.G. Weeramantry, it states;

> "There must in general be two parties to a contract. If one of the parties to the contract be dead or non-existent no contract can come into being."

In the circumstances, I am of the opinion that the said Sub-Contract is *void ab initio* as one of the parties to the said contract lacked the capacity to enter into the said contract, which is a core element in forming a valid contract. A similar view was expressed in *The Law of Contracts,* Volume I at page 95 by C.G. Weeramantry which is as follows;

> "The absence in a contract of any of the essentials of a valid contract would render it null and *void ab initio*."

Meeting of the Minds

The plaint filed in the Commercial High Court contains 6 causes of action based on the said Sub-Contract filed along with the plaint marked as 'P2'. It is apparent that the said causes of action are founded upon the said Sub-Contract.

In fact, following the proper procedure and accepted drafting skills of plaints, the appellant has averred the following in respect of each cause of action preferred to in the plaint filed in the Commercial High Court;

> "The Plaintiff re-iterates the averments contained in paragraph 1 to 21 above."

Hence, a careful consideration of the plaint shows that all the claims are based on the said Sub-Contract. Moreover, in a contract, the parties consent to perform certain obligations arising from the contract. Thus, it is necessary to have a "meeting of the minds" of the parties to perform the contractual rights/obligations under the contract. However, in the said Sub-Contract as one party is not an entity, it is not possible to have the meeting of the minds of the parties in order to form a contract. This aspect also renders the said Sub-Contract *void ab initio.*

Mistake in naming a party in the Sub-Contract

In the instant appeal, the appellant withdrew the initial Notice of Arbitration dated 2nd of April, 2014 and served the new Notice of Arbitration dated 20th of June, 2014 naming himself as the claimant. Further, in averment 12 of the plaint, the appellant stated that the said Trading Engineering and Manufacturing Company was named as a company duly incorporated under the Companies Act by mistake.

A careful consideration of the aforementioned two Notices of Arbitration shows that the appellant realised the error/mistake in the Sub-Contract where Trading Engineering and Manufacturing Company was not a company incorporated under the Companies Act only after the first Notice of Arbitration dated 2nd of April, 2014 was sent to the respondent. It is pertinent to note that a mistake in entering into a contract itself makes such a contract *ab initio void*. Moreover, it is pertinent to note that the appellant has been sending correspondences as the Managing Director of Trading Engineering and Manufacturing Company. However, there are no directors in Sole Proprietorships.

Therefore, I hold that the Commercial High Court was correct in holding that the said Sub-Contract marked 'P2' was void as one of the parties to the contract was neither a natural person nor a legal person known to law.

Given the inherent and intrinsic character of the plaintiff as an individual or as a person engaged in business as a sole proprietor; is he entitled to have and maintain the action maintained in the Commercial High Court?

In his plaint, the appellant sought to enforce the Sub-Contract marked and produced as 'P2' along with the plaint, which was declared *void ab initio* by the Arbitral Tribunal as the said Trading Engineering and Manufacturing Company, being a sole proprietor, did not have the capacity to enter into the said contract.

It is pertinent to note that the said Sub-Contract was not entered into between China National Technical Import and Export Corporation and the appellant, namely, Mahawaduge Priyanga Lakshitha Prasad Perera. Thus, as the Sub-Contract was *void ab initio*, the said contract is non-existent in the eyes of the law. Hence, it renders the said contract unenforceable, with no legal

rights or obligations arising from it. Therefore, the alleged parties to the Sub-Contract cannot seek to enforce any rights or remedies under the said contract.

As stated above, Trading Engineering and Manufacturing Company was described as a company duly incorporated under the laws of the Democratic Socialist Republic of Sri Lanka and registered under the Company Registration No. AA4726 in terms of the Companies Act No. 7 of 2007, and having its registered office at No. 317/A, Thelwatta Junction, Colombo Road, Negombo, Sri Lanka, (hereinafter referred to as "**TEAM**" which term and expression shall mean and include the said TEAM and its successors, administrators and liquidators). The aforementioned description contains all the features of a company incorporated under the Companies Act No. 7 of 2007. Further, a Sole Proprietorship cannot have successors and liquidators. Such matters are unique to an incorporated company.

Moreover, as stated above, in the plaint filed in the Commercial High Court, the appellant admitted that the Sole Proprietorship was named as a company by mistake. Hence, a person engaged in a business as a Sole Proprietor cannot be replaced as a party to the said Sub-Contract, particularly when the Sub-Contract is *void ab initio* and is non-existent before the law.

Applicability of the Doctrine of Res Judicata

It is pertinent to note that, if the court holds that the Sub-Contract produced marked as 'P2' is a valid contract between the parties, the arbitration agreement in Clause 17 of the said contract will become operative between the parties to the said action, and thereby, any dispute, controversy or difference of any kind arising between the appellant and respondent in connection with or arising out of the said Sub-Contract is required to be referred to arbitration.

Hence, if the respondent objects to the jurisdiction of the Commercial High Court under section 5 of the Arbitration Act No. 11 of 1995, the Commercial High Court will not have jurisdiction to entertain the plaint filed by the appellant and hear the case. Such an event will leave the appellant to go back to arbitration. However, as the arbitral tribunal has already ruled on its jurisdiction as the said Sub-Contract is *void ab initio* and come to the conclusion that it has no jurisdiction, the said Order of the Arbitral Tribunal acts as res judicata between the parties. Thus, no purpose would be served in continuing with the case pending before the Commercial High Court.

In any event, as the arbitral tribunal has already decided that the said Sub-Contract is *void ab initio*, the doctrine of res judicata also acts as a bar to the institution of the plaint filed by the appellant.

Further, section 26 of the Arbitration Act No. 11 of 1995 reads as follows;

> "Subject to the provisions of Part VII of this Act, **the award made by the arbitral tribunal shall be final and binding on the parties to the arbitration agreement**."
>
> [emphasis added]

Hence, the aforementioned decision of the Arbitral Tribunal shall be final and binding on the parties to the Sub-Contract marked and produced as 'P2' along with the plaint filed in the Commercial High Court. Moreover, a careful consideration of section 26 of the Arbitration Act shows that the Doctrine of Res Judicata has been introduced to arbitrations conducted under the said Act.

In ***Fidelitas Shipping Co Ltd v V/o Exportchleb*** **[1965] 1 Lloyd's Rep. 223 at 229 and 230,** Lord Denning MR held:

> *"Within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour) he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings.*
>
> *……*
>
> *It is in the interest of commerce that issues, once decided, should not be reopened because one side or the other thinks of another point. If we were to allow the issue of waiver to be raised now it might well mean another journey up this Court on another special case. That would never do. There must be an end of litigation some time."*

Further, in *International Commercial Arbitration 2021***,** 3rd Edition, Vol. 3, page 4145 by Gary B. Born, *inter alia*, discusses the preclusive effect and/or finality of jurisdictional awards in arbitral proceedings when there is no contractual relationship between the parties.

> *"Jurisdictional awards*
>
> *Particular issues of preclusion are raised by an arbitral tribunal's jurisdictional award. Such awards can be either positive (either upholding the existence, validity, or applicability of an arbitration agreement) or negative (holding that no valid arbitration agreement exist or applies). In either case, the question arises to the preclusive effects of the award in subsequent judicial or arbitral proceedings . this question can arise in different contexts, which require different analysis. …*
>
> *…*
>
> *Second, the preclusive effect of a jurisdictional award can arise in subsequent arbitral or judicial proceedings (i.e., other than actions to annul or recognize an award). In these proceedings, there is no reason that both positive and negative jurisdictional decisions should not be entitled to the same preclusive effects as those of other types of arbitral awards (not addressing issue of jurisdiction).*
>
> ***For example, if an arbitral tribunal decides that there was no contractual relationship between the parties, or that the asserted arbitration clause was never concluded, then the substantive decision should be preclusive with regard to that issue in subsequent efforts by one of the parties to commence a second arbitration based upon the putative arbitration clause or to rely on that clause in defence to a litigation**. Equally, a positive determination of this jurisdictional issue should be dispositive if, in a subsequent arbitration, one of the parties objected to jurisdiction or denied the existence of a contract, or if a party seeks to pursue claims covered under the arbitration agreement in a litigation."*
>
> [emphasis added]

Conclusion

In light of the above, the following questions of law are answered as follows;

(l) Did the High Court err by holding that the subcontract P2 was void and/or was entered into by an entity or person known to law?

No

(h) Given the inherent and intrinsic character of the plaintiff as an individual or as a person engaged in business as a sole proprietor; is he entitled to have and maintain the action maintained in the Commercial High Court?

No

In view of the answers given to the aforementioned questions of law, the other questions of law are not answered.

Accordingly, the appeal is dismissed. No costs

Judge of the Supreme Court

Yasantha Kodagoda PC, J

I Agree **Judge of the Supreme Court**

Arjuna Obeyesekere, J

I Agree **Judge of the Supreme Court**

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

In the matter of an application for Leave to Appeal made in terms of Section 31DD of the Industrial Disputes Act No. 53 of 1950 (as amended) and the Supreme Court Rules.

Balage Padmarupa.
Near the Rail Gate,
Welhengoda,
Ahangama.

APPLICANT

VS

1. P.P. Gunawardena.
   Sarath Gunawardena Mawatha,
   Wewala,
   Hikkaduwa.

2. Sidath Charuka Gunawardena.
   Sarath Gunawardena Mawatha,
   Wewala,
   Hikkaduwa.

RESPONDENTS

AND

SC APPEAL NO.29/2023

SC HC LA No. 72/2020

Galle H.C. Case No. LT/AP/1219/2017

L.T. Case No. LT4/G/87/2015

1. P.P. Gunawardena.
   Sarath Gunawardena Mawatha,
   Wewala,
   Hikkaduwa.

2. Sidath Charuka Gunawardena.
   Sarath Gunawardena Mawatha,
   Wewala,
   Hikkaduwa.

RESPONDENTS-APPELLANTS

VS

Balage Padmarupa.
Near the Rail Gate,
Welhengoda,
Ahangama.

APPLICANT-RESPONDENT

AND NOW BETWEEN

1. P.P. Gunawardena.
   Sarath Gunawardena Mawatha,
   Wewala,
   Hikkaduwa.

2. Sidath Charuka Gunawardena.
   Sarath Gunawardena Mawatha,
   Wewala,
   Hikkaduwa.

   (Appearing through his Power of Attorney holder Buddhika

Nilushan Ukwatta at C/FO 03 98/62, Richmmond Hill Residencies, Wekunagoda, Galle.)

RESPONDENTS- APPELLANTS-APPELLANTS

VS

Balage Padmarupa.

Near the Rail Gate,

Welhengoda,

Ahangama.

APPLICANT-RESPONDENT-RESPONDENT

BEFORE : S. THURAIRAJA, PC, J;

A.L. SHIRAN GOONERATNE, J &

JANAK DE SILVA, J.

COUNSEL : Chathura Galhena with Viduri Sulakkana instructed by Dharani Weerasinghe for the Respondent-Appellant-Appellant.

Chamara Nanayakkarawasam for the Applicant-Respondent-Respondent.

WRITTEN SUBMISSIONS: Respondent-Appellant-Appellant on 31st May 2010.

Applicant-Respondent-Respondent 25th September 2023.

ARGUED ON : 03rd October 2023.

DECIDED ON : 15th February 2024.

S. THURAIRAJA, PC, J.

The Applicant-Respondent-Respondent (hereinafter "the Applicant") filed an application in the Labour Tribunal on 14th August 2015, alleging the Respondent-Appellant-Appellant (hereinafter "the Respondent") to have unjustly terminated his services. The Appellant sought *inter alia* reasonable compensation against the unjust termination, gratuity for a service period of 15 years, cost and such other reliefs as the Court deems fit and reasonable. The Respondent pleaded that no relief should be granted to the Applicant as no termination of services had taken place and moved that the application be dismissed.

The Labour Tribunal following an inquiry, by its order dated 28th September 2017 decided the case in favour of the Applicant and granted compensation equivalent to the salary of 36 months. Being dissatisfied with the said order, the Respondent invoked the appellate jurisdiction of the Provincial High Court of Southern Province holden in Galle (hereinafter referred to as "the High Court") under section 31DD of the Industrial Disputes Act (as amended) and the High Court pronounced its judgment on 22nd July 2020. The learned High Court Judge in his judgment, *inter alia,* upheld the order of the President of the Labour Tribunal on the basis that the findings of the Tribunal were correct. Being dissatisfied with the said order the Respondent filed a leave to appeal application and after the matter was supported, leave was granted on the following questions of law:

"

(a) Did the President of the Labour Tribunal and the Provincial High Court misdirected themselves in deciding that the Respondent-Appellant-Petitioners had unjustly terminated the services of the Applicant-Respondent-Respondent?

(b) Did the Provincial High Court misdirected in deciding that the learned President of the Labour Tribunal has correctly calculated the quantum of compensation?"

[sic]

Factual Matrix

The Applicant's position was that he was employed in a business named 'Hotel Francis' managed by the Respondents since the year 2000, and in the year 2015, the said hotel was closed down, whereupon the Applicant was deemed to have been terminated from the employment. The position of the Respondents was that there was no termination but due to the ill health of the 2nd Respondent who managed the hotel, they were compelled to close down the business and all other employees except the Applicant had accepted compensation, but the Applicant without accepting the compensation has gone to the Labour Tribunal alleging unlawful termination of his services.

The learned President of the Labour Tribunal has based his entire finding on the basis that the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 as amended (hereinafter sometimes referred to as "TEWA") should apply in the event a business was closed down, and the termination of the Applicant amounts to an unlawful termination due to the Respondent's failure to comply with the Act before closing down the business.

> "සේවකයන් සිටින ආයතනයක් වසා දමන්නේ නම් ලංකාවේ වලංගු නීතියට කළ යුතු ක්‍රියා පටිපාටියක් හඳුන්වා දී ඇති අතර එනම් අනුව එය සේවකයන්ගේ සේවය අවසන් කිරීමේ පනත යටතේ කම්කරු කොමසාරිස් වරයාට දැනුම් දී අදාල ක්‍රියා මාර්ග ගැනීමයි
>
> *[When closing a business with employees, a procedure has been introduced by the prevailing law in Sri Lanka and that is to inform the Commissioner of Labour and follow the relevant procedure under Termination of Employment of Workmen Act]*"
>
> "ආයතනය වසා දැමීම නිසා ඉල්ලුම් කරුගේ සේවය අවසන් වී ඇති බව ද එසේ වසා දැමීමට ක්‍රියා කිරීම කාලයක සිට සිදු වූ ක්‍රියාවක් වීම මත ක්ෂණීව පාලනයෙන් තොරව සිදු වූ සිද්ධියක් නොවන බැවින් (පූර්වාපේක්ෂණය කළ හැකි ක්‍රියාවක් බැවින්) එසේ වසා දමන්නේ නම්

මා මුලින් සඳහන් කරන ලද පරිදි සේවකයන්ගේ සේවය අවසන් කිරීමේ පනත යටතේ ක්‍රියා කළ යුතු නමුත් එසේ ක්‍රියා නොකරමින් ආයතනය ඒක පාර්ශ්වික ව වසා දමා ඉල්ලුම්කරුගේ සේවය අවසන් කිරීම සිදු කිරීම අසාධාරණ හා අයුක්ති සහගත බවට තීරණය කරමි

[The applicant's employment has ended due to the closure of the establishment and the said closure is an action that has taken place over a period of time and is not an abrupt uncontrolled event (as it was a foreseeable act). I am of the view that it is unfair and unjust to unilaterally close down the institution and terminate the service of the applicant without acting under the Termination of Employment of Workmen Act.]"

[Approximate translations added]

It is submitted by the Respondent that the learned President of the Labour Tribunal in applying the TEWA, has failed to consider the limitation imposed by the provisions of the Act itself. In that, Section 3(1)(a) of the Act becomes relevant insofar as the applicability of the Act is concerned.

Section 3(1)(a) of the Act provides;

"*The provisions of this Act, other than this section, shall not apply to an employer by whom less than fifteen workmen on an average have been employed during the period of six months preceding the month in which the employer seeks to terminate the employment of a workman.*"

It is to be noted that the learned President of the Labour Tribunal has failed to give due consideration to the provision of the Act where it states that the TEWA applies only to a business in which there were more than fifteen (15) employees on an average during the period of preceding six (6) months. According to the evidence of the

Applicant himself, there have been less than fifteen (15) persons employed by the business of the Respondents.

ප්‍ර: කවුද හිටියෙ?

[Q: who was there?]

උ: සේවකයින් හිටියා.

[A: There were workers]

ප්‍ර: කී දෙනෙක් හිටියාද?

[Q: How many were there?]

උ: 5 ක් 6 ක්.

[A: 5 or 6]

ප්‍ර: ඔක්කොම සේවකයින් කීයක් විතර ඉන්නවා ද ඔය ආයතනයෙ ?

[Q: In total, how many workers were there in that business?]

උ: ඒ කාලයේ සිට 40 ක් විතර.

[A: About 40 from those days]

ප්‍ර: ඒ අවුරුද්දෙ?

[Q: In that year?]

උ: 7 ක්

[A: 7]

According to the evidence of the 2nd Respondent the said position has been confirmed.

ප්‍ර: හෝටලය වහන අවස්ථාව වන විට සේවකයන් කීයක් සේවය කළා ද?

[Q: At the time of closing the hotel, how many workers were there?]

උ: 5 ක් හෝ 6 ක්

[A: 5 or 6]

In this backdrop, the Counsel for the Respondent submitted that the learned President of the Labour Tribunal has applied the TEWA without considering the applicable

provisions in the Act. The entire finding of the Labour Tribunal President is based on this incorrect legal application and, hence, the finding of the President of the Labour Tribunal regarding the unlawful termination cannot stand. Accordingly, I answer the 1st question of law in the affirmative.

In the second ground of appeal, it was contended the calculation of compensation to be neither rational nor justifiable due to the following reasons:

i. At the time of giving evidence in the year 2016, the Applicant was 73 years old and the closing down of the business took place in the year 2015 when he was 72 years old.
ii. The Applicant in his evidence has stated that he could have worked for a few more years despite his old age.
iii. Soon after the closure of the business, he had found alternative employment with a higher salary.

As I observed, in the judgment of the Provincial High Court, the learned High Court Judge has also made the same erroneous findings regarding the applicability of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 as well as the calculation of compensation. Furthermore, I am of the view that, even though the judgment of ***Up Country Distributors (Private) Limited v. Subasinghe*** **(1992) 2 SLR 330** has been cited in the judgment of the Provincial High Court, the factors that need to be considered in calculating compensation have been misapplied.

The parameters set out in the said case, namely:

a. the nature of the employer's business and his capacity to pay,
b. the employee's age, and
c. the nature of his employment,

have not been properly applied in justifying the calculation of compensation.

In ***Ceylon Transport Board v. A.H. Wijerat*ne (1975) 77 NLR 481** at 498, Vythialingam J., after careful analysis of the law and the just and equitable concept, held as follows:

> *"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 calculation of compensation is subjective and it depends on several factors such as the type and nature of employment, period served, past conduct of the employee, contribution to the employer/establishment, future prospects, type of offence committed or the reason for termination. Moreover, when computing the compensation, the Tribunal should be mindful of the age of the Applicant, the service he had rendered as well as his capacity for future employment.

As discussed in this case, when the age of the employee is considered, he is far beyond the age of retirement of a public or private sector employee. Where the nature of the business and ability to pay compensation is considered, it was established that the business has been closed down and the 2nd Respondent is terminally ill even at the time of giving evidence which itself was the reason to close down the business. Where the present employment of the Applicant was considered, he is already employed elsewhere for a higher salary which makes him further disqualified for compensation since he has not sustained a financial loss by not being employed by the Respondents.

When all the totality of the above facts are taken into account, it shows that the learned High Court Judge has dismissed the appeal without taking into consideration the proper legal and factual merits of the case. Hence, I answer the 2nd question of law, too, affirmatively.

Furthermore, as I have previously noted, the question of law concerning the applicability of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 (as amended) to the business of the Respondents has not been duly analysed by the learned High Court Judge. The Respondents-Appellants-Appellants, having had 6 or 7 employees during the time of closure and several months before that, cannot be placed within the ambit of the Act. The said error or failure in analysis by the learned High Court Judge is an error which goes to the root of the case. Accordingly, the said decision cannot stand.

Decision

In the said circumstances, for the foregoing reasons, I am of the view that the findings of the learned President of the Labour Tribunal and the learned High Court Judge of the Provincial High Court of Galle with regard to the applicability of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 (as amended) is erroneous. Further, I am of the view that the learned Judge of the Provincial High Court has misdirected himself in deciding that the learned President of the Labour Tribunal has correctly calculated the quantum of compensation.

As such, both questions of law are answered in the affirmative.

However, in altering the aforementioned errors committed by the learned President of the Labour Tribunal and learned High Court Judge, this Court must, too, give an order that is fair, just and reasonable in the eyes of a reasonable man. It would not be desirable nor would it be fair, just and reasonable for employers to simply terminate the services of an employee without prior notice where such termination is plainly foreseeable as was in the instant case.

I accordingly alter the order made with regard to the compensation directing the Respondents-Appellants-Appellants to pay the Applicant-Respondent-Respondent, *ex gratia*, a sum equivalent to the salary of one month at the time of termination.

Appeal Allowed.

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

1. Rev. E.H. Palitha
   Mission House, Liyanwala, Padukka.

1A. Rev. Ranjan Karunaratne
   Maithri Christ Church,
   Preeman Mawatha, Anuradhapura.

2. Raja Uswetakeiyawa
   No.10/1, Kotugodella Street, Kandy.

3. Cyril Piyasena Wijayahewa
   No.646/1 A, Henawatte Road,
   Gonawala, Kelaniya.

4. Dharmadasa Kumarage,
   No.306/47,
   Thalawathugoda Road, Madiwela, Kotte.

5. Munisami Nesamani
   Danibar Mawatha, Hatton.

The Trustees of Christian Labour
Brotherhood of No.39, YMBA Building,
Bristol Street, Colombo 01.
Plaintiff-Respondents-Appellants

SC/APPEAL/30/2022
SC/HCCCA/LA/40/2021
WP/HCCA/MT/25/2017/F
DC MT. LAVINIA 2832/14/L

Vs.

Kurugamage Kingsley Perera,
No.10/1, Attidiya Road, Ratmalana.
Defendant-Appellant-Respondent

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

Counsel: Samantha Vithana with Nishanthi Mendis and Samudika de Silva for the Plaintiff-Respondent-Appellants.
Mokshini Jayamanne for the Defendant-Appellant-Respondent.

Written Submissions:
By the Plaintiff-Respondent-Appellant on 02.08.2022
By the Defendant-Appellant-Respondent on 24.11.2023

Argued on: 28.11.2023

Decided on: 31.01.2024

Samayawardhena, J.

The plaintiffs filed this action in the District Court of Mt. Lavinia seeking a declaration of title to the land described in the 5th schedule to the plaint, ejectment of the defendant therefrom and damages. On the summons returnable date (29.05.2014), a proxy was filed on behalf of the defendant. The District Court fixed 10.07.2014 to file the answer. However, on 10.07.2014 the defendant being absent and unrepresented, the Court fixed the case for *ex parte* trial. Following the *ex parte* trial, the judgment was entered in favor of the plaintiff, and the *ex parte* decree was duly served on the defendant. The defendant filed an application in terms of section 86(2) of the Civil Procedure Code to vacate the *ex parte* decree. At the inquiry, the registered Attorney for the defendant and the defendant himself gave evidence. After the conclusion of the inquiry, the learned District Judge by order dated 26.01.2017 refused to vacate the *ex parte* judgment and dismissed the application of the defendant. On

appeal, the High Court of Civil Appeal of Mt. Lavinia set aside the said order and directed the District Court to accept the answer and continue with the case. The plaintiffs are before this Court against the judgment of the High Court of Civil Appeal. This Court granted leave to appeal against the said judgment on the question whether the judgment of the High Court is contrary to law and against the weight of the evidence led before the District Court.

This appeal revolves around a question of fact, not law. Learned counsel for both parties accept that under section 86(2) of the Civil Procedure Code the defaulting defendant needs only to satisfy Court that "he had reasonable grounds for such default" in order to get the *ex parte* judgment and decree vacated.

Section 86(2) of the Civil Procedure Code 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.*

The only reason given on behalf of the defendant at the inquiry into the purging default was that the instructing Attorney for the defendant mistakenly heard the date to file the answer as 16.07.2014 instead of 10.07.2014. Both counsel agree that, if this reason is acceptable, the *ex parte* judgment shall be vacated. It is for this reason, I stated that this appeal concerns a question fact, not law.

As learned counsel for the defendant emphasises in the written submissions, the learned District Judge dismissed the defendant's application on the basis that the defendant's version cannot be believed.

It is important to note that the whole evidence at the inquiry was led before the District Judge by whom the impugned order was delivered. In the well-written order running into 14 pages, the learned District Judge has meticulously analysed the evidence and came to the conclusion that she cannot accept the evidence of the instructing Attorney on the mishearing of the date given for the answer.

Let me now consider the basis on which the High Court reversed the order of the District Judge. The High Court order virtually runs into two pages, and the relevant part reads as follows:

> *The reason adduced for the defendant under section 86(2) of the Civil Procedure Code is that the Attorney at Law of the defendant Mr. Thushara Nilantha Daskon heard the date as 16.07.2014 and so entered in his diary. He has given evidence and he has produced his diary.*
>
> *But the learned district judge has not believed this and had not vacated the ex parte judgment and the decree. It appears that one of the reasons as to why the learned district judge did not believe the above evidence is that Mr. Daskon has written in his diary under 10.07.2014 as 'Kamkaru Sevana Case'. The explanation given was however that he is having a consultation about 05 or 06 days previous to the date of the action and that entry related to such a consultation.*
>
> *Another reason that the learned district judge did not believe the said evidence is that the defendant stating in evidence that the answer was prepared in the month of August. However this evidence*

> *does not become conclusive since the answer bears the date 26th of July 2014. Although this is also considered as an indication that false evidence is given it could be that the defendant who is not a professional mistakenly thought that the answer was prepared in the month of August and that for 16th of July the answer mistakenly was dated as 26th of July.*
>
> *The provisions of section 86(2) reads as "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".*
>
> *Hence it appears to this court that the defendant has by evidence adduced sufficiently established that he had a reasonable ground for the default.*

The High Court only highlights two reasons for disbelieving the defendant's version by the trial Judge. I do not venture to enumerate other reasons given by the learned District Judge in her 14-page order for her inability to accept the defence version. Assuming those are the only two reasons given, can the High Court sitting in appeal reverse the said findings of fact of the District Judge in the manner it did in this appeal?

The High Court does not explain why the trial Judge was wrong in refusing to accept the explanation provided by the Attorney for writing down "Kamkaru Sevena case" on 10.07.2014 (the date the case was called for filing the answer) in his professional diary. The High Court has

not analysed the evidence at all but says "*Hence it appears to this court that the defendant has by evidence adduced sufficiently established that he had a reasonable ground for the default*". To say the least, this is very unsatisfactory.

It is trite law that, the findings of fact of the trial judge who has the priceless advantage of seeing and hearing witnesses giving evidence, thereby getting the opportunity to observe *inter alia* the demeanour and deportment of the witnesses, are regarded as sacrosanct and should not be lightly disturbed **unless there are compelling reasons**. There are no live witnesses before the appellate Court but only printed evidence. It is important to bear in mind that the trial Judge has the benefit of assessing the evidence in its overall context to reach the final decision, unlike the piecemeal approach adopted in presenting the case before the appellate Court.

One of the issues before the Court of Appeal of the United Kingdom in the recent case of *Musst Holdings Ltd v. Astra Asset Management UK Ltd* [2023] EWCA Civ 128 was whether novation could be inferred from the conduct of the parties involved in the case. Falk J. at paras 69-70 stated:

> *The question whether a novation can be inferred from the parties' conduct is a question of fact, with which this court will not lightly interfere. The judge had the benefit, which we do not, of a consideration of all the evidence. It is quite clear from his decision that he took careful account of the evidence as a whole in reaching his conclusions. This was not simply a question of looking at a few emails and invoices and determining that they amounted to an offer and acceptance. The judge explained that he was considering the documents to which he referred in their context. As Musst correctly emphasised, this was an evaluative exercise. The comment made by David Richards LJ in UK Learning Academy v. Secretary of State for*

> *Education [2020] EWCA Civ 370 at [41] bears repeating: "As has been frequently said, the trial judge is in the best position to assess the evidence not only because the judge sees and hears the witnesses but also because the judge can set the evidence on any particular issue in its overall context. This is true also of an assessment of what a particular document would convey to a reasonable reader in the position of the party who received it, having regard to all that had preceded it."*

In *Pickford (A.P) v. Imperial Chemical Industries PLC* [1998] 3 All ER 462, the House of Lords held that the Court of Appeal should not have interfered with the decision of the trial Judge that the appellants are not liable to the respondent in damages because the respondent had not discharged the onus of proving, as it was necessary to prove, that the pain she suffered due to excessively long periods of typing was organic in origin. Lord Hope of Craighead opined:

> *In the second place, the judge had the advantage of seeing and hearing all the medical evidence. The majority of the Court of Appeal said that they were well aware of the rules which define the approach which an appellate court should adopt in these circumstances. But they did not apply them as they should have done in the circumstances. As Lord Bridge of Harwich said in Wilsher v. Essex Area Health Authority [1988] AC 1074, 1091, the advantage which the trial judge enjoys is not confined to conflicts of primary fact on purely mundane matters between lay witnesses. In this case the medical experts were at odds with each other about complex issues which were particularly difficult to resolve as no pathology for the condition known as PDA4 has yet been demonstrated. They were examined and cross examined on these issues over several days. Their demeanour and the manner which*

they gave their evidence was before the judge, who saw and heard them while they were in the witness box. All the Court of Appeal had before them was the printed evidence.

In *Peter Johan Devries and Another v. Australian National Railways Commission and Another* (1993) 112 ALR 641 the question before the High Court of Australia (the apex Court in Australia) was whether the Full Court of the Supreme Court of South Australia erred in setting aside a finding of a trial Judge that the plaintiff had been injured as the result of the defendants' negligence in circumstances where the trial judge had accepted the plaintiff's evidence as to how the injury occurred. The High Court answered this question in the affirmative and allowed the appeal. Brennan, Gaudron and McHugh JJ. stated at paras 10-11:

More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against - even strongly against - that finding of fact (See Brunskill (1985) 59 ALJR 842; 62 ALR 53; Jones v. Hyde (1989) 63 ALJR 349; 85 ALR 23; Abalos v. Australian Postal Commission (1990) 171 CLR 167). If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge "has failed to use or has palpably misused his (or her) advantage" (S.S. Hontestroom v. S.S. Sagaporack (1927) AC 37, at p 47) or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable" (Brunskill (1985) 59 ALJR, at p 844; 62 ALR, at p 57).

The evidence of the plaintiff was not glaringly improbable. Nor was it inconsistent with facts incontrovertibly established by evidence.

> *Indeed, the plaintiff's account received much support from the evidence of his wife and his fellow worker. The learned trial judge dealt in detail with the inconsistencies between the plaintiff's evidence and his out-of-court statements. No ground exists for concluding that the judge failed to use or palpably misused his advantage.*

In *Munasinghe v. Vidanage* (1966) 69 NLR 97 the Privy Council quoted with approval the following part of the speech of Viscount Simon in *Watt or Thomas v. Thomas* (1947) AC 484 at 485-486:

> *If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.*

In *Munasinghe's* case the Privy Council stated that the Supreme Court should not have reversed the findings of the trial judge who heard and saw the witnesses giving evidence because it was a case of complicated facts and there was a good deal to be said on each side and the findings

of the trial judge were not unreasonable. The Privy Council restored the judgment of the trial Court.

Fradd v. Brown & Co. Ltd (1918) 20 NLR 282 is a similar case where the Privy Council quashed the judgment of the Court of Appeal and restored the judgment of the trial Court because the whole case depended upon the veracity and trustworthiness of the witnesses who gave evidence at the trial. The Privy Council stated at 282-283:

> *Accordingly, in those circumstances, immense importance attaches, not only to the demeanour of the witnesses, but also in the course of the trial and the general impression left on the mind of the Judge present, who saw and noted everything that took place in regard to what was said by one or other witness. It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance.*

Vide also *Dharmatilleke Thero v. Buddharakkita Thero* [1990] 1 Sri LR 211, *Alwis v. Piyasena Fernando* [1993] 1 Sri LR 119.

However, I must emphasise that this does not absolve the appellate Court from its responsibility when it is fully convinced that the trial judge has clearly erred in evaluating the evidence. Many injustices may lurk in factual mistakes, surpassing errors of law.

It is in this context Ranasinghe J. (later C.J.) in *De Silva v. Seneviratne* [1981] 2 Sri LR 7 at 17 stated:

> *On an examination of the principles laid down by the authorities referred to above, it seems to me: that, where the trial judge's findings on questions of fact are based upon the credibility of witnesses, on the footing of the trial judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration, and will be reversed only if it appears to the appellate Court that the trial judge has failed to make full use of the "priceless advantage" given to him of seeing and listening to the witnesses giving viva voce evidence, and the appellate Court is convinced by the plainest consideration that it would be justified in doing so: that, where the findings of fact are based upon the trial judge's evaluation of facts, the appellate Court is then in as good a position as the trial judge to evaluate such facts, and no sanctity attaches to such findings of fact of the trial judge: that, if on either of these grounds, it appears to the appellate Court that such findings of fact should be reversed, then the appellate Court "ought not to shrink from that task".*

In *Fox v. Percy* [2003] HCA 22, Callinan J. in the High Court of Australia stated at para 142:

> *Statements made by appellate judges about findings of fact by trial judges repeatedly emphasize the advantages attaching to an opportunity to hear and see witnesses. They tend to understate or even overlook that appellate courts enjoy advantages as well: for example, the collective knowledge and experience of no fewer than three judges armed with an organized and complete record of the proceedings, and the opportunity to take an independent overview of the proceedings below, in a different atmosphere from, and a less urgent setting than the trial.*

In the instant case, the registered Attorney marked the page of his professional diary for the date 16.07.2014 as P2 to show that the case number relevant to this case is mentioned under that date among other case numbers. The witness was cross-examined on the basis that it was an interpolation and an afterthought. Thereafter, the counsel for the plaintiffs (having perused the diary) marked the page for 10.07.2014 (the correct date on which the case was to be called) as V1 where it is mentioned "Kamkaru Sevana Case" in English. The witness admits that "Kamkaru Sevana Case" refers to the present case but his explanation was that it is a reference to his discussion about the case with his senior counsel about 5-6 days before the due date, which he usually does. The counsel *inter alia* has shown to the witness the entry for 21.07.2014 wherein it is written "Galle case" without a case number, which the witness has admitted as a case to appear on that date. It indicates that describing the case without the case number does not necessarily imply anything other than Court appearance.

ප්‍ර: ඔබ සඳහන් කළා මෙම ගරු අධිකරණයට සෑම විටම නඩු අංකයකින් තමයි මෙම දිනපොතේ සඳහන් කරන්නේ කියලා මෙම නඩු තිබෙන කොට?

උ: එහෙමයි

ප්‍ර: 2014.07.21 දින ඔබ සඳහන් කරනවා Galle case කියලා?

උ: එහෙමයි

ප්‍ර: ඔබ පෙනී සිටින නඩුවල නඩු අංකය නොමැතිව අදාළ අධිකරණයේ නඩුවක් කියන එක පමණක් ඔබ සඳහන් කරනවා ඔබගේ දිනපොතේ?

උ: එහෙමයි.

ප්‍ර: ඒ ආකාරයට ඔබ මෙම අධිකරණයේ මෙම නඩුව පිළිබඳව ඔබගේ දිනපොතේ 2014.07.10 වන දින පැහැදිලිවම සඳහන් කර තිබෙනවා

උ: කම්කරු සෙවන කේස් යනුවෙන් සඳහන් කර තිබෙනවා.

ප්‍ර: ඔබගේ සාක්ෂි අනුව මූලික සාක්ෂියේදී ඔබ විසින් සඳහන් කළ කරුණු අසත්‍යයක් කියා යෝජනා කරනවා?

උ: ප්‍රතික්ෂේප කරනවා.

Notwithstanding that the witness was an Attorney-at-Law, the learned District Judge by giving reasons has disbelieved the witness that he mistakenly heard the date to file the answer as 16.07.2014 instead of 10.07.2014 taking all the evidence led before her in its overall context. I cannot say that it is unreasonable or perverse. The trial Judge was entitled to come to the conclusion that she did on this issue of fact, and it was quite impossible for the High Court to substitute its own finding of fact on it unless there were cogent reasons that warrant such interference. The High Court in this case has manifestly failed to give such reasons.

In my view, on the facts and circumstances of this case, the High Court of Civil Appeal should not have cavalierly interfered with the factual findings of the trial Judge and reversed the order.

I answer the question of law upon which leave to appeal was granted in the affirmative. I set aside the judgment of the High Court of Civil Appeal dated 27.11.2020 and restore the judgment of the District Court. The plaintiffs are entitled to costs in all three Courts.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.

I agree.

Judge of the Supreme Court

<u>IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA</u>

Wilson Ekanayake,
Bandarawatta, Pebotuwa.
<u>Plaintiff-Appellant-Appellant</u>

SC APPEAL NO: SC/APPEAL/31/2020
SC HCCA LA NO: SC/HCCA/LA/157/2018
HCCA NO: SG/HCCA/RAT/32/2017(FA)
DC RATNAPURA NO: 16233/L

<u>Vs.</u>

1. Negiri Kande Piyaratne,
Bandarawatta, Pebotuwa.
2. Negiri Kande Nomis (Deceased)
Bandarawatta, Pebotuwa.

2A. G.K. Alice Nona,
Bandarawatta, Pebotuwa.

2C. Negiri Kande Anulawathie,
B-E/36, Bandarawatta, Pebotuwa.

2D. Negiri Kande Soma Ranjanie,
Diwulgaspitiya, Dematuluwa,
Kurunagala.

2E. Negiri Kande Nimal Padmasiri,
B-E/36, Bandarawatta, Pebotuwa.
<u>Defendant-Respondent-Respondents</u>

Before: Hon. Justice P. Padman Surasena
Hon. Justice Janak De Silva
Hon. Justice Mahinda Samayawardhena

Counsel: Anuruddha Dharmaratne for the Plaintiff-Appellant-Appellant.
Wasantha Atapattu for the Defendant-Respondent-Respondents.

Written Submissions:
By the Plaintiff-Appellant-Appellant on 11.05.2020
By the Defendant-Respondent-Respondents on 01.02.2021

Argued on: 22.06.2023

Decided on: 22.02.2024

Samayawardhena, J.

The plaintiff filed this action in the District Court of Ratnapura against the two defendants seeking a declaration of title to and ejectment of the defendants from Lot 16 of the Final Partition Plan No. 1723 prepared in partition case No. 3494.

The plaintiff claimed title to Lot 16 by Deed of Transfer No. 1100 dated 04.11.1992. The transferor was one Alice Nona, the 5th defendant in the said partition case, who was allotted the said Lot by the Final Decree of Partition dated 08.07.1988.

When the partition action was in progress, Alice Nona transferred her undivided rights of the land to the two defendants in this case by Deed No. 3728 dated 21.11.1986.

The defendants filed answer seeking dismissal of the plaintiff's action and a declaration that they are the owner of Lot 16 by Deed No. 3728 and on prescription.

The District Court entered judgment for the defendants only on prescription.

On appeal, the High Court of Civil Appeal set aside the judgment of the District Court on the basis that the defendants have not proved prescriptive title to Lot 16. However, the High Court entered judgment for the defendants on the basis that Deed No. 3728 executed pending partition was valid.

At the argument before this Court, learned counsel for both parties agreed to confine the argument to the following question of law:

> *Did the High Court of Civil Appeal err in law by failing to consider that Deed No. 3728 was executed in violation of section 66(1) of the Partition Law and therefore null and void?*

There is no dispute that Deed No. 3728 was executed after the *lis pendens* was registered but before entering the Final Decree of Partition, whereas Deed No. 1100 was executed after entering the Final Decree of Partition.

In terms of section 66 of the Partition Law, No. 21 of 1977, voluntary alienations made after a partition action is duly registered as a *lis pendens* are void.

> *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.

The main reason for this prohibition is the potential disruption that may be caused by alienating parts of the land at frequent intervals, making it a challenging task to reach finality in a partition action. (*Baban v. Amarasinghe* (1878) 1 SCC 24, *Annamalai Pillai v. Perera* (1902) 6 NLR 108, *Subaseris v. Prolis* (1913) 16 NLR 393, *Hewawasan v. Gunasekere* (1926) 28 NLR 33, *Srinatha v. Sirisena* [1998] 3 Sri LR 19 at 23)

However, it is now well-settled law that this prohibition against alienation does not apply to contingent interests in the land (those that might ultimately be allotted to the grantor in the final decree) being alienated pending partition. Section 66 only prohibits the alienation of undivided interests presently vested in the owners. (*Louis Appuhamy v. Punchi Baba* (1904) 10 NLR 196, *Sillie Fernando v. Silman Fernando* (1962) 64 NLR 404, *Karunaratne v. Perera* (1965) 67 NLR 529, *Sirinatha v. Sirisena* [1998] 3 Sri LR 19, *Abusali Sithi Fareeda v. Mohamed Noor* (SC APPEAL/134/2013, SC Minutes of 28.10.2014)

In the case of *Kahan Bhai v. Perera* (1923) 26 NLR 204 at 208, a Full Bench of the Supreme Court presided over by Bertram C.J. with the agreement of Ennis, Schneider, Garvin JJ., and Jayawardene A.J. held that "*Persons desiring to charge or dispose of their interests in a property subject to a partition suit can only do so by expressly charging or disposing of the interest to be ultimately allotted to them in the action.*"

In the Privy Council case of *Gunatilleke v. Fernando* (1921) 22 NLR 385, it was held:

> *Under the Roman-Dutch law a vested interest in remainder can be alienated. Similarly, an alienation of a contingent interest is not prohibited, and an instrument purporting to alienate such an interest is not null and void.*

In *Sirisoma v. Sarnelis Appuhamy* (1950) 51 NLR 337 at 341, a Divisional Bench of the Supreme Court presided over by Gratiaen J. with the agreement of Dias S.P.J. and Pulle J., having considered almost all the previous decisions including *Kahan Bhai v. Perera*, took the view that the prohibition against alienation pending partition need not be interpreted overly broadly.

> *Section 17 of the Partition Ordinance prohibits the alienation or hypothecation of undivided interests presently vested in the owners of a land which is the subject of pending partition proceedings. There is no statutory prohibition against a person's common law right to alienate or hypothecate, by anticipation, interests which he can only acquire upon the conclusion of the proceedings. That right is in no way affected by the pendency of an action for partition under the provisions of the Ordinance. "Section 17 imposes a fetter on the free alienation of property, and the Court ought to see that that fetter is*

> *not made more comprehensive than the language and the intention of the section require". Subaseris v. Prolis (1913) 16 NLR 393*

This view was confirmed by Gratiaen J. with the concurrence of Pulle J. in *Wijesinghe v. Sonnadara* (1951) 53 NLR 241 where it was held:

> *The sale by a co-owner in land of whatever interests might ultimately be allotted to him under the decree in a pending partition action may be construed as a conventio rei speratae. In such a case, if some benefit, even to a far smaller extent than the parties had originally hoped for, accrued to the seller under the partition decree, the purchaser is not entitled to claim a cancellation of the sale on the ground of failure of consideration.*

Nevertheless, the grantee of such contingent interest need not be made a party to the case as he has no vested interest pending partition. The contingent interest would only mature into a vested interest upon the entering of the final decree of partition, provided the grantor is allotted a lot in severalty. (*Nazeer v. Hassim* (1947) 48 NLR 282, *Karunaratne v. Perera* (1965) 67 NLR 529, *Abeyratne v. Rosalin* [2001] 3 Sri LR 308)

If a contingent interest is alienated pending partition without any conditions, the lot in severalty allotted to the grantor will automatically pass and vest in the grantee upon the entering of the Final Decree of Partition. However, in practice, another Deed is often executed for better manifestation of the intention of the grantor, although it is not strictly necessary.

In *Sirisoma v. Sarnelis Appuhamy* (1950) 51 NLR 337, Gratiaen J. stated at 343:

> *[W]hen an instrument has been executed whereby a present right is conveyed in respect of a contingent interest which the parties to the*

> *transaction expect to be realised at some future date, the instrument already executed operates so as to vest that interest in the purchaser as soon as it has been acquired by the vendor. No further conveyance is needed to secure the intended result – although it may well be desirable, as is often stipulated by prudent conveyancers, that the result already achieved should be "confirmed" in a further notarial instrument which will place the purchaser's rights beyond the possibility of controversy.*

In *Sillie Fernando v. Silman Fernando* (1962) 64 NLR 404, the 2nd defendant claimed certain soil rights, plantations and a thatched house in the land to be partitioned. Prior to the entering of the interlocutory decree, the 2nd defendant, by a Deed of Gift, donated to his natural children born to his mistress, the 41st defendant-appellant, the soil, plantations and the thatched house which would be allotted to him ultimately by the final decree. The 2nd defendant died before the entering of the final decree and his wife and legitimate child, namely, the 39th and 40th defendants, were respectively substituted in place of him. In the final decree the soil shares of the 2nd defendant, the plantations and the thatched house as a lot in severalty, were allotted to the substituted defendants, and they moved for a writ of possession against the 41st defendant and her children who were in possession. This was allowed by the District Judge. On appeal, the Supreme Court set aside that order and stated at 404-405:

> *It has been held by this Court in Sirisoma v. Sarnelis Appuhamy (1950) 51 NLR 337 and by a fuller Bench at a later stage, that, when a deed purports to sell or donate an undivided interest in a land, whatever will be allotted to the vendor or donor by a final decree in a partition action, the lot in severalty allotted to the vendor or donor or those representing him will automatically pass and vest in the*

> *vendee or donee under the deed in question, without any further conveyance, either by the vendor or donor or by his representatives.*
>
> *In view of this position, the moment a final decree was entered in this case allocating the thatched house, plantations and the lot in severalty to the representatives of the 2nd defendant in consequence of the terms of the deed Z1, title to that lot in severalty vested under the donees in Z1, namely, a life interest or usufruct in favour of the 41st defendant-appellant and title or donarium in her children.*

What did the High Court Judge say about Deed No. 3728 executed by Alice Nona pending partition?

> *However in accordance to the above-mentioned case Sirinatha vs. Sirisena (supra), whatever the rights will be allotted to the original owner Alice Nona by the final decree of the partition action, the lot in severalty finally allotted to her, will automatically pass and vest in the defendants. Therefore the lot No 16 of the final plan of the partition action, which is the land in suit in this case automatically vested to the defendants without any further conveyance by the original owner Alice Nona or his representatives.*

What did Alice Nona transfer to the defendants by Deed No. 3728?

> *ඉහතකී විකුණුම්කාර මට, ඩී. පී. ඇස්. රාජපක්ෂ ප්‍රසිද්ධ නොතාරිස් මහතා සහතික කළ අංක 5591/1924.06.06 දරණ තෑගි ඔප්පුව පිට අයිතිව නිරවුල්ව බුක්ති විඳ ගෙන එන, සබරගමු පලාතේ රත්නපුර දිස්ත්‍රික්කයේ නවදුන් කෝරළයේ මැද පත්තුවේ පැබොටුවේ පිහිටි, බන්ඩාර මහවත්ත නමැති උතුරට ගඟ ද, නැගෙනහිරටත් ගඟ ද, දකුණට ගලගාව දෙනිය ද, බස්නාහිරට ගල සහ ගොරොක්ගහ වත්ත ද, මායිම් වූ කුරක්කන් සේරු විසිපහක පමණ වපසරි ඉඩමෙන් සහ ඊට අයිති පලතුරු ගහකොලාදියෙනුත් නොබෙදූ එකසිය විස්සෙන් එකොලොස් පංගුව (11/120) වේ.*

It is abundantly clear that Alice Nona did not transfer "*whatever the rights will be allotted to the original owner Alice Nona by the final decree of partition action*" as the High Court Judge claims. Alice Nona transferred her undivided rights on the land subject to partition, which is in direct violation of section 66(1) of the Partition Law. In terms of section 66(2), such alienations are void, not voidable.

Conversely, by Deed No. 1100, Alis Nona transferred to the plaintiff not undivided or contingent interests in the land, but specifically Lot 16 of the Final Partition Plan No. 1923.

I answer the question of law reproduced above in the affirmative. The judgments of the High Court of Civil Appeal and the District Court are set aside. The District Judge will enter judgment for the plaintiff as prayed for in paragraphs (a) and (b) of the prayer to the plaint. On the facts and circumstances of this case, I make no order as to costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Janak De Silva, J.
I agree.

Judge of the Supreme Court

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

DFCC Bank,
No. 73/5,
Galle Road,
Colombo 01.
Petitioner

SC/APPEAL/33/2019
SC/HCCA/LA/448/2018
WP/HCCA/COL/155/2017/LA
DC COLOMBO NO: DSP/241/14

Vs.

Warnakulasuriya Chandima Prasad
Rajitha Fernando,
'Sarani Aquarium'
No. 297,
Kolinjadiya West,
Wennappuwa.
Respondent

AND BETWEEN

Warnakulasuriya Chandima Prasad
Rajitha Fernando,
'Sarani Aquarium'
No. 297, Kolinjadiya West,
Wennappuwa.
Respondent-Petitioner

Vs.

DFCC Bank,
No. 73/5, Galle Road,
Colombo 01.
Petitioner-Respondent

AND NOW BETWEEN

DFCC Bank,
No. 73/5, Galle Road,
Colombo 01.
Petitioner-Respondent-Appellant

Vs.

Warnakulasuriya Chandima Prasad
Rajitha Fernando,
'Sarani Aquarium'
No. 297, Kolinjadiya West,
Wennappuwa.
Respondent-Petitioner-Respondent

Before: Hon. Chief Justice Jayantha Jayasuriya, P.C.
Hon. Justice Achala Wengappuli
Hon. Justice Mahinda Samayawardhena

Counsel: Nigel Hatch, P.C. with Siroshni Illangage for the Petitioner-Respondent-Appellant.
L.P.A. Chithrangani for the Respondent-Petitioner-Respondent.

Argued on: 09.02.2023

Written Submissions:

By the Petitioner-Respondent-Appellant on 12.03.2019 and 10.04.2023

By the Respondent-Petitioner-Respondent on 24.04.2019 and 10.03.2023

Decided on: 26.02.2024

Samayawardhena J.

The short matter to be decided on this appeal is whether a right of appeal lies against an order made under section 16 of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990. Section 16 provides for the delivery of possession of the property. In the impugned order dated 19.11.2018, the High Court of Civil Appeal of Colombo, for the first time, determined that a right of appeal lies against such an order. Hence this appeal by the appellant bank.

In *Sunpac Engineers (Private) Limited v. DFCC Bank and Others* (SC/APPEAL/11/2021, SC Minutes of 13.11.2023) a Seven Judge Bench of this Court held that the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, is a special Act passed by Parliament aiming at revitalising the country's economy by facilitating speedy recovery of debts by non-judicial sales and the Act applies to any property mortgaged to the bank as security for any loan in respect of which default has been made irrespective of whether the mortgagor is the borrower or a third party. There is no need to highlight that this is a special Act and is a departure from the established law and procedure because it is expressly stated in the Act itself. Where there are provisions in a special Act which are inconsistent with the general law and procedure, the general law and procedure must yield to the provisions of the special Act.

I must state at the outset that if the view of the High Court of Civil Appeal is to be accepted, the purpose of the legislation and the intention of the legislature will seriously suffer. The mortgagor against whom an order for delivery of possession is made, will resort to ordinary appellate procedure jeopardizing the early finality of the litigation.

Section 16 of the Recovery of Loans by Banks (Special Provisions) Act reads as follows:

> *16(1) 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 situate, and upon production of the certificate of sale issued in respect of that property under section 15, be entitled to obtain an order for delivery of possession of the that property.*
>
> *(2) Every application under subsection (1) shall be made and shall be disposed of, by way summary procedure, in accordance with the provisions of Chapter XXIV of the Civil Procedure code; and on all documents filed the purpose of each such application and on all proceedings held thereupon, stamp duties and other charges shall be payable at the respective rates payable under any written law for the time being in force on applications for, and proceedings connected with, or incidental to, the execution of a decree of a District Court for the delivery of possession of any immovable property of the same value as the property to which such application relates.*
>
> *(3) Where any immovable property sold in pursuance of the preceding provisions of this Act in the occupancy of the borrower or some person on his behalf or of some person claiming under a title created by the borrower subsequently to the mortgage of the*

property to the bank the District Court shall order delivery to be made by putting the purchaser or any person whom he may appoint to receive possession on his behalf, in possession of the property.

(4) Where any immovable property sold in pursuance of the preceding provisions of this Act is in the occupancy of tenant or other person entitle to occupy the same, the District Court shall order delivery to be made by affixing a notice that the sale has been taken place, in the Sinhala, Tamil and English languages, in some conspicuous place on the property, and proclaiming to the occupant by beat of tom-tom or any other customary mode or in such manner as the court may direct, at some convenient place, that the interest of the borrower has been transferred to the purchaser. The cost of such proclamation shall be fixed by the court and shall in every case be prepaid by the purchaser.

(5) Every order under subsection (3) or subsection (4) shall be deemed, as the case may be, to be an order for delivery of possession made under section 287 or section 288 of the Civil procedure Code, and may be enforced in like manner as an order so made, the borrower and the purchaser being deemed, for the purpose of the application of any provisions of that Code, to be the judgment-debtor and judgment-creditor, respectively.

Under section 16(1), the Court is not expected to have a full trial or full inquiry and make an order on the merits of the substantive case, if any. The Court makes a perfunctory order for delivery of possession upon production of the certificate of sale. The intervention of the Court is sought at this stage primarily to prevent the breach of peace in the execution of a non-judicial order.

The main contention of the respondent is that section 23 of the Judicature Act, No. 2 of 1978 as amended by Act No. 37 of 1979 provides for the right of appeal against any order or judgment of the District Court. Hence, a right of appeal is available against orders made under section 16 of the Recovery of Loans by Banks (Special Provisions) Act as well. This is not a novel argument taken up for the first time in this appeal.

> *23. Any party who shall be dissatisfied with any judgment, decree, or order pronounced by a District Court may (excepting where such right is expressly disallowed) appeal to the Court of Appeal against any such judgment, decree, or order from any error in law or in fact committed by such court, but no such appeal shall have the effect of staying the execution of such judgment, decree, or order unless the District Judge shall see fit to make an order to that effect, in which case the party appellant shall enter into a bond, with or without sureties as the District Judge shall consider necessary, to appear when required and abide the judgment of the Court of Appeal upon the appeal.*

It is trite law that section 23 of the Judicature Act provides for a right of appeal only in respect of judgments and orders of the District Court made in the exercise of its ordinary civil jurisdiction and has no application when the Court exercises special jurisdiction unless the specific statute conferring such special jurisdiction expressly provides for an appeal. The right of appeal is a creature of a statute. It is not an inherent right. Without a statutory provision explicitly creating such a right the aggrieved party is not entitled to file an appeal. It cannot be assumed, implied, or inferred. If there is no right of appeal, there is no room for leave to appeal because, when leave is granted, it transforms into an appeal. Nevertheless, revision remains unaffected.

In the leading Supreme Court case of *Bakmeewewa, Authorised Officer of People's Bank v. Konarage Raja* [1989] 1 Sri LR 231 at 237-238, Justice G.P.S. de Silva (as His Lordship then was) made this abundantly clear in the following terms.

> *Section 23 of the present Judicature Act is similar to the provisions contained in section 73 of the repealed Courts Ordinance. Section 23 occurs in Chapter IV of the Judicature Act which spells out the civil jurisdiction of the District Courts. In my opinion section 23 of the Judicature Act provides for a right of appeal in respect of judgments or orders of the District Court made in the exercise of its ordinary, general, civil jurisdiction and has no application to the special jurisdiction conferred on the District Court as in the instant case. As already stated, the jurisdiction exercised by the District Court in terms of sections 72(7) and 72(8) of the Act is the jurisdiction of a Court of execution in respect of an extra judicial order. It is basically not different from the jurisdiction exercised by the Magistrate's Court in proceedings for the recovery of taxes in default under the Income Tax Ordinance. It is settled law that there is no right of appeal from an order made by a Magistrate's Court in such proceedings – vide Commissioner of Income Tax vs. De Vos (35 NLR 349) and De Silva vs. Commissioner of Income Tax (53 NLR 280, 282). The fact that there is no right of appeal does not mean that an aggrieved party is left without a remedy, for revision is available.*

In *Martin v. Wijewardena* [1989] 2 Sri LR 409 at 419, the Supreme Court made a similar pronouncement in the invocation of the appellate jurisdiction of the Court of Appeal under Article 138 of the Constitution. Similar to section 23 of the Judicature Act, Article 138 of the Constitution should also be understood subject to limitations.

Article 138(1) of the Constitution reads as follows:

The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First Instance, tribunal or other institution may have taken cognizance:

Justice Jameel with the agreement of Chief Justice Ranasinghe and Justice Amarasinghe stated at page 419:

In the light of these authoritative statements it is not possible to accept the contention that there is implied in Article 138 an unfettered "RIGHT OF APPEAL" to the Court of Appeal. Nor, is it possible to accept the contention that this alleged "RIGHT OF APPEAL" under this Article 138 is only fettered to the extent provided for in the Constitution or other Law. An Appeal is a Statutory Right and must be expressly created and granted by statute. It cannot be implied. Article 138 is only an enabling Article and it confers the jurisdiction to hear and determine appeals to the Court of Appeal. The right to avail of or take advantage of that jurisdiction is governed by the several statutory provisions in various Legislative Enactments. That is to say, for appeals from the regular courts, in the Judicature Act, and the Procedural Laws pertaining to those courts. For the various Tribunals and other Quasi-Judicial Bodies, in the respective statutes that created them. For these reasons the question formulated by the Court of Appeal is answered in the Negative. Section 18 of the Agrarian Services Act, No. 58 of 1979 does not provide for nor does it create a Right of Appeal in a tenant

> *cultivator, who is aggrieved by the Order of the Commissioner to pay up his arrears to the Landlord before a stipulated date. Further, Article 138 of the Constitution does not confer on such a tenant cultivator a Right of Appeal.*

Martin v. Wijewardena has consistently been followed in later decisions. *Vide Gamhewa v. Maggie Nona* [1989] 2 Sri LR 250, *Gunaratne v. Thambinayagam* [1993] 2 Sri LR 355, *Malegoda v. Joachim* [1997] 1 Sri LR 88, *Bandara v. People's Bank* [2002] 3 Sri LR 25, *The People's Bank v. Camillus Perera* [2003] 2 Sri LR 358.

In *Jayawardena v. Sampath Bank* [2005] 2 Sri LR 83 at 84-85, Justice Amaratunga applied the above principles of law in the invocation of jurisdiction of the District Court under section 16 of the Recovery of Loans by Banks (Special Provisions) Act.

> *The Act No. 4 of 1990 had been passed in order to permit the Banks defined in it to resort to parate execution to recover the loans granted by those Banks. The Act does not contain a provision bringing in the provisions of the Civil Procedure Code to cater to situations not covered by the provisions of the Act. Section 16 enables a purchaser to apply to the District Court to obtain an order for the delivery of possession. That is the only instance under the Act where recourse to ordinary courts is permissible. Section 16 or any other provision of Act No. 4 of 1990 do not provide that an appeal, direct or with leave, is available against an order made under Section 16. A right of appeal must, be specifically provided for. Such a right cannot be implied. Martin vs. Wijewardana [1989] 2 Sri LR 409. In the absence of a specific right of appeal given by Act No. 4 of 1990 and in the absence of any provision in Act No. 4 of 1990 incorporating the provisions of the Civil Procedure Code, there is no right to make an application for leave to appeal.*

Dismissing the application for leave to appeal, in *Dassanayake v. Sampath Bank* [2002] 3 Sri LR 268, Justice Nanayakkara at 269-270 stated:

> *The question at issue is whether the petitioner is entitled to come by way of leave to appeal seeking redress, which he has prayed for in his petition against an order made by the District Judge under section 16 of the Recovery of Loans by banks (Special Provisions) Act, No. 4 of 1990.*
>
> *A careful analysis of the provisions of the said Act makes it evident that the jurisdiction exercised by the District Court under the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, is in the nature of special jurisdiction created by the Act.*
>
> *As far as section 16(1) of the said Act is concerned, it provides for expeditious mode of recovery of the property, which has already been vested in the purchaser by an issuance of certificate of sale in terms of the provisions of the said Act. The right of appeal is a statutory right; unless it is expressly created and provided by the Statute, it cannot be implied or inferred.*

Quoting with approval the above dicta, in *Raj Motha v. Hatton National Bank* (CA/APPEAL/495/2001, CA Minutes of 30.09.2004) Justice Imam stated:

> *The Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 which is a special law does not provide for a right of appeal to any forum.*

In *Jayasundera v. Hatton National Bank* (CA/1479/2004, CA Minutes of 05.08.2005), Justice Somawansa stated:

> *[Under section 16 of Act No. 4 of 1990] the District Court is vested with special jurisdiction to deliver vacant possession of property referred to in the certificate of sale. Once a certificate of sale is issued by the board of directors of the licensed commercial bank the procedure in entertaining the disposing of such application is by way of summary procedure as set out in the Civil Procedure Code. Thus it is seen that only certain sections of the Civil Procedure Code which deals with the execution of the decree are applicable in respect of execution of such order. In the circumstances with reference to section 16 of the Act No. 4 of 1990 the District Court is vested with special jurisdiction to execute an extra judicial act done by the board of directors of a bank which is not a function of the District Court in exercising its ordinary civil jurisdiction of a District Court. Unfortunately for the respondent-petitioner provisions of section 16 or any other connected section in the aforesaid special law do not create a right of appeal to any person aggrieved by the order of the learned District Judge.*

The question whether appeal is available against an order of the District Court made under section 16 of the Recovery of Loans by Banks (Special Provisions) Act was authoritatively answered in the negative by the Supreme Court in *Hatton National Bank v. Thejasiri Gunethilake* [2016] 1 Sri LR 276. In that case Justice Anil Gooneratne with the agreement of Chief Justice Dep and Justice Abeyratne held at 284-285:

> *G.P.S. de Silva J. (a former Chief Justice) in Bakmeewewa, Authorised Officer of People's Bank Vs. Konarage Raja [1989] 1 Sri LR 231 held in a case under the Finance Act that the jurisdiction exercised by the District Court is a special jurisdiction. Case discussed therein is very similar to the case in hand and held further that Section 72(7) and 72(8) of the said law provide for a speedy*

mode of obtaining possession of premises, which have already vested in the Bank by virtue of the vesting order. He further held that an application made to the District Court and the provisions of Chapter 24 of the Civil Procedure Code are invoked solely for the purpose of executing an extra judicial order. To make it very clear a distinction has been made by G.P.S. de Silva J. and he observes that Section 23 of the Judicature Act provides for a right of appeal in respect of Judgment of the District Court made in the exercise of its ordinary, general, civil jurisdiction and has no application to the special jurisdiction conferred on the District Court.

In the above circumstances the Petitioner Bank is entitled to execute the writ notwithstanding the notice of appeal. Act No. 4 of 1990 has not provided for a right of appeal against an order made by the District Court in terms of Section 16 of the said Act. Martin Vs. Wijewardena [1989] 2 Sri LR 409 at 420 Jameel J. held an appeal is a statutory right and must be expressly created and granted by statute. It cannot be implied. The law is clear and I would say it is trite law on the point as in Section 16(1) of the said Act. The method followed by the Petitioner Bank to regain possession of the land in dispute cannot be faulted in any respect.

Section 16(1) of the Act no doubt provides, upon production of the certificate of sale issued in respect of that property under Section 15, entitle the Petitioner Bank to obtain an order for delivery of possession of that property. Wording in Section 16(1) is almost similar to Section 72(7) of the Finance Act No. 16 of 1973. Both statutes require the production of the vesting order or the certificate of sale as the case may be. Both statutes in this way provides for delivery of possession of property and so enacted by the legislature to expedite such delivery of possession. Certificate of sale is

> *conclusive proof in respect of that property and as regards its sale being duly complied with in terms of the Act. As such the certificate of sale cannot be challenged, if and when it is issued in terms of the said Act.*
>
> *The law as contemplated in Act No. 4 of 1990, and as amended, need to be strictly interpreted. The words employed by the said statute cannot be given any extended meaning other than to achieve the purpose of the statute. As such as observed in this Judgment the intention of the legislature was to expedite debt recovery under a special jurisdiction exercised by the District Court.*

When the law was well-settled that (a) section 23 of the Judicature Act provides for a right of appeal only in respect of judgments and orders of the District Court made in the exercise of its ordinary civil jurisdiction and has no application in instances where the District Court exercises special jurisdiction unless a right of appeal is expressly provided for in the Act; (b) the District Court exercises special jurisdiction in making orders for delivery of possession under section 16 of the Recovery of Loans by Banks (Special Provisions) Act; (c) the summary procedure is adopted in this process solely for the purpose of executing an extra judicial order; and (d) the Act does not provide for a right of appeal against an order made by the District Court in terms of section 16 of the Act, there is absolutely no justification in accordance with the doctrine of *stare decisis* for the High Court to give a different interpretation to the statutory provisions and come to a conclusion that is opposite to the well-settled law which stands to reason.

As held by a Five Judge Bench of this Court in *Indrani Mallika v. Siriwardena* (SC/APPEAL/160/2016, SC Minutes of 02.12.2022) *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). 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.

As Timothy Endicott, Hafsteinn Dan Kristjánsson and Sebastian Lewis state in the recent book titled *Philosophical Foundations of Precedent* (Oxford University Press, 2023) at page 2:

> *The unity that legal systems tend to impose on themselves offers a crucial initial step in a justification of following precedent in law. The legal unification of judicial agency may involve a hierarchy, and may allow dissenting judgments, but it secures finality and a non-contradictory form of ordering. In that unification of agency, judges tend not to be free to disregard what other judges have done. The judges who serve on a court tend to act as representatives of a single, institutional agency. That tendency generates expectations that the court will act consistently, and a sense of responsibility on the part of judges to do so. The decision of the court is seen as an action of the same agency that reached a decision yesterday, or years ago. Adherence to precedent not only makes the system look unified; it tends to make the system look timeless, conferring the stability, reliability, and consistency that are crucial elements in the rule of law.*

Nevertheless, there are exceptions to this doctrine. One such exception is the previous decision being given *per incuriam.* A decision *per incuriam* is one given in ignorance or forgetfulness of the law laid down in a statute or binding precedent, which, if considered, would have resulted in a different decision. It is important to bear in mind that a decision will not be regarded as *per incuriam* merely because a subsequent Court believes that the law had been misinterpreted in the previous decision. For the

previous decision to be regarded as *per incuriam*, the fault must derive from ignorance of statutory law or binding authority.

In the instant appeal, the High Court does not state that superior Courts have decided that there is no right of appeal against the orders of section 16 of the Recovery of Loans by Banks (Special Provisions) Act, in ignorance of relevant statutory provisions or binding precedent but rather on the basis that the statutory provisions have not been correctly interpreted and applied. Although the High Court does not use the term *per incuriam*, it has decided the appeal on that basis. I do not think that in the previous decisions, the statutory provisions have been misinterpreted. They have been correctly interpreted in line with the purpose of the Act and the intention of the legislature. Even if the said statutory provisions have not been correctly interpreted by the Superior Courts, High Court could not have come to a different conclusion as the judgments of the Superior Courts bind the lower courts in accordance with the doctrine of *stare decisis*. The High Court of Civil Appeal has exceeded its jurisdiction.

The High Court states that section 16 of the Act does not lay down a "special procedure" but provides for the application of "summary procedure" and therefore there is a right of appeal to the dissatisfied party. Firstly, the High Court may have conflated "special jurisdiction" alluded to by Justice G.P.S. de Silva in *Bakmeewewa* with "special procedure". Secondly, the Superior Courts, particularly Justice Somawansa in *Jayasundera v. Hatton National Bank* and Justice Anil Gooneratne in *Hatton National Bank v. Thejasiri Gunethilake* held that the entire chapter XXIV of the Civil Procedure Code on summary procedure is inapplicable and the limited function of the District Court in this instance is to act as a court of execution in respect of an extra judicial order made by the Board of Directors of the bank.

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

> *14(a). Has the High Court erred in law in disregarding and/or failing to apply the fundamental legal principle that no right of appeal lies unless expressly conferred by statute which said legal principle has been followed in Sri Lanka for almost a century?*
>
> *14(b). Has the High Court erred in law in disregarding and/or failing to follow and apply the case law decided by the Court of Appeal that no right of appeal has been conferred against an Order made under Section 16 of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 (as amended)?*
>
> *14(c). Has the High Court erred in law in failing to judicially consider and/or misdirected itself in law in applying the case law cited by the Petitioner which have held that the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 (as amended) is a special law and does not provide for a right of appeal?*
>
> *14(d). Has the High Court erred in law in failing to take cognizance of the legislative intention of Parliament which provided for a right of appeal in the Debt Recovery (Special Provisions) Act No. 2 of 1990 (as amended) but did not provide for a right of appeal in the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 (as amended) which establishes that there is no right of appeal under Act No. 4 of 1990?*
>
> *14(e). Has the High Court erred in law in disregarding and/or failing to follow the principle of stare decisis where the High Court of the Western Province Holden in Colombo (exercising appellate jurisdiction) is bound by the decisions of the Court of Appeal and Supreme Court?*

14(f). Has the High Court erred in law in analyzing the case law and drawing a distinction between special and ordinary jurisdiction exercised by the District Court and holding that no right of appeal exists from an Order made by the District Court exercising special jurisdiction unless expressly conferred by statute and in doing so completely disregarding the case law cited which specifically held that the District Court exercises special jurisdiction under the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 (as amended) which does not confer a right of appeal?

The respondent raised the following question of law:

Has the legislature introduced the principle that prohibitions must not be presumed under section 23 of the Judicature Act with regard to the right of appeal?

The appellant's questions of law are answered in the affirmative. The respondent's question of law is answered in the following manner: "Section 23 of the Judicature Act is applicable when the District Court pronounces judgments and orders in the exercise of its ordinary civil jurisdiction and not in instances where it exercises special jurisdiction."

The impugned order of the High Court of Civil Appeal is set aside. The preliminary objection raised by learned President's Counsel for the appellant bank that, the application for leave to appeal filed against the order of the District Court made under section 16 of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 is misconceived in law, is upheld. There is no right of appeal against an order of the District Court made under section 16 of the aforesaid Act. The application for leave to appeal shall stand dismissed. The appellant is entitled to costs in all three courts.

As agreed, the parties in the connected case No. SC/APPEAL/34/2019 will abide by this judgment.

Judge of the Supreme Court

Jayantha Jayasuriya, P.C., C.J.

I agree.

Chief Justice

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court

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

In the matter of an application for Special Leave to Appeal under Article 128(2) of the Constitution

SC/APPEAL No. 35/2016
SC/SPL/LA No. 09/2014
CA NO. 555/2000(F)
DC Bandarawela No. 174/RE

1. Mrs. Hyacinth Sita Seneviratne of 24 Aloe Avenue, Colombo 03 (a Trustee of "The Dassanayake Trust") (Deceased)

2. Dr. Mackingsley Gamini Dassanayake, J. C. R. 42, University Road, Highfield, Suthampton S09 5NH England (A Trustee of "The Dassanayake Trust") by his Attorney in Sri Lanka Mrs. Hyacinth Sita Seneviratne of 24, Aloe Avenue, Colombo 03 (Deceased)

3. Sarathchandra Bandara Ehelepola Seneviratne of 4420, Hawthrone Street, Washinton D. C United States of America, (A Trustee of "The Dassanayake Trust") by his Attorney in Sri Lanka Mrs. Hyacinth Sita Seneviratne of 24, Aloe Avenue, Colombo 03 (Deceased)

Plaintiffs

Vs.

1. Kader Ibrahim Mohamed Marzook
   50/1, Railway Station Road,
   Haputale
2. Jailabdeen Jaleel
3. Nageswary Arumugam
4. Miss N. Krishasamy (full name not known)
5. N. Kumaresmoorthy (full name not known) all of
   No. 9, Thambipilliai Avenue,
   Haputale.

Defendants

AND

Dr. Mackingsley Gamini Dassanayake of
No. 24, Aloe Avenue,
Colombo 03.

2nd Plaintiff-Appellant

Vs

1. K. I. Mohamed Marzook of
   No. 50/1, Railway Station Road,
   Haputale

2. Jailabdeen Jaleel of
   No. 9, Thambipilliai Avenue,
   Haputale

Defendants-Respondents

Mrs. Haycinth Sita Seneviratne of 24 Aloe Avenue, Colombo 03

(a Trustee of "The Dassanayake Trust")
(Deaceased)

1st Plaintiff-Respondent

Sarathchandra Bandara
Ehelepola Seneviratne of
4420, Hawthrone Street,
Washinton D. C
United States of America,

3rd Plaintiff-Respondent

3. Nageswary Arumugam
4. Miss N. Krishasamy
5. N. Kumaresmoorthy all of
   No. 9, Thambipilliai Avenue,
   Haputale

Defendants-Respondents

AND NOW BETWEEN

K. I. Mohamed Marzook of
No. 50/1, Railway Station Road,
Haputale.

1st Defendant- Respondent-Petitioner

Vs.

Dr. Mackinsley Gamini
Dassanayake of
No. 24, Aloe Avenue,
Colombo 03.
(Deceased)

2nd Plaintiff-Appellant-Respondent

2A. Thamara Kumari Ramani Dassanayake, nee Tennekoon, No. 24, Aloe Avenue, Colombo 03

2AA. Mackingsley Kushan Dassanayake, No. 24, Aloe Avenue, Colombo 03

Plaintiffs-Appellants-Respondents

Jailabdeen Jaleel of
No. 9, Thambipilliai Avenue,
Haputale
(Deceased)

2nd Defendant-Respondent

Mrs. Hyacinth Sita Seneviratne of
24 Aloe Avenue, Colombo 3

(a Trustee of "The Dassanayake Trust"
(Deceased)

1st Plaintiff-Respondent-Respondent

Sarathchandra Bandara
Ehelepola Seneviratne of
4420, Hawthrone Street,
Washington D. C
United States of America,

3rd Plaintiff-Respondent-Respondent

3. Nageswary Arumugam
4. Miss N. Krishasamy

5. N. Kumaresmoorthy all of
   No. 9, Thambipilliai Avenue,
   Haputale

Defendants-Respondents-Respondents

Before : Priyantha Jayawardena PC, J
A. L. Shiran Gooneratne, J
K. Priyantha Fernando, J

Counsel : Shantha Jayawardena with H. Damunupola, Sanjana de Zoysa and Wihangi Thiseru for the Defendant-Respondent-Appellant

: Kaushalya Nawaratne, PC with Ms. Mohotti and E. Sandungahawatta instructed by NW Associates for the Respondents.

Argued on : 6th of February, 2024

Decided on : 29th of February, 2024

Priyantha Jayawardena PC, J

This is an appeal from a judgment of the Court of Appeal, which allowed the appeal and set aside the judgment of the District Court dated 6th of September, 2000.

The 2nd Plaintiff-Appellant-Respondent (hereinafter referred to as the "2nd plaintiff") along with the 1st plaintiff (now deceased) and the 3rd Plaintiff filed the above style action in the

District Court of Bandarawela as trustees of the "Dassanayake Trust" against the 1st Defendant-Respondent-Appellant (hereinafter referred to as the "1st defendant"), the 2nd defendant(now deceased) and three other defendants *inter alia*, praying for ejectment on the ground of subletting the premises described in the schedule to the plaint.

In the plaint dated 29th of August, 1988, the plaintiff pleaded that without their written consent the 1st defendant sublet the premises, at No. 9, Thambipilliai Avenue, Haputale described in the schedule to the plaint to the 2nd to 5th defendants in January, 1998.

The 1st and 2nd defendants filed an answer and denied the allegation of subletting the premises. It was pleaded that the 2nd defendant was the brother-in-law of the 1st defendant, and the 3rd to 5th defendants were unknown and fictitious persons. Accordingly, the 1st and 2nd defendants prayed for the dismissal of the plaint with costs.

Summons could not be served on the 3rd to 5th defendants and therefore, the action against them was withdrawn by the plaintiffs. Hence, the District Court made an order to proceed only against the 1st and 2nd defendants.

Moreover, the said house had five rooms, and is subject to the Rent Act No. 7 of 1972. Further, the 2nd defendant who is the brother-in-law of the 1st defendant was also occupying the premises in suit with his family.

After an inter-parte trial, the learned District judge delivered the judgment and dismissed the plaint. In the said judgment it was *inter alia* held that the plaintiff has not proved the case on a balance of probability.

Being aggrieved by the said judgment the plaintiffs appealed to the Court of Appeal. After hearing the appeal, the Court of Appeal set aside the judgment of the District Court and allowed the appeal by judgment dated 29th November, 2013. In the said judgment, the Court of Appeal held *inter alia;*

> *"During the cross examination of the 1st Respondent, the Appellant has produced a certified copy of the Electoral Register marked P5. According to P5, the 1st Respondent was the chief house holder of premises No. 705A Railway Station Road…Said evidence has clearly shown that during the period relevant to this action, the 1st Respondent was not in occupation of the premises in suit, i.e., No. 09 Thambipillai Mawatha, Haputale. Also it was crystallised*

that the 1st Respondent was in occupation of the premises No. 705A, Railway Station Road.

When I consider the said evidence it is my considered view that the Appellants has led sufficient prima facie evidence to establish that there was subletting by proof of the fact that 2nd defendant was in the premises attend to his own work and that 1st Respondent appeared to have relinquished his control of the premises…

At the trial, the 2nd Respondent has not given evidence. Therefore, it seems that the Respondents have not only failed to challenge the evidence of the Appellants but also to corroborate the evidence of the 1st Respondent. In the said circumstances it can be concluded on a balance of probability that the 1st Respondent has sublet the premises in suit to the 2nd Respondent…"

Furthermore it was held by the learned Judge of the Court of Appeal, who stated;

"the Appellants has led sufficient prima facie evidence establishing that there was subletting by proof of the fact that the 2nd defendant was in the premises attend to his own work and that 1st respondent (Appellant) appeared to have relinquished his control of the premises. The burden must then necessarily shift to the 1st Respondent to explain the presence of the 2nd Respondent"

Being aggrieved by the said judgment of the Court of Appeal, dated 29th of November, 2013 the defendants sought Special Leave to Appeal and this court granted Special Leave to Appeal on the following questions of law:

"(a) *Has the Court of Appeal gravely erred in regard to its evaluation of the evidence in this case particularly in relation to P5 and P6?*

(b) Is there any evidence in this case to establish that the 1st defendant can in law be considered to have sublet the premises in suit or a part thereof to the 2nd defendant?"

Has the 1st defendant sublet the premises in suit or part of it?

The 2nd plaintiff gave evidence at the trial and stated that his deceased father and his sister, the deceased 1st plaintiff, gave the said premises on rent to the 1st defendant. Further, he had visited several times to see the premises in suit.

He further stated that when he went to the said premises along with his sister who is the 1st plaintiff in January 1988, the 1st defendant was not in the said premises. However, the 3rd, 4th and the 5th defendants were occupying two rooms of the said premises. Further, all the other rooms in the home were occupied by the 1st defendant, and the 2nd defendant and his family. Moreover, the 1st plaintiff spoke with the 3rd to 5th defendants, the female Tamil teachers who were residing in the premises, who said that they were residing in that home, and that they paid the rent to the 1st defendant.

Moreover, the plaintiffs produced the Electoral Register for the occupants of the house No. 705A, Station Road, Haputale, in order to establish that the 1st defendant had ceased to occupy the premises in suit.

The 1st defendant gave evidence and said that the premises were let out to him in 1979 by the 1st plaintiff. He stated that the house at Railway Station Road, Haputale was his father's house and that it was given to his elder brother. Hence, he took the premises in suit on rent.

The 1st defendant further stated that he occupied the premises in suit with his mother, his younger sister and her husband who is the 2nd defendant. In the circumstances, he denied that he sublet the said the premises to his brother-in-law, the 2nd defendant or to anyone else.

The 1st defendant admitted under cross-examination that he went to Saudi Arabia for employment in 1982 and had returned in 1984. Thereafter, once again he went to the said country in 1993 and returned in 1994. The 1st defendant stated that he paid the rent and that his younger sister or her husband made no payment whatsoever.

He further stated that he was not occupying his father's house at No. 50/1, Railway Station Road, Haputale until 1979. He also stated that his father died in 1978 and thereafter, his elder brother has been residing in that house with his sisters. However, the 1st defendant admitted that his name was registered in the Electoral Registers for the house at No. 50/1 Railway Station Road, Haputale.

Analysis

The 1st defendant stated that the 2nd defendant was married to his sister and that they were occupying the premises in suit. Although the 1st Defendant had taken up the position that after 1979, he was not residing in the house at No. 50/1, Railway Station Road, Haputale, because his brother got that house from the father, the Electoral Register showed that his name appeared as the Chief Occupant of the said house in the year 1988 along with the 2nd defendant and two others. It is pertinent to note that the summons in the case was served by the process sever on the 1st defendant at No. 50/1, Railway Station Road, Haputale. Further, the caption of the plaint refers to the said address as the address of the defendant.

The oral testimony of the 2nd plaintiff, established that in addition to the 1st defendant there was at least one other family occupying the premises. Further, the 2nd plaintiff produced the Electoral Register to show that the 1st defendant was residing at No. 50/1, Railway Station Road, Haputale. Hence, the burden was shifted to the 1st defendant to explain the nature and the mode of occupancy of the 2nd defendant. A similar view of the burden of proof was discussed in ***Sangadasa vs. Hussain and Another*** **[1999] 2 SLR 395** where it was held;

> *"It is sufficient for a landlord to establish a prima facie case of subletting and the burden them shifts to the tenant to explain the nature of the occupation of the alleged subtenant"*

However, the learned District Judge held that the plaintiff did not prove its case. As stated above, the plaintiffs established a prima facie case that the 1st defendant has sub-let the house to the 2nd defendant and his family. Hence, the learned District Judge erred in law when he held that the plaintiff did not prove the case. It is pertinent to note that the Court of Appeal correctly held that the 1st defendant has sub-let part of the premises to the 2nd defendant. Thus, I am of the view that the Court of Appeal is correct in coming to the aforementioned finding after considering the evidence led at the trial. Accordingly, I answer the following questions of law as follows;

"(a) Has the Court of Appeal gravely erred in regard to its evaluation of the evidence in this case particularly in relation to P5 and P6?"

No

"(b) Is there any evidence in this case to establish that the 1st defendant can in law be considered to have sublet the premises in suit or part thereof to the 2nd defendant?"

Yes

Accordingly, the appeal is dismissed. The District Court judgment is affirmed. No costs.

Judge of the Supreme Court

A. L. Shiran Gooneratne, J
I agree

Judge of the Supreme Court

K. Priyantha Fernando, J
I 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 Provision) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

S.C. Appeal No. 36/2019

SC/HC/CA/LA/No. 401/2017

WP/HCCA/COL/55/2014 (F)

D.C Colombo/4345/LA

U. Don Reginold Felix De Silva
No. 146/32/A, Salmal Place,
Mattegoda.

Defendant-Appellant-Petitioner

Madduma Arachchilage Sadimenike,
No. 146/32/A, Salmal Place,
Mattegoda.

Substituted Defendant-Appellant-Appellant

Vs.

Director (Land) Acquisition Officer,
Road Development Authority,
9th Floor, Sethsiripaya,
Battaramulla.

Plaintiff-Respondent-Respondent

BEFORE : **S. THURAIRAJA, PC, J.**
KUMUDINI WICKREMASINGHE, J.
JANAK DE SILVA, J.

COUNSEL : Kamal Dissanayake with Ms. Sureni Amaratunga, Ms. Purni Karunaratne and Ms. Hasara Matharaarachchi.

Ms. Sabrina Ahmed, SC for the Hon Attorney General as amicus.

ARGUED & DECIDED ON: 29th February 2024

Janak De Silva J.

The corpus forming the subject matter of this appeal was acquired by the State in terms of the Land Acquisition Act. The Defendant-Appellant-Petitioner ("Petitioner") claimed that he had prescriptive title. As there were no claimants to the corpus, the compensation payable was deposited in the National Savings Bank and referred the matter to the District Court in terms of Section 10(1)(b) of the Land Acquisition Act as amended.

The Petitioner made a claim therein based on prescriptive title and Deed of Declaration No. 11966 attested on 26.08.2007. The District Court held that prescriptive title was not proved and dismissed the claim of the Petitioner. This judgment was affirmed by the High Court of Civil Appeal of the Western Province (holden in Colombo).

Leave to appeal was granted on the following questions of law:

(1) Hon. PHC has failed to take cognizance of the fact that the learned Additional District Judge of Colombo has erred in coming to the conclusion that no specific assessment for the identical plot of land, whereas in fact the said 6.51 perch land has been assessed in 1995 as 25/1 Swasthika Gardens, Peliyagoda, and rates had been paid from 1995

(2) Hon. PHC has failed to take cognizance of the fact that the learned District Judge of Colombo has failed to give weight to the fact that that the Petitioner has enjoyed the property for more than 30 years from 1972 and had adequate title and he has commenced paying rates from 1995 onwards

(3) The learned Additional District Judge of Colombo as well as High Court have failed to analyze the fact that the Petitioner has paid rates for the said portion of land and that he has possessed and enjoyed as if he is the owner of the relevant land for more than ten years

Where a party invokes the provisions of Section 3 of the Prescription, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights [*Chelliah v. Wijenathan et al* (54 N.L.R. 337)].

The Petitioner claimed that he was in possession of the corpus from 1972. The corpus is situated North of Lot 6 depicted in P. Plan No. 2995 containing 15 perches in extent claimed by the son of the Petitioner. In fact, this claim was upheld and compensation paid for the said portion of land to the son. Nevertheless, the corpus claimed by the Petitioner is not shown to the North of the said land in the Plan No. 93 made by licensed surveyor M.J. Setunga dated 19.9.1971.

In the Deed of Declaration No. 11966 attested on 26.08.2007, the Petitioner claims to have constructed a corrugated sheets thatched small hut on the corpus in 1973. This claim if proved can certainly be taken in favour of the prescriptive title of the Petitioner. However, Plan No. 3462 made by licensed surveyor B.P. Gangodawila dated 26.05.1980 does not show any construction on the corpus.

In order to establish his prescriptive title, the Petitioner claimed that he had paid assessment rates for the corpus. Nevertheless, the payment receipts tendered in evidence prove only that such rates have been paid from 1995 onwards. The corpus was acquired by the State in 1999.

Moreover, the Deed of Declaration No. 11966 was prepared seven years after the corpus was acquired by the State. The claim of the Petitioner was made only thereafter. The Petitioner has failed to establish his claim of prescriptive title by cogent evidence.

For all the foregoing reasons, I answer all three questions of law in the negative.

Appeal dismissed. Parties shall bear their costs.

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 Appeal against the order dated 2nd April 2018 of the High Court of Northern Province Holden in Jaffna.

SC Appeal 46/2019,
47/2019, 48/2019,
49/2019 and 50/2019

SC (SPL) LA/135/2018,
136/2018, 137/2018,
138/2018 and 139/2018

High Court of Jaffna
Case Nos.
HC/Appeal/2097/2017,
HC/Appeal/2096/2017,
HC/Appeal/2230/2017,
HC/Appeal/2110/2017, and
HC/Appeal/2046/2017

LT Jaffna Case Nos.
LT/JF/23/2016,
LT/JF/12/2016,
LT/JF/16/2016,
LT/JF/11/2016 and
LT/JF/01/2016

1. A. Arunthavam,
   No.112,
   Mill Road,
   Uklangulam,
   Vavuniya.

2. V. Tharsigan,
   Putthur East,
   Sorkathidal.

3. P. Gajamugan,
   Egatiyan,
   Karaveffy East,
   Karaveddy.

4. D. Noyal,
   4th Cross Street,
   Kurthar Kovil Veethy,
   Keeri Mannar.

5. P. Ranjan,
   Kovinthapuram,
   Elavaalai.

Applicants

Vs.

1. Sri Lanka Transport Board,
   Head Office,
   No.200,
   Kirula Road,

Narahenpitiya,
Colombo 05.

2. Inquiry Officer,
   Sri Lanka Transport Board,
   Kondavil (N)
   Jaffna

3. Chairman Appeal Board,
   Sri Lanka Transport Board,
   Kondavil,
   Jaffna.

Respondents

AND BETWEEN

1. Sri Lanka Transport Board,
   Head Office,
   No. 200,
   Kirula Road,
   Narahenpitiya,
   Colombo 05.

2. Inquiry Officer,
   Sri Lanka Transport Board,
   Kondavil (N),
   Jaffna.

3. Chairman Appeal Board,
   Sri Lanka Transport Board,
   Kondavil,
   Jaffna.

Respondents-Appellants

1. A. Arunthavam,
   No.112,
   Mill Road,
   Uklangulam,
   Vavuniya.

2. V. Tharsigan,

Putthur East,
Sorkathidal.

3. P. Gajamugan,
Egatiyan,
Karaveffy East,
Karaveddy.

4. D. Noyal,
4th Cross Street,
Kurthar Kovil Veethy,
Keeri Mannar.

5. P. Ranjan,
Kovinthappuram,
Elavaalai.

Applicants-Respondents

AND NOW BETWEEN

1. Sri Lanka Transport Board,
Head Office,
No. 200,
Kirula Road,
Narahenpitiya,
Colombo 05.

2. Inquiry Officer,
Sri Lanka Transport Board,
Kondavil (N),
Jaffna.

3. Chairman Appeal Board,
Sri Lanka Transport Board,
Kondavil,
Jaffna

Respondents-Appellants-Appellants

1. A. Arunthavam,
   No. 112,
   Mill Road,
   Uklangulam,
   Vavuniya.

2. V. Tharsigan,
   Putthur East,
   Sorkathidal.

3. P. Gajamugan,
   Egatiyan,
   Karaveffy East,
   Karaveddy.

4. D. Noyal,
   4th Cross Street,
   Kurthar Kovil Veethy,
   Keeri Mannar.

5. P. Ranjan,
   Kovinthapuram,
   Elavaalai.

Applicants-Respondents-Respondents

Before : **P. Padman Surasena, J**
Mahinda Samayawardhena, J
K. Priyantha Fernando, J

Counsel :

Ranjith Ranawaka with Kosala H. Perera for the Respondents-Appellants-Appellants.

K. V. S. Ganesharajan with M. Mangaleswary Shanker and Mohan Shabishanth for the Applicants-Respondents-Respondents.

Argued on : 23.10.2023

Written Submissions Tendered On : 20.09.2019 on behalf of the Appellants

15.11.2021 on behalf of the Respondents

Decided on : 31.01.2024

K. PRIYANTHA FERNANDO, J

1. The five appeals mentioned above stems from separate applications that had been made by the five bus conductors namely, *A. Arunthavam, V. Tharsigan, P. Gajamugan, D. Noyal, and P. Ranjan* (hereinafter referred to as the 'applicants') to the Labour Tribunal of *Jaffna* under the Industrial Disputes Act, challenging the termination of their services by the Respondents-Appellants-Appellants (hereinafter referred to as the 'appellants') and claiming reinstatement of their services with back wages and compensation.

2. After trial, the learned President of the Labour Tribunal by his orders held in favour of the applicants, reinstating their employment without a break in services. Thereafter, the appellants appealed against the judgments of the learned President of the Labour Tribunal to the High Court of Northern Province holden in *Jaffna* (hereinafter referred to as the 'High Court').

3. The learned Judge of the High Court by his respective judgments, dismissed the appeals, thus, affirming the order of the learned President of the Labour Tribunal that was made in favour of the applicants.

4. Being aggrieved by the decisions of the learned Judge of the *High Court,* the appellants preferred the instant appeals. On 18.02.2019, this Court granted special leave

to appeal on the questions of law raised in paragraphs 7(i) and (iv) of the petition dated 23.07.2018.

The said questions of law are as follows,

(i) The Honorable High Court Judge has failed to consider that the application to the Labour Tribunal **has not** been submitted within the six months period as required by law. Thus the Labour Tribunal has no jurisdiction to entertain such application. The application should have been rejected in *limine*.

(iv). Have the Honorable High Court Judge erred in law by stating in the said Judgment that, "***It is well settled law that the Labour Tribunals are expected to grant "just and equitable reliefs". It is also necessary to be borne in mind that for the purpose of granting such relief there is no necessity for the Labour Tribunals to follow rigid rules of law".***

5. At the hearing of this case, the learned Counsel for the appellants, as well as the learned Counsel for the applicants, agreed that the questions of law raised in all five appeals are the same, and that, it would suffice for this Court to pronounce one Judgment in respect of all five appeals.

6. The learned Counsel for both the appellants and the applicants made submissions with respect to SC Appeal No.46/2019 during the hearing of this case. As agreed by the learned Counsel, this Judgment shall be binding on all five appeals: SC Appeal No.46/2019, SC Appeal No. 47/2019, SC Appeal No. 48/2019, SC Appeal No.49/2019 and SC Appeal No. 50/2019.

Facts in Brief:

7. The applicant was employed as a bus conductor by the appellants since 01.04.2001 and on the day in question he had been attached to *Mullaitivu Bus Depot*.

8. On 18.05.2015, while the applicant was on duty in the bus bearing Registration No. NC-1127, which had been plying from *Mullaitivu* to *Colombo,* the said bus had been inspected by the flying squad. Upon inspection, the flying squad had filed severed charges of fraud against the applicant.

9. As a result of the charges made against him, the Sri Lanka Transport Board (hereinafter referred to as the 'SLTB') had conducted a disciplinary inquiry into the conduct of the applicant.

10. The applicant had been terminated from his service on **30.09.2015**, upon finding him guilty of the charges at the disciplinary inquiry.

11. The applicant claims that, according to the Disciplinary Code of SLTB, if any employee is informed that he is being terminated after a disciplinary inquiry, that employee would have two opportunities to challenge the decision of the board before initiating action before a Labour Tribunal. Firstly, the employee could file an appeal in the Regional Appeal Board in respect of the correctness of the said decision. Secondly, the employee is given the opportunity to file an appeal to the Chairman of SLTB, whose decision is to be treated as final.

12. Therefore, as the applicant had been aggrieved by the said decision of termination after the disciplinary inquiry, the applicant had appealed to the Appeal Board of SLTB.

However, the original decision made at the disciplinary inquiry had been upheld by the Appeal Board on 23.12.2015. Thereafter, the applicant had then appealed to the Chairman of the SLTB under the provisions of the Disciplinary Code of the SLTB. The applicant claims that he had not received any response whatsoever from the Chairman.

13. While this appeal had been pending before the Chairman, the applicant had lodged an application bearing No. **LT/JF/23/2016** at the Labour Tribunal on **18.07.2016**, against the purported termination on **30.09.2015**.

14. The appellants in the instant case takes the position that the said application made by the applicant to the Labour Tribunal had been made after the time limit of six months clearly stipulated by Section 31B (7) of the Industrial Disputes Act and thereby, the application should have been rejected at the Labour Tribunal.

Written Submissions on Behalf of the Appellants:

15. The learned Counsel for the appellants, highlights the importance of section 31B (7) of the Industrial Disputes Act as a mandatory provision that restricts entertaining any application that has been submitted after 6 months of termination. The learned Counsel submitted that, the learned High Court Judge has totally failed to consider averments 14 and 16 of the petition of appeal where the learned Counsel for the appellants have highlighted the statutory provision of Section 31B (7).

16. Furthermore, the learned Counsel takes the position that the conclusions reached by the learned High Court Judge do not have any legal binding, and submitted that, no

discretionary power is granted to the Labour Tribunal or any Court handling a case under the Industrial Disputes Act to overrule the prescriptive period provided in the Act.

17. Where the learned High Court Judge has stated that there is no necessity for the Labour Tribunals to follow the rigid rules of law, the learned Counsel claims that the Labour Tribunals are compelled to follow the statutory provisions already established by statutes and must deliver a just and equitable decision which is within the law.

18. The learned Counsel submitted that the conclusions made by the learned High Court Judge has gone beyond well accepted norms and practices of the Labour Tribunals. The learned Counsel further submitted that the Labour Tribunals are bound to give an order which is just and equitable to both parties, however, that the Labour Tribunals are bound to comply with the statutory provisions at all times.

19. The learned Counsel contended that the phrase 'just and equitable' has not lent itself to precise definition and has been subject to numerous interpretations. However, the learned Counsel draws the attention of the Court to the cases of *Richard Pieris & Co. Ltd v. Wijesiriwardane (1960) 62 NLR 233, Walkers Sons & Co. Ltd v. Fry (1966) 68 NLR 73, Municipal Council of Colombo v. Munasinghe (1969) 71 NLR 233 and Arnold v. Gopalan (1963) 64 NLR 153* to show that the Labour Tribunals are expected to act within the framework of the Industrial Disputes Act and under no circumstances should they be permitted to go beyond the Act.

Written Submissions on Behalf of the Applicants:

20. With regards to the preliminary objection raised by the appellants, the learned Counsel takes the position that,

the appellants have never made any objection as to the maintainability of the application filed by the applicant before the Labour Tribunal, and that it cannot be raised for the first time during the appeal stage.

21. The learned Counsel further brought the attention of the Court towards the case of ***Somawathie v. Wilmon and Others [2010] 1 SLR 128,*** which lays down conditions that need to be satisfied in order for one to raise a new question of law for the first time in appeal. It was stated that,

> *"After a careful examination of the aforementioned decisions, it was clearly decided in Gunawardena v. Deraniyagala and others (supra), that according to our procedure a new ground cannot be considered for the first time in appeal, if the said point has not been raised at the trial under the issues so framed. Accordingly the Appellate Court could consider a point raised for the first time in appeal, if the following requirements are fulfilled.*
>
> *a. The question raised for the first time in appeal, is a pure question of law and is not a mixed question of law and fact.*
>
> *b. The question raised for the first time in appeal, is an issue put forward in the Court below, under one of the issues raised, and*
>
> *c. The Court which hears the appeal has before it all the material that is required to decide the question."*

22. The learned Counsel submitted that, as the preliminary objection in respect of the time bar was not raised by the appellants in the Labour Tribunal, the conditions laid

down under (b) and (c) were not met. Therefore, the preliminary objection raised by the appellant in this instance cannot be maintained.

Answering to the Questions of Law:

23. Having heard learned Counsel for both parties at the hearing, and at the perusal of all materials including the petition and the written submissions, I shall now resort to answering the questions of law before this Court.

24. It is the position of the learned Counsel for the appellants that, the applications made by the applicants at the Labour Tribunal, have not been done within the time period stipulated by the Industrial Disputes Act. Therefore, the matter is prescribed by law. The learned Counsel contended that the case should have been dismissed in the first instance. However, this objection was only raised at the appeal stage before the High Court. Therefore, it was argued by the learned Counsel for the applicants that, as the appellants have not raised this objection during trial at the Labour Tribunal, they must be refrained from adducing new questions of law during the appellate stage.

25. Generally, a party is not allowed to raise a new question of law in appeal for the first time. However, through case law precedents, it is settled law that a new question of law could be taken up for the first time in appeal. Nevertheless, it is limited strictly to pure questions of law only, and cannot be a question of mixed law and fact.

26. This issue of whether a new question of law could be raised for the first time during an appeal, was considered

by the Supreme Court in the case of ***Talagala v. Gangodawila Co-Operative Stores Society, Limited*** **[1947] 48 N.L.R. 472** by his Lordship, Dias J. , where he stated that,

> *"Where the question raised for the first time in appeal, however, is a pure question of law, and is not a mixed question of law and fact, it can be dealt with."*

27. In the instant case, the objection taken by the appellant in the High Court is that, the action is time-barred. Admittedly, this objection was not taken up at the trial before the Labour Tribunal. The above objection is not on patent lack of jurisdiction. If the objection is not taken, the Labour Tribunal is entitled to go on with the case and decide the matter on the merits as that has happened in the instant case.

28. In the case of ***Don Aruna Chaminda v. Janashakthi General Insurance Limited*** **SC/Appeal No.134/2018**, **S.C.Minute dated 09.10.2019**, his Lordship, Justice E. A. G. R. Amarasekara held that,

> *"…The said submission is only true with regard to a Patent lack of Jurisdiction. In **Baby v Banda (1999) 3 Sri L R 416,** it was held that if the want of jurisdiction is patent and not latent, objection can be taken at any time. The case laws and legal texts quoted above in this judgment clearly indicate that when it is latent want of jurisdiction the objection has to be taken at the earliest opportunity."*

29. **Section 39 of the Judicature Act No.2 of 1978** provides,

> *"Whenever any defendant or accused party shall have pleased 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 courts 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."*

30. In the case of ***Navaratnasingham v. Arumugam and Another*** **[1980] 2 SLR 01 (CA),** his Lordship, Justice Soza held that,

> *"Further the failure to object to jurisdiction when the matter was being inquired into must be treated as a waiver on the part of the 2nd respondent-petitioner. It is true that jurisdiction cannot be conferred by consent. But where a matter is within the plenary jurisdiction of the Court if no objection is taken, the Court will then have jurisdiction to proceed on with the matter and make a valid order."*

31. Further, in the case of ***Don Tilakaratne v. Indra Priyadarshanie Madawala* [2011] 2 SLR 280 at 289**, it was held by his Lordship, Justice Sripavan (as he was then) that,

"Even on a restrictive interpretation of the section, one can conclude that the petitioner is estopped in law from challenging the jurisdiction of the learned Magistrate. It is evident that the petitioner has conceded the jurisdiction of the Court and his failure to object at the earliest opportunity implies a waiver of any objection to jurisdiction."

32. In the case of ***Puwakgahakumbure Gedara William Wijesinghe v. Attorney General and Another,* SC Appeal No. 109/2017, S.C. Minute dated 28.09.2022**, his Lordship, Justice Thurairaja, PC, stated that,

"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.****"*

33. Further, in the case of ***Rajithi Agencies v. Romav Limited and Another*, SC/CHC/Appeal/04/2006,**

S.C. Minute dated 03.04.2018, his Lordship, Justice H.N.J.Perera (as he was then) held that,

"…The defendant has failed to formulate a preliminary issue relating to the jurisdiction of the Court at the commencement of the trial. His failure to move Court to try the said issue as a preliminary issue on such a vital matter will amount to a waiver of objections in regard to lack of jurisdiction of Court to hear and determine the defendant's action. The defendant is deemed to have consented and submitted to the jurisdiction of the Court and he cannot be permitted to challenge the jurisdiction. (Rodrigo V. Raymond (2002) (2) S.L.R.78.)"

34. Furthermore, in the case of ***Don Aruna Chaminda v. Janashakthi General Insurance Limited,*** **SC Appeal No.134/2018, S.C. Minute dated 09.10.2019,** his Lordship, Justice E.A.G.R.Amarasekara highlighted on several other authorities including ***Jaladeen v. Rajaratnam*** **[1989] 2 SLR 201**, ***David Appuhamy v. Yassassi Thero*** **[1987] 1 SLR 233** and the case of ***Edmund Perera v. Nimalaratne and Others*** **[2005] 3 SLR 38**, which held that an objection to jurisdiction must be taken at the earliest opportunity and if no objection is taken the matter is said to be within the plenary jurisdiction of the Court and that failure to take such objection was treated as a waiver.

35. In terms of the above case precedents, it is clear that in the instant case the appellants have failed to take up the

objection on the latent lack of jurisdiction and therefore, the learned President of the Labour Tribunal has delivered the Judgment after going through the full trial on its merits.

36. The appellant is deemed to have waived his right to object for the jurisdiction based on the time bar and he is therefore, precluded in taking the objection in the appellate Court. Hence, the first question of law raised under paragraph 7 (i) has to be answered in the negative.

37. I shall now resort to answering the second question of law raised by the appellant under paragraph 7 (iv) of the petition. In the case of ***Asian Hotels & Properties PLC v. Benjamin and 5 Others*** **[2013] 1 SLR 407 at 414 S.C.Minute 03.09.2012,** her Ladyship, former Chief Justice Dr. Shirani A. Bandaranayake stated that,

> *"It is well settled law that the Labour Tribunals are expected to grant just and equitable reliefs. It is also necessary to be borne in mind that for the purpose of granting such relief there is no necessity for the Labour Tribunals to follow the rigid rules of law."*

38. The case of ***The Bharat Bank Ltd., Delhi v. The Employees' of the Bharat Bank Ltd., Delhi (A. I.R. 1950 S.C. 188)*** had expressed the role of the Labour Tribunals in very clear terms, which reads as follows:

> *"...In settling the disputes between the employers and the workmen, the function of the Tribunal is not confined to administration of justice in accordance with*

law. It can confer rights and privileges on either party, which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or give effect to the contractual rights or obligations of the parties.

… The Tribunal is not bound by the rigid rules of law…"

39. Further, in the case of ***Daniel v. Rickett, Cockrell and Co.*** **[1938] 2 K.B. 322** it was held that, if the Tribunal or the Arbitrator is given the power to decide a mater justly and equitable, it is undoubtedly given a discretion.

40. It was further held by her Ladyship, Bandaranayake CJ in the case of ***Asian Hotels & Properties PLC v. Benjamin and 5 Others*** **[2013] 1 SLR 407 at 414** that,

> *"…What is necessary is to grant just and equitable relief and for this purpose it is essential that the principles of natural justice should be followed. This position was clearly, expressed by Tambiah, J. in* ***The Ceylon Workers Congress v The Superintendent, Kallebokka Estate (****Supra).*
>
> > *"Although, by subjective standards of an employer, a dismissal may be bona fide and just and equitable, nevertheless when looked at objectively, it may be unjust and inequitable…*
> >
> > *Whenever a Tribunal is given the power to decide a matter justly and equitably, it is given a discretion (****Daniel v Rickett****). Therefore the Industrial Disputes Act, as amended, gives a discretion to the Labour Tribunal, to*

make Order which may appear just and equitable and such a jurisdiction cannot be whittled away by artificial restrictions.""

41. For the clear reasons stated above, it could be observed that the learned High Court Judge was correct when he stated that the Labour Tribunals are expected to grant "just and equitable reliefs" and that there is no necessity for the Labour Tribunals to follow rigid rules of law. Therefore, the question of law raised under paragraph 7 (iv) of the petition will also be answered in the negative.

42. Hence, for the foregoing reasons, the respective Judgments of the High Court and the orders of the Labour Tribunal are affirmed.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA.

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 appeal in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, as amended.

SC Appeal No: 48/2021
SC HC (CA) LA No: 216/2020
HCCA Colombo Case No:
WP/HCCA/COL/41/2019(LA)
DC Colombo Case No: DDR/425/2017

Indian Overseas Bank

having its Central Office at No. 763 Anna Salai, Madras (Chennai), India and having a branch at No. 139, Main Street, Pettah, Colombo 11.

PLAINTIFF

vs.

1. Saffany Chandrasekera
   also known as Sappany Chandrasekera

2. Nalini Natasha Chandrasekera

   Both of No. 66B/19, Sri Maha Vihara Road, Kalubowila, Dehiwala

   Carrying on business under the name, style and firm of Cambridge Traders at No. 22E, Quarry Road, Colombo 12.

DEFENDANTS

And between

1. Saffany Chandrasekera
   also known as Sappany Chandrasekera

2. Nalini Natasha Chandrasekera

   Both of No. 66B/19, Sri Maha Vihara Road,
   Kalubowila, Dehiwala

   Carrying on business under the name, style and firm of Cambridge Traders at
   No. 22E, Quarry Road, Colombo 12.

DEFENDANTS – APPELLANTS

vs.

Indian Overseas Bank,

having its Central Office at No. 763 Anna Salai, Madras (Chennai), India and having a branch at
No. 139, Main Street, Pettah, Colombo 11.

PLAINTIFF – RESPONDENT

And now between

1. Saffany Chandrasekera
   also known as Sappany Chandrasekera

2. Nalini Natasha Chandrasekera

   Both of No. 66B/19, Sri Maha Vihara Road,
   Kalubowila, Dehiwala

   Carrying on business under the name, style and firm of Cambridge Traders at
   No. 22E, Quarry Road, Colombo 12.

DEFENDANTS – APPELLANTS – APPELLANTS

vs.

Indian Overseas Bank,

having its Central Office at No. 763 Anna salai, Madras (Chennai), India and having a branch at No.139, Main Street, Pettah, Colombo 11.

PLAINTIFF – RESPONDENT – RESPONDENT

Before: **Vijith K. Malalgoda, PC, J**
Yasantha Kodagoda, PC, J
Arjuna Obeyesekere, J

Counsel: Chathura A. Galhena with Dharani Weerasinghe and Chathuni Peiris for the Defendants – Appellants – Appellants

Priyantha Alagiyawanna with Isuru Weerasooriya and Duminda Premaratne for the Plaintiff – Respondent – Respondent

Argued on: 16th January 2023

Written Submissions: Tendered by the Defendants – Appellants – Appellants on 14th July 2021 and 22nd February 2023

Tendered by the Plaintiff – Respondent – Respondent on 22nd July 2021 and 17th February 2023

Decided on: 23rd January 2024

Obeyesekere, J

The Plaintiff – Respondent – Respondent [the Plaintiff] is a bank duly incorporated in the Republic of India, with a branch office in Sri Lanka. It is a licensed commercial bank within the meaning of the Banking Act, No. 30 of 1988, as amended, and is a lending institution within the meaning of the Debt Recovery (Special Provisions) Act, No. 2 of 1990 [the principal enactment], as amended by the Debt Recovery (Special Provisions) Amendment Act, No. 4 of 1994 [the Amendment Act] [collectively referred to as the Act].

The Defendants – Appellants – Appellants [the Defendants] who are carrying on business under the name, style and firm of 'Cambridge Traders,' were customers of the Plaintiff, and had maintained a current account with the Plaintiff.

Granting of credit facilities to the Defendants

The Plaintiff states that at the request of the Defendants, it issued the Defendants an offer letter dated 2nd July 2012, in terms of which, the Defendants were offered a cash credit facility of Rs. 75 million for a period of 12 months with an option to renew the facility for further periods of 12 months at a time, with interest to be calculated at the Primary Lending Rate [PLR], plus a margin of 1.50% per *annum*, and subject to other terms and conditions set out in the said letter. In essence, what the Defendants had been offered was a permanent overdraft facility.

The said offer letter also provided that the credit facility shall be secured by the personal guarantees of the Defendants and **by the mortgage of an immovable property** situated in Colombo 12, belonging to the 1st Defendant. The Defendants had acknowledged the said offer and thereby the terms and conditions contained therein, by placing their signature on the last page thereof. The assertion of the Plaintiff that the said offer letter contained the written agreement between the parties as contemplated by the Act has not been disputed by the Defendants. Certified copies of the said agreement, personal guarantees of the Defendants and the Mortgage Bond No. 8776 executed on 6th July 2012 to secure the said credit facility of Rs. 75 million and interest thereon had been annexed to the plaint.

It is admitted that:

(a) the Plaintiff permitted the Defendants to avail themselves of the said credit facility of Rs. 75 million through their current account;

(b) the Defendants had maintained the said current account by depositing and withdrawing monies;

(c) the credit facility had been renewed from time to time, with the last renewal for a period of one year having taken place in September 2015.

It is important to note that the loan account was reconciled by the Plaintiff on 30th September 2013, 31st March 2014 and 31st March 2015, with the balance outstanding on each occasion, which comprised of the capital sums of money withdrawn by the Defendants and the interest payable on the capital outstanding, amounting to over Rs. 76 million. The said balances have been communicated in writing to the Defendants and the accuracy thereof as well as the fact that the said sums of money are due and payable to the Plaintiff have been acknowledged in writing by the Defendants. Thus, the Defendants are estopped from disputing the accuracy of the balance outstanding as at 31st March 2015 on the credit facility obtained by them.

Institution of action

The Plaintiff states that even though the Defendants made payments after the renewal of the credit facility in September 2015, such payments were irregular. That the Defendants had defaulted in the settlement of the balance outstanding after the said renewal is reflected in the Statement of Accounts annexed to the plaint. After a series of correspondence between the parties during the period of August 2016 to June 2017 relating to the re-payment of the outstanding sums of money failed to yield any results, the Plaintiff had sent a letter of demand on 2nd September 2017 seeking the payment of:

(a) a sum of Rs. 83,883,674.99, which the Plaintiff claims was the debit balance outstanding as at 24th August 2017; and

(b) interest thereon at the rate of 16.48% per *annum* from 25th August 2017.

I must note that the Defendants failed to respond to the said letter of demand, and as held in **Disanayaka Mudiyanselage Chandrapala Meegahaarawa v Disanayaka Mudiyanselage Samaraweera Meegahaarawa** [SC Appeal No. 112/2018; SC Minutes of 21st May 2021], this is a circumstance which can be held against a defendant, although such failure to respond to a business letter cannot by and of itself prove the case of a plaintiff.

It is in these factual circumstances that the Plaintiff, acting in terms of Section 3 of the Act instituted action against the Defendants by filing a plaint on 12th October 2017 in the District Court of Colombo.

As provided for by the Act, the provisions of which I shall discuss in detail later in this judgment, the District Court issued a decree *nisi* for the sum prayed for in the plaint. The decree *nisi* having been served, the Defendants made an application supported by an affidavit seeking leave to appear and show cause against the decree *nisi* being made absolute. Accordingly, by its Order dated 21st February 2019, the District Court granted the Defendants leave to appear and show cause in terms of Section 6(2)(a), that is upon the payment of the sum of money specified in the decree *nisi*, or alternatively in terms of Section 6(2)(b), that is upon the furnishing of **security** sufficient to satisfy the said decree, in the event of it being made absolute.

It is perhaps important to note at this stage that the Defendants did not move that the property already mortgaged by them as security for the aforementioned credit facility by Mortgage Bond No. 8776, and which property had been valued at Rs. 75 million in 2012, be accepted as security, nor had the District Court given its mind to such fact, even though the District Court proceeded to act in terms of Section 6(2)(b) of the Act. It is this failure on the part of the District Court that the Defendants are complaining of in this appeal.

Invocation of appellate jurisdiction

Aggrieved by the said Order of the District Court, the Defendants had filed a petition in the Provincial High Court of the Western Province holden in Colombo [the High Court] seeking leave to appeal against the said Order. The High Court, while granting leave, had stayed the Order of the District Court. Following a full argument, the said appeal had been rejected and the Order of the District Court had been affirmed by the High Court by its judgment delivered on 15th July 2020.

By a petition filed on 18th August 2020, the Defendants sought leave to appeal against the judgment of the High Court. On 22nd March 2021, this Court, having heard learned Counsel, granted leave to appeal on the following question of law:

> "Did the Civil Appellate High Court err in law by affirming the District Court Order dated 21st February 2019 by holding that the Defendants are required to deposit security under Section 6(2)(a) or 6(2)(b) of the Debt Recovery Act, as amended, notwithstanding the fact that the Defendants have furnished a mortgage of a land in order to obtain the monies that are referred to in the plaint filed by the Plaintiff in the District Court?"

The above question of law brings into focus an important aspect of the Act, namely whether a security offered at the time of obtaining a loan facility can be considered as a security for the purposes of obtaining leave to appear in terms of Section 6(2)(b). This question does not appear to have been considered by this Court previously.

Before proceeding further, I must state that the District Court had entered the decree absolute on 31st August 2020, thus bringing the District Court proceedings to an end. The Plaintiff had thereafter executed the decree and accordingly, the property that is the subject matter of Mortgage Bond No. 8776 has been seized in satisfaction of such decree.

Introduction of legislation to expedite debt recovery

In order to give context to the provisions of the Act and the above question of law, I shall commence by going back in time to the late 1980s.

At that time, a bank licensed under the Banking Act, No. 30 of 1988 or a finance company licensed under the Finance Companies Act, No. 78 of 1988, which had lent and advanced monies to a customer and the repayment of which had been defaulted by the customer, had several options to choose from in order to recover the monies so lent and advanced, depending *inter alia* on whether the credit facility had been secured or not. The first and perhaps the most frequently adopted method was to resort to the regular procedure set out in the Civil Procedure Code and file a plaint followed by an answer and then proceed to trial, with the burden of proof being with the plaintiff bank or finance company. The second option that was available was where the credit facility had been secured by an immovable property. In such an instance [*and this being before the introduction of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990*], if the lender was a State bank, it was able to sell the immoveable property by way of *parate* execution, provided such power had been conferred by the incorporating statute of such bank. The third was to resort to the provisions of the Mortgage Act which were available where a loan had been secured by movable or immovable property. The fourth was to file action under summary procedure, as provided by Section 703 of the Civil Procedure Code, provided the criteria set out therein had been satisfied.

The view that prevailed at that time, which is borne out by the speech made by the then Minister of Justice during the second reading of the Debt Recovery (Special Provisions) Bill [*vide* Hansard of 24th January 1990] was that where a credit facility was not secured, the provisions of the Civil Procedure Code were inadequate for the speedy recovery of monies lent and advanced by banks and finance companies, and that new laws must be introduced to provide lenders with an expeditious method of recovering their debts. Reference was made to the recommendations of the Committee chaired by Justice D. Wimalaratne in support of this position. It is in this background that the Government of that time proposed the enactment of several new laws and consequential amendments to several existing laws [fourteen altogether] as part of its debt recovery legislation

package in order to improve the debt recovery environment in the country. One such proposed law was the Debt Recovery (Special Provisions) Bill.

The Debt Recovery (Special Provisions) Bill

The said Bill had been referred to this Court by the President, in terms of Article 122(1)(b) of the Constitution, for its special determination on whether the Bill or any provision thereof is inconsistent with the Constitution. In its determination on **The Debt Recovery (Special Provisions) Bill** [Decisions of the Supreme Court on Parliamentary Bills 1990, Vol. VI, page 3 at page 5] this Court observed as follows:

> "*It needs to be emphasised that legal provisions for the expeditious recovery of debts – not* ***before*** *they fall due, but* ***after*** *default by the borrowers – by banking and financial institutions* ***are not burdens or punitive measures imposed on borrowers****. Expeditious debt recovery is, in the long-term, beneficial to borrowers in general for at least two reasons. Firstly, expeditious repayment or recovery of debts enhances the ability of lending institutions to lend to other borrowers. Secondly, the Law's delays in respect of debt recovery, howsoever and by whomsoever caused, tend to make lending institutions much more cautious and slow in lending: by refusing some applications, by requiring higher security from some borrowers, and by insisting on more stringent terms as to interest from other borrowers. Expeditious debt recovery will thus tend to make credit available more readily and on easier terms, and will maximise the flow of money into the economy. Undoubtedly, there is a legitimate national interest in expediting the recovery of debts by lending institutions engaged in the business of providing credit, and thereby stimulating the national economy and national development*." [emphasis added]

In **Mahavidanage Simpson Kularatne v People's Bank** [SC Appeal No. 04/2015; SC Minutes of 15th September 2020], Murdu N. B. Fernando, PC, J, referring to the preamble of the Act which states that it is an Act to provide for the regulation of the procedure relating to debt recovery by lending institutions, observed at page 5 that, "*This legislation was brought into operation together with many other laws and amendments to existing laws in the early 1990s, for the manifestation of the economic development of the country*

and for the financial stability and efficient working of the lending institutions and also for the expeditious recovery of debts due and owing to a lending institution."

Thus, several provisions were introduced by the Act with a view to expediting the recovery of monies lent and advanced by banks and finance companies. One of the most notable provisions in the Act is that once the lending institution has established to the satisfaction of the District Court that the sums of money claimed in the plaint are due and owing to it, the Court shall issue in the first instance a decree *nisi*, and thereafter the burden of proving that the said sums of money are not due, shifts to the defendant, with the defendant first being required to obtain the leave of the Court in order to discharge this burden. It would thus be seen that a defendant against whom action has been filed under the Act is required to follow a two tiered process – the first is to obtain leave of Court in terms of the criteria laid down in the Act to defend the action, and the second is, if leave is granted, to thereafter satisfy Court that the monies claimed are not due from the defendant and that accordingly, the decree *nisi* should be discharged.

<u>Section 2 – the gateway to the Act</u>

While Section 2 is the gateway to the Act, sub-Section (1) thereof reads as follows:

> "*A lending institution (hereinafter referred to as the 'institution') may, subject to the provisions of subsection (2) recover debt due to it by an action instituted in terms of the procedure laid down by this Act, in the District Court within the local limits of whose jurisdiction–*
>
> *(a) a party defendant resides; or*
>
> *(b) the cause of action arises; or*
>
> *(c) the contract sought to be enforced was made*."

Jurisdiction in respect of any action filed under the Act has been vested with the District Court. Even though the High Court of the Western Province established under the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 [the Commercial High

Court] has jurisdiction in respect of commercial transactions, Schedule 1 of the said Act has specifically excluded from the jurisdiction of such Court actions instituted under the Act.

Being the gateway to the Act, Section 2 sets out three requirements that must be fulfilled in order to resort to the scheme of expeditious recovery of loans provided for in the Act. The first requirement is that the sum alleged to be in default should not be less than Rs. One hundred and fifty thousand.

Lending institution

The second requirement is that action should only be filed by a 'lending institution,' which term has been defined in Section 30, as amended by the Amendment Act, to mean a licensed commercial bank, a company registered under the Finance Companies Act No. 78 of 1988 to carry out finance business, the National Savings Bank, the National Development Bank, the Development Finance Corporation of Ceylon and includes a liquidator appointed under the Companies Act to wind up any of the above institutions.

The only exception to the requirement that the plaintiff must be a lending institution in order to invoke the provisions of the Act is contained in Section 25, in terms of which a person who *inter alia* knowingly draws a cheque which is subsequently dishonoured by the bank for want of funds is guilty of an offence under the Act, and proceedings can be instituted against such person in the Magistrate's Court by such person to whom the cheque was issued. This position was confirmed in **Officer in Charge, CID v Soris** [(2006) 3 Sri LR 375], where the majority of this Court accepted the submission of the Attorney General that:

(a) while Parts I to IV of the Act which set out the recovery procedure in respect of monies lent and advanced by lending institutions applies only to a lending institution, Part V of the Act under which Section 25 has been placed contains no such limitation;

(b) in terms of Section 25(1)(a), criminal responsibility is cast on any person who transacts business with any institution or person irrespective of such institution or person being a lending institution; and

(c) if it was within the contemplation of the Legislature that "person" should include only those transactions or financial business with a lending institution, Section 25(1)(a) would have made it clear in unambiguous terms that the person contemplated in Section 25(1)(a) is only a person who has transactions with a lending institution.

Recovery of a 'Debt'

The third requirement in Section 2 is that action should be filed only to recover a **debt**. Pursuant to the Amendment Act, the definition of 'debt' in Section 30 reads as follows:

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

Thus, the fact that the credit facility granted to the Defendant had been secured by the mortgage of an immovable property is not an impediment to the Plaintiff invoking the provisions of the Act in order to recover the sums outstanding on the credit facility.

It must perhaps be mentioned that the words, "*to have arisen from a transaction in the course of banking, lending, financial or other allied business activity of that institution*" were agreed to be added during the hearing into the constitutionality of the Bill before this Court in order to address an argument that affording the privilege and advantage of recovering debts unconnected with ordinary banking transactions and allied transactions through the provisions of the Act would be violative of Article 12(1) of the Constitution.

The above definition of 'debt' has made it mandatory that an action, while satisfying the several other requirements set out therein, must be based on a promise or agreement which is in writing, even if the sum of money that is sought to be recovered is otherwise capable of being ascertained.

In the determination of this Court in the **Debt Recovery (Special Provisions) (Amendment) Bill of 2003** [Decisions of the Supreme Court on Parliamentary Bills 1999-2003, Vol. VII, page 435 at page 437], it was held that:

> " *(ii) Section 2(1) of the original Act empowers a lending institution to have recourse to the special procedure to recover a debt due to such institution. The term 'debt' is defined in Section 30 as amended by Act No. 9 of 1994. In terms of this definition a debt would include any sum of money which is due to a lending institution arising from a transaction had in the course of its business. It is significant that the definition has a clear reservation that a debt 'does not include a sum of money owed under a promise or agreement which is not in writing'.*
>
> *In view of the reservation **the special procedure could be resorted to only in instances where there is a written promise or agreement on the basis of which the sum due is claimed**. This is broadly similar to the provision in the summary procedure on liquid claims. The amendment in clause 8 of the Bill, repeals the definition of the term 'debt' in section 30. The substituted definition excludes the words referred to above which limit its applicability to money owed under a promise or agreement which is in writing. The resulting position is that the court would not have any written evidence of the commitment on the part of the debtor when it issues decree nisi in the first instance.*
>
> *We are inclined to agree with the submission of the Petitioners that the two amendments referred to above would extend the application of the special procedure which is more stringent from the point of the debtor, to a wider category of persons and to any transaction had with the lending institutions, even in the absence of a written promise or agreement to pay*.
>
> *We are further of the view that there is no rational basis to extend the provisions of the Act that is presently in force in the manner referred to in (i) and (ii) above."*

Priyantha Jayawardena, PC, J in his dissenting judgment in **<u>Mahavidanage Simpson Kularatne v People's Bank</u>** [supra; at page 19] held that, "*… this court has consistently held that actions instituted under the Debt Recovery Act to recover a debt must be based on a promise or agreement in writing so that 'written evidence of the commitment on the part of the debtor' could be prima facie established before entering the decree nisi*."

It is important to note that this definition of debt does not refer to by name the written promise or agreement or the instrument under which the money is owed – e.g., whether it is a term loan agreement, a pledge loan agreement, an overdraft agreement etc. Therefore, the District Court must not be influenced or guided by the name assigned to the credit facility under which the monies have been granted to a customer.

In **<u>Kiran Atapattu v Pan Asia Bank Limited</u>** [(2005) 2 Sri LR 276; at page 279], the Court of Appeal, referring to an argument that the defendant has not obtained a loan but only an overdraft which does not come within the meaning of 'debt' in Section 30, and having referred to the definition of debt, stated that, "*Therefore whether one calls the sum borrowed an overdraft or a loan, if it is capable of being ascertained it falls within the meaning of debt under section 30 of the Debt Recovery (Special Provisions) Act. Accordingly, there is no merit in the submissions made by the learned President's Counsel for the Defendant that the capital sum claimed by the plaintiff does not fall within the meaning of 'debt' in terms of section 30 of the Debt Recovery (Special Provisions) Act. It is my further view that the term 'debt' described in section 30 includes overdrafts, if the amount is capable of being ascertained or is ascertained at the time of institution of the action*."

Raja Fernando, J in **<u>Eassuwaran and Others v Bank of Ceylon</u>** [(2006) 1 Sri LR 365], while rejecting an argument that the Act "*is not applicable to claims based on recovery on credit facilities or on overdraft facilities and that Debt Recovery (Special Provisions) Act is applicable only to fixed/term loans where the amount due is clearly ascertainable*" held that the transactions which were referred to in the plaint fell well within the definition of debt.

In **Dharmaratna v People's Bank** [(2003) 3 Sri LR 307], the Court of Appeal, having referred to the definition of debt, rejected the argument of the defendant that the decree absolute was void and/or a nullity for the reason that an overdraft is not a debt or a loan and is therefore outside the purview of the Act.

At this juncture, there are two things that I wish to stress.

The first is that it is not the nomenclature of the credit facility that matters, but *inter alia* whether the sum is owed under a promise or agreement that is in writing and whether the other requirements in Section 2 and the definition of 'debt' have been satisfied. Thus, it is open to a lending institution to resort to the Act in order to recover any monies owed to it so long as that sum of money is (a) owed under a promise or agreement that is in writing, (b) the said sum is ascertained or capable of being ascertained, and (c) satisfies the other requirements in the said definition.

The second is the danger of insisting on using a particular nomenclature in order to invoke the provisions of the Act, especially with regard to overdrafts, for the reason that an overdraft can take many forms and therefore, a clarification is perhaps appropriate at this stage. In **People's Bank v Jagoda Gamage Nishantha Pradeep Kumara** [SC Appeal No. 234/2017; SC Minutes of 12th December 2022] this Court, having examined in detail the nature of an overdraft facility, has identified its different forms. Accordingly, a bank may allow a customer who does not have sufficient funds in his or her current account and who does not have a pre-determined arrangement reflected by way of a written agreement with the bank, to overdraw his or her account by simply honouring a cheque presented by such customer.

While in terms of Section 73 of the Bills of Exchange Ordinance, "*A cheque is a bill of exchange drawn on a banker payable on demand*", Section 3 of the Ordinance provides that, "*A bill of exchange is an **unconditional order in writing**, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer*." [emphasis added]

A cheque issued by one person to another may amount to a promise in writing that the sum reflected in such cheque is owed by the former to the latter. In a customer-bank relationship however, even though a cheque presented by a customer and honoured by the bank in spite of a lack of funds in the customer's account is reflective of an offer and acceptance and is undoubtedly an overdraft, such a cheque may not amount to a promise or agreement in writing by the customer that he or she owes such sum of money to the bank. Therefore, for the purposes of the Act, it appears that an action cannot be based only on such cheque for the simple reason that it is not reflective of a written promise or agreement made to the bank and is therefore outside the purview of the Act.

I am however mindful that in **Mahavidanage Simpson Kularatne v People's Bank** [supra], the majority expressed the view that the presentation with the plaint of two cheques by which the account had been overdrawn was sufficient compliance with the above requirement of a written promise. A similar view was expressed in **Eagle Breweries Ltd v People's Bank** [(2008) 2 Sri LR 199] where the Court of Appeal, whilst conceding that a statement of accounts and the cheques by which the account had been overdrawn do not come within the meaning of 'instrument' or 'agreement,' nonetheless held that a cheque or a statement of accounts from a bank could also be considered to constitute a document containing a contract entered into between two parties and would therefore come within the ambit of a 'document' in terms of Section 4(1) of the Act.

Section 4(1) of the Act

The Plaintiff, having satisfied the requirements in Section 2, and as mandated by Section 4(1) read together with Section 4(4), filed together with its plaint an affidavit of its Chief Manager to the effect that the sum claimed is lawfully due to the Plaintiff from the Defendants. A certified copy of the aforementioned agreement on which the action was based and certified copies of other documents relied upon by the Plaintiff had been annexed to the plaint.

The Defendants had raised an objection before the District Court that the originals of the said agreement and other documents had not been annexed to the plaint. Although that was not an issue by the time this appeal was filed, such objections continue to be taken

before the trial Court, probably for the reason that conflicting views have been expressed whether the written promise or agreement, reflected by an instrument, agreement or document, and upon which the action is based – whether it be the original or a copy thereof – must be annexed to the plaint. These objections stultify the objectives of the Act. I would therefore like to consider the relevant provisions of the principal enactment and the Amendment Act, with a view to clarifying this issue and prevent such objections being raised before the trial Court in the future.

Section 4(1) of the principal enactment provided as follows:

> "*The institution suing shall on* ***presenting the plaint*** *file an affidavit to the effect that the sum claimed is justly due to the institution from the defendant and* ***shall in addition produce to the court the instrument, agreement or document sued upon*** *or relied on by the institution*." [emphasis added]

Section 4(5) went on to state that:

> "*The institution shall tender with the plaint–*
>
> *(a) the affidavit and instrument, agreement or document referred to in subsection (1) of this section;*
>
> *(b) draft decree nisi; and*
>
> *(c) the requisite stamps for the decree nisi and service thereof.*"

The Amendment Act repealed Section 4(5), and repealed and replaced Section 4(1) with the following:

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

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

In **Mahavidanage Simpson Kularatne v People's Bank** [supra; at page 13] the majority held that "*At the point of presenting the plaint what is material is for a court to be satisfied upon the affidavit and the 'instrument, agreement or document' presented before it, that the sum claimed is a 'debt' lawfully due to the plaintiff bank and the 'instrument, agreement or document' annexed to the plaint is in conformity with the threshold provisions of section 4(2) of the Act for a court to issue a decree nisi, an ex-parte order against a defendant.*"

Although dissenting with the conclusion reached by the majority, Jayawardena, PC, J stated at page 17 that, *"… it is evident that in order to institute an action under the Debt Recovery Act, the 'debt' owed to the lending institution must be ascertainable or capable of being ascertained, at the time of the institution of the action, from a promise or agreement which is in writing. Thus, in order to ascertain the 'sum of money' due to a lending institution from the defendant, prior to entering the decree nisi under section 4(2) of the said Act, the said institution is required to produce the said written document in court."*

Jayawardena, PC, J cited the following reasons to support his finding that producing the agreement with the plaint is mandatory:

> "*[Section 4(2)] casts a duty on the court to be 'satisfied' that the instrument, agreement or document produced in terms of section 4(1) of the said Act is properly stamped, not 'open to suspicion by reason of any alteration or erasure or other matter on the face of it' and the action is not barred by 'prescription' before entering the decree nisi.* [page 13]
>
> *The words 'court being satisfied', in section 4(2) of the said Act, require an independent judicial mind to examine not only the facts stated in the affidavit but also the instrument, agreement or document presented by the lending institution with the plaint in order to determine whether the aforementioned requirements that*

are stipulated in section 4(1) have been complied with and a prima facie case has been established by the lending institution against the defendant, before entering a decree nisi in terms of the said Act. [page 13]

… [I]n terms of section 4(2) of the Debt Recovery Act, the decree nisi entered should state 'a sum not exceeding the sum prayed for in the plaint together with interest up to the date of payment and such costs as the court may allow.' [page 13]

However, the Debt Recovery Act does not stipulate the method by which a court could ascertain the sum claimed as interest… [page 13]

Hence, in order to calculate the agreed interest that is required to be included in the decree nisi, the lending institution should file the written instrument, agreement or document along with the plaint. [page 14]

Thus, I am of the view that section 4(2) of the Debt Recovery Act has imposed a duty on the court to be 'satisfied' that not only the principal sum but also the interest claimed thereon are lawfully due to the lending institution from the defendant before entering the decree nisi based on the documents filed with the plaint in terms of section 4(1) of the Debt Recovery Act. …[page 14]

… [I]t is evident that the procedural law has made it imperative to produce the instrument, agreement or document upon which a plaintiff sues to be filed along with the plaint when instituting action. [page 16]

Moreover, in terms of section 8 of the Debt Recovery Act, the court is conferred with the power to order 'the original of the instrument, agreement or other document, copies of which were filed with the plaint or on which the action is founded, be made available', for its perusal at the time the action is being supported. Accordingly, section 8 facilitates the requirement of court being satisfied that the lending institution has complied with the requirements set out in section 4(1) of the Act when the action is supported to obtain a decree nisi." [page 19]

The position in this regard can therefore be summarised as follows:

(1) Section 4(1) requires copies of the instrument, agreement or document sued upon to be filed in Court for the purpose of serving it on the defendants, and therefore means that such copies must form part of the plaint. This is reflected in Section 50 of the Civil Procedure Code which provides 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.*";

(2) Given the fact that a plaintiff is entitled *ex parte* to a decree *nisi* in the first instance and thereafter the burden of disproving that the sum mentioned in the decree *nisi* is owed is on the defendant, it is critical for the District Court to be satisfied in the first instance itself that there is in fact a promise or agreement in writing and that the said promise or agreement is the basis of the action before Court;

(3) In terms of Section 4(2), at the time the decree *nisi* is issued *ex parte*, the Court must be satisfied that the instrument, agreement or document has been properly stamped and is not open to suspicion by reason of any alteration or erasure on the face of such document. The best way for the Court to be satisfied of this fact is for a copy of the agreement to be annexed to the plaint. Section 8 enables the Court to call for the original of the agreement in order to clarify any doubts that the Court may have with regard to the contents or authenticity of the agreement;

(4) The requirement laid down in Section 23, which is reproduced below, can only be satisfied by the District Court if a copy of the agreement is presented to Court with the plaint:

> "*In an action instituted under this Act the court shall, in the decree nisi, order interest agreed upon between the parties up to the date of decree nisi, and interest at the same rate on the aggregate sum of the decree nisi from the date of decree nisi until the date of payment in full. In the event of the parties not having agreed upon the rate of interest, the court shall in the decree nisi order interest at*

the market rate from the date of institution of action up to the date of decree nisi and thereafter on the aggregate sum of the decree nisi from the date of decree nisi until the date of payment in full.";

(5) When the Court is called upon in terms of Section 6 to consider the application of the defendant for leave to appear and defend the action, the Court must have the benefit of the agreement in order for the Court to be alert to the terms and conditions subject to which the credit facility has been granted and to make a proper determination on whether the defendant has made out a *prima facie* sustainable case.

I am therefore of the view that:

(a) It is mandatory for a plaintiff to produce with the plaint the instrument, agreement or document on which the plaintiff is suing and which contains the written promise or agreement;

(b) It is not mandatory for a plaintiff to produce the original of the said instrument, agreement or document sued upon, and tendering a copy would suffice;

(c) It is sufficient for the original of the said instrument, agreement or document sued upon to be available for production, if called upon by the Court.

Section 6 of the Act

If Sections 2 and 4 are at the core of a plaintiff's case, Section 6 is at the core of a defendant's case, and is very much the focus of this appeal.

Section 6(1) provides that, "*In an action instituted under this Act the defendant shall not appear or show cause against the decree nisi unless he obtains leave from the court to appear and show cause.*", and is reflective of the two tiered process that I referred to at the outset. Thus, where a defendant wishes to appear and show cause as to why the decree *nisi* should not be made absolute, it is imperative that he or she first seek and

obtain the leave of the District Court to do so. The prerequisites to seeking and obtaining leave are set out in Section 6(2).

Section 6(2) as it stood in the principal enactment reads as follows:

> *"The court shall upon the application of the defendant give leave to appear and show cause against the decree nisi either,–*
>
> *(a) upon the defendant paying into court the sum mentioned in the decree nisi; or*
>
> *(b) upon the defendant furnishing such security as to the court may appear reasonable and sufficient for satisfying the sum mentioned in the decree nisi in the event of it being made absolute; or*
>
> *(c) upon affidavits satisfactory to the court that there is an issue or a question in dispute which ought to be tried. The affidavit of the defendant shall deal specifically with the plaintiffs claim and state clearly and concisely what the defence is and what facts are relied on as supporting it."*

Section 6(2) was repealed and replaced by the Amendment Act, and presently reads as follows:

> *"**The court shall** upon the filing by the defendant of an application for leave to appear and show cause supported by affidavit which shall deal specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it, and after giving the defendant an opportunity of being heard, **grant leave to appear and show cause against the decree nisi**, either –*
>
> *[a] upon the defendant paying into court the sum mentioned in the decree nisi; or*
>
> *[b] upon the defendant furnishing such security as to the court may appear reasonable and sufficient for satisfying the sum mentioned in the decree nisi in the event of it being made absolute; or*

> *[c] upon the court being satisfied on the contents of the affidavit filed, that they disclose a defence, which is prima facie sustainable and on such terms as to security, framing and recording of issues, or otherwise as the court thinks fit*." [emphasis added]

The five requirements of Section 6(2)

A close examination of Section 6(2) reveals that there are **five requirements** that need to be complied with by a defendant who wishes to seek and obtain the leave of Court to appear and show cause.

The first is to make a written application seeking leave of Court to appear and show cause. As observed by the Court of Appeal in **People's Bank v Lanka Queen Int'l Private Limited** [(1999) 1 Sri LR 233 at 239], "*… in the absence of an application to show cause in writing as contemplated by section 6(2) it is possible to say that there is no proper application supported by an affidavit before court. If this interpretation is not given the amendment would become superfluous*." This position was reiterated in **Seylan Bank PLC v Farook** [(2021) 3 Sri LR 1 at page 10] where this Court took the view that, "*Moreover, a written application is necessary as the said Act does not permit the parties to lead oral evidence and/or produce fresh documentary evidence in an inquiry held in respect of an application filed under section 6(2) of the said Act to obtain leave to appear and show cause against the decree nisi entered by court.*"

It must perhaps be emphasised that the Act does not contain any provision to file answer, either at the stage of seeking leave or after leave has been granted.

The second is that such application must be supported by an affidavit. In **Seylan Bank PLC v Farook** [supra; page 11] this Court cited with approval the following passage from **People's Bank v Lanka Queen Int'l Private Limited** [supra; at page 237] where the Court of Appeal, referring to the Amendment Act, held as follows:

> "*This new subsection clears any doubt that would have prevailed earlier in respect of the procedure a defendant has to follow in applying for leave to appear and show*

cause. On an examination of the amendment introduced in subsection 6(2) it is abundantly clear that the word 'application' which appeared in the original section has been qualified with the following words: 'upon the filing of an application for leave to appear and show cause supported by affidavit'. This shows that–

(a) it is mandatory for the defendant to file an application for leave to appear and show cause.

(b) such application must be supported by an affidavit which deals specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it."

The third is that the application and affidavit must deal specifically with the plaintiff's claim, as held in **Seylan Bank PLC v Farook** [supra; at page 12]. I must state that most applications made to the District Court seeking leave to appear and show cause do not deal with the plaintiff's case but instead contain a mere denial or a whole host of objections classified as technical objections or objections that are unrelated to the plaintiff's claim. While a mere denial shall not suffice – *vide* **Metal Packaging Limited and Another v Sampath Bank PLC** [(2008) 1 Sri LR 356] – this Court and the Court of Appeal have reiterated time and again that leave cannot be obtained by raising frivolous technical objections.

The Court of Appeal in **Ramanayake v Sampath Bank Ltd and Others** [(1993) 1 Sri LR 145 at page 153] has held that,

"*The defendant has to deal with the plaintiff's claim on its merits; it is not competent for the defendant to merely set out technical objections. It is also incumbent on the defendant to reveal his defence, if he has any.*

On the other hand, mere technical objections and evasive denials will not suffice.

If no plausible defence with a triable issue is set up, the judge can give the defendant leave to appear and show cause against the decree nisi by placing him on terms either under section 6(2)(a) or section 6(2)(b).

> *The purpose of section 6 of the Act (and also sections 704 and 706 of the (Civil Procedure) Code) is to prevent frivolous or untenable defences being set up and to avoid the lengthening of proceedings by dilatory tactics*."

A similar view was expressed in **Seylan Bank PLC v Farook** [supra; at page 12] where it was held that:

> "*Hence, a bare denial of the several averments in the plaint and/or setting out frivolous technical objections in the application, without stating a defence to the plaintiff's claim and the facts relied upon in support of the defence, does not satisfy the criteria set out in section 6(2) of the said Act. A defendant should not be allowed to delay the administration of justice and prevent the plaintiff from obtaining an early judgment by making such an application, as it would defeat the object of the said Act to ensure an expeditious recovery of debts. However, a defendant who has disclosed a defence to the plaintiff's claim, should not be deprived of his right to appear and defend the claim of the plaintiff*."

The stage at which an objection with regard to the procedure followed by a plaintiff can be considered by the Court was discussed in **Seneviratne and Another v Lanka Orix Leasing Company Ltd** [(2006) 1 Sri LR 230 at page 236]. In that case, the Court of Appeal, having referred to the following passage from '**Civil Procedure in Ceylon**' [1971; page 318] by K. D. P. Wickremasinghe that, "*In an action under the summary procedure on a liquid claim the defendant cannot be heard or allowed to take any objection, as to the regularity of the procedure, without having first obtained the leave of the Court to appear and defend. A judge cannot dismiss a summary action on a liquid claim on the merits of the case before granting the defendant leave to defend,*" held that a defendant cannot take objections at the stage leave is sought as to the regularity of the procedure followed by a plaintiff without first obtaining the leave of Court to appear and defend the action.

The fourth is that the application and affidavit must state clearly and concisely what the defence to the claim is and what facts are relied upon to support it. This would necessarily

require a defendant to explain if any payments have been made to reduce the debt owed by such defendant and to produce proof in support of such position.

The above four requirements are mandatory and are conditions precedent that must be satisfied by a defendant, (a) in order for the District Court to consider whether leave to appear can be granted, and (b) irrespective of whether leave is sought under paragraphs (a), (b) or (c) of Section 6(2). Failure to comply with these conditions precedent shall result in the District Court making the decree nisi absolute in terms of Section 6(3).

The fifth and final requirement is for the defendant to choose under which paragraph of Section 6(2) he or she is seeking the leave of Court to appear and defend. However, there is nothing to prevent a defendant seeking leave, alternatively of course, under each of the three paragraphs. Logically speaking, a defendant who has defaulted on the credit facilities made available to him will generally not seek leave under paragraph (a) as this would require him to deposit the sum mentioned in the decree *nisi*. Similarly, an application for leave under paragraph (b) also would be a rare occurrence for the reason that the security must appear to the Court to be reasonable and sufficient to satisfy the sum mentioned in the decree *nisi*, should it be made absolute. This however was one such case where an application under paragraph (b) could have been made.

Thus, on most occasions, leave would be sought under paragraph (c) on the basis that the application of the defendant supported by an affidavit discloses a *prima facie* sustainable defence. I am therefore of the view that while it is desirable, it is not mandatory for a defendant to express a choice with regard to the paragraph in terms of which he or she seeks leave.

<u>The role of the District Court</u>

Provided a defendant has complied with the aforementioned first four requirements of Section 6(2), the next step shall be for the Court to consider if the defendant's application to appear and show cause against the decree *nisi* should be allowed.

The task of the District Court is made easier where an application is made only under either paragraphs (a) or (b). As held by the Court of Appeal in **National Development Bank v Chrys Tea (Pvt) Ltd and Another** [(2000) 2 Sri LR 206 at 209], where leave is granted under Section 6(2)(a) or 6(2)(b), "*… the Court has no discretion to order security which is not sufficient to satisfy the sum mentioned in the decree nisi*."

However, where an application is made directly, or on the face of it, as in this appeal, under paragraph (c), the District Court is required to consider the matters set out in the application and affidavit and be satisfied that the contents thereof disclose a defence which is *prima facie* sustainable. Three possible scenarios emerge at this stage.

The first is that if the District Court is satisfied that the application and affidavit disclose a *prima facie* sustainable defence, leave to appear can be granted, subject to such terms as to security, framing and recording of issues, or otherwise as the Court thinks fit. However, where the defendant admits liability to a part of the sum mentioned in the decree *nisi*, the Court should not grant leave to appear and show cause against the decree *nisi* under Section 6(2)(c) without requiring the defendant to pay into Court the said sum so admitted as a minimum condition to appear and show cause against the decree *nisi* [*vide* **Seylan Bank PLC v Farook** [supra; at page 16].

The second scenario is that if the District Court is not so satisfied, he or she may refuse the application and if leave has been sought in the alternative under paragraphs (a) or (b), make an appropriate order in terms of such paragraphs. However, where leave has only been sought under paragraph (c), does it mean that the District Court must act under Section 6(3) and proceed to make the decree *nisi* absolute? I think not.

It would perhaps be relevant to refer at this stage to the speech made by Mr. Harindranath Dunuwille, Member of Parliament, when the Bill pertaining to the Amendment Act was being discussed in Parliament [*vide* Hansard of 24th February 1994; column 1214] where he stated that, "*… I think it is fair to say that the law is not without mercy. Thankfully, the law is interpreted and the courts are manned by human beings and not automated machines which would not have a human face. Therefore, there is always an inherent right*

that is available to the Judges to ensure that the ends of justice are met and that the process of court is not abused. Therefore, Sir, I might mention finally that whatever the laws that are enacted, however stringent they may appear, it is always tempered with mercy at the hands of a reasonable Judge."

This brings me to the third scenario, which is linked to the question of law that must be answered in this appeal, and concerns the course of action the District Court should adopt where the Court is not satisfied that leave can be granted under paragraph (c), and where the defendant has not, on his own volition, made an application for leave under paragraph (a) or in the alternative, paragraph (b).

The application of these three scenarios was considered in **Seylan Bank PLC v Farook** [supra; at page 14], where this Court, referring to Section 6(2)I, held as follows:

> "*Accordingly, the above section has cast a duty on the court to be satisfied that the defendant has disclosed a defence which is prima facie sustainable against the claim made by the plaintiff, prior to making an order under and in terms of the said section.*
>
> *It is pertinent to note that the words 'prima facie' has been qualified by the addition of the adjective 'sustainable'. Thus, the court should not only be satisfied that the defendant has a prima facie defence, but that the defence of the defendant is prima facie* ***sustainable****. Accordingly, the court is required to consider whether the defence disclosed by the defendant can be sustained at the conclusion of the trial.*
>
> *If the court is not satisfied that the defendant has disclosed a prima facie sustainable defence, it has no jurisdiction to make an order under section 6(2)(c) of the said Act.* ***In such an instance, the court should make an order either under sections 6(2)(a) or (b) of the said Act.***
>
> *On the contrary, if the court is satisfied that the defendant has disclosed a prima facie sustainable defence, leave to appear and show cause against the decree nisi should be granted on the terms set out in section 6(2)(c) of the said Act*."

"The terms of an order granting leave to appear and show cause against the decree nisi are set out in sections 6(2)(a), (b) and (c) of the said Act. The use of the conjunction 'or' between the said sections requires the court to make an appropriate order either under sections 6(2)(a) or (b) or (c) of the said Act." [emphasis added]

I am therefore of the view that as in this appeal, even where the application of the defendant is silent with regard to the paragraph under which leave is sought or where it is apparent that the defendant is seeking leave only under Section 6(2)(c) and not under Section 6(2)(a) or (b), the District Court must consider leave, first under paragraph (c) and if not satisfied that leave can be granted under paragraph (c), then under paragraphs (a) or (b).

Is the imposition of security, mandatory in all cases?

There is one aspect arising out of Section 6(2)(c) that I must refer to. That is whether the granting of leave should always be subject to the imposition of terms or conditions or in other words, whether a defendant who has made out a *prima facie* sustainable defence is entitled to unconditional leave or leave without terms. This issue has been considered in several decisions, both of this Court as well as that of the Court of Appeal and is the basis on which the Defendants sought leave to appear and defend. I shall consider these judgments as there appears to be some ambiguity surrounding the issue of whether unconditional leave could be granted under Section 6(2)(c).

In **Ramanayake v Sampath Bank Ltd and Others** (supra; at page 152) the Court of Appeal considered Section 6(2)(c) of the principal enactment and expressed the view that, "*Leave may be granted unconditionally under section 6(2)(c) where the court is satisfied that the defendant's affidavit raises an issue or question which ought to be tried*.". However, in **Mahavidanage Simpson Kularatne v People's Bank** [supra; at page 19], the majority, having considered that in terms of Section 6(2)(c), leave can be granted "*on such terms, as to security, framing and recording of issues, or otherwise as the court thinks fit*" was of the following view:

> "*The Legislature in no uncertain terms has laid down the procedure to be followed for a defendant to show cause against a decree nisi and I see no reason to deviate from the said provisions or to disregard such provisions. The Act does not permit 'unconditional leave' to appear. Leave to appear is always subject to conditions. The least being furnishing security as the court thinks fit. As discussed earlier the intention of the Legislature has to be fulfilled and the purpose of the Act should not be brought to naught by a court relying on technical objections to defeat the very purpose of the Act*."
>
> *In any event, as pointed out by De Silva, J. in the case of Peo'le's Bank vs. Lanka Queen International (Pvt) Ltd., (supra) section 6(2) (as amended by Act, No.4 of 1994) does not permit unconditional leave to defend the claim;* ***the minimum requirement according to section 6(2) (c) is for the furnishing of security*** *determined by Court and the Court can exercise its discretion in determining the amount of security to be furnished by the defendant if he discloses a sustainable defence*." [emphasis added]

Thus, according to the majority opinion in **Kularatne**, leave to appear and defend cannot be given without conditions, with tendering security being a mandatory condition. A contrary view was however expressed in **Seylan Bank PLC v Farook** [supra; at page 18] where it was held that "*… the court is empowered to grant leave to appear and show cause against the decree nisi, without ordering security, under section 6(2)(c) of the said Act*."

While the issue of whether unconditional leave can be granted does not appear to have been directly addressed, the Court, having stated that, "*… a plain reading of the phrase 'or otherwise as the court thinks fit' shows that a* ***wide discretion*** *is conferred on the court to make an appropriate order under section 6(2)(c) of the said Act.*", held that it does not agree with the view expressed in **People's Bank v Lanka Queen Int'l Private Ltd** [supra] that unconditional leave cannot be granted, for the following reasons:

> “ *… when the literal rule of interpretation is applied to the phrases ‘on such terms as to security’ ‘***or*** otherwise as the court thinks fit’, it is clear that the legislature has intentionally used two different phrases to enable the court to make two different types of orders. The use of the conjunction ‘or’ empowers the court to make either of the orders as is necessary to safeguard the interests of the plaintiff.*”
>
> “*… the phrase ‘or otherwise as the court thinks fit’ should be interpreted to enable the court to make an appropriate order as it thinks fit, including an order granting leave to appear and show cause against the decree nisi without the defendant furnishing any security.*” [pages 16-17]

The position, in my view, can be summarised as follows:

(1) The use of the words, “*on such terms*” applies to “*security, framing and recording of issues, or otherwise as the court thinks fit*” and therefore terms or *conditions* must be imposed when granting leave;

(2) The words, “*otherwise as the court thinks fit*” cannot be read to mean that the District Court is empowered to grant leave with no terms or conditions whatsoever;

(3) Leave to appear therefore cannot be granted without terms or conditions;

(4) The District Court does indeed have a wide discretion with regard to the terms on which leave can be granted, as demonstrated by the use of the words “*otherwise as the court thinks fit*”, with the only limitation on such discretion being the requirement of the imposition of ‘*a’* term;

(5) It is not mandatory to impose *security*, as evinced by the use of the conjunction “or”;

(6) In imposing terms, the District Court must be mindful of the objectives of the Act, and its discretion must be exercised judicially.

Facts of the case – revisited

Having referred to the applicable provisions of the Act, I shall now consider the course of action adopted by the Defendants. On 26th April 2018, the Defendants filed an application in terms of Section 6(2), duly supported by the affidavit of the Defendants, seeking *inter alia* the following relief:

(අ) පැමිණිලිකරුගේ නඩුව නිෂ්ප්‍රභා කරන නියෝගයක් ලබා දෙන ලෙසත්,

(ආ) විත්තිකරුවන්ට විරුද්ධව ඇතුලත් කර ඇති නෛසයි තීන්දු ප්‍රකාශය, නියත තීන්දු ප්‍රකාශයක් බවට පත් නොකර විසුරුවා හැරීමේ නියෝගයක් ලබා දෙන ලෙසත්,

(ඇ) විත්තිකරුවන්ට විරුද්ධව ඇතුලත් කර ඇති නෛසයි තීන්දු ප්‍රකාශය, නියත තීන්දු ප්‍රකාශයක් බවට පත්කිරීමට කර ඇති ඉල්ලීම ප්‍රතික්ෂේප කිරීමේ නියෝගයක් ලබා දෙන ලෙසත්,

(ඈ) ඉහත (අ), (ආ) සහ (ඇ) ඡේද යටතේ නියෝග ගරු අධිකරණය ලබා නොදෙන්නේ නම් විත්තිකරුවන්ට මෙම නඩුවට **කොන්දේසි විරහිතව පෙනී සිටිම සහ හේතු දැක්වීමට අවසර ලබා දෙන නියෝගයක්** ලබා දෙන ලෙසත්, [emphasis added]

(ඉ) ඉන් පසු විත්තිකරුවන්ගේ උත්තරය ඉදිරිපත් කිරීමට අවසර ලබා දෙන නියෝගයක් ලබා දෙන ලෙසත්,

I have already concluded that the Act does not contemplate the granting of leave without terms or conditions and to that extent, the application of the Defendants did not come within either of the three paragraphs of Section 6(2). Although specific reference has not been made to Section 6(2)(c), given the matters raised in the affidavit and the aforementioned prayer, it is clear that the Defendants were seeking leave to appear and show cause under and in terms of paragraph (c).

The following objections had been raised by the Defendants in their application:

(a) The documents annexed to the plaint are not originals nor have they been translated to Sinhala;

(b) The rate of penal interest stipulated in the Agreement is contrary to Central Bank guidelines relating to the imposition of penal interest;

(c) The Defendants have only obtained an overdraft facility and that an overdraft facility does not fall within the definition of a 'debt';

(d) A facility secured by a mortgage bond is outside the definition of 'debt' and cannot be the subject matter of an action under the Act; and

(e) The Defendants have repaid a sum of Rs. 55,998,005, which fact has been suppressed by the Plaintiff, and that the said sum of money has not been set off against the monies that the Defendants have overdrawn from their account.

With regard to each of the above, I must state as follows:

(a) I have already considered the relevant provisions of the Act and arrived at the conclusion that it would suffice for copies of the instrument, agreement or document to be tendered with the plaint and for the originals to be produced if ordered by Court in terms of Section 8;

(b) Section 23 of the Act provides that the parties may agree on the rate of interest and it is only when agreement has not been reached that market rates would apply. In terms of Section 22 however, "*No sum of money which constitutes a penalty for default in payment, or delay in payment, of a debt shall be recoverable in an action instituted for the recovery of such debt, in terms of the procedure laid by this Act.*"

In **Car Mart Ltd and Another v Pan Asia Bank Ltd** [(2004) 3 Sri LR 56], an argument was raised that the total sum sought to be recovered in the action includes the amounts charged as penal interest and that in view of Section 22, the Bank cannot recover penal interest in an action filed under the Act, thereby rendering the whole plaint bad in law and accordingly preventing the Court from entering a legally valid decree *nisi*. The Court, referring to the proviso to Section 6(3) which reads thus, "*Provided that a decree nisi, if it consists of separate parts may be discharged in part and made absolute in part …*", held as follows at page 59:

"*This provision is similar to section 388(2) proviso of the Civil Procedure Code. The proviso to section 6(3) empowers the court to vary the decree nisi at the end of*

the action. If the defendant at the end of the case satisfies court that a sum of money is not legally due from him or a sum not legally recoverable from him (such as the sum referred to in section 22) the court has power to make adjustments to the decree nisi before making it absolute. If the court has no such power it would lead to an injustice.";

(c) I have already arrived at the conclusion that an overdraft facility falls within the definition of a 'debt' under the Act, as long as such facility is reflected in a written promise or agreement between the parties, and the other requirements are satisfied. Perhaps, I should reiterate that what is relevant is not the nomenclature attached to the written promise or agreement but that the amount claimed must be capable of being ascertained from such written promise or agreement at the time of the institution of the action;

(d) The definition given to 'debt' permits a facility secured by a mortgage bond to be recovered by way of an action instituted in terms of the Act.

It is a matter of regret that these objections continue to be raised, in spite of the Act being clear and in the backdrop of many judicial pronouncements addressing the same, and especially in proceedings instituted under an Act that has been introduced to expedite the recovery of debts. The objections raised by the Defendants are not only frivolous but once raised, required the learned District Judge to give his mind to such objections at the cost of his valuable judicial time. The situation is made worse when an appeal is made to the High Court and thereafter to this Court, wasting the valuable time that both Courts could otherwise allocate to other more deserving cases that require their attention.

What aggravates the situation in this appeal even further is that:

(a) The Defendants, having admitted that they obtained the credit facility, and in spite of a further admission in writing that the outstanding debit balance was Rs. 76 million as at 31st March 2015, raised as their primary defence that a sum of Rs. 56 million paid by them has not been credited to their current account. The Defendants however did not produce the relevant deposit slips to establish that such a sum has

in fact been deposited by them and that such sums have not been credited to their account. The failure to provide proof by way of the deposit slips was critical to this claim of the Defendants. The explanation for this failure is simple. Any person with a basic knowledge of banking is well aware that the elementary nature of an overdraft facility granted on a long term basis is such that the bank allows the customer to withdraw as well as deposit monies simultaneously and on a continuing basis, as long as the overdraft limit is not exceeded. Thus, even if one accepts the claim of the Defendants that they deposited Rs. 56 million, they have failed to establish that such monies have not been credited;

(b) Although the Mortgage Bond had been tendered with the plaint and even though the forced sale value of the property was fixed at Rs. 75 million in terms of a valuation report obtained in January 2012, the Defendants did not claim that the said property was sufficient to secure the repayment of the amount in default nor did they move that they be granted leave to appear and defend in terms of Section 6(2)(b). In other words, the question of law that is now before this Court has not been raised by the Defendants before the District Court. That was a very costly mistake on the part of the Defendants, which has resulted in two appeals spanning over four years.

Order of the District Court

The learned District Judge has considered each and every objection raised by the Defendants and has rejected them for the reasons contained therein, which reasons are not being challenged in this appeal. With the several objections of the Defendants having been rejected, the learned District Judge has quite rightly held that the Defendants have not made out a *prima facie* sustainable defence, which position too is no longer in issue.

What follows immediately after the said finding are the final two paragraphs of the Order, which read as follows:

"ඒ අනුව පනතේ 6(2)(බී) වගන්තිය අනුව නෛසයි තීන්දු ප්‍රකාශය නියත තීන්දු ප්‍රකාශයක් පත් කරනු ලැබුවහොත් එකී නෛසයි තීන්දු ප්‍රකාශයේ සඳහන් මුදල් ප්‍රමාණය පියවීම සඳහා යුක්ති සහගත බවට සහ ප්‍රමාණවත් ලෙස පෙනී යන ඇපයක් විත්තිකරු විසින් සපයනු ලැබිය යුතු බව පෙනී යයි.

ඒ අනුව නෛසයි තීන්දු ප්‍රකාශයේ සඳහන් මුදල් හෝ එකී මුදලට සරිලන ලෙස ප්‍රමාණවත් ඇපයක් විත්තිකරුවන් විසින් ඉදිරිපත් කිරීමෙන් පසුව පමණක් නඩුවට පෙනී සිට නෛසයි තීන්දු ප්‍රකාශයට එරෙහිව හේතු දැක්වීම සඳහා 1 සහ 2 වන විත්තිකරුවන්ට අවසර දෙමි."

It is true that the learned District Judge has not considered whether the mortgage already in place was an adequate security to cover the decree *nisi* in terms of Section 6(2)(b) but the blame for that cannot be attributed to the learned District Judge but solely to the Defendants for not raising it. Although Section 6(2)(b) places the onus on the Court to be satisfied that the security is sufficient, the Court could not have done so in the absence of the Defendants placing that material before Court, especially with regard to the current value of the said property?

However, given the manner in which the Order had been crafted, it was open to the Defendants to move Court to accept as security the property mortgaged by them which had a forced sale value of Rs. 75 million. Instead of doing so, the Defendants opted to file a petition of appeal in the High Court seeking leave to appeal against the said Order of the District Court.

<u>Appeal to the High Court and its judgment</u>

Having heard both parties, the High Court had granted leave to appeal as well as a stay of the said Order.

In addition to the objections raised before the District Court, the Defendants raised the following two matters in its petition of appeal:

(a) The learned District Judge has failed to consider that he should act under Section 6(2)(a) or (b); [1994 අංක 09 දරන ණය ආපසු අයකර ගැනීමේ (විශේෂ විධිවිධාන) (සංශෝධන) පනතේ 06 (2) වගන්තිය අනුව විත්තිකාර-පෙත්සම්කරුවන් විසින් හේතු දැක්වීම සඳහා අවසර පතන ඉල්ලීමක් ඉදිරිපත් කල විට එකී වගන්තියේ (අ) සහ (ආ) උපවගන්ති අනුව ගරු අධිකරණය ක්‍රියා කළයුතු බවට වන කරුණ ගරු උගත් අතිරේක දිසා විනිසුරුවරයා සලකා බලා නොමැති බව].

(b) The learned District Judge failed to consider that the Defendants have already mortgaged a property valued at Rs. 75m when he directed the Defendants to place a security adequate to secure the sum in the decree *nisi*.

While the matter in (b) was never urged before the District Court, as far as the matter in (a) is concerned, the learned District Judge has acted under Section 6(2)(b) although not at the instance of, and therefore with no assistance from the Defendants. This complaint is therefore completely unwarranted. Even though the matter in (b) had been reiterated in the written submissions filed by the Defendants before the High Court, it has been done half-heartedly, with the focus being very much on seeking to set aside the Order on the basis that the learned District Judge failed to appreciate that the Defendants had made out a *prima facie* sustainable defence warranting leave to appear being granted under Section 6(2)(c).

Although in its judgment delivered on 15th July 2020, the High Court had considered the principal objections and overruled them for the reasons set out therein, the High Court has not considered whether the mortgaged property was an adequate security for the purposes of Section 6(2)(b). Aggrieved by the above judgment, the Defendants filed their petition of appeal before this Court on 18th August 2020, seeking to set aside the said judgment of the High Court and the Order of the District Court.

Question of law

It is in the above factual and legal circumstances that I must consider the aforementioned question of law, which for convenience is reproduced below:

> "Did the Civil Appellate High Court err in law by affirming the District Court order dated 21st February 2019 by holding that the Defendants are required to deposit security under Section 6(2)(a) or 6(2)(b) of the Debt Recovery Act as amended notwithstanding the fact that the Defendants have furnished a mortgage of a land in order to obtain the monies that are referred to in the plaint filed by the Plaintiff in the District Court?"

I have already stated that once the District Court forms the view that the defendant has not made out a *prima facie* sustainable defence and is therefore not entitled to leave under Section 6(2)(c), the District Court shall act under Section 6(2)(a) or (b), even though the defendant may not have sought leave under paragraphs (a) or (b). Although in this

case, the learned District Judge has allowed the Defendants to deposit a sum of money equivalent to the sum specified in the decree *nisi* or to furnish a security which is reasonable and sufficient to satisfy the sum mentioned in the decree *nisi*, the reality is that the learned District Judge has not considered whether that requirement could be satisfied by accepting as security for the purposes of Section 6(2)(b) the same property mortgaged to the Plaintiff at the time the credit facility was obtained. This becomes even more significant in view of the Plaintiff's failure to explain in the plaint why it chose not to proceed by way of *parate* execution, although such a course of action was available to it.

The question that I must answer is did the learned District Judge err in law when he failed to do so? In searching for the answer to that question, I shall bear in mind the rationale for the introduction of the Act and its provisions and the fact that the Act was meant to expedite the recovery of debts owed by customers to a lending institution. On the face of it, the provisions of the Act are lender friendly and accords with its objective. However, that does not mean that it is a piece of legislation that is heavily weighted in favour of the lender, for there are provisions that amply safeguard the rights of the debtor, as well. In the application of the Act, it is the duty of the Court to strike the correct balance between the conflicting interests of the parties. I shall examine in that light the rationale for the requirement to deposit security in order to proceed with the challenge to the decree *nisi*.

The rationale is simple. If the defendant makes out a *prima facie* sustainable defence, the discretion with regard to the terms on which leave should be granted is with the learned District Judge. However, where the defendant fails to make out a *prima facie* sustainable defence, the Act mandates that security be deposited, whether it be money or otherwise, and that it be sufficient to satisfy the sum of money specified in the decree *nisi*. The intention of the Legislature in requiring a security is therefore to ensure that if the defendant fails in his or her bid to prevent the decree *nisi* being made absolute, the plaintiff must be able to immediately access the security, with Section 13 of the Act providing that a decree absolute shall be deemed to be a writ of execution issued to the fiscal in terms of Section 223(3) of the Civil Procedure Code.

I am however mindful that where the Defendants have pledged an immovable property as security for the underlying credit facility, which is readily realisable by resorting to

parate execution in terms of the provisions of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, but the Plaintiff has chosen instead to invoke the provisions of the Act, and especially in the absence of an explanation by the Plaintiff as to why it cannot pursue the security already available, it is inherently unfair and unreasonable to direct the Defendants to furnish further security which to the Court may appear reasonable and sufficient to satisfy the sum mentioned in the decree *nisi*. To hold otherwise would mean that the Plaintiff would have access to two securities, very much in excess of the sums of money due to it, leaving the Defendants at the mercy of the Plaintiff in the event of the decree *nisi* being made absolute. This certainly could not have been the intention of the Legislature.

The learned Counsel for the Plaintiff presented two arguments as to why the property already mortgaged could not have been considered as security for the purposes of Section 6(2)(b).

The first was that Section 6(2) provides that the Court shall grant leave to appear and show cause against the decree *nisi* upon the defendant **furnishing** such security, and that the use of the word 'furnishing' contemplates a new security as opposed to a security which has already been given. I am not in favour of taking such a restrictive view for the reason that the discretion with regard to the adequacy of the security must always remain with the Court. In exercising such discretion, the Court shall bear in mind the wording in paragraph (b) – i.e., "*security as to the court may appear reasonable and sufficient for satisfying the sum mentioned in the decree nisi in the event of it being made absolute;*". This discretion must not be interfered with, especially in a case such as this, where there already is a security.

The second argument of the learned Counsel for the Plaintiff was based on Sections 16 and 17(3) of the Act, which specifically mandates the Court to direct the tendering of cash or a guarantee from a bank for the satisfaction of the entire claim. It must be noted that Section 16 applies when further proceedings in the District Court are stayed by the Court of Appeal upon an application for leave to appeal from an order made in the course of any action and that Section 17(3) applies where leave to appeal to this Court is granted against a decree absolute. It was the position of the learned Counsel that similar words in the

statute should be interpreted similarly and for that reason, the security that is contemplated by Section 6(2)(b) must also be cash or a bank guarantee.

I cannot agree with this argument for two reasons. The first is that while Section 6(2)(b) confers upon the Judge the discretion to decide on the type of security, with the requirement being that such security be reasonable and sufficient for satisfying the sum mentioned in the decree *nisi*, neither Section 16 nor Section 17(3) gives any such discretion to the Court. Instead, both Sections specifically set out the type of security to be deposited thereunder. The second is that the stage at which security is ordered under Sections 16 and 17 is much later than when an application is made under Section 6(2)(b), and by which time there is already a finding with regard to the liability of the borrower.

I am therefore not in agreement with the said two arguments of the learned Counsel for the Plaintiff.

Conclusion

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

(a) Where a defendant has already pledged an immovable property as security for the same loan that is sought to be recovered through the action filed under the Act and the defendant moves that leave to appear and show cause be granted by accepting the said property as security, the learned District Judge must consider if such security is adequate for the purposes of Section 6(2)(b) and whether it is reasonable and sufficient for satisfying the sum mentioned in the decree *nisi*;

(b) However, this is subject to one crucial condition, that being that the onus of satisfying the learned District Judge that the security already in place is reasonable and sufficient to satisfy the sum mentioned in the decree *nisi* shall always be with the defendant;

(c) In this appeal, the Defendants completely failed in that regard in spite of the Plaintiff having pleaded the mortgage bond in its plaint. The Defendants also had the duty of demonstrating to the District Court and the High Court that the value of the property

is sufficient to cover the amount of the decree *nisi* or at least a part thereof. This is critical, as how else would the learned Judges know the value of the security already offered? Had that material been placed before the District Court or even the High Court, it would have enabled the Court to decide whether the said security is reasonable and sufficient for satisfying the sum mentioned in the decree *nisi*;

(d) Although the Defendants did raise the issue currently before us in the High Court, it was a half-hearted attempt, and was subject to the same infirmities that I have referred to in the previous paragraph. Hence, it cannot be said that the High Court erred in law when it failed to consider the adequacy of the security already mortgaged to the Plaintiff for the purposes of Section 6(2)(b).

I would therefore answer the question of law raised in this appeal in the negative. The Order of the District Court delivered on 21st February 2019 and the judgment of the High Court dated 15th July 2020 are affirmed. This appeal is accordingly dismissed, with costs fixed at Rs. 100,000.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT

Yasantha Kodagoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for an Appeal to the Supreme Court from the Judgement dated 27th of January 2016 of the High Court Kurunegala in case No. HC Kurunegala No. 70/2014 under Section 14(2) of the Maintenance Act, No. 37 of 1999.

Case No: SC APPEAL 49/2016

High Court (Kurunegala) Case No: 70/2014

Magistrate Court (Polgahawela) Case No: 2481/12

Pilawala Pathirennehelage Upeksha Erandathi,
Otharakiruwanpola, Keppitiwalana,

APPLICANT

vs.

Dasanayake Achchilage Dammika Kumara Dasanayake,
Otharakiruwanpola, Keppitiwalana.

RESPONDENT

AND BETWEEN

Pilawala Pathirennehelage Upeksha Erandathi,
Otharakiruwanpola, Keppitiwalana.

APPLICANT-APPELLANT

Vs

Dasanayake Achchilage Dammika Kumara Dasanayake,

Otharakiruwanpola, Keppitiwalana.

RESPONDENT-RESPONDENT

AND NOW BETWEEN

Dasanayake Achchilage Dammika Kumara Dasanayake,
Otharakiruwanpola, Keppitiwalana.

RESPONDENT–RESPONDENT-APPELLANT

Vs

Pilawala Pathirennehelage Upeksha Erandathi,
Otharakiruwanpola, Keppitiwalana.

APPLICANT-APPELLANT-RESPONDENT

BEFORE : **S. THURAIRAJA, PC, J**
JANAK DE SILVA, J AND
ACHALA WENGAPPULI, J

COUNSEL : N.M. Riyaz with Ms. G. B. Madhushani Chandrika instructed by Amali Ranasinghe for the Respondent-Respondent-Appellant.
W. Dayaratne, PC with Ms. Ranjika Jayawardena, for the Applicant-Appellant-Respondent.

WRITTEN SUBMISSIONS : No written submissions filed

ARGUED ON : 14th February 2023

DECIDED ON : 07th February 2024

S. THURAIRAJA, PC, J

The Applicant-Appellant-Respondent, namely Pilawala Pathirennehelage Upeksha Erandathi, ("Hereinafter referred to as the "Applicant-Respondent") had filed an application before the Magistrate Court of Polgahawela on 5th January 2012 against the Respondent-Respondent-Appellant, namely, Dasanayake Achchilage Dammika Kumara Dasanayake (Hereinafter referred to as the "Respondent-Appellant"), to whom she was married from 24th September 2009, praying for a sum of Rs. 10, 000/- as maintenance in terms of Section 2(1) of the *Maintenance Act, No. 37 of 1999*.

Respondent-Appellant claimed that he did not have sufficient income or assets to pay the same and prayed for the dismissal of the Applicant-Respondent's application. The Magistrate Court delivered the order on 23rd May 2014 and dismissed the application of the Applicant-Respondent.

Aggrieved by the said order, the Applicant-Respondent then appealed to the Provincial High Court of North Western Province Holden in Kurunegala. By judgment dated 27th January 2016, the learned High Court Judge held in favour of the Applicant-Respondent and the Respondent-Appellant was ordered to pay Rs. 7,500/- monthly as maintenance from January 2012. Aggrieved by the said decision of the learned High Court Judge, the Respondent-Appellant filed the instant application before this Court.

Initially, the Attorney-at-Law for the Respondent-Appellant identified the following questions of law:

> *"1. To what extent is an Appellate Judge entitled to disturb a trial judge's finding which was based on testimonial trustworthiness?*
>
> *2. Can a Court consider unmarked documents filed with the written submissions?*
>
> *3. Is the Maintenance Act, No. 37 of 1999 a consolidating or codifying Act?"*

When the case was taken up on 14th February 2023, the Counsel for the Respondent-Appellant submitted that he wished to confine himself to the aforementioned second question of law.

The Factual Background of the Case

According to the Applicant-Respondent, the Applicant-Respondent and Respondent-Appellant, who had been a Navy deserter unbeknownst to her at the time, registered their marriage on 24th September 2009 as a result of a romantic relationship. Following the marriage, they had relocated to Australia, where they were employed in various capacities for about two years.

The Applicant-Respondent asserted that she pursued a Diploma during this period while enduring severe mistreatment, characterized by beating and forceful appropriation of money she had earned. The Applicant-Respondent further claims that the Respondent-Appellant was "addicted to unnatural sexual behaviour", which she could not tolerate. The Applicant-Respondent claimed that when she refused to engage in such unnatural sexual behaviours, he would resort to physical violence and beat her.

The Applicant-Respondent and the Respondent-Appellant had returned to Sri Lanka on 2nd November 2011. The Applicant-Respondent asserted that her inability to endure the harsh treatment within the confines of married life, coupled with genuine concerns for her personal safety, prompted her to file a complaint at the Katunayake Airport Police after her arrival. Thereafter, she had filed two further complaints dated 03rd November 2011 and 6th November 2011 at the Alawwa Police Station, having chosen to reside with her parents in the said area for her safety.

The Applicant-Respondent had subsequently initiated divorce proceedings bearing Case No. 10408/Divorce at the District Court of Kurunegala. Within the context of these legal proceedings, the Applicant-Respondent contended that the Respondent-Appellant, through fraudulent means, acquired funds belonging to her. She asserted

that she has been left with only the "clothes she is wearing", as the Petitioner allegedly obtained all other assets and belongings.

The Applicant-Respondent further stated that she had not been employed since she returned to Sri Lanka and that she has been living with her parents with no income.

The position of the Respondent-Appellant throughout these proceedings has been that he does not have sufficient means and all that he earned while in Australia was used to pay back his debts. He further asserted that the Applicant-Respondent has a good earning capacity considering her educational background and strong command of the English language.

Analysis

The question of law to be considered in the instant case is, simply, whether or not a judge is able to consider unmarked documents filed with written submissions as evidence.

Where unmarked documents are considered by a judge in arriving at his or her decision, especially when such documents are submitted at a later stage of a case, a party may be prejudiced where such party is not afforded sufficient time and opportunity to answer or explain the contents of such document. Where prejudice is so caused, an appellate court is left with no option but to interfere with the findings of the original court.

Then, what this Court needs to inquire into are the following:

1. Whether or not the learned High Court Judge has considered any unmarked documents in arriving at his findings; and
2. If the answer to the above is positive, then whether such documents being considered has affected the outcome of the case, thereby causing prejudice.

The unmarked document referred to in the instant case is the Medico-Legal Report dated 6th November 2011, which was submitted as evidence in the aforementioned divorce proceedings bearing Case No. 10408/Divorce before the District Court of Kurunegala. Despite the Applicant-Respondent's plea for the same to be adopted in the maintenance proceedings, the record reveals that the learned Magistrate has unequivocally rejected this plea.[1] The learned High Court judge in his judgment dated 27th January 2016 has not once mentioned the Medico-Legal Report.

Section 2(1) of the *Maintenance Act, No. 37 of 1999* provides as follows:

> *"Where any person having sufficient means, neglects or unreasonably refuses to maintain such person's spouse who is unable to maintain himself or herself, the Magistrate may, upon an application being made for maintenance, and upon proof of such neglect or unreasonable refusal, order such person to make a monthly allowance for the maintenance of such spouse at such monthly rate as the Magistrate thinks fit, having regard to the income of such person and the means and circumstances of such spouse:*
>
> *Provided however, that no such order shall be made if the applicant spouse is living in adultery or both the spouses are living separately by mutual consent."*

According to the aforementioned provision, in making an order for maintenance, a Magistrate must satisfy himself/herself as to the following elements:

i. The person against whom the claim is made has sufficient means;

ii. Such person neglects or unreasonably refuses to maintain his/her spouse;

iii. The spouse is unable to maintain herself/himself; and

[1] Order dated 23rd May 2014 by the Magistrate of Polgahawela in Case No. 2481/12/නඩත්තු at pp. 13-14; Case Record at pp. 201-202

iv. The case does not fall within the proviso therein, i.e. the spouse is not living in adultery and the spouses are not living separately by mutual consent.[2]

Once a Magistrate is satisfied with all said elements, an order to pay a monthly allowance for the maintenance of the spouse can be made against such a person. Although this allowance can be made at a rate as the Magistrate thinks fit, such rate must be decided having considered the income of the person and the means and circumstances of the spouse.

The learned High Court Judge, in his judgment dated 27th January 2016, has first dispensed with the question with regards to the proviso. In that, the question of adultery has been correctly dismissed for there is no allegation of adultery against the Applicant-Respondent. Even where such an allegation is made the burden of proving the same would be on the person who alleges it.[3]

In considering whether there has been a mutual separation, the learned Magistrate has considered the allegations of unnatural sexual behaviour in the following manner, and the same has been accepted by the learned High Court Judge:

> "කෙසේ නමුත් වගඋත්තරකරු වෙනුවෙන් හෝ වගඋත්තර කරුගේ සාක්ෂි මගින් එකී කාරණාව හබ කිරීමක් සිදු කොට නොමැති හෙයින් "දැඩිමුණි විමලසේන එදිරිව නීතිපති" නඩුවේ තීන්දුව ප්‍රකාරව වගඋත්තරකරු ඉල්ලුම්කාරිය සමඟ අස්වාභාවික ආකාරයෙන් ලිංගික ක්‍රියා වල යෙදී ඇති බවට පිලි ගැනීමක් ලෙසට සැලකීමට බාධාවක් නැති අතර ඒ අනුව වග උත්තරකරුගේ ලිංගික හිරිහැර නිසා ඉල්ලුම්කාරියට ඔහුව හැර යන්නට සිදු වී ඇති බවටත්, ඔහු නැවත විවාහ ජීවිතය ගත කිරීමට ආරාධනා කිරීම ප්‍රතික්ෂේප කිරීමට තරම් ප්‍රමාණවත් හේතුවක් බවත් පැහැදිලි වන බවයි.

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[2] *Hewa Walimunige Gamini v. Kudaanthonige Rasika Damayanthi,* SC Appeal 151/2017, SC Minutes of 11th March 2020 at 8

[3] *Vide* Section 103 of the Evidence Ordinance; *Selliah v. Sinnammah* 48 NLR 261; *Armugam v. Athai* 50 NLR 310; *Weerasinghe v. Renuka* [2016] 1 Sri LR 57

[However, as the same has not been refuted on behalf of the Respondent or by the evidence of the Respondent, by virtue of the decision in Dadimuni Wimalasena v. Attorney-General, there is no impediment to considering the fact that there had been unnatural sexual behaviour with the Applicant as an admission, and, as such, due to these sexual harassments the Applicant had had to separate from him and it is revealed that there are reasonable grounds to refuse his invitation to resume their marital life.]"[4]

Although she has only made this allegation to Katunayake Police after returning to Sri Lanka after a considerable delay without ever informing the authorities in Australia, this need not affect her testimonial creditworthiness. It is naturally difficult for anyone subjected to such treatment to muster up the courage to voice out their concerns—especially when living in a foreign country, far away from anyone who may lend a shoulder. After arriving in Sri Lanka, she has expeditiously informed the police of her ordeal, which the learned High Court Judge has taken into account in assessing her evidence.[5]

The decision of the learned Magistrate in refusing to make an order concerning the payment of maintenance was mainly based on his finding that the Respondent-Appellant did not have sufficient means. The learned Magistrate had further concluded the Applicant-Respondent to have a higher earning capacity compared to the Respondent-Appellant and that she was able to maintain herself.

The learned High Court Judge has analysed the ability of the Applicant-Respondent to maintain herself in the following manner:

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[4] Order dated 23rd May 2014 by the Magistrate of Polgahawela in Case No. 2481/12/නඩත්තු at pp. 14-15; Case Record at pp. 202-203 (An approximate translation added to reflect the text as closely as possible)

[5] Judgment dated 27th January 2016 of the Provincial High Court of the North Western Province Case No. HCA 70/2014 at p. 7

"'ඉල්ලුම්කාරියගේ සාක්ෂිය විශ්ලේෂණය කිරීමේදී අතිශෝක්තියකින් යුතුව තමා අසරණ භාවයට පත් වී ඇති බව පෙන්වා දීමට උත්සාහ දරා ඇති බව පෙනේ' යනුවෙන් මහෙස්ත්‍රාත්වරයා තම නියෝගයේ සඳහන් කර ඇත. එසේ කියා ඇත්තේ තමාට අදායමක් නොමැති නිසා ඇඳුම් ගැනීමට හෝ නොහැකිව තමාගේ සහෝදරියගේ ඇඳුම් අඳින බවට සාක්ෂි මගින් කියා ඇති බව සඳහන් වේ. මෙහිදී මහෙස්ත්‍රාත්තුමා පියාගේ වත්කම් සලකා ඇය එවැනි මට්ටමකට පැමිණිය නොහැකි බව කියා ඇතත්, මෙවැනි ඉල්ලීමකදී දෙමාපියන් සතු වත්කම් සලකා බැලමේ අවශ්‍යතාවයක් නීතිමය ලෙස නොපවතී. එබැවින් එවැනි පදනමක පිහිටා ගනු ලබන තීරණ නිවැරදි ලෙස සැලකිය නොහැක.

[The magistrate has stated in his order that "in the analysis of the testimony of the petitioner, it seems that efforts have been made to point out that she is helpless with some exaggeration". It was so found as the witness had said that she wears her sister's clothes because she has no income or is unable to afford even clothing items. Here, although the magistrate has said that she cannot reach such a level considering the assets of the father, there is no legal requirement to consider the assets of the parents in an application of this nature. Therefore, a decision made on such a basis cannot be deemed accurate]"[6]

I am inclined to agree with the findings of the learned High Court Judge. The assets of her parents, or any relative for that matter, cannot be considered her own means, although parents and relatives may naturally lend a hand. The means and circumstances of relatives cannot release a spouse from the responsibility of maintaining the other.

Furthermore, the learned High Court Judge has arrived at a different conclusion to that of the learned Magistrate in assessing whether the Respondent-Appellant has sufficient means. The learned High Court Judge has arrived at his conclusion based on

[6] Judgment dated 27th January 2016 of the Provincial High Court of the North Western Province Case No. HCA 70/2014 at p. 15 [An approximate translation added]

the testimonial creditworthiness of the evidence produced before the Magistrate on behalf of the Respondent-Appellant—the overall improbability of the evidence was considered in particular.

The Respondent-Appellant had submitted that he had no sufficient means of maintaining his spouse owing to being unemployed and having to spend the entirety of his earnings in Australia on paying back his debts.

According to the evidence led before the learned Magistrate, the Respondent-Appellant had had Rs. 3,108,940/- in an account maintained by him at the Bank of Ceylon as of 2nd December 2011, and all but Rs. 2706.63/- had been withdrawn after the Applicant-Respondent took necessary legal steps to separate from him. The Respondent-Appellant had taken the position that he withdrew the money in order to pay back his loans, obtained to facilitate their migration to Australia.

One Wipulasena—a relative of the Respondent-Appellant—had testified that he lent the Respondent-Appellant two million rupees by pawning his wife's jewellery and leasing his vehicle. One Buwaneka had testified that he lent one million rupees, which he collected from his friends, to the Respondent-Appellant. Neither of them have taken any security or documentation in lending the said amounts, nor have they charged any interests.[7] As the learned High Court Judge has correctly concluded, such amounts being let with no security or documentation and not interest, while the lenders would be paying interest themselves, is highly improbable and cannot therefore be accepted.

As the learned judge has further noted, despite having returned to Sri Lanka in the early days of November 2011, the Respondent-Appellant has waited over a month to purportedly pay back his debts, while his friend and relative who lent him money were paying interests. This, too, is highly improbable.

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[7] Case Record at 172-183

Moreover, the learned High Court Judge has concluded the Respondent-Appellant to have *sufficient means* based on the finding that the Respondent-Appellant had the capacity to earn, for he has failed to adduce any proof of illness or similar incapacity despite having so claimed. He had already worked as a labourer from time to time, at the time material, according to his own admission.

The learned Judge has relied on the case of ***Rasamany v. Subramaniam,***[8] where His Lordship Basnayake J observed as follows:

> *"In my view section 2 should be given a wide meaning and not restricted in its scope to persons having an income or actually earning at the time of the application. In this context the word " means " should be taken to include capacity to earn money. It cannot be that the legislature when enacting these provisions intended to exclude from the scope of sections 2 and 3 able-bodied men capable of earning and maintaining their wives and children but who by their voluntary act refrain from so doing."*[9]

Citing Eales JC in ***Me Tha v. Nga San E.***[10] with approval, His Lordship further noted that *"a mere denial by the man himself of sufficiency of means, when that man is an-able bodied man, is not conclusive proof of want of sufficient means"* and that *"a man is not, and ought not to be, permitted by his own voluntary act to free himself from the elementary duty of maintaining his wife and children".*[11]

The aforementioned observations were made with regard to section 2 of the Maintenance Ordinance, well before the enactment of the *Maintenance Act, No. 37 of 1999*. Despite that, the observations are most certainly consistent with the scheme of

[8] [1948] 50 NLR 84

[9] Ibid at 86

[10] 13 Cr. L.J. 162

[11] Citing *Maung Tin v. Ma Hmin* 34 Cr. L.J 1933

the Maintenance Act and therefore remain as relevant today as they were five decades ago.

As it can be observed, the question of law in the instant case is purely hypothetical and has no bearing on the case as the learned Magistrate nor the learned High Court Judge had based their decisions on the Medico-Legal Report or any other unmarked document submitted with the written submissions. As such, I see no need to answer the question of law.

Therefore, I see no reason to interfere with the decision of the learned High Court Judge and the same is affirmed. The decision of the learned High Court Judge is to be accordingly implemented. The Applicant-Respondent is entitled to costs.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J

I agree.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI, J

I agree.

JUDGE OF THE SUPREME COURT

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

SC/APPEAL/54/19

SC(HCCA) LA NO: 486/17

WP/HCCA/MT/46/12(F)

D.C. Mount Lavinia Case No: 1637/02/L

Pattiyage Leelawathie Gomes of No: 60/10J, Templers Road, Mount Lavinia.

PLAINTIFF

-VS-

1. Kotagoda Mudiyanselage Seneviratne Yatigammana,
2. Kotagoda Mudiyanselage Swarnamali Yatigammana,
3. Kotagoda Mudiyanselage Yashodara Srima Kumari Yatigammana,

All of No: 53/4, Sri Gunarathana Mawatha, Mount Lavinia.

DEFENDANTS

AND BETWEEN

1. Kotagoda Mudiyanselage Seneviratne Yatigammana,
2. Kotagoda Mudiyanselage Swarnamali Yatigammana,
3. Kotagoda Mudiyanselage Yashodara Srima Kumari Yatigammana,

All of No: 53/4, Sri Gunarathana Mawatha, Mount Lavinia.

DEFENDANTS-APPELLANTS

-VS-

Pattiyage Leelawathie Gomes of No: 60/10J, Templers Road, Mount Lavinia.

PLAINTIFF-RESPONDENT

(since deceased)

1A. Sriya Sepalika Suludagoda of No: 60/10 M, Templers Road, Mount Lavinia.

1B. Lal Kumara Suludagoda of No: 60/10 K, Templers Road, Mount Lavinia. (since deceased)

1C. Neetha Kamani Suludagoda of No: 60/10 J, Templers Road, Mount Lavinia.

1D. Geetha Chandani Suludagoda of No: 60/10 H, Templers Road, Mount Lavinia.

SUBSTITUTED PLAINTIFFS-RESPONDENTS

AND BETWEEN

1A. Sriya Sepalika Suludagoda of No:60/10 M, Templers Road, Mount Lavinia.

1B 1. Luwis Widanelage Gimhani Thilini

Suludagoda

1B 2. Luwis Widanelage Emil Thilanga

Suludagoda

1B 3. Luwis Widanelage Eshan Thiwanka

Suludagoda

1B 4. Luwis Widanelage Udaya Bhathiya

Suludagoda (Minor)

Appearing by his next friend;

Luwis Widanelage Emil Thilanga Suludagoda

All of No. 60/10K, Tempers Road, Mount Lavinia.

1C. Neetha Karmani Suludagoda of No: 60/10 J, Templers Road, Mount Lavinia.

1D. Geetha Chandani Suludagoda of No: 60/10 H, Templers Road, Mount Lavinia.

SUBSTITUTED PLAINTIFFS-RESPONDENTS-PETITIONERS

-VS-

1. Kotagoda Mudiyanselage Seneviratne Yatigammana,

2. Kotagoda Mudiyanselage Swarnamali Yatigammana,

3. Kotagoda Mudiyanselage Yashodara Srima Kumari Yatigammana,

All of No: 53/4, Sri Gunarathana Mawatha, Mount Lavinia.

DEFENDANTS-APPELLANTS-RESPONDENTS

AND NOW BETWEEN

1A. Sriya Sepalika Suludagoda of No:60/10 M, Templers Road, Mount Lavinia.

1B 1. Luwis Widanelage Gimhani Thilini Suludagoda

1B 2. Luwis Widanelage Emil Thilanga Suludagoda

1B 3. Luwis Widanelage Eshan Thiwanka

Suludagoda

1B 4. Luwis Widanelage Udaya Bhathiya

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Luwis Widanelage Emil Thilanga Suludagoda

All of No. 60/10K, Tempers Road, Mount Lavinia.

1C. Neetha Karmani Suludagoda of No: 60/10 J, Templers Road, Mount Lavinia.

1D. Geetha Chandani Suludagoda of No: 60/10 H, Templers Road, Mount Lavinia.

SUBSTITUTED PLAINTIFFS-RESPONDENTS-PETITIONERS-APPELLANTS

-VS-

1. Kotagoda Mudiyanselage Seneviratne Yatigammana,

2. Kotagoda Mudiyanselage Swarnamali Yatigammana,

3. Kotagoda Mudiyanselage Yashodara Srima Kumari Yatigammana,

All of No: 53/4, Sri Gunarathana Mawatha, Mount Lavinia.

DEFENDANTS-APPELLANTS-RESPONDENTS- RESPONDENTS

Before : Priyantha Jayawardena, PC, J.

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

A.L.Shiran Gooneratne, J.

Counsel : J.A.J.Udawatta with Anandha Ponnamperuma instructed by Mrs. Ganga Wanigaratne for the Substituted Plaintiff-Respondent-Petitioner-Appellants

Ikram Mohamed, PC, with S.K. Lankatillak, PC, Tanya Marjan, Charitha Jayawickrema and Vinura Gunawardena for the Defendant-Appellant-Respondents

Argued on : 03.02.2021

Decided on : 27.02.2024

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

This is an appeal by the Plaintiff- Respondent-Appellants (hereinafter sometimes referred to as the Plaintiffs) against the Judgment of the Provincial High Court of the Western Province (exercising Civil Appellate Jurisdiction) Holden in Mount Lavinia (hereinafter sometimes referred to as the High Court) dated 11.10.2017 allowing the appeal of the Defendant-Appellant-Respondents (hereinafter sometimes referred to as the Defendants) by which the said High Court set aside the Judgment of the learned Additional District Judge of Mount Lavinia dated 03.01.2012.

When the leave to appeal application was supported, this Court granted leave on the following question of law.

"Did the Learned High Court Judges err in law in failing to consider whether the plaintiff was entitled to a declaration of title, in the capacity of the administratrix of the estate of her late husband namely Luwis Widanalage Jagathipala?"

As per the Plaint filed in the District Court, the cause of action has been described as follows;

- The deceased husband of the original Plaintiff, namely Luwis Anthony Widanelage Jagathipala was the owner of the land described in the schedule to the Plaint as Lot C1 of plan no. 4704 made by Surveyor H.W. Fernando in terms of the Deed of Gift No. 930 attested by C.H. Peiris, N.P.
- Aforesaid Jagathipala gave permission to his sister one L. A. V. Rathnawathie Suludagoda and her offspring, the Defendants to occupy the house bearing assessment no. 52/2 (now 53/4) from on or around 1972 as licensees.

- The said Jagathipala died without leaving a Last will and the heirs to his estate are the Plaintiff, the wife of the deceased and his four offspring.
- For the administration of the said estate, Rathnawathie Suludagoda, the Original Plaintiff, filed the Testamentary action No.318/95/T in the District Court of Mount Lavinia as the Petitioner and obtained limited letters of administration to sue the people who are occupying the premises described in the schedule to the aforesaid Plaint.
- The Plaintiff terminated the aforesaid license to occupy and demanded the peaceful possession of the said premises by letter dated 27.06.2002 sent by her lawyer.
- Irrespective of the said termination of license and demand, the Defendants continued to occupy the premises causing Rs. 5000/- per month as damage.
- The Defendants are estopped from challenging her title.
- A cause of action has arisen to sue for the eviction of the Defendants and to claim damages as aforesaid.

Thus, the Original Plaintiff had prayed for a declaration of title to the property described in the schedule to the Plaint, eviction of the Defendants and damages until the possession is given back to the Plaintiff.

In the answer filed by the Defendants, the 1st, 2nd and 3rd Defendants denied the averments contained in the Plaint except the fact that a cause of action had accrued to the Plaintiff and averred that the original owner to the property was one Julias Suludagoda, the grandfather of the Defendants who became entitled to the said property by Deed No.149 dated 09.04.1960. It was further averred that the mother of the Defendants, Rathnawathie Suludagoda who was the daughter of said Julias Suludagoda possessed the said property after said Julias Suludagoda, and said Rathnawathie Suludagoda gave the property described in the schedule to the Plaint to the Defendants to occupy. Thus, the Defendants claimed prescriptive title to the said property and the dismissal of the Plaint.

In the replication, the Original Plaintiff had denied the averments in the answer that are contrary to the averments in the Plaint and stated that the Deed No. 149, referred to in the answer, conveyed title to one L.W. Leelarathne and said Leelaratne by Deed No. 930 referred to in the Plaint transferred the property to Jagathipala, the husband of the Plaintiff. It is reiterated in the replication that said Jagathipala gave permission to his sister, the mother of the Defendants to occupy the property and the Original Plaintiff filed the action after obtaining limited letters of administration.

Contents of the Plaint and the replication clearly indicate that the action filed by the Original Plaintiff was not an action that can be properly described as a *rei vindicatio* action. The cause of action is based on occupation of the property after the termination or expiry of the license, in other words, after the termination of the contractual relationship. This position is fortified by the

averment in the Plaint which states that the Defendants are estopped from challenging the title of the Plaintiff. By stating so, it appears that the Original Plaintiff relied on the provisions of section 116 of the Evidence Ordinance. Thus, prayer for the declaration of title to the property described in the schedule to the Plaint has to be understood in that context as on this occasion the declaration of title to the property is prayed not based on ownership but on contractual relationship that was present between the parties. In **Pathirana V Jayasundara 58 N L R 169** a similar situation was explained as follows;

"*A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei-vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his over holding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner.*"

If the Original Plaintiff wanted to file this action as an owner or a co-owner based on the title or ownership she got after the death of her husband, she need not have averred with regard to the testamentary case and the limited papers of administration she obtained to file the Plaint. She could have directly referred to the title her late husband got through the deeds and her right through succession as the wife. As held in **Silva V Silva 10 N L R 234**, upon a death of a person his/her estate in the absence of a will, passes at once by operation of law to his/her heirs and the *dominium* vests in them. Thus, to eject the trespassers, if it is a cause of action based on the ownership of the Plaintiff, such as in *rei vindicatio* action, it was not necessary to plead issuance of limited letters of administration to sue the Defendants. It is pertinent to note, that in **Mohamed V Public Trustee (1978-79-80) 1 Sri L R 1**, it was held that although the title to the property of a person dying intestate vests on the intestate heirs by operation of law, the property is regarded as vested in the administrator for the purposes of section 472 of the Civil Procedure Code, in strictly limited sense, so as to enable him, in his representative capacity to recover from a third party, what is claimed to be an asset of the intestate estate. [Also see **Chelliah V Wijenathan (1951) 54 N L R 337**]. Thus, this decision focuses on the ability of an administrator of an estate to file an action to recover possession of the property belonging to the estate in his representative capacity, and it also indicates the capacity of the administrator to claim for title on behalf of the estate as the property is vested in him in that limited sense. By indicating in the Plaint that she obtained the limited letters of administration, the Plaintiff has indicated that she was filing the case in that capacity. It appears that the learned District Judge correctly understood this position and gave the declaration of title to her as the administrator of the estate- vide answer to issue No.13 in the District Court Judgment.

It is averred that she terminated the license by sending letters through her lawyer. Thus, it is clear that the action was filed in the District Court after obtaining letters of administration from the testamentary case based on a cause of action that alleges the occupation of the scheduled property after the termination of license or contractual relationship. Due to the reference to the fact that she obtained limited letters of administration to sue the Defendants clearly shows that she filed the

action as the administrator after obtaining limited letters of administration to recover the property that belongs to the estate of the deceased husband. Thus, the Plaint clearly indicates that the action in the District Court was filed in pursuance of the duties she was entrusted with as the administrator as per the limited letters of administration. As per the decision in **Haniffa V Cader 42 N L R 403**, it appears that such letters of administration cannot be challenged in a different action on the ground of an irregularity.

Hence, the scope of the case before the learned District Judge was dependent on the following facts namely, whether the Defendants were illegally occupying the land after termination or expiry of the license or whether the Defendants have prescriptive title to the property. The issues had been raised focusing the aforesaid scope and in fact, the Original Plaintiff had raised an issue in relation to the issuance of limited letters of administration to sue the Defendants. As explained above, if this was a *rei vindicatio* action based on her ownership, she need not had raised such issue relating to the issuance of limited letters of administration. It must be observed that no issue had been raised questioning the *locus standi* or the ability of the Original Plaintiff to sue the Defendants.

The learned District Judge delivered his judgment in favour of the Plaintiff granting relief as prayed for in the Plaint- vide answer to issue No.9, and further stated that the Plaintiff has a legal right to the property as the Administrator of the property- vide answer to the issue No.13. In coming to his conclusions, the learned District Judge has considered the certified copy of the Deed No.149 dated 09.04.1960 tendered by the Plaintiff (marked as P2 at the trial), the evidence given by the land registry officer confirming that it was a true copy as against the photo copy of the Deed No.149 tendered by the Defendants (marked as V1 at the trial) and the fact relating to the time of death of the alleged predecessor in title of the Defendants who as per the Defendants was the Donee of the said deed. As per the true copy, the Donee was L.W. Leelarathne, one who donated the land to Jagathipala, the Original Plaintiff's husband and for whose estate the Original Plaintiff was given limited letters of administration. Further, the learned District Judge has given reasons to state why he cannot accept the prescriptive claim to the property by the Defendants. On the other hand, as per the chain of title presented by the Defendants, Julius Suludagoda was the original owner who got title through Deed No.149. If so, the deceased Jagathipala who appears to be the brother of the mother of the Defendants should have also become a co-owner with the demise of said Julius Suludagoda. Then to claim prescriptive title, the Defendants must have proved an overt act and adverse possession for ten years from that overt act against the co-owners. The action before the District Court was filed in 2002. As per the Judgment of the learned District Judge, the evidence of the 1st Defendant only refers to a chasing away of the Plaintiff in 1969, when she tried to claim the land. The Plaintiff had marked necessary documents to prove that she obtained limited letters of administration to sue the occupiers in the property described in the schedule to the plaint as well as letters sent as the administrator through her lawyer to terminate license given to the Defendants. It must be noted, when the claim for prescriptive title of the Defendants failed, it is only the licensor – licensee relationship averred in the plaint that explains the occupation of the Defendants in the property. Hence, there was sufficient material before the learned District Judge

to establish on balance of probability that the property in question is part of the estate of the deceased Jagathipala; that the Defendants were licensees and that license was terminated by the administrator; and that she obtained the authority from the testamentary case to sue the Defendants. It must be noted, that evaluation of facts by the learned District Judge has not been challenged as perverse through a question of law raised when the leave was granted.

Being aggrieved by the Judgment of the learned District Judge, the Defendants appealed to the High Court. The learned High Court Judges allowed the appeal and set aside the Judgment of District Court. When perusing the Judgment of the High Court dated 11.10.2017, it is clear the learned High Court Judges considered the action before the District Court as an action in the nature of *rei vindicatio* proper which needs strict proof of title; Thus, as an action based on proof of title in its strict sense. In this regard I prefer to quote the following part from the High Court Judgment.

" .....Therefore, it is to be understood that she filed the action being a co-owner and not in any other capacity...."

The learned High Court Judges have failed to observe correctly that the action filed before the District Court was based on a termination of license and if the license was proved, as per section 116 of the evidence ordinance, the Defendants are estopped from challenging the ownership of the licensor. Further, the learned High Court Judges have failed to appreciate that the Plaintiff had specifically pleaded in the Plaint that the Defendants are estopped from challenging the title. The learned High Court Judges have also failed to observe that if the Plaintiff filed the action on the basis of her title as a co-owner or owner, she need not had pleaded with regard to the testamentary case or the issuance of limited letters of administration to sue the Defendants nor she had any necessity to lead evidence in relation to the obtaining of limited letters of administration to sue the Defendants. Thus, the learned High Court Judges have failed to recognize that the declaration of title that was prayed in the prayer had been prayed in the limited capacity of an administrator as well as it was prayed with regard to a situation of terminated or expired license where section 116 of the Evidence Ordinance is relevant.

In addition to above, it must be stated that even if the action before the District Court is considered as one in the nature of *rei vindicatio*, the conclusion reached by the learned High Court Judges referring to **Hariette V Pathmasiri (1996) 1 Sri L R 358, Dharmasiri V Wickrematunga (2002) 2 Sri L R 218** and **Hevawitarane V Dangan Rubber Co.Ltd. 17 NLR 49** is incorrect as this Court after considering those decisions and decisions made in **Jayasinghe V Tikiri Banda (1988) 2 CALR 24, Unus Lebbe V Zayee (1893) 3 S C R 56, Arnolisa V Dissan 4 N L R 163, Geeta V Fernando (1905) 4 Bal. 100, Rockland Distilleries V Azeez 52 N L R 490, Allis V Seneviratne and Others (1989) 2 Sri L R 335** and **Attanayake V Ramyawathie (2003) 1 Sri L R 401** has held in **Gallage Saummehammy alias Somawathie V A.Dharmapala SC Appeal**

184/14 Supreme Court minutes dated 08.09.2022, that a co-owner can maintain an action to eject a trespasser without making other co-owners parties to the action, and that even if the co-owner claims ownership to the entire land, lesser relief declaring that he is only a co-owner can be granted by a Court. It was also held that prayer for a declaration is not a must in a vindicatory action if the title is averred and proved. Thus, even a co-owner is entitled to obtain the relief of ejectment of a trespasser as per our law. Even if the prayer for declaration of title is not there or defective for some reason, if the title is proved the prayer for ejectment can be granted. It is pertinent to note that a co-owner has a right to every grain of sand or every part and portion of the land in dispute to the extent of his share where a trespasser has no right or interest.

As per the reasons given above, it is clear that the learned High Court Judges erred in many aspects by failing to consider,

- that the action was based on the occupation by licensees after termination of license,
- that the action was filed after obtaining limited letters of administration in the relevant testamentary case,
- that even it was considered as an action filed in the nature of a *rei vindicatio*, as the title was proved as co-owner she was entitled to a lesser relief even if she has prayed relief for a declaration of ownership for the entirety.

Before answering the question of law, it is necessary to examine the section 42 of the Civil Procedure Code which states as follows;

"42. *When the Plaintiff sues in a representative character, the plaint should show, not only that he has an actual existing interest in the subject-matter, but that he has taken the steps necessary to enable him to institute an action concerning it*."

The relevant illustration (b) is as follows;

"(b) *A sues as C's administrator. The Plaint must state that A has taken out administration to C's estate."*

In the Plaint relevant to the case at hand, the Plaintiff had averred that she was given limited letters of administration to sue the Defendants. Further, there are sufficient facts revealed to show that the relevant property was part of the estate which indicates that the administrator should have taken interest to recover it.

As per the said section 42, it must be revealed in the Plaint that the action is filed in a representative capacity. As per the Plaint, Plaintiff was the administrator with limited letters of administration to sue the Defendants. Thus, she has averred facts to indicate that she filed this action in a representative capacity. Even though the exact words to indicate that she was filing in representative capacity were not included, one familiar with law can easily recognize that she has filed the action after obtaining the necessary authority from the testamentary case. Those facts indicate that she filed the action as the Administrator with limited letters of administration to sue the Defendants. It is true that the relevant Form No. 14 included in the First Schedule to the Civil Procedure Code has mentioned the representative character of an administrator in the caption itself. However, the said section 42 does not indicate that it must only be done according to the said form. Section only requires to indicate it in the Plaint. Therefore, the form is only an example showing how the representative character may be indicated in the Plaint. If the body of the Plaint has revealed sufficient material to show the representative character of the Plaintiff, it is sufficient for the purpose of the section. In my view, the Plaintiff sufficiently indicated in the Plaint that she filed the action as the one who held the letters of administration to sue the Defendant. Thus, her representative nature with regard to the estate of the deceased was revealed in the Plaint.

As said before, if it was an action filed based on her co-ownership or ownership, she need not have averred in relation to the issuance of limited letters of administration to sue the Defendants. At the trial, an issue had also been raised on the premise that limited letters of administration had been issued to the Plaintiff. The learned District Judge in his judgment has clearly recognized that the action had been filed as the administrator. That is why he gave the declaration of title on the basis that the Plaintiff is the Administrator of the estate- vide answer to issue No 13. There was no objection or challenge to the status or *locus standi* of the Plaintiff through issues raised in the action before the District Court. Now if this Court considers to decide the insufficiency of the exposure of the representative character, in a way, this court is going to decide on a matter not placed before the original Court.

On the other hand, one may argue that the original licensor was the deceased Jagathipala, and with his demise it is the duty and responsibility of the Plaintiff as the administrator to recover the properties of the estate in the hands of persons who have become the trespassers and she herself can file action of this nature without any representative nature as this involves a matter related to her duties and responsibilities which is of a fiduciary nature. Anyway, I do not intend to do a deep discussion in that aspect as I think sufficient facts have been revealed through averments in the Plaint to recognize that she sued the Defendant in her representative capacity as the Administrator after obtaining the limited letters of administration to sue the Defendants. However, as explained above, the learned High Court Judges failed to appreciate such facts.

For the forgoing reasons, I answer the question of law quoted at the beginning of this Judgment in the affirmative in favour of the Plaintiff-Appellants.

Therefore, I set aside the Judgment of the High Court dated 11.10.2017 and restore the Judgment of the Learned District Judge as the case had been filed as the Administrator of the estate of the deceased Jagathipala to recover a property belonging to the estate after the expiry of a license to occupy given by said Jagathipala to the Defendants.

Appeal allowed with costs.

……………………………………………...

Judge of the Supreme Court

Hon. Priyantha Jayawardena, PC, J

I agree.

……………………………………………..

Judge of the Supreme Court.

Hon. 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. 68/2014
WP/HCCA/MT/LA Application
No: 164/2007(F)
DC Mt. Lavinia Case No. 362/98/Spl

1. Vadivelu Anandasiva.

2. Vigneshwary Anandasiva.

   Both of No. 15, Alexandra Road,
   Colombo 6.

PLAINTIFFS

Vs.

1. Paranirupasingham Arulrajasingham,
   No. 22, Govt. Quarters,
   Bambalapitiya.

2. Subramaniam Shanmuganathan,
   No. 56, Vaverset Place,
   Colombo 6.

DEFENDANTS

AND BETWEEN

1. Vadivelu Anandasiva.

2. Vigneshwary Anandasiva.

   Both of No. 15, Alexandra Road, Colombo 6.

PLAINTIFFS – APPELLANTS

Vs.

1. Paranirupasingham Arulrajasingham,
   No. 22, Govt. Quarters,
   Bambalapitiya.

2. Subramaniam Shanmuganathan,
   No. 56, Vaverset Place,
   Colombo 6.

DEFENDANTS – RESPONDENTS

AND NOW BETWEEN

1. Paranirupasingham Arulrajasingham,
   No. 22, Govt. Quarters,
   Bambalapitiya.

1ST DEFENDANT – RESPONDENT – APPELLANT

Vs.

1. Vadivelu Anandasiva.

2. Vigneshwary Anandasiva.

Both of No. 15, Alexandra Road, Colombo 6.

PLAINTIFFS – APPELLANTS – RESPONDENTS

1. Subramaniam Shanmuganathan,
   No. 56, Vaverset Place,
   Colombo 6.

2ND DEFENDANT – RESPONDENT – RESPONDENT

Before: **Priyantha Jayawardena, PC, J**
A.L. Shiran Gooneratne, J
Arjuna Obeyesekere, J

Counsel: M.A. Sumanthiran, PC, with Ms. Juanita Arulanandam and Ms. S Arulendran for the 1st Defendant – Respondent – Appellant

Ikram Mohammed, PC, with S. Mitrakrishnan, Ms. Tanya Marjan, Vinura Jayawardena and Reeshman Jiffry for the Plaintiffs – Appellants – Respondents

Argued on: 1st November 2021

Written Submissions: Tendered on behalf of the 1st Defendant – Respondent – Appellant on 10th November 2021

Tendered on behalf of the Plaintiffs – Appellants – Respondents on 5th August 2014 and 9th November 2021

Decided on: 21st February 2024

Obeyesekere, J

This is an appeal filed by the 1st Defendant – Respondent – Appellant [*the Appellant*] against the judgment delivered on 10th February 2012 by the High Court of the Western Province holden at Mount Lavinia, exercising civil appellate jurisdiction [the High Court]. Leave to appeal has been granted by this Court on 20th May 2014 on three questions of law, which I shall refer to in detail later; suffice to state at this point that the said questions of law would require this Court to determine on whom lies the burden of proof in establishing that a particular property is Thediathetam property, and whether that burden has been discharged by the Appellant.

In the course of writing this judgment, I have observed that the words '*Thesawalamai*' and '*Thediathetam*' have been spelt differently over the years. In order to maintain uniformity, I have opted to follow the above spellings which have been used by Chief Justice Sharvananda in **Manikkavasagar v Kandasamy and Others** [(1986) 2 Sri LR 8].

I shall commence by setting out the material facts relating to this appeal.

Money recovery action

On 30th January 1997, the Appellant filed Case No. 88/97 in the District Court of Mount Lavinia against Subramanium Shanmuganathan, who is the 2nd Defendant – Respondent – Respondent [*Shanmuganathan*], under and in terms of the provisions of Chapter LIII of the Civil Procedure Code. In his plaint, the Appellant alleged that during the period of 10th June 1996 to 30th June 1996, Shanmuganathan had issued in favour of the Appellant, two cheques drawn on the Commercial Bank of Ceylon Limited in a sum of Rs. 250,000 each, and a further cheque drawn on the same Bank in a sum of Rs. 100,000. The Appellant had stated further that he presented all three cheques to the Bank but that the said cheques were dishonoured, with an endorsement that it be referred to the drawer. As Shanmuganathan had failed to pay the said sums of money to the Appellant, although demanded through an Attorney-at-Law, the above action had been instituted seeking to recover the said sums of money.

Shanmuganathan had failed to appear before the District Court in spite of summons having been served on him. Pursuant to a report of the Fiscal that Shanmuganathan is avoiding the service of summons, and being satisfied that summons had been served on Shanmuganathan by way of registered post, the learned District Judge had entered judgment as prayed for in the plaint. Even though the journal entries available to me do not indicate that the judgment and decree were served on Shanmuganathan, the Appellant had moved and obtained from the District Court in October 1997, a writ of execution in satisfaction of the said decree, in respect of a property bearing assessment No. 348, Galle Road, Wellawatte, Colombo 6 [*the Wellawatte property*] that the Appellant claimed was owned by Shanmuganathan. The said writ was executed on 28th October 1997, and the property was seized by the Fiscal.

The Wellawatte property

It is admitted between the parties that the said property was jointly purchased by Shanmuganathan's wife, Renukadevi and his business partner, Murugesu Amirthanayagam, by Deed of Transfer No. 1369 dated 5th December 1991. In January 1993, Renukadevi and Murugesu Amirthanayagam had mortgaged the said property to Seylan Bank Limited and obtained a loan in a sum of Rs. 2 million. It is further admitted that by Deed of Transfer No. 1976 dated 31st March 1994, Murugesu Amirthanayagam transferred the half share owned by him to Renukadevi. On 24th August 1996, by Deed of Transfer No. 2326, the said property had been sold to the 1st and 2nd Plaintiffs – Appellants – Respondents [*the 1st and 2nd Respondents, or collectively, the Respondents*] who are husband and wife. The aforementioned mortgage in favour of Seylan Bank had been cancelled on 6th September 1996, with the Respondents having settled the loan.

Thus, by the time the aforementioned Case No. 88/97 was instituted by the Appellant in the District Court of Mount Lavinia in January 1997, and therefore by the time the writ was executed on 28th October 1997, the Wellawatte property was owned, *at least on the face of it*, by the Respondents.

Application under Section 241

Aggrieved by the fact that the property owned by her and her husband had been seized in order to satisfy a debt owed by Shanmuganathan to a third party [*i.e. the Appellant*], the 2nd Respondent had made an application on 6th November 1997 to the District Court in terms of Section 241 of the Civil Procedure Code, against the seizure of the property. Even though the 2nd Respondent had pleaded the aforementioned Deed No. 2326, and claimed that she had purchased the said property from Renukadevi and is a bona fide purchaser of the said property, the application was refused by the learned District Judge as the 2nd Respondent had not averred that she was in possession of the property. Accordingly, the Respondents took steps to institute action in terms of Section 247 of the Civil Procedure Code.

Action filed by the Respondents

Section 247 of the Civil Procedure Code provides as follows:

> "*The party against whom an order under section 244, 245, or 246 is passed may institute an action within fourteen days from the date of such order to establish the right which he claims to the property in dispute, or to have the said property declared liable to be sold in execution of the decree in his favour; subject to the result of such action, if any, the order shall be conclusive*."

Accordingly, the Respondents filed Case No. 362/98/Spl in the District Court of Mount Lavinia in which they named the Appellant as the 1st Defendant and Shanmuganathan as the 2nd Defendant. Shanmuganathan never participated in the said action and trial proceeded only against the Appellant. In the plaint, it was admitted that both Renukadevi and Shanmuganathan, as well as the Respondents, were subject to and governed by the Law of Thesawalamai. It was the position of the Respondents that they had paid valuable consideration to Renukadevi and that the loan that was outstanding to Seylan Bank was also settled by them. They claimed further that they were bona fide purchasers and that the property was not subject to seizure for any sums of money owed by Shanmuganathan, or in satisfaction of any decree against Shanmuganathan.

In his answer, the Appellant took up the position that Shanmuganathan continued to own half of the property in spite of the execution of Deed No. 2326 and therefore, the said property was still liable for seizure. The basis of this argument was threefold. The first was that the said property acquired by Renukadevi is Thediathetam property. The second was that accordingly, ownership in an undivided one half of the said property vested in Shanmuganathan by operation of law from the moment it was acquired by Renukadevi. The third was that even though Shanmuganathan had signed the Deed of Transfer No. 2326 in favour of the Respondents, he had done so not in his capacity as the owner of one half of the property but, as the husband of Renukadevi, to provide his written consent to Renukadevi transferring her half share in the property to the Respondents, and as such had not alienated the half share vested in him by operation of law.

While stating further that the Respondents were not bona fide purchasers of the property, the Appellant set up a claim in reconvention that Deed No. 2326 had been executed in order to defraud the creditors of Shanmuganathan and sought a declaration that the said Deed No. 2326 was null and void.

Issues before the District Court

The Respondents raised the following three issues, with their position being that they are the owners of the said property by virtue of Deed No. 2326:

1. ආර්.සී. කනගරත්නම් ප්‍රසිද්ධ නොතාරිස් තැන විසින්, 1996, අගෝස්තු මස 24 වන දින ලියා සහතික කරන ලද අංක. 2326 දරණ ඔප්පුවෙන් දෙවන පැමිණිලිකරු මෙම නඩුවට අදාල විෂය වස්තුවේ අයිතිකරු විද?

2. එසේ නම්, ගල්කිස්ස දිසා අධිකරණයේ අංක 88/97/එස් දරණ නඩුවේ 1997.10.28 වන දින දේපල තහනමට ගැනීම වැරදි සහගත ද?

3. ඉහත සඳහන් විසඳිය යුතු ප්‍රශ්ණය පැමිණිලිකරුගේ වාසියට විසදෙන්නේ නම්, පැමිණිල්ලේ ආයාචනයේ ඉල්ලා ඇති සහන ලබා ගැනීමට පැමිණිලිකරුට අයිතියක් තිබේද?

The issues framed by the Appellant were as follows:

4. පැමිණිල්ලේ උපලේඛණයෙහි විස්තර කර ඇති සහ අංක. 1369 හා 1976 දරණ ඔප්පුව මගින්, රේණුකා දේවි, 2වන විත්තිකරුගේ භාර්යාව විසින් අත්කරගෙන ඇති දේපල, **තේසවලමේ නීතිය යටතේ, "තේඩියතේට්ටම්" දේපලක් වන්නේද**?

5. ඉහත සඳහන් 4 වන විසඳිය යුතු ප්‍රශ්ණයට, "ඔව්" යනුවෙන් පිළිතුරු ලැබෙන්නේ නම්, එකී රේණුකාදේවි විසින් එකී දේපල අත්කරගත් මොහොතේ පටන් නීතිය ක්‍රියාත්මක වීමෙන් එකී දේපල ට නොබෙදූ 1/2 ක් 2 වන විත්තිකරුට පැවරේද?

6. ගල්කිස්ස දිසා අධිකරණයේ අංක. 88/97/එස් දරණ ලඝු නඩුවේ තීන්දු ප්‍රකාශය, 2 වන විත්තිකරුට එරෙහිව ඇතුලත් කල වේලාවේදී එකී දේපල එකී නොබෙදූ 1/2 හි අයිතිකරු, 2 වන විත්තිකරුට වේද?

7. ඉහත විසඳිය යුතු ප්‍රශ්ණ 4, 5, 6 ට පිළිතුරු "ඔව්" යනුවෙන් ලැබුනහොත්, එකී තීන්දු ප්‍රකාශය යටතේ පිස්කල් වරයා විසින් එකී දේපල තහනමට ගැනීම නිත්‍යානුකූල තහනමට ගැනීමක්ද?

8. 4, 5, 6, 7 ප්‍රශ්නවලට පිළිතුරු "ඔව්" යනුවෙන් ලැබෙන්නේ නම් පැමිණිලිකරුගේ නඩුව නිශ්ප්‍රභා කල යුතුද?

9. ප්‍රසිද්ධ නොතාරිස්, ආර්.ටී. කනගරත්නම් විසින් ලියා සහතික කරන ලද අංක. 2326 දරණ 96.8.24 වන දිනැති එකී ඔප්පුව ලියා සහතික කරන ලද්දේ, 2 වන විත්තිකරුගේ ණය හිමියන්ට වංචා කරනු පිණිසද?

10. ඉහත (9) වන විසඳිය යුතු ප්‍රශ්ණයට පිළිතුරු, "ඔව්" යනුවෙන් ලැබෙන්නේ නම්, එකී අංක. 2326 දරණ ඔප්පුව නීතියට අනුව, ශූන්‍ය සහ බල රහිත බවට ප්‍රකාශයක් ලබා ගැනීමට 1 වන විත්ති කරුට හිමිකම් තිබේද?

The Appellant, the Attorney-at-Law who executed Deed No. 2326, as well as the 1st Respondent and the Fiscal who executed the writ, gave evidence before the learned District Judge.

Judgment of the District Court

By his judgment delivered on 13th December 2007, the learned District Judge accepted the argument of the Appellant that: (a) the said property was in fact Thediathetam property; (b) Shanmuganathan had only consented to Renukadevi transferring her half share; and (c) Shanmuganathan had not transferred his half share in the property to the Respondents, thus leaving the Respondents with ownership to only one half of the property. The learned District Judge had also held that it was open to the Respondents to have called Renukadevi to contradict the above position that the said property was Thediathetam and that the failure to do so gives rise to the presumption in illustration (f) of Section 114 of the Evidence Ordinance that "*the court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it*".

Even though the learned District Judge had also arrived at the conclusion that the Respondents had acted fraudulently and colluded with Shanmuganathan, he had disallowed the claim in reconvention of the Appellant.

Judgment of the High Court

Aggrieved by the aforesaid judgment of the District Court, the Respondents preferred an appeal to the High Court. By its judgment dated 10th February 2012, the High Court set aside the judgment of the District Court and allowed the appeal, holding as follows:

a) The burden of proving that a property is Thediathetam property is on the party alleging so;

b) The District Court erred when it placed the burden on the Respondents;

c) The Appellant has failed to discharge the said burden;

d) Shanmuganathan does not have any right to the said property;

e) Shanmuganathan had consented to his wife Renukadevi transferring the said property to the Respondents;

f) The transfer in favour of the Respondents had been done several months prior to the institution of Case No. 88/97 by the Appellant and there was no evidence that the Respondents had acted fraudulently.

Questions of Law

Dissatisfied by the judgment of the High Court, the Appellant sought and obtained leave to appeal from this Court, on the following questions of law:

1) Have the learned High Court Judges erred in law in coming to a finding that the person claiming that certain property is Thediathetam property should establish his stance?

2) Have the learned High Court Judges erred in law in coming to a finding that the Appellant failed to prove that the said property is Thediathetam property?

3) Have the learned High Court Judges erred in law in coming to a finding that the Appellant failed to prove in the District Court that the said property is Thediathetam property?

It must be noted that the Appellant had proposed in his petition of appeal, a question of law with regard to whether Shanmuganathan had acted fraudulently by transferring the said property to the Respondents in order to defraud his creditors. Leave to appeal had however been granted only on the above three questions.

The core issue arising from the above questions of law is on whom lies the burden of proof in establishing that a particular property is Thediathetam property. This Court in **Manikkavasagar vs Kandasamy and Others** [supra] has considered the question of burden of proof in connection with Thediathetam in detail. However, the learned President's Counsel for the Appellant has sought to assail the said decision on the basis that it is *per incuriam*, and also on the basis that the peculiar circumstances of this case, where the dispute with regard to the nature of the property is not between spouses, but third parties, would render the dicta in the said case inapplicable to the present facts.

In order to address the several arguments of the learned President's Counsel for the Appellant, and in view of the changes that have occurred to the law relating to Thesawalamai and in particular to Thediathetam through legislative interventions and judicial interpretations, it is necessary to first consider the following matters:

1) Thesawalamai and its evolution.

2) Classification of property under the Thesawalamai.

3) The concept of Thediathetam as recognized by the law relating to Thesawalamai and its evolution.

4) The requirement for a wife to obtain the written consent of her husband prior to the sale of any immovable property.

5) The right of a non-acquiring spouse to own one half of Thediathetam property acquired by his/her spouse.

The Thesawalamai

The word *Thesawalamai* means the 'customs of the land'. As pointed out by Justice H.W. Tambiah, QC, in **Principles of Ceylon Law** [H.W. Cave & Company; 1972] at page 199:

> "*Thesawalamai is a special system of law applicable to the Tamil inhabitants of Jaffna. It appears to have evolved from a system of customary laws applicable to the ancient Tamils, who had a matriarchal system of society. The first wave of emigration brought the Tamils from the Malabar District of India, and they brought with them the customary usages peculiar to a society based on matriarchy. Later emigrations brought an influx of Tamils from South India, whose customs and manners were influenced by the Aryan system of society and Hindu law. While they brought certain customary laws specially suited to a patriarchal system of society, at some point of time a compromise appears to have been effected and therefore we find in Thesawalamai rules peculiar to a matriarchal system of society blended with rules based on a patriarchal pattern*."

Codification of Thesawalamai by the Dutch

During the period that they governed Jaffna, the Portuguese applied the Thesawalamai as they found it, without attempting to codify it. Zwaardecroon, who was at one time the Dutch Commander of Jaffna, referring to Thesawalamai as the native customs which governed the Tamils of Jaffna, has stated as follows, in **Memoir of Hendrick Zwaardecroon**, as translated by Sophia Pieters [Government Printer; 1911] at pp. 49-50:

> "*There are also many native customs according to which civil matters have to be settled, as the inhabitants would consider themselves wronged if the European laws be applied to them... As, however, a knowledge of these matters cannot be obtained without careful study and experience, which not everyone will take the trouble to acquire, it would be well if a concise digest be compiled according to information supplied by the chiefs and most impartial natives. No one could have a better opportunity to do this than the Dessave, and such work might serve for the instruction of the members of the Court of Justice as well as for new rulers arriving*

here, for no one is born with this knowledge. I am surprised that no one has yet undertaken this task."

Acting on this suggestion, Governor Simons entrusted the task of collecting and codifying the customs to Claas Isaaksz, the Dissawe of Jaffnapatam. As set out in **Seelachchy v Visuvanathan Chetty** [23 NLR 97 at page 99]:

"*Tesawalamai, as its name denotes, is a description of the country custom. Tesa (country) and walamai (custom). In 1704 the Dutch Governor of Ceylon, Governor Simons, directed the Disawa of Jaffna, Claas Isaaksz, to inquire into the customs of the Tamil inhabitants of Jaffna as then existed and to compile them. In consequence, after inquiry, Isaaksz submitted a description of the customs, in the Dutch language, to the Commander van der Duyn in 1707. The Commander had the same translated into the Tamil language, and delivered the translation to twelve "sensible" modeliars to peruse and revise the same. The "sensible" modeliars reported that they perfectly agreed with the usual customs prevailing at this place, and fully confirmed the same...*

In 1708 the customs were promulgated by the Dutch Governor of Ceylon and were given the force of law, and authenticated copies of the same were sent to the Courts of Justice and the Civil Landraad for their guidance.

This composition of the country customs is called the Tesawalamai."

An English translation of the said submission of Isaaksz dated 5th April 1707 that he had "*composed the Malabar laws and customs by Order of His Excellency the Governor … so far as my knowledge of the same permitted me*", the report of Van der Duyn and an extract of a letter dated 4th June 1707 by the Governor to Van der Duyn confirming that the Thesawalamai Code compiled in Dutch has been translated into Tamil by Jan Pirus, have been re-produced by Henry Francis Mutukisna in **A New Edition of the Thesawaleme: Or The Laws and Customs of Jaffna** [Ceylon Times Office; 1862], and are found in the Legislative Enactments of 1911.

Regulation No. 18 of 1806

After the Dutch settlements in Ceylon were ceded to the British, Regulation No. 18 of 1806 was issued declaring as follows:

> "*The Tésawalamai, or customs of the Malabar inhabitants of the province of Jaffna, as collected by order of Governor Simons, in 1706, shall be considered to be in full force*.
>
> *All questions between Malabar inhabitants of the said province, or wherein a Malabar inhabitant is defendant, shall be decided according to the said customs*."

Once Sir Alexander Johnston assumed the Office of Chief Justice in 1814, he had a fresh translation correcting "*the rude English of the Ceylonese (Dutch) translator*". In **The Dominium of Ceylon – The development of its Laws and Constitution** by Sir Ivor Jennings and H.W. Tambiah [Stevens & Sons Limited; 1952], referring to **Sabapathy v Sivaprakasam** [8 NLR 62] the authors have pointed out that the English translation must be referred to as authoritative since it has been used for over a century. This translation of the Code is now found in the Legislative Enactments as the Thesawalamai Ordinance.

The Matrimonial Rights and Inheritance (Jaffna) Ordinance No. 1 of 1911

The Matrimonial Rights and Inheritance (Jaffna) Ordinance No. 1 of 1911 [*the Ordinance*] was introduced to amend the law relating to the matrimonial rights of the Tamils who were governed by the Thesawalamai with regard to their property and inheritance. While the Ordinance initially comprised of forty sections, Sections 39 and 40 have been repealed and Sections 2 and 5 have been re-numbered as Sections 40 and 39, respectively. The rest of the Sections have been renumbered. These changes to the Ordinance are reflected in the Ordinance that is found in the Legislative Enactments of 1938. I have for convenience, referred the numbers of the Sections and the text as it appears in the said Legislative Enactment.

While it has been stated in **Manikkavasagar v Kandasamy and Others** [supra] that the Ordinance was a *declaratory law* in the sense that it gives statutory validity to the customs of the Malabar inhabitants of the Northern Province embodied in the Thesawalamai, Section 40 provided that, "*So much of the provisions of the collection of customary law known as the Tesawalamai, and so much of the provisions of section 8 of the Wills Ordinance, as are inconsistent with the provisions of this Ordinance are hereby repealed*."

While in terms of Section 2, "*the Ordinance shall apply only to those Tamils to whom the Thesawalamai applies"*, Section 5 provided that, "*The respective matrimonial rights of every husband and wife married after the commencement of this Ordinance in, to, or in respect of movable or immovable property shall, during the subsistence of such marriage, be governed by the provisions of this Ordinance*."

Amendment to the Ordinance in 1947

Several significant amendments were introduced to the Ordinance by the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947 [*the Amendment*] to give effect, as stated in **Sellappah v Sinnadurai and Others** [53 NLR 121 at page 125], to:

> *"… the recommendations contained in the Report of the Thesawalamai Commission dated December 12, 1929 (Sessional Paper III of 1930) and in their Supplementary Report of October 9, 1931 (Sessional Paper I of 1933) with some modifications rendered necessary by the decision of the Supreme Court in the case of Avitchy Chettiar v. Rasamma (35 NLR 313).*"

These included an amendment to Section 2 in terms of which the Ordinance was to now apply *to those Tamils to whom the Thesawalamai applies in respect of their movable and immovable property wherever situate*, as well as to Sections 6, 19 and 20, to which I will advert to later.

The Law relating to Thesawalamai is now found in the Thesawalamai Code and the Ordinance, as amended in 1947.

Classification of Property under the Thesawalamai

As pointed out by Justice Dr. H.W. Tambiah, QC, in **The Laws and Customs of the Tamils of Jaffna** [Revised Edition; Women's Research and Education Centre; 2004; at page 150], in early Hindu Law, property was divided into hereditary property and acquired property. Later, the right of a married woman to own her property separately was recognized and her separate property was called *stridhana*. The Thesawalamai distinguished between hereditary property brought by the husband or wife (*mudusam*), dowry property brought by the wife (*chidenam*), and property acquired by the husband and wife (*thediathetam*).

The fact that mudusam property connotes hereditary property is evident from Section 1 of Part I of the Thesawalamai Code, which reads as follows:

> "*From ancient times* ***all the goods brought together in marriage*** *by such husband and wife have from the beginning been distinguished by the denomination of modesium, or hereditary property, when brought by the husband, and when brought by the wife were denominated in the Tamil language chidenam, or by us dowry;* ***the profits during marriage are denominated tediatêtam, or acquisition****. On the death of the father all the goods brought in marriage by him should be inherited by the son or sons, and when a daughter or daughters married they should each receive dowry, or chidenam, from their mother's property, so that invariably the husband's property always remains with the male heirs, and the wife's property with the female heirs, but the acquisition or tediatêtam should be divided among the sons and daughters alike; the sons, however, must always permit that any increase thereto should fall to the daughters' share*." [emphasis added]

Thus, under the Thesawalamai Code, property was divided into the following three classes:

(1) Mudusam or hereditary property brought into the family by the husband;

(2) Chidenam or dowry brought into the family by the wife; and

(3) Thediathetam or acquisition, being profits accruing to either husband or wife during marriage.

The Ordinance adopted a slightly different mode of classification. While in terms of Section 15, "*Property devolving on a person by descent at the death of his or her parent or of any other ancestor in the ascending line is called mudusam (patrimonial inheritance)*", Section 16 provided that "*Property devolving on a person by descent at the death of a relative other than a parent or an ancestor in the ascending line is called urumai (non-patrimonial inheritance)*." The Ordinance also recognized the right of a wife and husband to own their separate property – vide Sections 6 and 7, respectively.

Definition of Thediathetam Property – Prior to 1911

In **Waliamma v Sandrasegar Modliar Sooper**, referred to in **The Laws and Customs of the Tamils of Ceylon** by H.W. Tambiah [1954; at page 158], it has been stated as follows:

> "*The English and Roman-Dutch Law certainly recognise a community of goods between man and wife, but the Thesawalamai or country law, clearly recognizes a distinct and separate interest – the husband in the property inherited from his father, and the wife in her dowry and inheritance. The only property in which both have a mutual interest and is in common, is the profits arising from each of these respective properties, or what is acquired by their own exertions, during the marriage*."

In **Jivaratnam v Murukesu and Others** [1 NLR 251] decided in 1895, Withers, J stated [at page 253] that:

> "*Chapter IV., section 3, of the [Thesawalami] Code declares that a gift of land to either spouse is to be regarded as separate property of the spouse who has received the gift, though if alienated during the marriage no compensation is to be made out of the other spouse's estate. Only the proceeds (? profits) [sic] of the land are to swell the thediathettum. The same rule is applied to slaves and cattle or anything else which may be increased by procreation, with this difference, that the progeny remains the property of the spouse presented with the original slave or animal.*"

Having thereafter referred to several previous cases, Withers, J went on to state as follows [at page 254]:

> "*It really comes to this, that according to the Thesavalamai as interpreted by decisions, the separate property of spouses is that* ***which either party brings to the marriage*** *or acquires during the marriage by inheritance or donation made to him or her particularly, while common property is restricted to the rents, revenue, and income of their separate estate, and what is acquired by the exertions of the spouses."* [emphasis added]

The above paragraph has been cited with approval in **A Handbook of the Thesawalamai** by S. Katiresu [S Ragunath; 1907].

Browne, J went on to state in **Jivaratnam v Murukesu and Others** [supra; at page 255], that, "*The precedents cited by the Solicitor General from pages 182 and 267 [of Mutukistna] certainly show that investments or transmutation of the character of the property will not affect the rights which belong to it in its original character*…"

A different view was expressed in **Ponnamah v Kanagasuriyam** [19 NLR 257]. Although decided by the Supreme Court in 1916, this case relates to the legal position that prevailed prior to the Ordinance. Ennis, J agreed with the District Judge that all property purchased after the date of marriage is presumed to be acquired property under the Thesawalamai until the contrary is proved. This judgment will be examined later when considering the submissions of the learned President's Counsel for the Appellant on the applicability of a presumption.

Thus, under the Code, Thediathetam was limited to property acquired during the marriage from the profits of the separate properties and by the exertions of the spouses. The Code did not consider as Thediathetam, property acquired by the conversion of *mudusam* or *chidenam*, even though such property may have been acquired during the subsistence of the marriage.

Thediathetam Under the 1911 Ordinance

The Ordinance introduced four important sections relating to property that a wife or husband could own.

The first is Section 6 in terms of which "*Any movable or immovable property to which any woman married after the commencement of this Ordinance may be entitled* ***at the time of her marriage****, or, except by way of Tediatetam as hereinafter defined, may become entitled during her marriage, shall … belong to the woman for her separate estate*…"

The second is Section 7 which provided that, "*Any movable or immovable property to which any husband married after the commencement of this Ordinance may be entitled at the time of his marriage, or, except by way of tediatetam, may become entitled during his marriage, shall, subject and without prejudice to the trusts of any will or settlement affecting the same, belong to the husband for his separate estate. Such husband shall, subject and without prejudice to any such trusts as aforesaid, have full power of disposing of and dealing with such property.*"

The third is Section 19 of the Ordinance which defined Thediathetam as follows:

> "*The following property shall be known as the Thediathetam of any husband or wife–*
>
> *(a)* *property acquired for valuable consideration by either husband or wife during the subsistence of marriage;*
>
> *(b)* *profits arising during the subsistence of marriage from the property of any husband or wife.*"

The fourth is Section 20(1), which declared that, "*The Thediathetam of each spouse shall be property common to the two spouses, that is to say although it is acquired by either spouse and retained in his or her name, both shall be equally entitled thereto.*"

The above Sections therefore set out:

(a) What constitutes the separate estate of a woman married after the commencement of the Ordinance which includes the property that she is entitled to at the time of her marriage;

(b) That the said separate property belongs to her;

(c) The power of disposition that a woman has over such property;

(d) An important limitation in that the ownership contemplated by Section 6 did not extend to Thediathetam property in view of the provisions of Section 20(1) that an acquiring spouse only owns one half of Thediathetam property.

The applicability of Section 19 was considered in **Nalliah v Ponnamah** [22 NLR 198]. In that case, the husband, after the death of his wife in 1917 and the death of their only child in 1918, sought to administer his wife's estate. The husband sought to deduct from the estate, certain sums of monies on the basis that such monies formed part of his mudusam. The husband's position was that before his marriage he had considerable sums of money saved out of his professional earnings, and after his marriage he invested these moneys and other moneys subsequently acquired in bonds and promissory notes. He contended that so much of the money invested as belonged to him before the marriage is his separate property, and need not, therefore, be brought into the testamentary account. The respondent, who was his mother-in-law, objected to the final account being accepted *inter alia* on the basis that the husband is not entitled to any deductions and that all these investments must be regarded as Thediathetam of both spouses as the investment was made during the marriage, and that half of such investments should be included in the deceased's estate.

De Sampayo, J held as follows at page 203:

"*It is well settled, I think, that if the money by which acquisitions are made during marriage can be earmarked or traced back to the mudusom of the husband or the wife, the acquisitions should not be considered part of the common property, but*

would partake of the nature of the source from which they sprang. The Acting District Judge, who is a gentleman of great experience, and well versed in Jaffna customs, has, in a well-considered judgment, found that the investments in question to the extent of Rs. 8,000 was traceable to the moneys which had belonged to the husband before the marriage, and that the investments less that sum should alone be considered common property and be liable to be accounted for in the testamentary accounts. This finding of fact and the ruling of the learned District Judge are, in my opinion, quite right and just."

The argument that was presented before the Supreme Court was that whatever might be the correct interpretation of the original Thesawalamai, the meaning of Mudusam and Thediathetam has been altered by the Ordinance and therefore the husband's professional earnings before marriage, not being property devolving on him by descent, were not part of his mudusam, and that the investments on bonds and promissory notes, wherever the money came from, were property acquired for valuable consideration during marriage, and, therefore, was Thediathetam.

Rejecting the said argument, De Sampayo, J held as follows at page 204:

"*Mudusom does, in general, mean property devolving by descent, and this, perhaps, was its sole meaning in the ancient days when unmarried sons and daughters could not acquire anything for themselves, but what they acquired belonged to the parents, and would come back to them on the death of the parents.* ***But this custom as to disability has long since become obsolete, and sons and daughters can now acquire for themselves before marriage****, and such property has been considered their mudusom. Else under what other class would such property fall? It cannot be thediathetam since the acquisition is not made during the subsistence of the marriage. Then, again, the expression "property acquired for valuable consideration" in section [19] well applies to acquisitions by purchase and the like, but is wholly inappropriate to investments of money on loans. The truth appears to be that Sections [15] and [19] of the Ordinance are not, and do not purport to be, exhaustive definitions of mudusom and thediathetam. They, I think, are intended to be only general explanations of the Tamil words. The provisions of the Ordinance which are*

most relevant to the present question and determine the rights of husband and wife to property acquired before marriage are those contained in sections [6] and [7], which declare such property to belong to the man or woman, as the case may be, for his or her separate estate. I think, therefore, that the money which the husband had saved out of his earnings before his marriage belonged to him for his separate estate, whether it is strictly called mudusom or not. The circumstance that it was invested during marriage does not change its character. Even if he invested it in the purchase of property during marriage and not on mere loans, I think that in view of the principle of the decisions on this point, the property would receive the character of the money invested, and would not be regarded as thediathetam. This is much more the case when the investments take, as in this instance, the shape of loans of money on bonds or other instruments." [emphasis added]

An expanded definition of Thediathetam was given in **Seelachchy v Visuvanathan Chetty** [supra]. In that case, Sangarapillai, whose parents were both Tamils of Jaffna came to Colombo and traded in cigars. In October, 1881, he went to Jaffna and married the plaintiff, who was Tamil and a native of Jaffna. At the time of the marriage he was not possessed of any immovable property or any hereditary property. After marriage, while Sangarapillai continued his trading activity in Colombo, the plaintiff continued to remain in Jaffna.

Sangarapillai acquired immovable properties both in Colombo and in Jaffna, including the property in dispute at Bankshall Street in 1894 through the profits made in his business. In 1906, Sangarapillai donated the property to his eldest son, Nagalingam. Sangarapillai died in 1910, leaving a will, by which he left his properties to his wife. During 1912 and 1918, Nagalingam executed several mortgages over the said land. Due to non-payment, the bond was put in suit by the mortgagee, and decree was entered in his favour against Nagalingam. Upon execution of the decree, the property was purchased by the defendant. In September 1920, Sangarapillai's wife filed action on the ground that as the property was bought by her husband during the subsistence of the marriage, half of it became her own at the time of the acquisition, and that Nagalingam became entitled only

to half the property and therefore, the defendant's right to one half of the property is invalid.

Chief Justice Bertram, at pages 100 and 101, held as follows:

> *"The Tesawalamai Code was compiled at an age when the people of Jaffna, who were more or less agriculturists, were residing, both in fact and in law, in Jaffna and were "inhabitants" of Jaffna. Times changed, means of communication with other parts of the world became possible, and these "inhabitants" went to several parts of Ceylon and also to distant countries, but still maintained their relationships with their home, and constructively continued to be "inhabitants" of Jaffna and governed by the Code of Tesawalamai.*
>
> *Though the customs mentioned in the Code related to the usages and habits of people actually resident in Jaffna, some of the expressions used in the Code may be applicable, and have been made applicable, both by Statute as well as by judicial decisions, to a wider extent.*
>
> *For instance, the term thediathetam originally was intended to convey the meaning profits acquired. A husband brought his inherited or mudusom property, and a wife brought her dowry property. They both cultivated the lands and fields. Any profits they gained became common, and was known as thediathetam. In olden times, and even at the present day in many places, both husband and wife, and often the children too, joined in cultivating the fields and gardens and earned their living. It is possible that neither Isaaksz nor the sensible modeliars of old had in their minds any thought of the Jaffna inhabitant making money outside Jaffna by his own exertions, unaided by his wife, and getting profits and acquiring property. But the term thediathetam is wide enough to embrace this mode of acquisition, and the objection of Mr. Tisseverasinghe, for the defendant, that in this case the property bought by Sangarapillai in his own name cannot be said to come within the meaning of the term thediathetam under the Tesawalamai cannot, therefore, be sustained. In my opinion, all property acquired by either of the spouses during marriage must be held to be thediathetam or acquired property*."

Change in Position – Avitchy Chettiar v Rasamma

The question whether a property acquired by a woman who marries after the Ordinance came into operation and during the subsistence of the marriage, but out of her dowry, formed Thediathetam property, was re-agitated before a Divisional Branch of three Judges of the Supreme Court in **Avitchy Chettiar v Rasamma** [35 NLR 313].

Garvin, ACJ referring to the definition of Thediathetam in Section [19], held as follows at pages 316 and 317:

> "*If this property falls within either of the two heads (a) or (b) of section [19], then clearly it would be liable to be taken in execution in this case since it is liable "to be applied for payment or liquidation of debts contracted by the spouses or either of them". No question arises here as to profits arising during the subsistence of the marriage. The sole question is whether the premises in question are of the character of the property which is declared by section [19](a) to be thediathetam. Now if the words of that sub-section be given their ordinary effect it would seem that there were two conditions which property claimed to be thediathetam must satisfy, first that it was acquired for valuable consideration by husband or wife, and secondly that it should have been acquired during the subsistence of the marriage.*
>
> *The property which is claimed in this case by Rasamma by virtue of the deed No. 1,669 of November 3, 1924, was acquired for valuable consideration and it was acquired during the subsistence of the marriage. It was urged, however, that notwithstanding the provisions of this section property acquired for valuable consideration provided by the spouse who had acquired it out of funds which formed part of his or her separate estate was not thediathetam but remained his or her separate property. Counsel relied strongly upon the case of Nalliah v. Ponnammah [22 NLR 198] in which a Bench of two Judges (De Sampayo J. and Schneider A.J.) upheld a similar contention and expressed themselves in language which indicates that they held the view that property acquired by a spouse out of funds which formed part of his separate estate "would receive the character of the money invested and*

would not be regarded as thediathetam". In view of this judgment it became necessary to have the matter argued before a larger Bench.

The question before us must, it seems to me, be settled by the interpretation of the language of the legislature. So far as it relates to the matter now before us these words are as follows: "Property acquired for valuable consideration by either husband or wife during the subsistence of marriage". These very general words are followed by no words of limitation nor of exception. Indeed, very similar words appear in the very next section which declares that "the thediathetam of each spouse shall be property common to the two spouses" – and then by way of explanation – "although it is acquired by either spouse and retained in his or her name". Once again emphasis is laid upon the fact that property acquired for valuable consideration during the subsistence of the marriage is thediathetam, notwithstanding that "it is acquired by either spouse and retained in his or her name". Indeed, if any question of ascertaining the intention of the legislature arises, the words of section [20] would seem to indicate the intention that notwithstanding that the property was the separate acquisition of one of the spouses it came within the definition of "thediathetam" so long as it was an acquisition for valuable consideration made during the subsistence of the marriage.

Garvin, ACJ at page 318 went on to state as follows:

Whatever the law may have been prior to this enactment it is beyond question that where a matter has to be determined in accordance with its provisions the law prior thereto must be treated as repealed. Section [40] states that "so much of the provisions of the collection of customary law known as the Thesawalamai ... as are inconsistent with the provisions of this Ordinance are hereby repealed", and moreover the Ordinance itself purports to be an Ordinance "to amend the law relating to the Matrimonial Rights of the Tamils who are now governed by the Thesawalamai with regard to property and the law of Inheritance"..."

"*It only remains therefore to interpret the language of the legislature as it appears in section 19. The meaning of the words used is clear and there is no reason to*

suppose that the legislature did not intend that these words should be interpreted in their plain and ordinary sense. Indeed, it is quite impossible to find any justification for expanding the section by the addition of words which would exclude from the subjects of property which appear to be caught up by the section all property acquired by either spouse for consideration provided by him or her from a separate estate.

In the case before us the premises were acquired for valuable consideration during the subsistence of the marriage and therefore falls within the definition of thediathetam."

In terms of **<u>Avitchy Chettiar v Rasamma</u>**, any property acquired for valuable consideration during the subsistence of a marriage was Thediathetam. This marked a major point of deviation from the previous view that the source of the funds determined whether property acquired during the subsistence of a marriage was Thediathetam or not.

As pointed out by Chief Justice Sharvananda in **<u>Matrimonial Rights of Tamils Governed by Thesawalamai</u>** [(1993) 1 BALJ 41 at page 44], *"This view of the law was alien to the concept of thediathetam as conceived by the customary law of the Tamils and there was agitation for the restoration of the old concept of the law, as expounded by Sampayo, J. in <u>Nalliah v. Ponnammah</u>."*

In **<u>Sellappah v Sinnadurai and Others</u>** [supra; at page 126], the Supreme Court, referring to the above departure from the traditional view, has pointed out that the Commission appointed in 1929 to recommend amendments to the Ordinance had taken the opportunity "*to make some modifications rendered necessary by the decision in Avitchy Chettiar v Rasamma (supra) with intent to give a clear definition of the separate property of each of the partners of a marriage based on well-established custom and to remove the ambiguity which led to the decision in the case of Avitchy Chettiar v Rasamma (supra).*"

Definition of Thediathetam in terms of the Amendment

Accordingly, by the Amendment in 1947, Section 19 was repealed and replaced with the following:

> "*No property other than the following shall be deemed to be the thediatheddam of a spouse:*
>
> *(a) Property acquired by that spouse during the subsistence of the marriage for valuable consideration, such consideration not forming or representing any part of the separate estate of that spouse.*
>
> *(b) Profits arising during the subsistence of the marriage from the separate estate of that spouse*."

In **Kumaraswamy v Subramanium** [56 NLR 44 at page 47], Gratiaen, J stated thus:

> "*The new section 19 gives a definition of tediatetam "which restores for the future the more traditional conception of tediatetam which had been unmistakably, even though carelessly, altered by legislative intervention in 1911" –* Akilandanayake v Sothinagaratnam and Others *[(1952) 53 NLR 385 at 397]. Accordingly, property which would previously have constituted tediatetam within the meaning of the principal Ordinance in accordance with the ruling in Avitchi Chettiar's case [(1933) 35 NLR 313], must, if acquired on or after 4th July, 1947, be regarded as "separate property"*."

The above view has been confirmed by the Privy Council in **Subramanium v Kadirgarman** [72 NLR 289].

As pointed out by Justice Dr. H.W. Tambiah, QC in **The Laws and Customs of the Tamils of Jaffna** [supra; at page 172], the amendment in 1947 to Section 19 restored the class of property that could be classified as Thediathetam to what prevailed prior to the enactment of the Ordinance. Sections 6 and 7 which defined what comprises the separate

property of the wife and husband, respectively, were also suitably amended by the deletion of the words, "*except by way of tediatettam as hereinafter defined, may become entitled during her marriage*" and the substitution therefor, of the words, "*or which she may during the subsistence of the marriage acquire or become entitled to by way of gift or inheritance or by conversion of any property to which she may have been so entitled or which she may so acquire or become entitled to*", thus making it clear that property acquired during a marriage with the proceeds coming from the separate estate of a spouse shall continue to form part of his or her separate estate and shall not be Thediathetam.

Accordingly, where the wife's dowry or Mudusam property was sold and a new property was bought during the subsistence of the marriage with the proceeds for such acquisition coming from the said dowry or mudusam property, the acquired property retained the original character of the property sold and remained the property of the wife. Such acquired property was not regarded as Thediathetam. In other words, whether property purchased during the subsistence of a marriage for valuable consideration was Thediathetam depended entirely on the source of the funds that were used in the acquisition of such property. This amendment therefore plays a pivotal role in deciding whether a presumption exists that a particular property is Thediathetam, as submitted by the learned President's Counsel for the Appellant, and in determining on whom lies the burden of proof in this appeal.

<u>The Necessity for a Wife to Obtain the Consent of the Husband to Transfer Immovable Property</u>

While there is no dispute between the parties that Shanmuganathan had consented to his wife Renukadevi transferring the said property to the Respondents, I would, for the sake of completeness, very briefly refer to the provisions of the Ordinance that require such consent.

Section 6 of the Ordinance, having set out what constitutes the separate estate of a woman, goes on to state as follows:

> "*… Such woman shall … have as full power of disposing of and dealing with such property by any lawful act inter vivos without the consent of the husband in case of movables, or* ***with his written consent in the case of immovables****, but not otherwise, or by last will without consent, as if she were unmarried.*" [emphasis added]

Section 6 therefore contains an important limitation in that the written consent of the husband was required for a valid transfer of any immovable property owned by a married woman subject to Thesawalamai, irrespective of whether such property was Thediathetam or separate property. As pointed out by Chief Justice Bonser at the turn of the 20th century [(1901) 2 Brown's Reports 362], the rationale for requiring the consent of the husband was "*to protect the married woman and prevent her being inveigled into some foolish disposition of the property and perhaps cheated of it. It is supposed that the husband would protect the interests of his wife and see that she does not do anything foolish*".

In **Vijayaratnam v Rajadurai and Others** [69 NLR 145 at page 147], Tambiah, J, referring to the power of the husband to give such written consent, held that it arises from the husband's marital right to manage the Thediathetam of his wife during the subsistence of the marriage and that it is an essential feature of the community in almost all its forms that the husband should be the manager of the common property.

Even though Section 6 was amended in 1947 to reflect the amendments made to the definition of Thediathetam in Section 19, the requirement for a wife to obtain the written consent of the husband in the disposition of her immovable property, stands. The present position therefore is that while a married woman retains full ownership of her separate property, she is not competent to transfer her immovable property without her husband's written consent. Any disposition of such immovable property without the written consent of her husband will be void.

The Right of a Non-Acquiring Spouse to Own Half of Thediathetam

The crux of the Appellant's argument was that even though the property was acquired in the name of Renukadevi, Shanmuganathan owned one half of the property by virtue of the said property being Thediathetam. Although the learned President's Counsel for the Respondents did not dispute the basis of the above argument of the Appellant, it being the current position of the law as set out in **Manikkavasagar v Kandasamy and Others** [supra], I would, once again for the sake of completeness, briefly set out the applicable provisions of the law that confers on a spouse the right to own one half of Thediathetam property of the other spouse, and the evolution thereof.

I shall commence with Section 20 of the Ordinance, which, prior to the Amendment, read as follows:

> *"(1) The thediathetam of each spouse shall be property common to the two spouses, that is to say, although it is acquired by either spouse and retained in his or her name, both shall be equally entitled thereto*.
>
> *(2) Subject to the provisions of the Thesawalamai relating to liability to be applied for payment or liquidation of debts contracted by the spouses or either of them on the death intestate of either spouse, one-half of this joint property shall remain the property of the survivor and the other half shall vest in the heirs of the deceased; and on the dissolution of a marriage or a separation a mensa et thoro, each spouse shall take for his or her own separate use one-half of the joint property aforesaid*."

Thus, irrespective of whether a property is purchased in the name of one spouse, if that property falls within the description of Thediathetam, the non-acquiring spouse shall own half of that property.

In **Seelachchy v Visuvanathan Chetty** [supra; at page 121], Garvin, AJ in his minority opinion held as follows:

"It is not disputed that under the Tesawalamai there is community between spouses in all property acquired by either during the subsistence of the marriage…

Property so acquired, which as such becomes subject to community, is designated thediathetam. What is the nature of this community? Does title to property acquired by one of the spouses vest equally in the other, as in the case of spouses subject to the communio bonorum of the Roman-Dutch law, or does the title remain in the spouse who acquired it, subject to the equitable right of the other spouse to take his share? Under the latter system a formal conveyance of immovable property to the wife will immediately, upon the execution of the conveyance, vest the title in both spouses. It was suggested that under the community known to the Tesawalamai the spouses in relation to property subject to that community stood in exactly the same position as the members of a commercial partnership. That is to say, that the title to property standing in the name of one partner remained in that partner alone, though as regards the other members of the partnership his position was that of a trustee. For this proposition no authority was cited. Though I can find no local decision which explicitly declares the community subsisting between spouses subject to the Tesawalamai to be in this respect identical with that known to the Roman-Dutch law, there are indications that that position was never doubted."

Referring to the provisions of Section 20, Garvin, J went on to state [at page 122] as follows:

"This is an explicit declaration of the law in the sense in which it was, so far as I am able to judge, always understood.

If this view of the law be correct, these premises at the time of acquisition by Sangarapillai vested by operation of law equally in his wife."

In **Manikkavasagar v Kandasamy and Others** [supra; at page 19], it was held as follows:

"According to the customary law of Thesawalamai, thediathetam is common to both spouses: they are both co-owners of the thediathetam. The concept that

thediathetam is common estate of the spouses to which both are equally entitled is basic to the customary law of Thesawalamai. An undivided half of the property vests automatically by operation of law on the non-acquiring spouse … In *__Seelachchy v. Visuvanathan Chetty__* *Garvin, J., who was in a minority held that thediathetam property, at the time of acquisition by the husband vested by operation of law, equally on his wife…*

In *__Ponnachchy v. Vallipuram__* *(25 NLR 151) it was held that even though the property is acquired by a wife during the marriage and the deed is executed in her favour it vests by law in both spouses…*

The view that the non-acquiring spouse automatically becomes entitled to [half] share of thediathetam was accepted in *__Kumaraswamy v. Subramaniam__* *(56 NLR 44). This view is founded on the basis that both spouses are equally entitled to the thediathetam from the moment at which it was acquired even though it was acquired by one spouse only.*"

Section 20 was repealed and replaced by the Amendment in 1947 with the following, which on the face of it, was a radical departure from the concept of community of interest in Thediathetam property:

"*On the death of either spouse one-half of the thediatheddam which belonged to the deceased spouse, and has not been disposed of by last will or otherwise, shall devolve on the surviving spouse and the other half shall devolve on the heirs of the deceased spouse*."

One would immediately see that the new Section only provided for what would happen to Thediathetam property after the death of the acquiring spouse and that too, where such spouse died intestate, and that the new Section did not contain any provision as to the incidence of Thediathetam during the lifetime of the spouses.

In **Kumaraswamy v Subramaniam** [supra], the issue arose whether a wife who died after the Amendment owned half share of the Thediathetam property acquired by the husband prior to the Amendment. Referring to the new Section 19 introduced by the Amendment, Gratiaen, J held as follows at page 47:

> *"Accordingly, property which would previously have constituted tediatetam within the meaning of the principal Ordinance in accordance with the ruling in Avitchi Chettiar's case [(1933) 35 NLR 313], must, if acquired on or after 4th July, 1947, be regarded as "separate property".*
>
> *The repeal of the old section 20 and the substitution of the new section 20 have the following effect:*
>
> *(a) if either spouse acquires tediatetam property on or after 4th July, 1947, no share in it vests by operation of law in the non-acquiring spouse during the subsistence of the marriage;*
>
> *(b) if the acquiring spouse predeceases the non-acquiring spouse without having previously disposed of such property, the new section 20 applies; accordingly, half the property devolves on the survivor and the other half on the deceased's heirs;*
>
> *(c) if the non-acquiring spouse predeceases the acquiring spouse, the tediatetam property of the acquiring spouse continues to vest exclusively in the acquiring spouse; the new section 20 has no application because the tediatetam of the acquiring spouse never "belonged" to the non-acquiring spouse."*

Justice Dr. H.W. Tambiah, QC, in **The Laws and Customs of the Tamils of Jaffna** [supra; at page 172] expresses a similar view that after the amendment came into force, property acquired by a spouse was his or her Thediathetam and half did not vest on acquisition with the non-acquiring spouse but if it was undisposed of on death, the other spouse became an heir to half.

But in **Manikkavasagar v Kandasamy and Others** [supra], Chief Justice Sharvananda held that the above "*enunciation [of Gratiaen, J] was not necessary for the decision of the case and was obiter dictum*", a view which has also been expressed by Chief Justice H.N.G. Fernando in **Annapillai v Eswaralingam and Others** [62 NLR 224 at page 226]. Chief Justice Sharvananda went on to state that the new Section 20 does not alter the position that a non-acquiring spouse owns one half of the Thediathetam property of the acquiring spouse. The argument that as the original Section 20 has been repealed, one cannot look back to the customary law of Thesawalamai or to the repealed Section 20 for the nature of Thediathetam but one must decide the rights of parties on the basis that the new Section 20 is exhaustive of the law relating to Thediathetam was rejected by Chief Justice Sharvananda, for the following reasons, at pages 22 and 23:

a) Section 20, as introduced in 1911, is declaratory of the customary law of Thesawalamai and it enacts in statutory language the fundamental concept of Thesawalamai that Thediathetam of each spouse shall be property common to the spouses and both shall be equally entitled thereto.

b) The provisions of the old section 20 are not inconsistent with any provisions of Thesawalamai and does not change or alter the incidents attaching to Thediathetam as found in the Thesawalamai. Section 40 of the Ordinance therefore does not apply, as Section 20 only re-states the customary law relating to Thediathetam, and the provisions of the Thesawalamai as are not inconsistent with the provisions of the Ordinance survive to supplement the latter.

c) That part of the customary law of Thesawalamai dealing with the incidents of Thediathetam are not affected by the repeal of old Section 20 and the repeal of Section 20 does not have the effect of obliterating the customary law of Thesawalamai.

d) As the customary law survives the repeal of the declaratory provision, the incidents of Thediathetam referred to in the old Section 20 continue to attach to the Thediathetam as defined by the new section 19.

e) The concept that Thediathetam of a spouse is property common to both spouses is far too firmly entrenched in the jurisprudence of the law of Thesawalamai to be jettisoned except by unequivocal express legislation.

f) Since the new section 20 has not referred to or dealt with the incidents of Thediathetam, the provision of Thesawalamai which postulated that Thediathetam of each spouse shall be property common to the two spouses, both being equally entitled thereto, therefore continues to be operative in spite of the repeal of the old section 20.

The above view expressed by Chief Justice Sharvananda has been criticized by Justice Dr. H.W. Tambiah, QC, in **The Laws and Customs of the Tamils of Jaffna** [supra; at page 174]. He takes the view that, (a) the law of Thediathetam ceased to be governed by custom when it was codified by the Dutch and when Sir Alexander Johnston translated it, with modifications and enacted it as the Regulations of 1806; (b) Thediatettam now has a statutory definition; and (c) by the amendments made to Sections 19 and 20, the concept of one half of Thediathetam property acquired by one spouse belonging to the other spouse has been abolished. However, as I have already noted, there was no dispute between the parties that if the said property was in fact Thediathetam property of Renukadevi, that Shanmuganathan owned one half, and hence, the necessity to re-visit the reasoning in **Manikkavasagar v Kandasamy and Others** [supra] on this issue does not arise in this appeal.

This brings me to the core issue that needs to be answered in this appeal.

On whom does the burden of proof lie to establish that a property is Thediathetam?

The Appellant obtained an *ex-parte* judgment and decree against Shanmuganathan and in order to satisfy such decree, it was open for the Appellant to obtain a writ of execution to seize property belonging to Shanmuganathan. The Appellant did move the District Court in that regard except that, as far as the Appellant was aware, the property that was seized did not belong to Shanmuganathan but to his wife. That was however not an impediment in view of the present position of the law that a property classified as

Thediathetam shall belong in equal share to the spouses. It appears that the Appellant became aware that Renukadevi had transferred the said property to the Respondents only after the Fiscal seized the property. Irrespective of the said transfer, in order to succeed with his claim that the said property is liable for seizure to satisfy the debt owed to him by Shanmuganathan, **it was imperative for the Appellant to establish that the said property was in fact Thediathetam**, and that Shanmuganathan continued to own one half share as he had not signed Deed No. 2326 as a transferor. This obligation on the Appellant is consistent with Sections 101 and 102 of the Evidence Ordinance, which are set out below:

Section 101

> "*Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*
>
> *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person*."

Section 102

> "*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*."

As expressed in the maxim *ei incumbit probatio, qui dicit, non qui negat*, the burden of proof lies on him who affirms, and not upon him who denies - cited in **Rodrigo v. Central Engineering Consultation Bureau** [(2009) 1 Sri LR 248] and followed in **Dehiwattage Rukman Dinesh Fernando v Union Apparel (Pvt) Ltd** [SC Appeal No. 19/2015; SC minutes of 28th October 2021], **Brandix Apparel Solutions Limited (Formerly Brandix Casualwear Ltd) v Kachchakaduge Frank Romeo Fernando** [SC Appeal 60/2018; SC Minutes of 5th May 2022] and **Kanthi Fernando v W. Leo Fernando (Maddagedara) Estates Company Limited** [SC Appeal (CHC) No. 84/2014; SC minutes 24th January 2024].

It is the Appellant who claimed that the property that was seized was Thediathetam and therefore one half of the property belonged to Shanmuganathan. If he failed to establish this fact, the Appellant would fail. Thus, the burden of proving that the property that was seized in fact is Thediathetam was entirely on the Appellant. Illustration (b) of Section 101, reproduced below, supports the above position:

> *"A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts, and which B denies to be true. A must prove the existence of those facts*."

The fact that the Appellant was fully aware of the evidentiary burden that was placed on him is borne out by the issue raised by him in this regard in the District Court.

Burden of proof as laid down in Manikkavasagar vs Kandasamy and Others

The question with regard to the burden of proof was considered in detail by this Court in **Manikkavasagar vs Kandasamy and Others** [supra]. In that case, the petitioner had married Ramanathan Thuraiappah on 21st January 1961. He had died on 29th June 1973, intestate and issueless, leaving his widow, the petitioner. The 1st - 6th respondents were his sisters and brothers and his deceased brother's two children. All parties were governed by the Thesawalamai.

The estate of the deceased consisted *inter alia* of an allotment of land at Clifford Place, Colombo 3, valued at Rs. 19,000.00. The wife claimed that the entire estate of her husband was Thediathetam, and that she was entitled to 3/4th share of the same. She conceded the balance 1/4th to the respondents. The respondents on the other hand claimed that the Clifford Place property was "separate property" of the deceased and hence the entirety of it devolved on the respondents as intestate heirs, without any co-sharing with the petitioner.

This Court, having considered the definition of Thediathetam under the Code, the Ordinance and the Amendment, held as follows at page 15:

"In the present case the land at Clifford Place was purchased by the deceased on Deed of Transfer No. 1290 of 11th June 1973 (P3), for a sum of Rs. 28,875. The deed says that the money was paid by the deceased Thuraiappah and that the property was conveyed to him. In the attestation clause the notary certifies that the consideration was paid in cash in his presence by the purchaser to the vendor. Apart from the production of the Deed of Transfer (P3) no evidence has been led by the petitioner or by the respondents as to how the consideration came to be provided: whether the consideration came from the separate estate of the deceased or from savings after his marriage. The petitioner was the best person who could have testified to the source of the consideration. Be that as it may, the question arises on whom the burden of proof lies to establish that this land was or was not the thediathetam of the deceased. The petitioner contended successfully in the lower courts that the burden of proof rested on the respondents to prove that the consideration formed or represented part of the separate estate of the deceased and that it was not thediathetam. The respondents, on the other hand contend that the burden lies on the petitioner to establish that the consideration for the purchase of the land did not form or represent any part of the separate estate of the deceased...

Sections 6 and 7 of the Ordinance include in the concept of separate property "all movable and immovable property to which any husband or woman married after the commencement of this ordinance may be entitled at the time of his or her marriage". So that under the present law it is possible for a spouse to enter on his/her married life while being entitled to movable or immovable property by way of mudusom/dowry and his/her earnings prior to marriage. In Nalliah v. Ponnammah (supra) it was held that money which a husband had saved out of his earnings before his marriage belonged to him for his separate estate.

According to the definition of thediathetam, in the new section 19, only such property which has been established to have been acquired by the deceased spouse during the subsistence of the marriage for valuable consideration, such consideration not forming or representing any part of the separate estate of the spouse, can be deemed to be thediathetam. Any person who claims any property to be thediathetam has to establish that the property was acquired for the kind of

consideration which would qualify it to be categorised as thediathetam property – such consideration not forming or representing any part of the separate estate of that spouse – the negative allegation forms an essential part of the petitioner's case. Hence the burden of proving that the land is thediathetam rested on the petitioner who asserts it to be so. She had to prove as part of the probanda that the consideration did not form or represent any part of the separate estate of the deceased spouse who acquired it in his name…

It was the petitioner who asserted that the said land was thediathetam of the deceased. And it was for her, in terms of section 101 of the Evidence Ordinance, to establish all the elements of thediathetam to succeed in her claim. The petitioner has failed to show that the land at Clifford Place was thediathetam property. Hence in my view, it has to be held that it was part of the separate estate of the deceased and as such the petitioner will not be entitled to any share therein. The respondents inherit the entire land in accordance with the rules of inheritance in part III of the Ordinance."

What this Court has done in **Manikkavasagar** is to consider the provisions of Section 19 of the Ordinance in accordance with the aforementioned provisions of the Evidence Ordinance. The current legal position therefore is that if any person wishes to prove that a property is Thediathetam, he / she must establish that the property was acquired by a spouse during the subsistence of the marriage for valuable consideration, and that such consideration did not form or represent any part of the separate estate of that spouse, or that such consideration formed the profits from the separate estate of that spouse arising during the subsistence of the marriage.

The learned President's Counsel for the Appellant submitted that the decision of this Court in **Manikkavasagar** is *per incuriam* and should not be followed. It was his position that even though Chief Justice Sharvananda recognises that there is a presumption that property acquired during a marriage is Thediathetam, he mistakenly goes on to hold that the said presumption has been repealed by the Ordinance, though impliedly.

The existence of a presumption has been discussed in **<u>Ponnamah v Kanagasuriyam</u>** [supra]. It involved a dispute between husband and wife married before the Ordinance as to what constitutes joint property, where Ennis, J stated as follows, at page 257:

> *" … the learned Judge has held that **all property purchased after the date of marriage is presumed to be acquired property under the Tesawalamai until the contrary is proved**. The case in Muttukristna's Tesawalamai, at page 30, seems to support that contention, and also in Katiresu's Tesawalamai two cases are cited for the same proposition. **The presumption would appear to be correct**, because at the time when the Tesawalamai was written it would seem that a son, before marriage and during the lifetime of his father, could not hold for himself any property gained or earned by him during the time of his bachelorhood; it all belonged to his father. So that on the marriage the property brought together, which is dealt with in section 1 of the Tesawalamai, would be, on the side of the husband, such property as the son had received as a gift from his father, or, if his father had been dead at the time, had inherited from him, **and purchases after that <u>would presumably be made</u> from the profits which section 1 distinctly says are acquired property**."* [emphasis added]

Though Ennis, J held that the presumption appears to be correct, it is clear that he said so based on the customs and decisions that existed prior to the Ordinance.

In **<u>Manikkavasagar vs Kandasamy and Others</u>** [supra], the Court of Appeal had relied upon, and followed, the above judgment in holding that the Clifford Place property was Thediathetam property. Having referred to the judgment of the Court of Appeal, Chief Justice Sharvananda stated as follows, at page 15:

> *"I do not agree with this process of reasoning. The Court of Appeal was in error in applying the ruling re [sic] burden of proof in <u>Ponnammah v. Kanagasuriyam</u> (supra) to the facts of the present case. **That was a case decided under the original Thesawalamai.** An analysis of the relevant sections of Thesawalamai tends to show that property purchased after the date of marriage could be presumed to be acquired property until the contrary is proved. This presumption stems from the provision in the Thesawalamai (Art. I, Section 1, Clause 7), that a son before marriage*

and during the lifetime of the parents could not hold for himself any property gained or earned during the time of his bachelorhood; it formed part of the common estate of his parents. So that at the time of marriage a husband would commence married life only with mudusom as his separate property without being entitled to the moneys earned by him prior to the marriage. Hence apart from what could be identified as such separate property, all that is acquired during the pendency of the marriage could legitimately be presumed to have been bought out of the profits of his separate property or earnings after marriage (In that era there was no question of a woman earning prior to her marriage). The Jaffna Matrimonial Rights & Inheritance Ordinance has by its definition of Thediathetam impliedly abrogated that provision of Thesawalamai, viz Part I, Section 1, Clause 7, which was the basis for such presumption. The son's earnings during his bachelorhood formed no more his parents' Thediathetam but remained his separate property."

Any such presumption that may have existed under the Thesawalamai Code has been superseded by the developments that have been referred to in **Nalliah v Ponnamah** [supra]. While the argument of the learned President's Counsel for the Appellant may have succeeded pursuant to the judgment in **Avitchy Chettiar v Rasamma** [supra], the new definition of Thediathetam introduced by the Amendment in 1947, read together with Sections 6 and 7, as amended, have replaced the customary position that prevailed under the Code and has put to rest the issue as to what comprises Thediathetam and thereby the fact that there exists no presumption that a property is Thediathetam merely for the reason that it was purchased during a marriage for valuable consideration. I am therefore unable to agree with the submission of the learned President's Counsel for the Appellant that there exists a presumption that all property acquired during a marriage for valuable consideration is Thediathetam.

The position that prevails today as to what is Thediathetam is contained in Section 19, in terms of which only the following property shall be deemed to be the Thediathetam of a spouse:

(a) Property acquired by a spouse during the subsistence of the marriage for valuable consideration, such consideration not forming or representing any part of the separate estate of that spouse.

(b) Profits arising during the subsistence of the marriage from the separate estate of that spouse.

The learned President's Counsel for the Appellant submitted further that the issue of whether a property is Thediathetam arises mostly between spouses, who are in a better position to discharge the burden, and that it is impossible for the Appellant to prove that the property is Thediathetam since he is only a judgment creditor of Shanmuganathan and a complete stranger. While that may be so, it is a burden that the Appellant has undertaken and therefore is required to satisfy in order to succeed.

This brings me to the next submission of the learned President's Counsel for the Appellant. It was submitted that in view of the provisions of Section 106 of the Evidence Ordinance, which provides that "*When any fact is **especially within the knowledge** of any person, the burden of proving that fact is upon him*" [emphasis added], the burden has shifted to the Respondents to prove that the said property is not Thediathetam.

Applicability of Section 106 of the Evidence Ordinance

E.R.S.R. Coomaraswamy, in his treatise **The Law of Evidence** [Volume 2, Book 1 at page 263], has stressed that Section 106 contemplates facts **especially** within the knowledge of a party. Referring to the judgment in **Ram Bharosey v Emperor** [AIR (1936) All. 835], the author goes on to state as follows:

> "*The words 'especially' would seem to indicate that the facts must in their nature be such as to be within the knowledge of the accused or the party to a civil case concerned and no one else; for example, his own intention in doing an act, as in illustration (a) or the fact that he purchased a railway ticket, although he was subsequently found to be without one, as in illustration (b) to Section 106. It has no application to cases where the fact in question, having regard to its nature, is such*

as to be capable of being known not only to an accused or party to a civil case, but also by others, if they happened to be present, when it took place. It cannot be invoked, for example, to make up for the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused.

The word 'especially' means facts that are pre-eminently or exceptionally within his knowledge. If knowledge of certain facts is as much available to the prosecution, on exercise of due diligence, as to the accused, the facts cannot be said to be 'especially' within the knowledge of the accused."

In **Sanitary Inspector, Mirigama v Thangamani Nadar** [55 NLR 302], Nagalingam, ACJ held as follows:

"*When the section refers to a fact as being especially within the knowledge of a party, the term "especially" there means "almost exclusively" if not "altogether exclusively" within the knowledge of a party, and not that the fact is one within the knowledge of the one party as well as of the other*."

The question that I must therefore consider in order to apply the provisions of Section 106 to this appeal is, has the Appellant established that the Respondents had an *almost exclusive* knowledge that the said property is Thediathetam? It is common knowledge that the Respondents are only purchasers of the property that belonged to Renukadevi. Whether Renukadevi purchased the said property with the consideration for such purchase coming from her separate estate or whether the consideration was provided by the profits earned during her marriage with Shanmuganathan are not matters that will be within the knowledge of the Respondents. Nor has the Appellant placed any material before the District Court to establish that the Respondents had *almost exclusive* knowledge of this fact. As much as the Appellant may not have the resources to establish that the said property is Thediathetam, the Respondents too do not have the knowledge that is contemplated by Section 106. The Respondents therefore are in no better position than the Appellant. I therefore cannot agree with the submission of the learned President's Counsel for the Appellant.

In the above circumstances:

(a) I am of the view that the burden of proving that a property is Thediathetam is on the party who claims it to be so;

(b) I am in agreement with the finding that has been arrived at by the learned Judges of the High Court on this issue.

<u>Has the Appellant discharged the burden of proof?</u>

The next issue that I must consider is whether the Appellant has discharged the burden of proof cast on him by law.

In the application made under Section 241, the Appellant claimed that Shanmuganathan, who had been known to him for a long time, is a Chartered Accountant by profession and was engaged in property development, while his wife, Renukadevi was not employed and was a housewife. He had submitted further that "*the property that was seized in execution of the decree was purchased by the judgment-debtor with his own money although the deeds of transfer were executed in favour of his wife*". This position was echoed in his evidence before the District Court, with the Appellant stating that it is Shanmuganathan who has financed the purchase of the said property, although purchased in the name of Renukadevi. The Appellant however has not presented any material to substantiate this position. The two deeds by which Renukadevi purchased the said property does not specify the source of the consideration for such purchase. It was the evidence of the 1st Respondent that the land was purchased from Renukadevi and that Shanmuganathan too had signed the deed. In cross examination, it had been suggested that the land belonged to Renukadevi and her husband in equal share but that suggestion has been denied. The Respondents had led the evidence of the Attorney-at-Law who attested Deed No. 2326 by which the Respondents had purchased the said property, but no useful evidence has been elicited during cross examination to support the position of the Appellant.

Taking into consideration the totality of this evidence, I am of the view that the Appellant has failed to present any material to establish that the property that was seized in execution of the decree is Thediathetam and has therefore failed to discharge the burden of proof cast on him.

The learned President's Counsel for the Appellant also submitted that Shanmuganathan had signed Deed No. 2326 only in order to give his consent to Renukadevi transferring her half share and not in order to sell his share. The necessity to consider this argument does not arise in view of the conclusion I have reached that the Appellant has failed to establish that the said property is Thediathetam.

Conclusion

Taking into consideration all of the above, I answer the three questions of law as follows:

1) Have the learned High Court Judges erred in law in coming to a finding that the person claiming that certain property is Thediathetam property should establish his stance? **No**.

2) Have the Learned High Court Judges erred in law in coming to a finding that the Appellant failed to prove that the said property is Thediathetam property? **No**.

3) Have the learned High Court Judges erred in law in coming to a finding that the Appellant failed to prove in the District Court that the said property is Thediathetam property? **No**.

The judgment of the High Court is accordingly affirmed. The appeal of the Appellant is dismissed, without costs.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena, PC, 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 Section 5C of the High Court of the Provinces (Special Provision) (Amendment) Act No. 54 of 2006.

S.C. Appeal No. 69/2013

SC(SPL) LA No. 07/2012

CA 257/97(F)

D.C. Kurunegala 4009/L

Aluth Muhandiramge Somawathie (Deceased)

PLAINTIFF

1. (A) Sumanasiri Harischandra
2. (B) Susila Mukthalatha
3. (C) Chithra Dharmalatha
4. (D) Liliat Chandrawathie
5. (E) Piyaseli Sarathchandra
6. (F) Jayasiri Nimalchandra
7. (G) M. Aratchilage Ariyaseeli
8. (H) Gayani Fonseka
9. (I) Pradeep Premachandra
10. (J) Dilhani Fonseka

All of Keppetiwalana, Alawwa.

SUBSTITUTED PLAINTIFFS

Vs

Amarapathy Mudiyanselage Podishingo (Deceased)

DEFENDANT

1. (A) Lucy Nona
2. (B) Amarapathy M. Senarathne
3. (C) A. M. Indra Amarapathy
4. (D) A.M.M.J. Amarapathy
5. (E) A.M. Jane Nona Amarapathy
6. (F) A. M. Ashoka Chandrawathie
7. (G) A.M. Wijeratne
8. (H) A.M.Premawathie
9. (I) J.T. Somawathie
10. (J) A.M.Ramulatha Sriyakantha
11. (K) A.M.Ranjith Senaratne
12. (L) A.M. Pushparaj Chaminda
13. (M) A.M. Priyantha Damayanthi
14. (N) A.M. Samantha Amarapathy
15. (O) A.M. Dhammika Amarapathy
16. (P) A.M. Wijesiri Amarapathy

All of Keppetiwalana, Alawwa.

SUBSTITUTED DEFENDANTS

AND BETWEEN

1. Amarapathy Mudiyanselage M.J. Amarapathy,
   Ihala Keppitiwalana, Alawwa.

1(D) SUBSTITUTED

DEFENDANT-APPELLANT

Vs

1. (A) Sumanasiri Harischandra
2. (B) Susila Mukthalatha
3. (C) Chithra Dharmalatha
4. (D) Liliat Chandrawathie
5. (E) Piyaseli Sarathchandra
6. (F) Jayasiri Nimalchandra
7. (G) M. Aratchilage Ariyaseeli
8. (H) Gayani Fonseka
9. (I) Pradeep Premachandra
10. (J) Dilhani Fonseka

All of Keppetiwalana, Alawwa.

SUBSTITUTED PLAINTIFF-RESPONDENTS

1. (A) Lucy Nona
2. (B) Amarapathy M. Senarathne
3. (C) A. M. Indra Amarapathy
4. (D) A.M.M.J. Amarapathy
5. (E) A.M. Jane Nona Amarapathy
6. (F) A. M. Ashoka Chandrawathie
7. (G) A.M. Wijeratne
8. (H) A.M.Premawathie
9. (I) J.T. Somawathie
10. (J) A.M.Ramulatha Sriyakantha

11. (K) A.M.Ranjith Senaratne
12. (L) A.M. Pushparaj Chaminda
13. (M) A.M. Priyantha Damayanthi
14. (N) A.M. Samantha Amarapathy
15. (O) A.M. Dhammika Amarapathy
16. (P) A.M. Wijesiri Amarapathy

All of Keppetiwalana, Alawwa.

SUBSTITUTED DEFENDANT-RESPONDENTS

AND NOW BETWEEN

1. (A) Sumanasiri Harischandra
2. (B) Susila Mukthalatha
3. (C) Chithra Dharmalatha
4. (D) Liliat Chandrawathie
5. (E) Piyaseli Sarathchandra
6. (F) Jayasiri Nimalchandra
7. (G) M. Aratchilage Ariyaseeli
8. (H) Gayani Fonseka
9. (I) Pradeep Premachandra
10. (J) Dilhani Fonseka

All of Keppetiwalana, Alawwa.

SUBSTITUTED PLAINTIFF-RESPONDENT-APPELLANTS

Vs

Amarapathy Mudiyanselage M.J. Amarapathy,

Ihala Keppitiwalana, Alawwa.

1(D) SUBSTITUTED DEFENDANT-APPELLANT

1. (A) Lucy Nona
2. (B) Amarapathy M. Senarathne (Deceased)
3. 1(B) Amarapathy Mudiyanselage Priyantha Padmakumari Senarathne
4. 2(B) Amarapathy Mudiyanselage Piyumi Pushpa Amarapathy
5. (C) A. M. Indra Amarapathy (Deceased)
6. 1(C) Amarapathy Mudiyanselage Jane Nona
7. 2(C) Amarapathy Mudiyanselage Premawathie
8. 3(C) Amarapathy Mudiyanselage Anulawathie
9. 4(C) Amarapathy Mudiyanselage Chandrawathie
10. 5(C) Amarapathy Mudiyanselage Wijeratne
11. (D) A.M.M.J. Amarapathy
12. (E) A.M. Jane Nona Amarapathy

13. (F) A. M. Ashoka Chandrawathie
14. (G) A.M. Wijeratne
15. (H) A.M.Premawathie
16. (I) J.T. Somawathie
17. (J) A.M.Ramulatha Sriyakantha
18. (K) A.M.Ranjith Senaratne
19. (L) A.M. Pushparaj Chaminda
20. (M) A.M. Priyantha Damayanthi
21. (N) A.M. Samantha Amarapathy
22. (O) A.M. Dhammika Amarapathy
23. (P) A.M. Wijesiri Amarapathy

All of Keppetiwalana, Alawwa.

SUBSTITUTED DEFENDANT-RESPONDENT-RESPONDENTS

BEFORE : **S. THURAIRAJA, PC, J**
A.H.M.D. NAWAZ, J AND
ACHALA WENGAPPULI, J

COUNSEL: W. Dayaratne, PC with Ms. Ranjika Jayawardena for the Substituted Plaintiff-Respondent-Appellants.
Manohara De Silva, PC with Ms. P. Wickramaratne and Hirosha Munasinghe for the 1(D) Substituted Defendant-Appellant-Respondent.

WRITTEN SUBMISSIONS: Substituted Plaintiff-Respondent-Appellant on 19th July 2013 and 04th July 2023.

1D Substituted Defendant-Appellant-Respondent on 18th November 2013.

Substituted Defendant-Appellant-Respondent on 04th July 2023.

ARGUED ON: 16th May 2023.

DECIDED ON: 15th February 2024.

S. THURAIRAJA, PC, J.

This case is one that has traversed the halls of these courts for several years. The action was first instituted in 1972 by the original Plaintiff (hereinafter referred to as the "Plaintiff") in the District Court of Kurunegala against the original Defendant (hereinafter referred to as the "Defendant") for a declaration of title to the land called "Damunugahamulawatta", ejectment of the original Defendant from the said land, restoration of possession and damages.

The learned District Judge, by judgment dated 29th March 1976, held in favour of the Plaintiff. The Defendant preferred an appeal to the Court of Appeal, following which, by judgment dated 25th October 1984, the learned Court of Appeal Judges set aside the judgment of the District Court and sent the case back for a trial de-novo on the basis that the learned District Court Judge had not taken into consideration the documents marked "D1" to "D8" in evidence.

Following the second trial, the learned District Judge, by judgment dated 28th April 1997, held in favour of the Plaintiff. The Substituted 1D Defendant-Appellant-Respondent preferred an appeal to the Court of Appeal. The learned Judge of the Court of Appeal, by judgment dated 02nd December 2011, set aside the District Court judgment on the grounds that the Plaintiff had failed to properly discharge the burden of proof to establish title and identity of the land in dispute. Finally, being aggrieved

by the Court of Appeal judgment, the Substituted Plaintiff-Respondent-Appellants appealed to the Supreme Court. Leave to appeal was granted by this Court on 6th May 2013 on the following questions of law:

a) Did His Lordship of the Court of Appeal err in law when he held that as the Plaintiff failed to read her documents in evidence at the conclusion of her case she has failed to prove her title when there was no objection raised by the Defendant for any of the documents of the Plaintiff marked in evidence? [sic]
b) Did His Lordship of the Court of Appeal err in law when his Lordship held that the Petitioner had failed to identify the corpus?
c) Did his Lordship of the Court of Appeal err in law when he held that the Lease Agreement marked V7 dated 26/02/1963 is valid?
d) Did His Lordship of the Court of appeal seriously misdirect himself when he held that the deeds marked V2 and V3 are need not be proved under section 68 of the Evidence Ordinance as the Plaintiff did not object for those documents when the Defendants read those documents in evidence at the conclusion of their case?
e) Did His Lordship of the Court of Appeal seriously misdirect himself when his Lordship held that the Plaintiff's action should be dismissed as there was a valid lease at the time of filing this action and held that 1(F) Substituted /Defendant/Respondent had title to the property which are two contradictory positions?

Factual Matrix

It is usually my practice to lay out the facts of the case inasmuch description as needed and available prior to the analysis from my perspective and the ultimate decision, especially if the narration of events and facts of one party appear drastically different from the other(s).

However, to quote the Plaintiff's own written submission in the District Court, *"[t]he issue that this Court has to decide is a simple one, though an attempt is being made to complicate it*." I believe both parties are culpable of this fallacy; the questions of law themselves, for instance, appear overly convoluted and ambiguous, despite the court's directive to the Counsel to refine and crystallise the questions of law afresh. While I do not wish to divulge into the perils of inadequate and imprecise legal drafting in this judgment, I believe there is much to be said about its correlation to delayed and ineffective access to justice.

To return to the instant case, I have attempted, to the best of my capabilities, to simplify the facts of the case as told by the parties in presenting them as a precursor to the analysis. The land in question, "Damunugahamulawatta" is described in Schedule A to the amended plaint in the extent of 2R.10P depicted as Lots 5D1 and 5E1, and the pedigree of the said land is as follows: one Abdul Jabbar became the owner of the property described in Schedule B to the plaint in the extend of 4 Kurakkan Lahas (KL) by virtue of Deed No. 22528 dated 13th October 1919 and attested by S.P.S. Jayawardena Notary Public. Following the passing of Jabbar in 1925, his estate was administered in the testamentary case bearing No. 3039/T, and the property devolved on his widow, Hajji Umma, and his son, Mohamadu Kalideen (alias 'Halideen'). Following the passing of Hajji Umma, Halideen became the sole owner of the property.

According to the Petitioner, Halideen transferred the entirety of the property to the original Plaintiff by virtue of Deed No. 462 dated 30th January 1969 and attested by P.S. Suriyarachchi Notary Public (marked "P8"). The Petitioner states that, on the same day, the original Defendant forcibly entered the land illegally and unlawfully, causing damage to the Plaintiff.

According to the Respondents, prior to the agreement between Halideen and the Plaintiff, Halideen had executed four lease agreements for the land with one Ausadahamy, the original Defendant's brother, and subsequently, with the original Defendant in the manner tabulated below.

06th November 1959	Deed of Lease bearing No. 6305 between Halideen and Ausadahamy	1959 – 1962 (3 years)
22nd March 1960	Deed of Lease bearing No. 6716 between Halideen and Ausadahamy	1962 – 1964 (2 years)
29th November 1960	Deed of Lease bearing No. 7287 between Halideen and Ausadahamy	1964 – 1970 (6 years)
26th February 1963	Deed of Lease bearing No. 9601 between Halideen and Podisingho (original Defendant) (marked "V7")	1970 – 1980 (10 years)

Following the passing of the original Defendant, one Ashoka Chandrawathie was substituted in his place as the 7E Substituted-Defendant (now 1(F) Substituted-Defendant-Respondent-Respondent) on 17th January 1986 in terms of Section 398(1) of the Civil Procedure Code. When the retrial proceedings in the District Court commenced on 01st December 1992, the Substituted Defendants also moved to allow the 1(F) Substituted Defendant-Respondent-Respondent (hereinafter referred to as the "1(F) Substituted Defendant") to intervene and be made an independent party in terms of Section 18 of the Civil Procedure Code. It was the position of the Substituted Defendants that, in fact, Halideen had transferred the property described in Schedule

A to Podisingho's daughter, the 1(F) Substituted-Defendant, prior to the deed executed with the Plaintiff in the following manner:

23rd December 1964	Deed of Transfer bearing No. 10861 between Halideen and 1(F) Substituted-Defendant (marked "V2")	2/3 of the land
11th April 1967	Deed of Transfer bearing No. 12644 between Halideen and 1(F) Substituted-Defendant (marked "V3")	1/6 of the land

The learned District Judge disallowed the said application by order dated 04th April 1993 on the basis that the 1(F) Substituted Defendant's failure in entering this application at the time she was substituted in place of the original Defendant, and only making such request 6 years after this period, is a request made with the purpose of delaying the case, and is, therefore, contravention of Section 18 of the Civil Procedure Code.

In the Court of Appeal judgment, the learned Court of Appeal Judge held that the Plaintiff had failed to discharge the burden of proving proper title and establishing identity, as well as that the Plaintiff had not proven title due to the Plaintiff's failure to read documents in evidence, including Deeds "P1" to "P8", at the closure of the case.

Simultaneously, the learned Court of Appeal Judge accepted Deeds "V2" and "V3" produced by the 1(F) Substituted-Defendant on the basis that the Plaintiff did not object to these documents in evidence at the conclusion of the case.

Proof of Title

This is evidently a *rei vindicatio* action, and it is settled law that in order to succeed in a rei vindication action, the Plaintiff must, firstly, prove ownership of the property and, secondly, that the defendant is in possession of the property. The burden of proof is placed on the Plaintiff to prove ownership on a balance of probabilities.

In ***Luwis Singho and Others v. Ponnamperuma [1996] 2 S.L.R. 320*** [page 324] it was stated by Wigneswaran J. that,

> *"No doubt actions for declaration of title and ejectment (as is the present case) and vindicatory actions are brought for the same purpose of recovery of property. But in a rei vindicatio action, the cause of action is based on the sole ground of violation of the right of ownership. In such an action proof is required that ; (i) the Plaintiff is the owner of the land in question i.e. he has the dominium and, (ii) that the land is in the possession of the Defendant."*

The standard of the burden proof placed on the Plaintiff has been extensively discussed, such as in ***Preethi Anura v. William Silva (SC Appeal No. SC/LA/116/2014, Minutes of the Supreme Court on 5th June 2017),*** where Dep. C.J. stated:

> *"In a rei vindicatio action, the Plaintiff has to establish the title to the land. Plaintiff need not establish the title with mathematical precision nor to prove the case beyond reasonable doubt as in a criminal case. The Plaintiff's task is to establish the case on a balance of probability. In a partition case the situation is different as it is an action in rem and the trial judge is required to carefully examine the title and the devolution of title. This case being a rei vindicatio action this court has to consider whether the Plaintiff discharged the burden on balance of probability."*

Samayawardhena J's discussion in ***Premawathie v. Jayasena (SC Appeal No. 176/2014, Minutes of the Supreme Court on 17th May 2021)*** is an important reference, wherein he states:

> *"It is well settled law that in a rei vindicatio action the burden is on the Plaintiff to prove title to the land in suit irrespective of weaknesses in the Defendant's case. H.N.G. Fernando J. (later C.J.) in Pathirana v. Jayasundara (1955) 58 NLR 169 at 171 required "strict proof of the Plaintiff's title".*
>
> *But this shall not be understood that a Plaintiff in a rei vindicatio action shall prove his title beyond reasonable doubt such as in a criminal prosecution, or on a high degree of proof as in a partition action.* ***The standard of proof of title is on a balance of probabilities as in any other civil suit. The stringent proof of chain of title, which is the norm in a partition action to prove the pedigree, is not required in a rei vindicatio action****."*
>
> *[Emphasis added.]*

Samayawardhena J further elaborated upon the circumstances in which the Court shall hold that the Plaintiff has discharged his burden, establishing that this determination is dependent upon the totality of the evidence presented in each case:

> *"The Court shall not protect rank trespassers and promote unlawful occupation to the detriment of the legitimate rights of lawful landowners by setting an excessively higher standard of proof in a rei vindicatio action than what is expected in an ordinary civil suit.*
>
> *Bearing in mind the burden of proof cast upon the Plaintiff in a rei vindicatio action, if the Plaintiff in such a case has "sufficient title" or "superior title" than that of the Defendant, the Plaintiff shall succeed****. No rule of thumb can be laid down on what circumstances the Court shall hold that the Plaintiff has***

discharged his burden. Whether or not the Plaintiff proved his title shall be decided upon a consideration of the totality of the evidence led in the case*."*

[Emphasis added.]

Counsel for the Plaintiff in this instant case, in reference to deeds "V2" and "V3", submitted the argument that despite the failure of the adverse party to object when documents are read in evidence, it is mandatory that deeds marked subject to proof are proved in terms of Section 68 of the Evidence Ordinance.

Section 68 of the Evidence Ordinance reads:

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

It is curious to note that, in fact, neither the Plaintiff nor the Defendant called for an attesting witness in order to prove the title deeds submitted by the respective parties.

However, it is also pertinent to consider that these deeds were executed more than fifty years ago, which therefore brings into operation another relevant provision from the Evidence Ordinance.

Section 90 of the Evidence Ordinance reads:

"Where any document purporting or proved to be thirty years old is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's

handwriting and in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested."

Further, while there have been seemingly conflicting views on the application of section 68 in the past, fortunately, the Civil Procedure Code (Amendment) Act, No. 17 of 2022, has settled this matter; sections 2 and 3 read as follows:

(2) (1) Notwithstanding the provisions of the Evidence Ordinance (Chapter 14), in any proceedings under this Code, ***it shall not be necessary to adduce formal proof of the execution or genuineness of any deed, or document which is required by law to be attested****, other than a will executed under the Wills Ordinance (Chapter 60), and on the face of it purports to have been duly executed, unless–*

(a) in the pleadings or further pleadings in an action filed under regular procedure in terms of this Code, the execution or genuineness of such deed or document is impeached and raised as an issue; or

(b) the court requires such proof:

Provided that, the provisions of this section shall not be applicable in an event, a party to an action seeks to produce any deed or document not included in the pleadings of that party at any proceedings under this Code.

[...]

(3) 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) *(i) if the opposing party does not object or has not objected to it being received as evidence on the deed or document being tendered in evidence; or*

> *(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;*
>
> *[Emphasis added.]*

Perusal of the evidence submitted in the instant case shows that the Plaintiff submitted the documents marked "P1" to "P8", which include, inter alia, Deed No. 22528 in evidence of Abdul Jabar's ownership of the property, inventory of the administration and devolution of the estate to Halideen in the testamentary case bearing No. 3039/T, and the Deed of Sale bearing No. 462 executed between Halideen and the Plaintiff for the transfer of the property. Furthermore, the title deeds were not marked subject to proof nor challenged by the Substituted Defendants.

In ***Cinemas Limited v. Sounderarajan [1998] 2 S. L. R. 16*** Jayasuriya, J. held that;

> *"In a civil case when a document is tendered the opposing party should immediately object to the document. Where the opposing party fails to object, the trial judge has to admit the document unless the document is forbidden by law to be received and no objection can be taken in appeal - S. 154 CPC (explanation)."*

As such, in the application of section 2(1) and section 3 of the Civil Procedure Code (Amendment) Act together with section 90 of the Evidence Ordinance, and the totality of evidence produced by the Plaintiff, I am of the opinion that the Plaintiff has sufficiently proved, on a balance of probabilities, ownership of title to the property.

I do not discern that the Plaintiff's failure to read documents in evidence at the conclusion of the case in the District Court corresponds to the Plaintiff's failure to establish title by those documents in evidence. While in agreement with the learned Judge of the Court of Appeal that this is a serious lapse on the part of the trial court, the practice of reading documents in evidence at the closing of a case has been discussed by Marsoof J in ***Jamaldeen Abdul Latheef v. Abdul Majeed Mohamed Mansoor 2010 2 SLR 333*** [page 204] as follows:

> *"There remains, however, one more matter on which learned counsel for the contending parties have made submissions, which was raised in the context that the usual practice of reading in evidence the documents that were marked and produced at the trial in the course of witness testimony was not followed when the case for the Respondents was closed on 27 April 1993.*
>
> *This is substantive question 5, which specifically focuses on this issue, namely: is it mandatory to read the documents in evidence at the conclusion of the trial.* ***There is no provision in the Civil Procedure Code that mandates the reading in of the marked documents at the close of the case of a particular party. However, learned and experienced Counsel who have appeared in the original courts in civil cases from time immemorial developed such a practice, which has received the recognition of our Courts.****"*
>
> *[Emphasis added.]*

In light of the aforementioned circumstances, facts, and evidence, I answer the first question of law affirmatively.

Identity of Corpus

It is trite law that the identity of the property in a *rei vindicatio* action is as fundamental to the success of the action as the proof of the ownership (dominium) of the owner

(dominus); 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.

I once again quote Marsoof J in the case of ***Jamaldeen Abdul Latheef v. Abdul Majeed Mohamed Mansoor 2010 2 SLR 333*** on the importance of this principle:

> *"The identity of the subject matter is of paramount importance in a rei vindicatio action because the object of such an action is to determine ownership of the property, which objective cannot be achieved without the property being clearly identified. Where the property sought to be vindicated consists of land, the land sought to be vindicated must be identified by reference to a survey plan or other equally expeditious method. It is obvious that ownership cannot be ascribed without clear identification of the property that is subjected to such ownership, and furthermore, the ultimate objective of a person seeking to vindicate immovable property by obtaining a writ of execution in terms of Section 323 of the Civil Procedure Code will be frustrated if the fiscal to whom the writ is addressed, cannot clearly identify the property by reference to the decree for the purpose of giving effect to it. It is therefore essential in a vindicatory action, as much as in a partition action, for the corpus to be identified with precision."*

In the instant case, it is clear that the Plaintiff has successfully identified the corpus; the land described in the schedule to the amended plaint is as follows:

> *"වයඹ පළාතේ කුරුණෑගල දිස්ත්‍රික්කයේ දඹදෙනි හත්පත්තුවේ දඹදෙනි උඩුකහ කෝරළේ කැප්පිටිවලාන ගමෙහි පිහිටි දමුනුගහමුලවත්ත කුරක්කන් ලාස් හතරක වපසරයකින් යුත් ඉඩමේ උතුරට - මීගහමුලවත්ත, නැගෙනහිරට - අඹගහමුලවත්ත හා වෙහෙරගාවවත්ත, දකුණට - දෙල්ල්ගහමුලවත්ත, බස්නාහිරට - රජයේ ඉඩම් අගල යන මායිම් තුල එෆ් 143/2 වශයෙන් ලියාපදිංචි වී ඇති ඉඩම. මෙම ඉඩම 1919 ජුනි සෙ 27 දින මිනුම්පති කාර්යාලයේ නිකුත් කර ඇති පිඹුරු අංක 450 අනව මායිම් වේ.*

එකි පිඹුරු අංක 450 හි පෙන්වා ඇති එකි දමුනුගහමුල වත්ත නැමැති ඉඩම් රූඩ් දෙකයි පර්චස් දහයක් (ඇ.0 රූ2 පර්.10) විශාල ලොට් අංක 5ඩී1 සහ 5ඊ1 ට මායිම් උතුරට - මීගහමුලවත්ත එකි පිඹුරේ අංක 450 කැබලි අංක 8 දරණ ඉඩමද, නැගෙනහිරට - අඹගහමුලවත්ත හෙවත් වෙහෙරගාව වත්ත (එකී පිඹුරේ ලොට් අංක 18 ද) දකුණට - අලව්ව ගිරිඋල්ල බස් මාර්ගයද, බස්නාහිරට - එකී පිඹුරේ 5ඩී සහ 5ඊ ද වේ. ලියාපදිංචිය එෆ් 683/178."

[ALL that land called 'Damunugahamulawatta' situated in the village of Keppitiwalana, Dambadeni Udukaha Korale, Dambadeni Hatpattu, Kurunegala District in Wayamba Province and extended in the extent of 07 Kurakkan Lahas is bounded on the North- Meegahamulawatta, on the East-Ambagahamulawatta and Weheragawawatta, on the South- Delgahamulawatta, On the West- ditch of the state lands and registered as F 143/2. This land is bounded as per Plan No. 450 issued dated 27th June 1919 by the Surveyor General's Office.

All that Lots No. 5D1 and 5E1 of the aforesaid 'Damunugahamulawatta' depicted in the aforesaid Plan No.450 extended in the extent of Two Roods and Ten Perches (A: 0 – R: 2 – P: 10) is bounded on the North- the land bearing Lot No. 8 of aforesaid Plan No.450 of Meegahamulawatta, on the East-Ambagahamulawatta alias Weheragawawatta (Lot No.18 of the aforesaid plan) on the South - Alawwa-Giriulla Bus Route on the West-5D and 5E of the said plan. Registered under F 683/178."]

The title deed produced by the Plaintiff marked "P8" describes the land in the same manner. Further, the land was surveyed by Court Commissioner A.M. Weber who prepared and produced Plan No. 1566 dated 29th October 1991 (marked "X") and subsequent report marked "X1". The following extracts from the plan and report confirm the identity of the subject matter:

"කුරුණෑගල දිස්ත්‍රික්කයේ, දඹදෙනි හත්පත්තුවේ, දඹදෙනි උඩුකහ දකුණ කෝරළේ සැප්පිටිවලාන ගමෙහි පිහිටා තිබෙන "දමුණුගහමුලවත්ත" නැමැති ඉඩම මා විසින් මැන අවසාන ගම් පිඹුරු 450 හි 5D1 සහ 5E1 වැනි කැබලි පිහිටුවා අධිෂ්ඨාපනය කර සාදන ලද බිම් කැබලි දෙකකින් යුත්

["I have surveyed the land called "Damunugahamulawatta'' situated in the village Keppitiwalana, Dambadeni Udukaha Korale-South, Dambadeni Hatpattu in Kurunegala District contained 2 lots superimposed and prepared by utilizing the 5D1 and 5E1 of the Final Village Plan no. 450.]

Hence, I find no reason to disagree with the conclusions of the learned District Court Judge pertaining to the Plaintiff's identification of the corpus, as stated below:

"අංක 450 දරණ පිඹුරේ කැබලි අංක 5ඩී1 හා 5ඊ1 හාල්දීන්ට හිමි වී තිබූ බවට සැකයෙන් තොරව ඔප්පු කර ඇති අතර, එම අයිතිය හා එහි මායිම් සහ සකස් කරන ලද පිඹුර අනුව එනම් 5ඩී1 හා 5ඊ1 1979.01.30 දින අංක 462 දරණ ඔප්පුවෙන් පැමිණිලිකරුට පවරා ඇති බවට පැමිණිල්ලේ සාක්ෂි වලින් මනාව තහවුරු වී ඇති අතර, විත්තිය ද එය පිළිගෙන ඇත. ඒ අනුව පැමිණිල්ලේ නඩුකරය සාක්ෂි සමබරතාවය මත ඔප්පුකර ඇති බවට නිගමනය කරමි."

["Beyond reasonable doubt, it has been proved that Lot No. 5D1 and 5E1 of Plan No. 450 belonged to Halideen and the Plaintiff's evidence strongly supports as per the said ownership, its boundaries, and the plan prepared i.e., by Deed No. 462 dated 30.01.1979 that the Lots 5D1 and 5E1 have been transferred to the plaintiff and the defence has also accepted it. Accordingly, I decide that the Plaintiff has successfully proven its case based on the balance of probability."]

As such, I answer to the second question of law affirmatively.

Lease Agreement

The third question of law pertains to the validity of "V7", the lease agreement bearing Deed No. 9601 between the original Defendant, Podisingho, and Halideen dated 26th February 1963 commencing from 1970 to 1980 for a period of 10 years, and specifically whether the two deeds must be proved in terms of Section 68 of the Evidence Ordinance.

It is, once again, settled law that when the paper title to the property is admitted or proved to be in the plaintiff, the burden shifts to the defendant to prove on what right he is in possession of the property.

In Siyaneris v. Udenis de Silva (1951) 52 NLR 289 the Privy Council held:

> *"In an action for declaration of title to property, where the legal title is in the plaintiff but the property is in the possession of the defendant, the burden of proof is on the defendant."*

In ***Theivandran v. Ramanathan Chettiar [1986] 2 Sri LR 219 at 222***, Sharvananda C.J. stated:

> *"In a vindicatory action the claimant need merely prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the defendant. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession of it without his consent. Hence when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession."*

Despite the fact that the lease agreement between Podisingho and Halideen was signed in 1963, the deed would not come into operation until 1970, by which point

Halideen no longer possessed title to the property. Further, it is an admitted fact that the prior three lease agreements from the period between 1959 and 1970 were executed between Halideen and the Defendant's brother, Ausadahamy and not the original Defendant himself. I fail to understand the Defendant's claim for his rights as a lessee when, in fact, the Defendant was not a party to the lease agreements, specifically Deed No. 7287 in operation from 1964 to 1970, at all.

In these above-mentioned circumstances, I answer the third question of law affirmatively.

Deeds belonging to the 1(F) Substituted Defendant

The fourth question of law draws attention to the two deeds marked "V2" and "V3" which, according to the Substituted-Defendants, made the 1(F) Substituted Defendant owner to the property denoted as the subject matter in this instant case.

From my point of view, this creates several gaps in the narrative. It is indeed curious that the original Defendant, in the action instituted against him in 1972, would plead for his rights as a lessee under the lease agreement between himself and Halideen and not for declaration of title and/or ownership, when by that time, the property had allegedly been transferred to his daughter several years ago; even more fascinating is the fact that Ausadahamy should continue to occupy property as a lessee alongside his brother, the Defendant, up until 1970 under the lease agreement wherein Halideen retains ownership and not the 1(F) Substituted-Defendant.

Nevertheless, in this instant case, there are no grounds upon which the 1(F) Defendant can claim ownership of the land. It is settled law that a defendant who enters into a land in a subordinate character such as a tenant, lessee or licensee of the plaintiff is

estopped from disputing the title of the plaintiff to the land as per section 116 of the Evidence Ordinance, which enacts:

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

In ***Ruberu v. Wijesooriya [1998] 1 Sri LR 58 at 60***, Gunawardana J. held:

> *"**Whether it is a licensee or a lessee, the question of title is foreign to a suit in ejectment against either. The licensee (the defendant-respondent) obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of him, i.e. the plaintiff-appellant without whose permission, he (the defendant-respondent) would not have got it.** The effect of the operation of section 116 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must, first, quit the land. The fact that the licensee or the lessee obtained possession from the plaintiff-appellant is perforce an admission of the fact that the title resides in the plaintiff. No question of title can possibly arise on the pleadings in this case, because, as the defendant-respondent has stated in his answer that he is a lessee under the plaintiff-appellant, he is estopped from denying the title of the plaintiff-appellant. It is an inflexible rule of law that no lessee or licensee will ever be permitted either to question the title of the person who gave him the lease or the licence or the permission to occupy or possess the land or to set up want of title in that person, i.e. of the person who gave the licence or the lease. That being so, it is superfluous, in this action, framed as it is on the basis that the defendant-respondent is a licensee, to seek a declaration of title."*

[Emphasis added.]

Moreover, as discussed within the factual matrix, the application by the 1(F) Substituted Defendant (named "7E Defendant" in the judgement by the District Court) to be added as an independent party was refused by the learned District Court Judge, whose inferences I find no discerning reason to disagree with, as stated:

> *"මෙම නඩුවේ මුල් විත්තිකරුවූ පොඩිසිංඤෝ 1985 මැයි මස මියගොස් ඇත. ඒ අනුව 1-17 දක්වාවූ ඔහුගේ දරුවන් විත්තිකරුවන් ලෙස ඇතුළත් කර ඇත. එසේ කර ඇත්තේ සිවිල් විධාන සංග්‍රහයේ 398(1) වගන්තිය ප්‍රකාරව එකී ආදේශ කිරීම සම්බන්ධයෙන් දැනට නඩුවට මැදිහත්වීමට ඉල්වා සිටින 17ඊ ලෙස ආදේශ කරඇති චන්ද්‍රාවතී අධිකරණයට පැමිණ සිට ඇති අතර, ආදේශ කිරීම සම්බන්ධයෙන් විරුද්ධ වී නැත. 86.1.17 වන දින කාර්ය සටහන අනුව අශෝකා චන්ද්‍රාවතී අධිකරණයේ පෙනිසිට ඇත. ඇය 7ඊ විත්තිකාරිය ලෙස ආදේශකර ඇත. දැනට ඇය වෙනමම විත්තිකරුවෙකු ලෙස ඇතුලත් වීමට ඉල්වා සිටින්නේ 1964 අංක 10861 හා 1967 අංක 12644 යන ඔප්පු මත මෙම දේපල ඇයට හිමි බවට යන පදනම මතය. ඇය 7ඊ විත්තිකාරිය ලෙස අධිකරණයේ ආදේශ කිරිම සඳහා පෙනී සිටි 86.1.17 වන දින වන විට මෙම හිමිකම් ලබාගත් ඔප්පු තිබු බව ඇය දැන සිටිය යුතුය. එසේ නම් 86.1.17 වන දින ඇය 7ඊ විත්තිය ලෙස ආදේශ කිරීමට විරුද්ධව කරුණු කියා වෙනමම විත්තිකරුවෙකු ලෙස ඇතුල් වීමට ඉල්වා සිටීමට හොඳටම ඉඩ තිබිනි. එසේ නොකර වසර 6ක් ගතවී එම ඉල්ලීම කිරීම මෙම නඩුව ප්‍රමාද කිරීමේ අරමුණින් කරන ඉල්ලීමක් ලෙස පළිගැනීමට සිදුවේ. වෙනමම විත්තිකාරියක් ලෙස ඇතුල්වීමට ඉල්වා සිටින 7ඊ ලෙස දැනටම ආදේශ කරඇති විත්තිකාරිය වෙනුවෙන් ලිඛිත දේශනයේ සඳහන් කරඇති කරුනු සලකා බැලුමුත් සිවිල් විධාන සංග්‍රයේ 18 වගන්තියෙන් පාර්ෂවකරුවන් එකතු කිරිම සම්බන්ධයෙන් සලකා බැලීමේදී මෙම නඩුවේ සිදුවී ඇති කරුණු මුල් නඩුව පවරා ඇති පදනම මත මෙම 7ඊ විත්තිකාරියගේ ඉල්ලීමට ඉඩදිය නොහැකි බව කිව යුතුය......"*
>
> *[Podisingho, the first Defendant in this case, passed away in May 1985. Accordingly, his children 1-17 have been included as Defendants. This has been done as per the provisions of Section 398(1) of the Civil Procedure Code. Chandrawathie, now been substituted as the 7E Defendant, and currently seeking*

to intervene in the case, appeared in the courts and did not object to the substitution. Ashoka Chandrawathie appeared before the court as per the journal entry dated 17.01.86. She has been substituted as the 7E Defendant. Presently, she is seeking independent entry as a Defendant, claiming ownership of the property based on Deeds No. 10861 of 1964 and No. 12644 of 1967. By the date of her appearance in court on 17.01.1986, she must have been aware of the fact that the relevant deeds were available to assert these claims. At that juncture, on 17.01.1986, she had the opportunity to contest her substitution as the 7E Defendant and plead to be entered as a separate independent Defendant by presenting pertinent facts. Without doing so, the current application is being submitted after a lapse of six years and this can be construed as an application made to delay this case. Even though the facts presented in the written submission on behalf of the 7E Defendant are considered, it is evident that her application to be entered as a separate Defendant cannot be allowed based on the institution of the initial case when considering the procedure prescribed in law for the addition of parties under Section 18 of the Civil Procedure Code.]

Further, I'd like to once again underscore the provisions of the Civil Procedure Code (Amendment) Act, No. 17 of 2022, specifically the constraints upon the application of section 2 that allows for parties to prove documents without formal proof, which reads:

(2)(1) Notwithstanding the provisions of the Evidence Ordinance (Chapter 14), in any proceedings under this Code, it shall not be necessary to adduce formal proof of the execution or genuineness of any deed, or document which is required by law to be attested, other than a will executed under the Wills Ordinance (Chapter 60), and on the face of it purports to have been duly executed, unless–

(a) in the pleadings or further pleadings in an action filed under regular procedure in terms of this Code, the execution or genuineness of such deed or document is impeached and raised as an issue; or

(b) the court requires such proof:

Provided that, the provisions of this section shall not be applicable in an event, a party to an action seeks to produce any deed or document not included in the pleadings of that party at any proceedings under this Code.

[Emphasis added.]

Upon the passing of the original Defendant, his daughter, the 1(F) Substituted Defendant, was substituted in the room, place and shoes of the original Defendant, Podisingho.

In ***Careem vs. Sivasubramaniam and Another (2003) 2 SLR 197*** Udalagama J states that:

> *"In the event of the death of a party substitution would be for the purpose of representing the deceased solely for the purpose of prosecuting the action and nothing more."*

As the original Defendant did not claim for a declaration of title to the corpus and instead claimed for his rights as a lessee under the agreement executed between himself and Halideen, the 1(F) Substituted Defendant cannot take up a position different to the original Defendant.

Further, in application of section 2 of the Civil Procedure Code (Amendment) Act, No. 17 of 2022, the provisions of this section are not applicable to any deed and/or

document not included in the pleadings of that party, and therefore I find that the 1(F) Substituted Defendant's deeds are not proved.

In light of these aforementioned facts, I answer the fourth question of law affirmatively. As the third and fourth questions of law have been answered in the affirmative, it follows that the fifth question of law is also answered in the affirmative.

In consideration of the totality of the above facts and submissions, the appeal is allowed with costs.

Appeal Allowed.

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

Saraswathie Duraisamy,
No. 22,
Approach Road,
Fruithill,
Hatton.

SC APPEAL 69/2020

Plaintiff

SC HCCA LA No. 286/19

WP/HCCA/Colombo
Case No. 03/14/F

District Court of Colombo
Case No.21632/L

Vs.

S. Manickarasa,
No. 47/8,
Walls Lane,
Mutual,
Colombo 15.

Defendant

AND BETWEEN

S. Manickarasa,
No. 47/8,
Walls Lane,
Mutual,
Colombo 15.

Defendant-Appellant

Saraswathie Duraisamy,
No. 22,

Approach Road,
Fruithill,
Hatton.

Plaintiff-Respondent

AND NOW BETWEEN

Saraswathie Duraisamy,
No. 22,
Approach Road,
Fruit Hill,
Hatton.

Plaintiff-Respondent-Petitioner

S. Manickarasa,
No. 47/8,
Walls Lane,
Mutual,
Colombo 15.

Defendant-Appellant-Respondent

Before : **S. Thurairaja PC, J**
A. L. Shiran Gooneratne, J
K. Priyantha Fernando, J

Counsel :

M.Nizam Kariapper, PC with M.I.M. Iynullah and Ms. Arshada for the Plaintiff-Respondent-Appellant.

V. Puvitharan, PC with G.A.Arunraj and V.Rinogi for the Defendant-Appellant-Respondent.

Argued on : 29.11.2023

Decided on : 23.01.2024

K. PRIYANTHA FERNANDO, J

1. The Plaintiff-Respondent-Petitioner (hereinafter referred to as the "plaintiff"), by plaint dated 13.12.2007, instituted action against the Defendant-Appellant-Respondent (hereinafter referred to as the "defendant") at the District Court of *Colombo*, praying *inter alia,* for a declaration of title to the land of 5.50 perches described in the 1st Schedule to the plaint and for the ejectment of the defendant from the land of 1.686 perches described in the 2nd Schedule to the plaint.

2. After trial, the learned Additional District Judge pronounced Judgment on 29.01.2014 in favour of the plaintiff. Thereafter, the defendants filed an appeal against the Judgment of the learned District Judge, to the High Court of Civil Appeal of *Colombo*, upon which the learned Judges of the High Court by their Judgment dated 12.07.2019, allowed the appeal setting aside the District Court Judgment which was entered in favour of the plaintiff.

3. Being aggrieved by the decision of the learned Judges of the High Court of Civil Appeal, the plaintiff preferred this instant appeal, whereby this Court on 06.07.2020, granted leave to appeal on the following question of law:

    1) *Did the Civil Appellate High Court err in law when it held that the Defendant has prescribed to the property whereas the Defendant has admitted that he has entered the premises as a licensee?*

4. The main issue in the instant appeal is whether a person who entered a land as a licensee could claim prescriptive title over the same piece of land. In order to answer to the question of law raised, I shall also address the issue

as to whether a licensee would continue to remain as a licensee even when the licensor has died and the land had been passed onto his/her heirs, and whether he could claim prescriptive title, against the heirs of the owners of the land (his licensor), on the basis that he possessed the property for a period as per section 3 of the Prescription Ordinance.

Facts in Brief:

5. The plaintiff's case, as pleaded in the plaint, was that one *Kunchjipullai Poornam* (hereinafter referred to as "*Poornam*") (claimed to be the mother of the plaintiff) became owner of the land described in the first schedule to the plaint by virtue of Deed No. 909 dated 21st May 1979 attested by *T. J. E. N. Fernandopulle,* Notary Public.

6. On 30.11.1983, the said *Poornam* had created a Last Will (Will no. 2047, which is marked as පැ2(අ)). In her Will, she had appointed her adopted daughter *Saraswathie Duraisamy* (the plaintiff) as the sole and universal heiress of all her estate and effects, as well as the executrix of her Will.

7. *Poornam* had died on 23.06.1989, and upon her death, the said Last Will had been duly administered and probate had been issued to the plaintiff in the District Court of Colombo Case No. 32407/T.

8. Thereafter, upon the conclusion of the District Court Case, the property had been conveyed to the plaintiff by Executrix Conveyance No. 2035 on 07.12.2000, upon which the plaintiff became the owner of the land described in the first schedule to the plaint in extent of 5.50 perches.

9. The issue in the instant case arises when the plaintiff alleged that the defendant had been in wrongful

occupation of the land described in the second schedule to the plaint, in extent of 1.686 perches, which as alleged by the plaintiff, is a part of the land described in the first schedule.

10. However, the defendant claims that he and his wife had been in exclusive occupation and, undisturbed and uninterrupted possession of the land in dispute, by a title adverse to, and/or independent of that of the plaintiff for more than ten years previous to the date of the action. The defendant claims that he has become the owner of the land by way of prescription in terms of Section 3 of the Prescription Ordinance.

11. The plaintiff contends that the defendant cannot obtain prescriptive title of the land in dispute, as the defendant had been occupying the land in the capacity of a licensee. During the hearing of this case, the learned President's Counsel for the plaintiff draws attention of this Court to the evidence of the defendant of the proceedings dated 28.08.2012 to show that the defendant has accepted that he came to the premises as a licensee.

12. The learned President's Counsel for the defendant in his written submissions submitted that, the defendant has never admitted that, he entered the land in dispute as a licensee of the plaintiff. The learned President's Counsel takes the position that he was only a licensee to *Poornam*, but had never been a licensee to the plaintiff.

13. The defendant's position was that the said *Poornam* gave the said portion of land to him and his wife, during their marriage, when dowry was being asked by them. The said *Poornam* had told the defendant to put up a hut and reside therein. Thereafter, the defendant and his family have lived in that premise up until today. The defendant submitted that *Poornam*, had never told them that they should leave when asked for.

14. Furthermore, the learned President's Counsel for the defendant submitted that, the alleged permission granted to the defendant by *Poornam* had lapsed when the said *Poornam* died on 23.06.1989. The learned President's Counsel for the defendant submitted that, upon the death of *Poornam*, no one had demanded the defendant and his wife to leave the premises. The defendant had been living in the premises since 02.06.1977 (from the date of their marriage) and that the defendant had therefore established adverse possession under and in terms of Section 3 of the Prescription Ordinance.

Answering to the Question of Law:

15. Having heard learned President's Counsel for both parties at the hearing, and at the perusal of the petition of appeal, the written submissions and the proceedings in the District Court, I shall now resort to answering the question of law before this Court.

16. The learned President's Counsel for the plaintiff takes the position that someone who entered the land in dispute as a licensee, cannot prescribe to the land. A person who enters a land as a licensee is estopped from denying the title of the licensor. For him to claim title over that land by prescription he must prove that his possession was adverse to the owner commencing from an overt act for a period specified in Section 3 of the Prescription Ordinance.

17. In the case of **Ashar v. Kareem, SC Appeal 171/2019, S.C. Minute dated 22.05.2023,** his Lordship Justice Samayawardhena stated that,

"A defendant who enters into a land in a subordinate character such as a tenant, lessee or licensee of the plaintiff is estopped from disputing the title of the

plaintiff to the land. Section 116 of the Evidence Ordinance enacts:

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

His Lordship further stated that,

"The presumption is that a person who commences possession in a subordinate character continues such possession in that character. In order to show change of the character of possession, cogent and affirmative evidence is required."

18. Bonser CJ in the case of ***Maduanwala v. Ekneligoda* 3 NLR 213 at p.215** held that,

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

19. In the case of ***Chaminda Abeykoon v. H.Caralain Pieris,* SC Appeal 54A/2008, S.C. Minute dated 02.10.2018**, his Lordship Justice Prasanna Jayawardena, PC, stated that,

"It is a well-established principle of law that, so long as a person possesses a property as the licensee or agent of the owner, that person cannot acquire prescriptive title to that property. Instead, the running of prescription can commence only upon the licensee or agent committing some "overt act" which demonstrates that he has cast aside his subordinate character and is now possessing the property adverse to or independent of the owner of the property and without acknowledging any right of the owner of the property. The overt act is required to give [or deem to give] notice to the owner that his erstwhile licensee or agent is no longer holding the property in the capacity of a licensee or agent and is, from that time onwards, claiming to possess the property adverse to or independent of the owner. The overt act makes the owner aware [or is deemed to make him aware] that he runs the risk of losing title to the property if the licensee or agent complete ten years of such adverse or independent possession and acquires prescriptive title to the property."

20. Furthermore, it is for the person who claims prescriptive title to prove that he, by an overt act showed his intention to possess the immovable property adversely to the right of the owner.

21. In the case of ***Seeman v. David*** **[2000] 3 Sri LR 23 at 26**, his Lordship Justice Weerasuriya held that,

    "It is well settled law that a person who entered property in a subordinate character cannot claim prescriptive rights till he changes his character by an overt act. He is not entitled to do so by forming a secret intention unaccompanied by an act of ouster. The proof of adverse possession is a condition precedent to the claim for prescriptive rights."

22. As per the above case law authorities, it is well settled law that for a licensee to claim title by way of

prescription, he must commence his possession independent and adverse to the licensor commencing from an overt act.

23. Admittedly, the defendant came into possession of the land as a licensee of *Poornam*. The plaintiff has thereafter gained title from *Poornam*. The position taken by the learned Counsel for the defendant is that the defendant was not a licensee of the plaintiff but of *Poornam*.

24. This issue was discussed in case of ***Ameen and Another v. Ammavasi Ramu,*** **SC/Appeal/232/2017, SC Minute dated 22.01.2019** in which case, one of the questions to be decided was whether the defendant who was a licensee was entitled to put forward a plea of prescription. It was held by his Lordship Justice De Abrew A.C.J. in that case that,

"When a person starts possessing an immovable property with leave and licence of the owner, the presumption is that he continues to possess the immovable property on the permission originally granted and such a person or his agents or heirs cannot claim prescriptive title against the owner or his heirs on the basis of the period he possessed the property."

25. The above principle was also referred to and followed in the case of ***Ashar v. Kareem (Supra)*** by his Lordship Justice Samayawardhena.

26. As mentioned before, the defendant has come to possession of premises in question as a licensee of Poornam. The plaintiff has derived her title from the said Poornam. Hence, the defendant continues to be a licensee of the plaintiff. The defendant has failed to prove adverse possession independent that of to the plaintiff commencing from an overt act. Hence, the defendant has failed to prove prescriptive title to the property in question.

27. In the above premise, the question of law raised is answered in the affirmative. The Judgment of the High Court dated 12.07.2019 is set aside and the Judgment of the District Court is affirmed.

Appeal allowed with costs.

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA, PC.

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 REP6UBLIC OF SRI LANKA

In the matter of an Application for Leave to Appeal to the Supreme Court, in terms of Section 5C(1) of the High Court of the Provinces (Special Provisions) (as amended) Act No. 54 of 2006 against the Judgment of the High Court of the Southern Province Holden in Galle (Exercising Civil Appellate Jurisdiction).

Nanayakkarawasam
Halloluwage Sisil Dias,
No. 360/1, Poddalawatta,
Wakwella Road, Galle.

PLAINTIFF

SC Appeal 72/18

Civil Appellate Court Case
No: SP/HCCA/RA/20/2013

DC Galle Case No: 12849/L

Vs

1. Kirinda Liyanarachchige Premadasa,
   No. 359/1, Wakwella Road,
   Galle.

2. Wewelwala Hewage Hemathi,
   No. 362, Poddalawatta, Wakwella Road,
   Galle.

DEFENDANTS

AND

Wewelwala Hewage Hemathi,
No. 362, Poddalawatta,
Wakwella Road,
Galle.

2nd DEFENDANT-PETITIONER

Vs

Nanayakkarawasam Halloluwage Sisil Dias,
No. 360/1, Poddalawatta,
Wakwella Road,
Galle.

PLAINTIFF-RESPONDENT

Kirinda Liyanarachchige Premadasa,
No. 359/1, Wakwella Road,
Galle.

1st DEFENDANT-RESPONDENT

AND NOW BETWEEN

Nanayakkarawasam Halloluwage Sisil Dias,
No. 360/1, Poddalawatta,
Wakwella Road,
Galle.

PLAINTIFF-RESPONDENT-PETITIONER

Vs

Wewelwala Hewage Hemathi,
No. 362, Poddalawatta,
Wakwella Road,
Galle.

2nd DEFENDANT-PETITIONER-RESPONDENT

Kirinda Liyanarachchige Premadasa,
No. 359/1, Wakwella Road,
Galle.

1st DEFENDANT-RESPONDENT-RESPONDENT

AND

In the matter of an Application for Leave to Appeal to the Supreme Court, in terms of Section 5C(1) of the High Court of the Provinces (Special Provisions) (as amended) Act No. 54 of 2006 against the Judgment of the High Court of the Southern Province Holden in Galle (Exercising Civil Appellate Jurisdiction).

SC Appeal 73/18

Civil Appellate Court Case No: SP/HCCA/RA/23/2013

DC Galle Case No: 12849/L

Nanayakkarawasam
Halloluwage Sisil Dias,
No. 360/1, Poddalawatta,
Wakwella Road, Galle.

PLAINTIFF

Vs

1. Kirinda Liyanarachchige Premadasa,
   No. 359/1, Wakwella Road,
   Galle.

2. Wewelwala Hewage Hemathi,
   No. 362, Poddalawatta, Wakwella Road,
   Galle.

DEFENDANTS

AND

Kirinda Liyanarachchige Premadasa,
No. 359/1, Wakwella Road,
Galle.

1st DEFENDANT-PETITIONER

Vs

Nanayakkarawasam Halloluwage Sisil Dias,
No. 360/1, Poddalawatta, Wakwella Road,
Galle.

PLAINTIFF-RESPONDENT

Wewelwala Hewage Hemathi,
No. 362, Poddalawatta,
Wakwella Road,
Galle.

2nd DEFENDANT-RESPONDENT

AND NOW BETWEEN

Nanayakkarawasam Halloluwage Sisil Dias,
No. 360/1, Poddalawatta,
Wakwella Road,
Galle.

PLAINTIFF-RESPONDENT-PETITIONER

Vs

Kirinda Liyanarachchige Premadasa,
No. 359/1, Wakwella Road,
Galle.

1st DEFENDANT-PETITIONER-RESPONDENT

Wewelwala Hewage Hemathi,
No. 362, Poddalawatta,
Wakwella Road,
Galle.

2nd DEFENDANT-RESPONDENT-RESPONDENT

Before: Hon. Priyantha Jayawardena PC, J
Hon. E.A.G.R. Amarasekera, J
Hon. Kumudini Wickremasinghe, J

Counsel: Priyal Wijayaweera PC with Wasundara Jayaweera for the Plaintiff-Respondent-Appellant

Sanjaya Kodithuwakku for the Defendant-Petitioner-Respondent-Respondents

Argued on: 8th November, 2023

Decided on: 29th February, 2024

Priyantha Jayawardena PC, J

The instant appeal was filed by the plaintiff-respondent-appellant (hereinafter referred to as the "appellant") seeking to set aside the judgment of the Civil Appellate High Court of the Southern Province holden in Galle dated 30th of August, 2017 which allowed the two Revision Applications filed to revise the judgment of the District Court of Galle dated 28th of December, 2007 on the grounds that there are exceptional circumstances to set aside the said judgment.

On the 29th of August, 1997, the appellant instituted action in the District Court of Galle, seeking, *inter alia,* to grant him a 10 feet roadway by widening the existing 4 feet path on the basis of necessity to enter into his land over the lands owned by the 1st defendant-respondent-respondent (hereinafter referred to as the "1st respondent") and the 2nd defendant-respondent-respondent (hereinafter referred to as the "2nd respondent").

Thereafter, the 1st and 2nd respondents filed two separate answers and pleaded, *inter alia,* for the dismissal of the action with costs.

After an *inter parte* trial, the learned District Judge delivered the judgment dated 28th of December, 2007 and allowed the prayer to the plaint to widen the existing 4 feet footpath to 10 feet, to access the land owned by the appellant from the Galle-Wakwalla road of the basis of necessity.

Being aggrieved by the said judgment of the District Court, the respondents filed two separate appeals in the Civil Appellate High Court holden in Galle (hereinafter referred to as the "High Court").

Thereafter, the High Court by its judgment/Order dated 27th of April, 2010 dismissed the 2nd respondent's appeal bearing No. SP/HCCA/0146/2007(F) on the basis that the fees for the preparation of the appeal brief was not paid by the appellant.

Further, the High Court by its judgment/Order dated 18th of September, 2013 dismissed the appeal bearing No. SP/HCCA/0145/2007(F) filed by the 1st respondent on the basis that the said appeal was not filed within the stipulated time.

It is pertinent to note that the said respondents did not appeal against the said judgments/Orders of the High Court.

Thereafter, on the 23rd of October, 2013 the 2nd respondent filed a Revision Application in the said High Court seeking to revise the said judgment delivered by the learned District Judge dated 28th of December, 2007.

Furthermore, the 1st respondent also filed a Revision Application in the High Court on the 26th of December, 2013 seeking to revise the same judgment delivered by the District Judge dated 28th of December, 2007.

Both respondents in their Revision Applications had pleaded that since the judgment of the District Court was patently illegal, it was an exceptional circumstance which warranted the exercise of the revisionary jurisdiction of the High Court.

After hearing both Revision Applications, the High Court delivered one judgment dated 30th of August, 2017 allowing the Revision Applications and setting aside the judgment of the District Judge dated 28th of December, 2007 on the basis that the 2nd respondent's land was only in extent of 5.82 perches and *widening of the roadway to give access to the appellant's land reduces the extent of the said land belonging to the 2nd respondent and thereby, would cause great prejudice to the 2nd respondent. It was further held that reducing the extent of the land belonging to the 2nd*

respondent was an exceptional circumstance which warranted the exercise of revisionary jurisdiction of the High Court.

Being aggrieved by the said judgment of the High Court dated 30th of August, 2017, the appellant sought leave to appeal from the Supreme Court and the court granted leave to appeal on the following question of law;

> "Has the Civil Appellate High Court of Galle erred in law by arriving at the conclusion that the 2nd Defendant has established exceptional grounds to invoke the jurisdiction of the Civil Appellate High Court?"

Submissions of the appellant

The learned President's Counsel for the appellant submitted that the learned judges of the High Court erred in law by holding that the respondents established 'exceptional circumstances' to invoke the revisionary jurisdiction of the High Court. Further, it was submitted that the alleged 'exceptional circumstances' pleaded by the respondents do not warrant the invocation of the revisionary jurisdiction of the High Court.

In support of his contention, the learned President's Counsel cited the cases of ***Rajkumar and another v Hatton National Bank Limited*** **(2007) 2 SLR 1** and ***Dharmaratne and another v Palm Paradise Cabanas Ltd and others*** **(2003) 1 SLR 24.**

It was further submitted that the learned judges of the High Court should not have exercised its revisionary jurisdiction to grant reliefs prayed for in the Revision Applications due to the negligence and laches of the respondents. In the circumstances, the learned President's Counsel submitted that the judgment of the High Court is contrary to the law and thus, it should be set aside.

Submissions of the respondents

The learned counsel for the respondents submitted that the term 'exceptional circumstances' that are required to invoke the discretionary power of court to entertain Revision Applications have not

been defined in any Act. However, courts have interpreted the term 'exceptional circumstances' from time to time.

In support of the above submission, the learned counsel cited ***Attorney General v Podisingho*** **51 NLR 385 at 390** where it was held;

> *"In my view such exceptional circumstances would be (a) where there has been a miscarriage of justice, (b) where a strong case for the interference of this Court has been made out by the petitioner, or (c) where the applicant was unaware of the orders made by the Court of trial."*

It was further submitted that if the Order of the lower court is patently illegal, the courts have the power to treat the said illegality as an 'exceptional circumstance' and interfere with the judgment of the lower court by way of exercising revisionary jurisdiction.

In support of the above submission, the learned counsel cited the case of ***Ranasinghe v Henry*** **1 NLR 303**, which held that an order of a District Court, which is wrong *ex facie,* may be quashed by the court in the exercise of its revisionary power.

The learned counsel for the respondents further submitted that where the judgment of the District Court is contrary to law, the Appellate courts should interfere with the said judgment by revising the said judgment even though there was a delay on the part of the respondents to invoke the revisionary jurisdiction.

In support of the above contention, the learned counsel cited the case of ***Ranasinghe and Others v L.B. Finance Ltd.*** **(2005) 2 SLR 393 at pgs. 401 to 402**, where it was held;

> *"The next matter to be decided is whether the defendants are guilty of laches. The question whether delay is fatal to an application in revision depends on the facts and circumstances of the case. If the impugned order is manifestly erroneous and is likely to cause great injustice, the Court should not reject the application on the ground of delay alone."*

Moreover, the learned counsel for the respondents contended that the learned District Judge has not considered any of the objections raised by the counsel for the respondents at the trial when delivering his judgment in favour of the appellant and granting him a right of way over the lands of the respondents.

Therefore, it was submitted that the respondents were entitled to invoke the revisionary jurisdiction of the High Court even though their appeals were dismissed by the High Court on technical grounds. Thus, it was submitted that the instant appeal should be dismissed with costs.

Has the Civil Appellate High Court of Galle erred in law by arriving at the conclusion that the 2nd Defendant has established exceptional grounds to invoke the jurisdiction of the Civil Appellate High Court?

The issue that needs to be considered in the instant appeal is whether the respondents have established 'exceptional circumstances' to invoke the revisionary jurisdiction of the High Court.

The jurisdiction to hear Revision Applications applicable to the instant appeal is set out in Article 138 of the Constitution.

Article 138(1) of the Constitution states;

> *"The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal,* ***revision*** *and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First Instance, tribunal or other institution may have taken cognizance:*
>
> *Provided that no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."*
>
> [emphasis added]

However, exercising the revisionary jurisdiction is a discretionary remedy unlike in an Appeal. Further, the courts exercise revisionary jurisdiction only if there are 'exceptional circumstances' that warrant the court to exercise its discretion.

A similar view was held in ***Dharmaratne and Another v Palm Paradise Cabanas Ltd. and Others*** **(2003) 3 SLR 24 at 30,** where it was held;

> *"The practice of Court to insist on the existence of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which should not be lightly disturbed. The words used by the legislature do not indicate that it ever intended to interfere with this 'rule of practice'."*

Further, in ***Wijesinghe v Tharmaratnam*** **Sri Skantha's Law Reports Vol. IV 47 at 49** it was held;

> *"Revision is a discretionary remedy and will not be available unless the application discloses circumstances which 'shocks the conscience of the court'."*

Hence, it is necessary for a petitioner to establish 'exceptional circumstances' by pleading such grounds in their Revision Application, in order to invoke the discretion of court to entertain a Revision Application.

It is pertinent to note that when a petitioner pleads 'exceptional circumstances' in a Revision Application, the learned judge is required to consider whether the 'exceptional circumstances' pleaded warrant the exercise of the revisionary jurisdiction of the court after judicially evaluating the facts, the circumstances in which revisionary jurisdiction is invoked, and the law applicable to the relevant Revision Application.

A similar view was expressed in ***Rustom v Hapangama*** **(1978-79) 2 SLR 229** where it was held;

> *"It must depend entirely on the facts and circumstances of each case and one can only notice the matters which courts have held to amount to exceptional circumstances in order to find out the essential nature of these circumstances."*

Further, the courts do not exercise its revisionary jurisdiction where there is an alternative remedy, unless there are 'exceptional circumstances' which warrants the invocation of the revisionary jurisdiction of the court.

A similar view was held in ***Gunasekera v Chitra Silva and others* (2006) 3 SLR 188** where it was held;

> *"Where an alternative remedy is available and if a party fails and or neglects to exercise such remedy due to the parties own conduct and or negligence court will not exercise the extraordinary powers of revision. However, when the party is able to show exceptional circumstances, Court will not hesitate to exercise such jurisdiction."*

A perusal of the appeal brief shows that the respondents had invoked the appellate jurisdiction of the High Court prior to filing their Revision Applications. However, the 2nd respondent's petition of appeal was dismissed for not depositing brief fees and the 1st respondent's petition of appeal was dismissed for not filing the same within the stipulated time.

Thereafter, both respondents filed two Revision Applications in the High Court stating that the judgment of the District Court was wrong *ex facie* and thus, it constituted 'exceptional circumstances' which warrant the invocation of the revisionary jurisdiction. Further, it was stated that if the High Court does not revise the said judgment, it would result in a miscarriage of justice.

It is pertinent to note that the respondents have not pleaded to set aside aforementioned Orders/judgment of the High Court dated 18th of September, 2013 and 27th of April, 2010. The prayer of the 2nd respondent's Revision Application stated;

> "අ. වගඋත්තරකරුවන් වෙත නිවේදන නිකුත් කරන මෙන් ද,
>
> ආ. ගාල්ල දිසා අධිකරණයේ අංක එල් 12849 දරණ නඩුවේ ගොනුව මෙම අධිකරණය හමුවට කැඳවන ලෙසද,
>
> ඇ. ගාල්ල දිසා අධිකරණයේ අංක එල් 12849 දරණ නඩුවේ 2007.12. 28 වන දිනැතිව ඇතුළත් කර ඇති සියලු තීන්දු ප්‍රකාශයන් ද ප්‍රතිශෝධනය කර අවහරණය කරන ලෙසද,
>
> ඇ. ගාල්ල දිසා අධිකරණයේ අංක එල් 12849 දරණ නඩුව නිෂ්ප්‍රභා කරන ලෙසද,
>
> ඉ. මෙම ප්‍රතිශෝධන අයදුම සම්බන්ධයෙන් සලකා බලා නියෝගයක් ඇතුලත් කරන තෙක් ගාල්ල දිසා අධිකරණයේ අංක එල් 12849 දරණ නඩුවේ ඉදිරි කටයුතු අත්හිටුවන මෙන් ද,

ඊ. නඩු ගාස්තු සහ ගරු උතුමාණන්ගේ අධිකරණයට මැනවයි හැඟෙන වෙනත් සහ වැඩිමනත් සහන ලබා දෙන ලෙස ද වේ."

Further, the Revision Application filed by the 1st respondent contained an identical prayer. Thus, it is evident that the **respondents had only prayed** for the judgment of the District Court dated 28th of December, 2007 to be revised and not the judgments/Orders made by the High Court dismissing the appeals filed by the respondents.

Thus, the said Revision Applications filed by the respondents are a collateral attack on the judgment/Orders of the said High Court after the appeals were dismissed by the High Court. Hence, it is not possible for the respondents to file Revision Applications to revise the said judgment of the District Court without setting the judgment/Order of the High Court which dismissed the said appeals.

It is pertinent to note that negligence by a party in failing to proceed with an alternative remedy cannot be considered an 'exceptional circumstance' that warrants the indulgence of the court to exercise its revisionary powers.

The learned counsel for the respondents cited ***Ranasinghe and Others v L.B. Finance Ltd.*** *(supra)* in support of his submissions. This case was in respect of a delay in filing a Revision Application and not establishing 'exceptional circumstances' to invoke the revisionary jurisdiction. Thus, the said case has no relevance to the instant appeals. Further, the case of ***Attorney General v Podisingho*** *(supra)* cited by the learned counsel has no application to the instant appeals as it was an appeal arising from a criminal case. Moreover, the case of ***Ranasinghe v Henry*** *(supra)* cited by the learned counsel has no application to the instant appeal as the appeals filed by the respondents were dismissed by the High Court which exercised the appellate jurisdiction.

Moreover, in the Revision Applications, the respondents have not disclosed that the appeals preferred by them to the High Court were dismissed by the said court. It is paramount to come to court with clean hands in order to invoke the discretionary powers of the court.

Therefore, I am of the opinion that the High Court has erred in law by holding that the 2nd respondent established exceptional grounds to invoke the revisionary jurisdiction of the High Court.

Conclusion

In light of the above, the following question of law is answered as follows;

Has the Civil Appellate High Court of Galle erred in law by arriving at the conclusion that the 2nd Defendant has established exceptional grounds to invoke the jurisdiction of the Civil Appellate High Court?

Yes

In the circumstances, I set aside the judgment of the High Court dated 30th of August, 2017 and affirm the judgment of the District Court dated 28th of December, 2007.

The appeal is allowed. No costs.

Judge of the Supreme Court

Hon. E.A.G.R. Amarasekera, J

I Agree

Judge of the Supreme Court

Hon. Kumudini Wickremasinghe, J

I Agree

Judge of the Supreme Court

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

Dissanayaka Mudiyanselage
Senarath Bandara Dissanayaka,
16, Uplands, Kandy.
Plaintiff

SC APPEAL NO: SC/APPEAL/74/2016
HCCA KANDY NO: CP/HCCA/Rev/16/2010
DC KANDY NO: 168/2004/L

Vs.

Muthukuda Wijesuriya Arachchige
Jayantha Nishantha Wijesuriya,
103, Polgolla, Kandy.
Defendant

AND

Muthukuda Wijesuriya Arachchige
Jayantha Nishantha Wijesuriya,
103, Polgolla, Kandy.
Defendant-Petitioner

Vs.

Dissanayaka Mudiyanselage
Senarath Bandara Dissanayaka,

16, Uplands, Kandy.
Plaintiff-Respondent

AND NOW
Dissanayaka Mudiyanselage
Senarath Bandara Dissanayaka,
16, Uplands, Kandy.
Plaintiff-Respondent-Appellant

Vs.

Muthukuda Wijesuriya Arachchige
Jayantha Nishantha Wijesuriya,
103, Polgolla, Kandy.
Now at
16, Uplands, Kandy.
Defendant-Petitioner-Respondent

Before: Hon. Justice P. Padman Surasena
Hon. Justice Mahinda Samayawardhena
Hon. Justice K. Priyantha Fernando

Counsel: Sumedha Mahawanniarachchi with Nishan Balasooriya for the Plaintiff-Respondent-Appellant.
Dr. Sunil Cooray for the Defendant-Petitioner-Respondent.

Written Submissions:
By the Appellant on 14.09.2016

Argued on: 11.01.2024

Decided on: 27.02.2024

Samayawardhena, J.

Background

The plaintiff filed this action in the District Court of Kandy on 16.06.2004 seeking a declaration of title to the land in suit and ejectment of the defendant therefrom. Halfway through the trial, on 09.10.2009, the case was settled whereby the defendant agreed to purchase the property from the plaintiff for a sum of Rs. 2,750,000 on or before 31.12.2009. If payment was not made, it was agreed that the plaintiff is entitled to the judgment, and he can get the writ executed to eject the defendant without prior notice. The defendant did not pay, notwithstanding further extended time was granted for it.

The fiscal went to the land on 26.02.2010 to execute the writ but as the land could not be properly identified, writ was not executed.

The fiscal went to the land again on 19.03.2010 with surveyor Weerakoon and other officers to execute the writ. However, according to the fiscal's report, although the surveyor showed the land (Lot 21 of Surveyor-General's plan No. 641 dated 19.02.1978), the defendant, under the influence of liquor, prevented the fiscal from executing the writ. Upon reading the fiscal's report, it is abundantly clear that the writ was not executed at all.

The defendant made an application dated 17.03.2010 to the District Court to issue a commission to identify the land and call for a valuation report. The Court suspended the execution of the writ until the matter was looked into. The plaintiff filed objections to this application. After inquiry (vide journal entry Nos. 61, 63, 64 of the District Court case record), the District Judge refused this application by order dated 25.05.2010 and ordered the fiscal to execute the writ.

The fiscal executed the writ on 01.06.2010.

The defendant then made an application to the District Judge dated 02.06.2010 seeking to set aside the order dated 25.05.2010. The defendant argued that when the fiscal was obstructed in executing the writ on 19.03.2010, the judgment-creditor was required to make the application under section 325 of the Civil Procedure Code. Since this was not done, he contended that the order to re-issue the writ on 25.05.2010, was given *per incuriam*. The defendant moved to vacate the order. The District Judge by order dated 04.06.2010 rejected this application on the basis that, if the writ could not be executed due to the conduct of the defendant, the Court could re-issue the writ under section 337 of the Civil Procedure Code.

The defendant filed a revision application in the High Court of Civil Appeal of Kandy seeking to set aside the orders of the District Court dated 25.05.2010 and 04.06.2010. The High Court accepted the said argument of the defendant that it was mandatory on the part of the plaintiff to have come before the District Court under section 325 when the fiscal was obstructed in executing the writ. The High Court, by judgment dated 27.01.2011, set aside both orders of the District Court and restored the defendant to possession.

The plaintiff is before this Court against the judgment of the High Court. Although leave was granted against the judgment of the High Court on several questions, during the argument, learned counsel for both parties conceded that the essential question of law to be decided by this Court is whether, when the fiscal was resisted in executing the writ by the judgment-debtor, the judgment-creditor shall necessarily make the application under section 325 or if the Court can re-issue the writ under section 337(3) of the Civil Procedure Code.

I accept that the execution of a writ is a complicated area of law, particularly due to the various procedural intricacies involved and the potential challenges that may arise during the enforcement process. Due to this complexity, the judgment-debtor raises numerous technical objections in a rather convoluted fashion, hindering the judgment-creditor from enjoying the fruits of his victory. The case at hand provides a good example. The judgment-creditor in this case has been unable to execute the writ for 14 long years. With this in mind, in *Fawsan v. Majeed Mohamed and Others* (SC/APPEAL/135/2017, SC Minutes of 31.03.2023) I dealt with this area of law quite extensively.

The instant case is a straightforward one. The judgment-debtor obstructed the fiscal to execute the writ under the influence of liquor. The fiscal reported it to Court. The Court re-issued the writ. The fiscal executed it and ejected the defendant. The High Court restored him to possession on the basis that the judgment-creditor did not make the application under section 325 of the Civil Procedure Code.

The defendant judgment-debtor made one application before the District Court prior to the execution of the writ, and another after the execution of the writ. The District Court, after inquiry, refused both applications. It was not the contention of the judgment-debtor that he paid the money in satisfaction of the decree and therefore the writ should not be executed. His purported objection related to the identification of the property. Although the property was properly identified with the assistance of a surveyor, the defendant, under the influence of liquor, did not allow the fiscal to execute the writ. He also moved to call for a valuation report. There was absolutely no necessity to call for a valuation report. It is obvious that he was adopting dilatory tactics to delay the execution of the writ. In such circumstances, does the Court lack jurisdiction to re-issue the writ? Is it necessary to conduct another inquiry upon an application

made by the judgment-creditor under section 325? The answer should be in the negative.

What is the duty of fiscal in the execution of writ?

Section 324 is an important section, but this section is often misinterpreted hindering the fiscal from executing the writ. It is argued that, in case of resistance, the fiscal has no authority to execute the writ but he must report it to Court. This is a misconception. Section 324 reads as follows:

> *324. (1) Upon receiving the writ the Fiscal or his officer shall as soon as reasonably may be repair to the ground, and there deliver over possession of the property described in the writ to the judgment-creditor or to some person appointed by him to receive delivery on his behalf, and if need be by removing any person bound by the decree who refuses to vacate the property:*
>
> *Provided that as to so much of the property, if any, as is in the occupancy of a tenant or other person entitled to occupy the same as against the judgment-debtor, and not bound by the decree to relinquish such occupancy, the Fiscal or his officer shall give delivery by affixing a copy of the writ in some conspicuous place on the property and proclaiming to the occupant by beat of tom-tom, or in such other mode as is customary, at some convenient place, the substance of the decree in regard to the property; and*
>
> *Provided also that if the occupant can be found, a notice in writing containing the substance of such decree shall be served upon him, and in such case no proclamation need be made.*
>
> *(2) The cost (to be fixed by the court) of such proclamation shall in every case be prepaid by the judgment-creditor.*

Once the Court issues the writ of execution to the fiscal, section 324(1) authorises the fiscal to deliver possession either to the judgment-creditor or his nominee "*if need be by removing any person bound by the decree who refuses to vacate the property*". However, if there is "*a tenant or other person entitled to occupy the same as against the judgment-debtor*", the fiscal can deliver constructive or symbolic possession. An empty claim or a mere objection to the execution of the writ shall not prevent the fiscal from executing the writ. The objection shall be well-founded and the fiscal shall be *prima facie* satisfied that there is a *bona fide* claim, not a sham designed to frustrate the execution of the writ by the judgment-debtor or someone acting on his behalf.

In the Supreme Court case of *Weliwitigoda v. U.D.B. De Silva and Others* [1997] 1 Sri LR 51, at the time of execution of the writ, the 1st respondent made a claim to tenancy but did not support his claim with documentary evidence. The fiscal executed the writ and delivered possession of the premises to the appellant. The Court of Appeal quashed the writ of execution. On appeal to the Supreme Court, whilst setting aside the judgment of the Court of Appeal, Kulatunga J. (with G.P.S. De Silva C.J. and Ramanathan J. concurring) held at page 55:

> *The powers of Fiscal in executing a writ are set out in S.324 of the Code which requires him to deliver possession of the property to the judgment creditor "if need be by removing any person bound by the decree who refuses to vacate the property". However, if there is a tenant or other person "**entitled** to occupy the same as against the judgment-debtor, and not bound by the decree to relinquish such occupancy" the Fiscal can only give symbolic possession viz. by affixing a copy of the writ on the property and taking other steps, required by the proviso to S.324.*

> *As regards the requirement to give symbolic possession, it does not appear that the Fiscal is bound to do so on the basis of a mere claim of tenancy, which is not in any way supported by facts. Such a claimant may become liable to removal as an agent, servant or other person, bound by the decree. The 1st respondent was not residing on the premises in dispute. His claim was that he was a sub-tenant under the judgment debtor and in that capacity used some of the buildings on the premises to conduct a school. However, he has not placed any material before the Fiscal to support that claim. If so, he became liable to be removed, in view of his empty claim subject, however, to his right to make an application under S.328 of the Code.*
>
> *It seems to me that the 1st respondent acted in the belief that if he merely claimed to be a tenant the Fiscal was ipso facto barred from giving the appellant vacant possession of the property; and that if the fiscal then attempted to remove him, he was entitled to resist, whereupon the Fiscal ought to have reported such resistance to Court.* ***If this were the law and the occupants have such a "right" to resist execution, effective execution of writs would indeed be impeded. I am of the view that a claim under the proviso to S.324 cannot be entertained unless it is prima facie tenable.***

I am in total agreement with these dicta of Kulatunga J.

In the instant case, the person who resisted the fiscal was not a third party but the judgment-debtor himself. Upon careful examination of the execution proceedings set out in the Civil Procedure Code, it becomes evident that the judgment-debtor has virtually no defence except to claim that he has already satisfied the decree.

Section 325

Section 325 of the Civil Procedure Code was amended by Act Nos. 20 of 1977, 53 of 1980 and 79 of 1988. Section 325 as it stands today reads as follows:

> *325. (1) Where in the execution of a decree for the possession of movable or immovable property the Fiscal is resisted or obstructed by the judgment-debtor or any other person, or where after the officer has delivered possession, the judgment-creditor is hindered or ousted by the judgment-debtor or any other person in taking complete and effectual possession thereof, and in the case of immovable property, where the judgment-creditor has been so hindered or ousted within a period of one year and one day, the judgment-creditor may at any time within one month from the date of such resistance or obstruction or hindrance or ouster, complain thereof to the court by a petition in which the judgment-debtor and the person, if any, resisting or obstructing or hindering or ousting shall be named respondents. The court shall thereupon serve a copy of such petition on the parties named therein as respondents and require such respondents to file objections, if any, within such time as they may be directed by court.*
>
> *(2) When a petition under subsection (1) is presented, the court may, upon the application of the judgment-creditor made by motion ex parte, direct the Fiscal to publish a notice announcing that the Fiscal has been resisted or obstructed in delivering possession of such property, or that the judgment-creditor has been hindered in taking complete and effectual possession thereof or ousted therefrom, as the case may be, by the judgment-debtor or other person, and calling upon all persons claiming to be in possession of the whole or any part of such property by virtue of any right or interest and who object*

to possession being delivered to the judgment-creditor to notify their claims to court within fifteen days of the publication of the notice.

(3) The Fiscal shall make publication by affixing a copy of the notice in the language of the court, and, where the language of the court is also Tamil, in that language, in some conspicuous place on the property and proclaiming in the customary mode or in such manner as the court may direct, the contents of the notice. A copy of such notice shall be affixed to the court-house and if the court so orders shall also be published in any daily newspaper as the court may direct.

(4) Any person claiming to be in possession of the whole of the property or part thereof as against the judgment-creditor may file a written statement of his claim within fifteen days of the publication of the notice on such property, setting out his right or interest entitling him to the present possession of the whole property or part thereof and shall serve a copy of such statement on the judgment-creditor. The investigation into such claim shall be taken up along with the inquiry into the petition in respect of the resistance, obstruction, hindrance or ouster complained of, after due notice of the date of such investigation and inquiry has been given to all persons concerned. Every such investigation and inquiry shall be concluded within sixty days of the publication of the notice referred to in subsection (2).

In terms of section 325(1), the judgment creditor <u>may</u> at any time within one month from the date of resistance, obstruction, hindrance or ouster make an application to Court for relief. In addition, if the property is an immovable property, such hindrance or ouster shall fall within one year and one day of such delivery of possession.

If the argument of learned counsel for the defendant is accepted, for instance, if the judgment-debtor resisted the fiscal in executing the writ, but, due to some reason, the judgment-creditor could not complain to Court within one month from the date of such resistance under section 325, or if his application, having been filed within one month, was dismissed on a technical ground, he would have no option but to institute a fresh action against the judgment-debtor. Accepting such an argument would clearly result in a travesty of justice.

If the judgment-creditor fails to make the application within one month, this failure will not disqualify him from making an application for execution of the writ in terms of section 337. If the judgment-creditor's complaint falls outside the timeframe specified in section 325(1), the procedure outlined in section 325 and related sections will not be applicable. In such cases, for example, the provisions for imprisonment (as contemplated in section 326(1)(c)) and contempt of court proceedings (as contemplated in section 330) will not apply.

As the District Judge rightly pointed out in the order dated 04.06.2010, there was no necessity for a section 337 inquiry. The Court had the power to re-issue the writ under section 337.

Section 337

After the Civil Procedure Code (Amendment) Act, No. 53 of 1980, section 337 reads as follows:

> *337. (1) No application (whether it be the first or a subsequent application) to execute a decree, not being a decree granting an injunction, shall be granted after the expiration of ten years from-*
>
> > *(a) the date of the decree sought to be executed or of the decree, if any, on appeal affirming the same; or*

(b) where the decree or any subsequent order directs the payment of money or the delivery of property to be made on a specified date or at recurring periods, the date of the default in making the payment or delivering the property in respect of which the applicant seeks to execute decree.

(2) Nothing in this section shall prevent the court from granting an application for execution of a decree after the expiration of the said term of ten years, where the judgment-debtor has by fraud or force prevented the execution of the decree at some time within ten years immediately before the date of the application.

(3) Subject to the provisions contained in subsection (2), a writ of execution, if unexecuted, shall remain in force for one year only from its issue, but-

(a) such writ may at any time, before its expiration, be renewed by the judgment-creditor for one year from the date of such renewal and so on from time to time; or
(b) a fresh writ may at any time after the expiration of an earlier writ be issued,

till satisfaction of the decree is obtained.

Simply stated, in terms of section 337(1), no application to execute the decree shall be allowed after 10 years from the date of the decree or, if there was an appeal, after 10 years from the date on which the decree was affirmed on appeal.

In cases where the decree or any subsequent order directs the payment of money over a period of time on part payments or the delivery of property on a specified date, the 10-year period is calculated from the date of the default in making such payment or delivery of such property.

However, as per section 337(2) if the judgment-debtor has by fraud or force prevented the execution of the decree within that period, the rigidity of this rule is relaxed. In such circumstances, the 10-year period begins to run from the date of removal or cessation of such malady or disability.

The 10-year period should be interpreted broadly in favor of the decree holder, not against him. For example, if the judgment-debtor had fraudulently held himself out of reach of the legal process, the Court shall take cognizance of this in calculating the 10-year period.

Wood Renton C.J. in *Fernando v. Latibu* (1914) 18 NLR 95 held that the systematic evasion of service by a judgment-debtor constitutes "fraud" within the meaning of that term as used in section 337.

This judgment was cited with approval by Wanasundara J. in *Union Trust Investment Ltd v. Wijesena and Another* (SC/APPEAL/91/2012, SC Minutes of 06.03.2015) when the Court allowed the execution of writ 10 years after the date of the decree on the basis of "fraud" in a case where the judgment-debtor had evaded service of notice of writ *inter alia* by changing his address.

In the Supreme Court case of *Mohamed Azar v. Idroos* [2008] 1 Sri LR 232 at 241, Amaratunga J. held:

> *The time bar prescribed by section 337(1) commences to operate only from the date on which the judgment creditor becomes entitled to execute the writ, and as such it has no application to a case where the judgment creditor is prevented by a rule of law from executing the writ entered in his favour. The time bar will apply in cases where the judgment creditor after becoming entitled to obtain the writ has slept over his rights for ten years.*

Under section 337(3), introduced by Act No. 53 of 1980, a writ of execution remains in force for only one year from its issue. It can be renewed before its expiration for another one year from the date of such renewal and so on, continuously. If renewal is not done within the year, fresh writs can be issued until the satisfaction of the decree, provided the application is within the 10-year period mentioned above.

Before the said amendment, once an application to execute a decree had been allowed under section 337(1), no subsequent application to execute the same was allowed unless the Court was satisfied that on the last preceding application "due diligence" had been exercised to procure complete satisfaction of the decree. This was removed by the amendment. Irrespective of due diligence, the judgment-creditor can now make successive applications for writ until satisfaction of the decree.

If the judgment-creditor did not or could not in law make the application under section 325 in case of resistance or obstruction or hindrance or ouster, he can make the application under section 337 within 10 years as provided therein for a fresh writ/re-issue of writ subject to section 347.

Technical objections

The defendant's objection is a technical objection. It is not based on merits. In execution proceedings, there is no room for technical objections. The Court shall focus on the substance rather than the form. It is the duty of the Court in such proceedings to facilitate the judgment-creditor to enjoy the fruits of his victory. The decree should not merely be a paper decree. It must be translated into practical and effective relief, enforcing the judgment-creditor's rights.

In *Brooke Bond (Ceylon) Ltd v. Gunasekara* [1990] 1 Sri LR 71 at 81 it was observed that the provisions relating to execution proceedings should not be construed in such a way as to lightly interfere with a

decree-holder's right to reap the fruits of his victory as expeditiously as possible.

In *Ekanayake v. Ekanayake* [2003] 2 Sri LR 221 at 227, Amaratunga J. held:

> *Execution is a process for the enforcement of a decreed right, mere technicalities shall not be allowed to impede the enforcement of such rights in the absence of any prejudice to the judgment debtor.*

In *Nanayakkara v. Sulaiman* (1926) 28 NLR 314 at 315 Dalton J. stated:

> *As observed by the Privy Council in Bissesur Lall Sahoo v. Maharajah Luckmessur Singh (6 Indian Appeals 233) in execution proceedings, the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon merely technical grounds, when the execution has been found to be substantially right.*

This view has received strong endorsement in an array of decisions including *Wijewardene v. Raymond* (1937) 39 NLR 179 at 181 per Soertsz J., *Latiff v. Seneviratne* (1938) 40 NLR 141 at 142 per Hearne J., *Wijetunga v. Singham Bros. & Co.* (1964) 69 NLR 545 at 546 per Sri Skanda Rajah J. and *Leechman & Co. Ltd. v. Rangalla Consolidated Ltd.* [1981] 2 Sri LR 373 at 380 per Soza J.

In *Samad v. Zain* (1977) 79(2) NLR 557, the plaintiff filed five applications for writ. While the fifth one was pending, he passed away. The substituted judgment-creditor filed a sixth application for writ, which was refused on the ground that the plaintiff had failed to exercise "due diligence" to procure execution in the previous attempts. The Supreme Court opined that section 337 should not be construed rigidly against the judgment-

creditor. Wanasundera J. with the concurrence of Tennekoon C.J. and Rajaratnam J. stated at 563:

> *The Supreme Court has always been disposed to overlook technicalities in dealing with execution proceedings. Hearne, J. in Latiff vs. Seneviratne quoted the words of the Privy Council to the effect that-*
>
> *"In execution proceedings, the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon merely technical grounds, when the execution has been found to be substantially right."*
>
> *We would be interpreting the relevant provisions unduly harshly if we were to deny the appellant relief in the circumstances of this case. I would, therefore, allow the appeal with costs both here and below. The petitioner would be entitled to take out writ of execution with a view to obtaining satisfaction of the decree of which he is the assignee.*

In *Dharmawansa v. People's Bank and Another* [2006] 3 Sri LR 45, the Court of Appeal quoted *Samad v. Zain* in interpreting the provisions of the execution proceedings broadly.

Vide also the judgment of De Sampayo J. in *Suppramanium Chetty v. Jayawardene* (1922) 24 NLR 50 and the separate judgments of Sirimane J. and Alles J. in *Perera v. Thillairajah* (1966) 69 NLR 237.

Conclusion

On the facts and circumstances of this case, the District Court was correct in re-issuing the writ. The execution of the writ by the fiscal on 01.06.2010 is lawful.

The High Court was in error when it decided that the District Court had no power to re-issue the writ without an application made under section 325 and restored the defendant to possession.

The question of law is answered as follows: When the fiscal is resisted or obstructed by the judgment-debtor, it is not mandatory for the judgment-creditor to make an application under section 325 of the Civil Procedure Code in order to get the writ re-issued.

I set aside the judgment of the High Court and affirm the orders of District Court dated 25.05.2010 and 04.06.2010 and allow the appeal.

The defendant shall pay to the plaintiff Rs. 150,000 as costs of this appeal.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.
I agree.

Judge of the Supreme Court

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

1. Weerathunga Arachchige Samuel de Costa (Deceased)

1A. Weerathunga Arachchige Hema de Costa

2. Weerathunga Arachchige Albert de Costa

3. Weerathunga Arachchige Hema de Costa

4. Weerathunga Arachchige Violet de Costa

5. Weerathunga Arachchige Prema de Costa

All of No. 31/2,
Anderson Road,
Kohuwala.

Plaintiffs

SC APPEAL 75/2014

SC/HCCA/LA 44/2011

WP/HCCA/MT 24/2002(F)

DC/MT LAVINIA 691/96/L

Vs.

Polwattage Bandusena Gomez of
No. 19/3, Srigal Mawatha,
Kohuwala,
Nugegoda.

Defendant

AND BETWEEN

Polwattage Bandusena Gomez of
No. 19/3, Srigal Mawatha,
Kohuwala, Nugegoda.
Defendant-Appellant

Vs.

1. Weerathunga Arachchige Samuel de Costa (Deceased)

1A. Weerathunga Arachchige Hema de Costa

2. Weerathunga Arachchige Albert de Costa (Deceased)

3. Weerathunga Arachchige Hema de Costa

4. Weerathunga Arachchige Violet de Costa

5. Weerathunga Arachchige Prema de Costa

All of No. 31/2,
Anderson Road,
Kohuwala.
Plaintiff-Respondents

AND NOW BETWEEN

Polwattage Bandusena Gomez of
No. 19/3, Srigal Mawatha,
Kohuwala,
Nugegoda.
Defendant-Appellant-Appellant

Vs.

1. Weerathunga Arachchige Samuel de Costa (Deceased)

1A. Weerathunga Arachchige Hema de Costa

2. Weerathunga Arachchige Albert de Costa (Deceased)

3. Weerathunga Arachchige Hema de Costa

4. Weerathunga Arachchige Violet de Costa (Deceased)

5. Weerathunga Arachchige Prema de Costa

All of No. 31/2,
Anderson Road,
Kohuwala.
Plaintiff-Respondent-Respondents

Before: P. Padman Surasena, J.
Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Rohan Sahabandu P.C. with Sachini Senanayake for the Defendant-Appellant-Appellant.
Manohara de Silva P.C. with Harithriya Kumarage and Sasiri Chandrasiri for the Plaintiff-Respondent-Respondents.

Argued on: 20.11.2023

Written Submissions:

By the Defendant-Appellant-Appellant on 16.09.2014, 08.11.2022 and 01.12.2023

By the Plaintiff-Respondent-Respondents on 27.07.2021 and 04.12.2023

Decided on: 12.01.2024

Samayawardhena, J.

The plaintiffs-respondents filed this action in the District Court of Mount Lavinia against the defendant-appellant seeking a declaration of title to Lot D in Plan No. 684, ejectment of the defendant therefrom and damages. The defendant filed answer seeking dismissal of the plaintiffs' action and claiming title to Lot D on prescription. After trial, the District Court entered the judgment as prayed for in the prayer to the plaint. On appeal, the High Court affirmed the judgment of the District Court. This Court had granted leave to appeal against the judgments of the Courts below on two questions of law:

(a) Has the District Court and the High Court misinterpreted and misconceived the terms of settlement when the terms of settlement did not give Lot D in Plan No. 684 referred to in the plaint to any party?

(b) In the circumstances pleaded, are the judgments of the District Court and the High Court correct and according to law?

The District Court and the High Court rejected the defendant's prescriptive claim. This Court also did not grant leave to appeal against the refusal of the defendant's prescriptive claim. Hence there is no necessity to consider the defendant's claim on prescription.

Learned President's Counsel for the defendant submits that notwithstanding the defendant's failure to prove prescriptive title, the plaintiff did not prove title to Lot D. He argues that the District Judge was wrong to have held with the plaintiffs on the basis that the plaintiffs became entitled to Lot D in terms of the settlement entered into in another case (962/L) between the same parties.

Let me now consider whether this line of argument is sustainable.

The defendant and the plaintiffs were parties to case No. 962/L. The said case was settled. In accordance with the settlement, Lots A, B and F of Plan No. 684 were transferred by the plaintiffs as owners of the said Lots to the defendant by Deed No. 1988. It had later been realised that the plaintiffs had mistakenly transferred Lot D of the said Plan also to the defendant by that Deed.

This mistake has been rectified by the Court of Appeal in Case No. CA/83/1988(F). Accordingly, Deed No. 1988 has been cancelled and new Deed No. 2232 has been executed by the plaintiffs transferring only Lots A, B and F to the defendant.

It may be noted that when Lots A, B, F and D were transferred by the plaintiffs to the defendant by Deed No. 1988, they did so as the owners of the said Lots. This was not contested by the defendant.

It is the position of the plaintiffs that their father became entitled to Lot D by Deed No. 35 and they became entitled to this Lot through their father. At the trial, this Deed was not marked subject to proof. Deed No. 35 does not refer to Lot D in Plan No. 684, the reason being that at the time of the execution of Deed No. 35, Plan No. 684 was not in existence. However, the plaintiffs' position is that what was purchased by Deed No. 35 is crystalized in Lot D. This is not a new position taken up by the plaintiffs for the first time in this appeal.

It may be noted that when Lot D was transferred by Deed No. 1988 executed on 05.11.1979, the plaintiffs also described Lot D as the land described in the schedule to Deed No. 35 – *vide* item 4 of the schedule to the Deed. This was not disputed by the defendant when Deed No. 1988 was executed in his favour.

The 3rd plaintiff in her evidence clearly described how the plaintiffs became entitled to Lot D. The learned District Judge in the judgment has referred to Deed No. 35 as the title Deed of the plaintiffs' father. The 1st issue raised by the plaintiffs was regarding title. This issue was answered by the District Judge in favour of the plaintiffs.

In terms of section 3 of the Prescription Ordinance, the defendant shall, *inter alia*, prove adverse possession against the true owner. This land was not a "no man's land". What the defendant prayed in paragraph (b) of his answer was "මෙහි පහත උපලේඛනයේ විස්තර වන ඉඩම කාලාවරෝධ භුක්තියෙන් පැමිණිලිකරුවන්ට හෝ වෙන කොයි කවරෙකුට හා එරෙහිව විත්තිකරුට සතු වී ඇති බවට නියෝග කර තීන්දු ප්‍රකාශ කරන ලෙස ද".

The defendant has indirectly accepted that the plaintiffs are the true owners of Lot D, but his claim is that he acquired the said Lot by prescription. As stated previously, this claim has been rejected by all Courts.

For the aforesaid reasons, I am unable to accept the argument of learned President's Counsel for the defendant that the plaintiffs failed to prove title to Lot D. The plaintiffs proved 'sufficient title' to Lot D on a balance of probabilities as required from a plaintiff in a *rei vindicatio* action. The plaintiffs need not prove absolute title to Lot D against the whole world. They need to prove title only against the defendant.

I accept that the learned District Judge was not correct when it was stated in the judgment that the plaintiffs became entitled to Lot D in

terms of the aforesaid settlement. However, merely because the District Judge has stated so in the judgment, this Court need not set aside the judgment of the District Court and allow the appeal. Such attitude by the apex Court will cause grave prejudice to the plaintiffs for no fault of them.

When the judgment was entered in favour of the plaintiffs as prayed for in the prayer to the plaint, there was no reason for the plaintiffs to prefer an appeal against the judgment. The plaintiffs should not be made to suffer for the lapses of the learned District Judge.

I answer the first question of law quoted above in the affirmative, which is in favour of the defendant. I answer the second question of law as follows: "The conclusion of the judgments of the Courts below is correct".

The appeal is accordingly dismissed but without 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

Maddumage Don Somaratne
No. 64/15, Templers Road,
Mt. Lavinia.
Plaintiff

SC APPEAL NO: SC/APPEAL/75/2017
SC HCCA LA NO: SC/HCCA/LA/524/2014
HCCA NO: WP/HCCA/MT/35/2009(F)
DC MT. LAVINIA NO: 206/96/P

Vs.

1. Maddumage Don Somapala
   No. 64/15, Templers Road,
   Mt. Lavinia.
2. M.D. Albert (Deceased)
   No. 64/16, Templers Road,
   Mt. Lavinia.

2A. M.D. Rohan Nishantha
No. 64/16, Templers Road,
Mt. Lavinia.
Defendants

AND BETWEEN

2. M.D. Albert (Deceased)
   No. 64/16, Templers Road,
   Mt. Lavinia.

2A. M.D. Rohan Nishantha
No. 64/16, Templers Road,
Mt. Lavinia.
2nd Defendant-Appellant

Vs.

Maddumage Don Somaratne
No. 64/15, Templers Road,
Mt. Lavinia.
Plaintiff-Respondent

Maddumage Don Somapala
No. 64/15, Templers Road,
Mt. Lavinia.
1st Defendant-Respondent

AND NOW BETWEEN

2A. M.D. Rohan Nishantha
No. 64/16, Templers Road,
Mt. Lavinia.
2(a) Defendant-Appellant-Appellant

Vs.

Maddumage Don Somaratne
No. 64/15, Templers Road,
Mt. Lavinia.
Plaintiff-Respondent-Respondent

Maddumage Don Somapala
(Deceased)
No. 64/15, Templers Road,
Mt. Lavinia.
1st Defendant-Respondent-Respondent

1A. M.D. Swarnaseeli,
No. 64/15, Templers Road,
Mt. Lavinia.
1(a) Defendant-Respondent-Respondent

Before: Hon. Justice Vijith K. Malalgoda, P.C.
Hon. Justice Yasantha Kodagoda, P.C.
Hon. Justice Mahinda Samayawardhena

Counsel: Rohan Sahabandu, P.C. with Chathurika Elvitigala for the 2(a) Defendant-Appellant-Appellant.
Ranjan Suwandaratne, P.C. with Anil Rajakaruna for the Plaintiff-Respondent-Respondent.

Written Submissions:
By the Appellant on 16.03.2022

Argued on: 23.01.2023

Decided on: 12.02.2024

Samayawardhena, J.

The plaintiff filed this action, naming two defendants, seeking to partition the land described in the schedule to the plaint among the plaintiff and the 1st defendant. The plaintiff is the son of the 1st defendant and the 2nd defendant is the brother of the 1st defendant.

The preliminary plan No. 510 dated 16.06.1998 consists of lots 1 and 2.

The position taken up by the 2nd defendant-appellant at the trial by way of issues was that he is entitled to lot 1 of the preliminary plan by prescription.

After trial, the District Court refused the prescriptive claim of the 2nd defendant and partitioned the land between the plaintiff and the 1st defendant. On appeal, the High Court of Civil Appeal affirmed it.

This Court granted leave to appeal on the following two questions:

(a) Did both courts below investigate title to the land in question as required in a partition action?
(b) In any event, did the respondent have title to the corpus?

The point made by learned President's Counsel for the 2nd defendant-appellant before this court was that the plaintiff became entitled to 8 perches from lot 1 in plan No. 1839 dated 31.07.1956 but he filed the partition action to partition lot 2 in plan No. 1839. However, he admits that the preliminary plan depicts lot 1 in plan No. 1839. It is on that basis, learned President's Counsel states that the District Court has failed to investigate title to the land to be partitioned.

In the written submissions filed before this court, learned President's Counsel states thus:

> *The plaintiff Somarathne was seeking to partition lot 2 in plan 1839. It is respectfully submitted that Somarathna could not partition lot 2 as he got 8 perches from lot 1 and lot 2 was given to Cornelis Appuhamy. The preliminary plan No. 510 dated 16.06.1998, G. Saranasena licensed surveyor shows not lot 2 but lot 1. The surveyor has surveyed a different land to the land in the plaint.*

The description of the land in the schedule to the plaint is unclear. It identifies the land as lot 2(1) of plan No. 1839 with an extent of 22.5 perches. However, the lot number does not align with either lot 1 or lot 2 of plan No. 1839 but rather refers to both. Notably, each lot 1 and lot 2 of plan No. 1839 has an extent of 22.5 perches.

The preliminary plan No. 510 and its report were marked as X and X1 at the trial without objection. There was no objection at any stage of the District Court proceedings or High Court proceedings that the preliminary plan does not depict the land to be partitioned. There is no dispute that the land depicted in the preliminary plan is lot 1 of plan No. 1839. It is clearly stated in the preliminary plan itself. According to the report X1, the land to be partitioned had been shown to the surveyor by the plaintiff and the two defendants. In the preliminary plan the land is shown as lots 1 and 2. The 2nd defendant in his evidence in chief itself categorically stated that the land to be partitioned is depicted as lots 1 and 2 in the preliminary plan. There was no dispute on the identification of the corpus in the District Court or in the High Court. The 2nd defendant raised issues on the basis that he prescribed to lot 1 of the preliminary plan. When the 2nd defendant failed his claim on prescriptive title, he cannot now be permitted to thwart the partition action filed more than 27 years ago by raising a technical objection on the identification of the corpus comparing the schedule to the plaint with the land shown in the preliminary plan.

The identification of the corpus is a question of fact or, at least, a mixed question of fact and law. It is not a pure question of law that can be raised for the first time on appeal. Therefore, a party to an action cannot raise the question of identification of the corpus for the first time before the High Court or in the Supreme Court, whether it is a partition case or a land case.

I answer the two questions on which leave was granted in the affirmative and dismiss the appeal with costs.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., J.
I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.
I agree.

Judge of the Supreme Court

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

In the matter of an application for Appeal in terms of Section 5(c) of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006 against the Judgment dated 26th July 2021 of the Provincial Civil Appellate High Court of the Western Province (Holden at Gampaha) in Case No. WP/HCCA/GPH/96/2018/F.

Sudath Sugeeshwara Bamunu-Arachchi,
No.28/B,
Napagoda,
Nittambuwa.

SC APPEAL No. 80/2022
SC HCCA LA No. 274/2021

Plaintiff

Gampaha Civil Appellate Case No. WP/HCCA/GPH/96/2018/F

District Court of Attanagalla Case No.712/L

Vs.

Mahinda Dematagolla,
No. 68/10,
Kimbulhenawatta,
Nittambuwa.

Defendant

AND BETWEEN

Mahinda Dematagolla,
No. 68/10,
Kimbulhenawatta,
Nittambuwa.

Defendant-Appellant

Sudath Sugeeshwara Bamunu-Arachchi,
No. 28/B,
Napagoda,
Nittambuwa.

Plaintiff-Respondent

AND NOW BETWEEN

Sudath Sugeeshwara Bamunu-Arachchi,
No. 28/B,
Napagoda,
Nittambuwa.

Plaintiff-Respondent-Appellant

Mahinda Dematagolla,
No. 68/10,
Kimbulhenawatta,
Nittambuwa.

Defendant-Appellant-Respondent

Before : **P. Padman Surasena, J**
Mahinda Samayawardhena, J
K. Priyantha Fernando, J

Counsel :

Dinesh De Alwis instructed by Janakz Sandakelum for the Plaintiff-Respondent-Appellant.

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

Argued on : 12.01.2024

Decided on : 01.02.2024

K. PRIYANTHA FERNANDO, J

1. The Plaintiff-Respondent-Appellant (hereinafter referred to as the "*plaintiff*"), by plaint dated 25.11.2010, instituted action against the Defendant-Appellant-Respondent (hereinafter referred to as the "*defendant*") at the District Court of *Attanagalla,* praying *inter alia,* for a declaration of title to the premises described in the Schedule to the plaint and further for the ejectment of the defendant from the 2.8 perches of the said premises, which he is alleged to have encroached onto and that the possession of the said 2.8 perches be given to the plaintiff.

2. After trial, the learned District Judge pronounced Judgment on 26.11.2018 in favor of the plaintiff. Thereafter, the defendant filed an appeal against the Judgment of the learned District Judge, to the High Court of Civil Appeal of *Gampaha*, upon which the learned Judges of the High Court by their Judgment dated 26.07.2021, allowed the appeal setting aside the District Court Judgment which was entered in favour of the plaintiff, on the basis that the defendant had prescriptive title.

3. Being aggrieved by the decision of the learned Judges of the High Court of Civil Appeal, the plaintiff preferred the instant appeal, whereby this Court on 27.07.2022, granted leave to appeal on the questions of law set out in paragraph 11(a) and (b) of the petition dated 31.08.2021.

The said questions of law are as follows,

*(a) Did the Judges of the Provincial Civil Appellate High Court of the Western Province err, by determining that the starting point of the adverse possession of the disputed portion, began on the date the Respondent purchased Lot 48, when the Respondent had explicitly stated in his evidence that **he had no intention of possessing any extent more than 40 perches** he had purchased?*

(b) *Did the Judges of the Provincial Civil Appellate High Court of the Western Province err, by determining that the starting point of the adverse possession of the disputed portion, began on the date the Respondent purchased Lot 48, when the Respondent had stated in his evidence, **that even at the time of giving evidence he was not aware** that he was possessing an extent more than the 40 perches he had purchased?*

In addition, further leave was granted on the following question of law raised by the learned Counsel of the defendant,

"*Whether a person who possesses land of another without being aware that it belongs to other person may acquire prescriptive rights in respect of that land in terms of Section 3 of the Prescription Ordinance?*"

4. The main issues in the instant appeal are the starting point of adverse possession and whether a person

possessing land without knowledge that it belongs to another, or possessing another person's land without having an intention of possessing it as his own, could claim prescriptive title over that piece of land.

Facts in Brief:

5. On 01.06.2001 the plaintiff became the owner of lot No. 57 of Plan No. 1971 [marked as 'V1'] dated 19.07.1980, by Licensed Surveyor *S. Welagedara*, described in the schedule to the plaint by Deed No. 322 marked as ['P3'] at the trial, which as alleged by the plaintiff was a 40 perches land which he had brought from his predecessor who had purchased the said land from a land auction.

6. In the year 2009, the plaintiff required a loan from a bank, and for this reason, he had to resurvey the premises. After completion of the resurvey, it was discovered that the extent of the land lot No.57 was only 37.2 perches, 2.8 perches less than that it should be. It is alleged that the 2.8 perches had been encroached on by the defendant, who is the owner of Lot No.48 in the same Plan No. 1971 [marked as 'V1']. Both Lot No.48 and Lot No.57 are situated adjacent to each other. The land of the defendant is situated towards the North of the plaintiff's land.

7. The plaintiff alleges that the defendant has encroached into his land and therefore, instituted action at the District Court of *Attanagalla* to eject the defendant from the 2.78 perches portion of the plaintiff's land.

8. Upon issuing a commission by the learned District Judge the Court Commissioner upon surveying the land had discovered that the extent of encroachment is 1.70 perches. The Commissioner *K.N.A.W.Suriyaarachchi's*

plan No. 5121/e dated 15.11.2011 was marked as [‘P10’] at the trial.

9. The defendant takes the position that he did not encroach into the plaintiff’s land and that he had been using the land in the same manner since the day he had purchased it. The defendant purchased Lot No.48 from a land auction before the plaintiff bought his Lot No.57, with specific boundaries that had been shown by the vendor, and believed that his land contained 40 perches in extent as per the survey plan No. 1971 [marked as ‘V1’]. According to plan No.1971 [marked as ‘V1’], the extent of Lot No. 48 is 1 rood (40 perches).

10. The defendant contends that he had prescriptive rights over the said encroached 1.70 perches. The learned District Judge held that the defendant was not entitled to prescriptive title. However, the learned Judges of the High Court held that the defendant had prescriptive rights for the reason that he had been occupying the land for a time period above the 10 years stipulated by the Prescription Ordinance and that adverse possession had begun from the day he had purchased his land.

Answering to the questions of law:

11. Having heard learned Counsel for both parties at the hearing, and at the perusal of the petition of appeal, the written submissions, and the proceedings in the District Court, I shall now resort to answering the questions of law before this Court. Leave has been granted on three questions of law. As all the questions are interconnected, I will be addressing them simultaneously.

12. The learned Counsel for the plaintiff submitted that the learned High Court Judges were wrong when they held that the defendant was entitled to prescriptive title on the basis that adverse possession commenced from the date the defendant purchased his land.

13. The law on prescription is now governed by the **Prescription Ordinance No.22 of 1871 (as amended)**. This had been recognized by his Lordship, former Chief Justice Basnayake in the case of ***Perera v. Ranatunge 66 NLR 337 at p.339*** where he held that,

"It is common ground that the Roman-Dutch Law of acquisitive prescription ceased to be in force after Regulation 13 of 1882 and that the rights of the parties fall to be determined in accordance with the provisions of the Prescription Ordinance. It is now settled law that the Prescription Ordinance is the sole governing the acquisition of rights by virtue of adverse possession, and that the common law of adverse prescription is no longer in force except as respects the Crown."

14. **Section 3** of the **Prescription Ordinance No. 22 of 1871 (as amended)** provides,

"Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action…for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs.."

15. Pursuant to section 3, any person claiming prescriptive title must prove adverse possession for a period of ten years before the action was initiated.

16. Section 3 has further elaborated on the phrase "title adverse to or independent of possession" where it reads as follows,

> "…(*that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgement of a right existing in another person would fairly and naturally be inferred).*

17. The learned Counsel for the plaintiff draws attention of the Court to the case of ***Jayasinghe Pathman v. Korale Kandanamge Somapala,*** **SC Appeal 06/2014 SC Minute dated 19.11.2021** to show the distinction between occupation and possession. The learned Counsel contends that the defendant was occupying the 1.70 perches of the land but he was not aware that he was in possession of that same piece of land. Hence, Counsel takes the view that without having intention of ousting the plaintiff, prescription does not start. During the hearing of this case, the learned Counsel for the plaintiff contended that mere possession of one's land does not amount to adverse possession.

18. His Lordship Justice Canekeratne in the case of ***Fernando v. Wijesooriya [1947] 48 NLR 320*** pointed out on the issue of "adverse possession" that,

> *"It is the intention to claim the title which makes the possession of the holder of the land adverse; if it be clear that there is no such intention, there can be no pretence of an adverse possession"*

His Lordship further elaborated that,

"There must be a corporeal occupation of land attended with a manifest intention to hold and continue it and when the intent plainly is to hold the land against the claim of all other persons, the possession is hostile or adverse to the rights of the true owner"

19. Therefore, upon considering the case of *Fernando v. Wijesooriya* (supra) it could be established that for the defendant to prove "adverse" possession, there should have been an intention by him to claim title to the land against its owner. The time period for adverse possession will only commence from the moment, the defendant intends to possess the land of the plaintiff as if he were the owner of it.

20. From the above case law authorities, it could be inferred that where there was possession by the defendant, though there is physical possession, but it had not been with the intention to hold it adverse to the owner, then prescription cannot take place.

21. The learned Counsel for the defendant submitted the case of *Ayanhamy v. Silva 17 NLR 123* to show that a person who possesses a land of another without knowledge that it is not theirs can claim prescriptive title to that land.

22. The learned Counsel for the plaintiff draws the attention of the Court to the case of ***Prasanth and another v. Devarajan and Another,*** **SC Appeal 163/2019, SC Minute dated 22.03.2021** where his Lordship Mahinda Samayawardhena J. takes the position that prescription commences from the point adverse possession commences and not from the date the defendant came into possession.

His Lordship stated that,

"…The Defendants must establish a clear starting point known to the owner in order for the former to claim prescriptive possession against the latter. The prescriptive period of ten years begins to run only from that point and not from the date the Defendants came into possession."

His Lordship further held that,

"…the proof of mere possession of the property for over ten years does not satisfy the requirements under section 3 of the Prescription Ordinance. The possession shall be "by a title adverse to or independent of that of the claimant or Plaintiff in the action."

23. The learned Counsel for the plaintiff draws attention of the Court to the proceedings of the defendant's evidence dated 18.07.2018, found in page 157 of the Brief to show that the defendant has denied encroachment by saying that he was not aware that he was possessing a part of the plaintiff's land. The proceedings read as follows:

උ : මම දන්නෙ නෑ ඇත්ත වශයෙන්ම මගෙ ඉඩමෙ වැඩියෙන් තියෙනවා කියලා. මොකද පර්චස් 40 කොටස් තමයි කැඩුවෙ. එතකොට මම දන්නෙ නෑ මගෙ ඉඩමෙ වැඩියෙන් තියෙනවාද කියලා.

ප්‍ර: ඒ කියන්නෙ තමුන්ගෙ ඉඩම පර්චස් 40 කට වඩා වැඩි ප්‍රමාණයක් තියෙනව කියල තමුන් දන්නෙ නෑ ?

උ : තවම දන්නෙ නෑ.

It could be observed that the defendant had no knowledge that he was in possession of the plaintiff's land which indicated that he had no intention of possessing the plaintiff's part of the land as an owner, therefore he cannot claim prescriptive title.

24. For the clear reasons stated above, it could be observed that the learned High Court Judges were wrong when they stated that adverse possession begins from the date the defendant purchased the land. In the instant case, it is clear that that the defendant had not been aware that he was in possession of a portion of the plaintiff's land which as mentioned above indicates that he lacked the necessary intention to prove adverse possession. Thereby, the defendant shall not be entitled to prescriptive rights under the circumstances of this case. Therefore, the first two questions of law are answered in the affirmative. The question of law raised by the defendant is answered in the negative.

25. Hence, for the foregoing reasons, the judgment of the District Court is affirmed and the judgment of the High Court is set aside. The appellant is entitled to costs.

Appeal is allowed.

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA.

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 appeal under and in terms of section 9(a) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

Officer-in-Charge
Police Station,
Wellawatta.
Complainant

SC Appeal No. 82/2019
SC SPL LA No. 97/2019
High Court of Colombo
Case No HC MCA 67/2016
Magistrate's Court of Colombo
Case No. 13904/03

Vs.

Beminahennadige Krishantha Ranmal Pieris
No. 41, Mahavidana Mawatha,
Koralawella,
Moratuwa.
Accused

AND BETWEEN

Beminahennadige Krishantha Ranmal Pieris
No. 41, Mahavidana Mawatha,
Koralawella,
Moratuwa.
Accused- Appellant

Vs.

1. Officer-in-Charge
Police Station,
Wellawatta.

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

AND NOW BETWEEN

Beminahennadige Krishantha
Ranmal Pieris
No. 41, Mahavidana Mawatha,
Koralawella,
Moratuwa.
**Accused- Appellant-
Appellant**

Vs.

1. Officer-in-Charge
Police Station,
Wellawatta.
2. Hon. Attorney General
AttorneyGeneral's
Department,
Colombo 12.
Respondent-Respoondents

****

BEFORE	**:**	**PRIYANTHA JAYAWARDENA, PC.,J.** **S. THURAIRAJA, PC., J.** **ACHALA WENGAPPULI, J.**
COUNSEL	**:**	Isuru Somadasa instructed by Pramodya Thilakaratne for the Accused-Appellant-Appellant Ganga Wakishta Arachchi DSG for the Respondent-Respondents.
ARGUED ON	:	13th June, 2023
DECIDED ON	**:**	27th February, 2024

****

ACHALA WENGAPPULI, J.

This is an appeal preferred by the Accused-Appellant-Appellant, (hereinafter referred to as the Appellant) seeking to set aside the judgment of the Provincial High Court, dismissing his appeal against the conviction entered by the Magistrate's Court.

The Appellant was charged before the Magistrate's Court of *Colombo* for committing criminal intimidation of one *Lakna Somasiri* on 02.08.2014, an offence punishable under Section 486 of the Penal Code. He was also charged for using criminal force on her, in the course of same transaction, and thereby committing an offence punishable under Section 343 of that Code. The Appellant pleaded not guilty to both charges and proceeded to trial. The prosecution led evidence of *Lakna Somasiri, Sujeewa Gamage* and WSI *Perera* of *Wellawatta* Police Station. The Appellant gave evidence under oath, and called *Don Lewis Fernando, Dulani Madurangi Perera* and *Sinnadorai Kuvendra Rajah* as witnesses on his behalf.

The trial Court pronounced its judgment on 26.04.2016, and found the Appellant guilty to the 1st count, while acquitting him of the 2nd count. The Appellant was imposed a term of imprisonment of six months to serve, a fine of Rs. 500.00 with a default sentence of six months. The Appellant was also ordered to pay a sum of Rs. 30,000.00 to the virtual complainant as compensation coupled with a default sentence of six months.

Being aggrieved by the said conviction and sentence, the Appellant preferred an appeal to the Provincial High Court of *Colombo*. One of the grounds of appeal taken up in the petition of appeal by the Appellant was that the trial Court had failed to consider his *alibi*. In dismissing the appeal of the Appellant, the Provincial High Court, rejected the ground of appeal raised by him on *alibi.* The Provincial High Court, whilst affirming the conviction and the sentences imposed on the Appellant, decided to enhance the period of imprisonment imposed on him from six months to one year.

The Appellant sought leave to appeal against the judgment of the Provincial High Court. When the Appellant supported his application seeking leave to appeal on 06.05.2019, this Court granted leave on questions of law, as set out in paragraph 43(a) to (f) in his petition dated 22.03.2019. However, at the hearing of the appeal on 13.06.2023, learned Counsel for the Appellant confined his submissions only to the question of law, as set out in sub paragraph 43(f).

The question of law on which this Court was addressed on by the learned Counsel for the Appellant as well as the leaned Deputy Solicitor General was;

> Did the learned High Court Judge of *Colombo* and the learned Additional Magistrate of *Colombo* fail to properly consider the defence of *alibi* presented by the Appellant ?

In relation to the said question of law, learned Counsel for the Appellant submitted that the learned Judges of the Magistrate's Court as well as of the Provincial High Court misdirected themselves in adopting the view that a plea of *alibi* should create a serious doubt in the prosecution and it is for him to prove his *alibi*. He invited attention of Court to the relevant instances where both Courts, in their respective judgments, used the words "*failure to prove*" when his plea of *alibi* being considered.

The contention of the Appellant on the imposition of a burden by the Courts below to "*prove*" an *alibi* on him are based on certain terminology used in the impugned judgments in dealing with his plea of *alibi*. Hence, the said contention should be considered in the context in which those references were used in the impugned judgments and should also be assessed in the totality of the evidence presented by the parties for its validity.

In view of the said solitary question of law that should be decided in the instant appeal, I shall confine myself to dealing with the evidence relating to the *alibi*.

Perusal of the evidence of the virtual complainant, *Lakna Somasiri,* indicates that the incident of intimidation had taken place at about 12.30 or 1.00 p.m. on 02.08.2014, along *Marine Drive* near the *KFC* outlet at *Wellawatta*. She was returning home after her classes at ACBT campus in a vehicle driven by one of her relatives. When the vehicle became stationary for some time due to heavy traffic jam near the *KFC* outlet, the Appellant came up to the vehicle and threatened her with death. His verbal threat was to the effect that if the complainant and her family were to appear in Court, they all would be killed. Driver of the vehicle, *Sujeewa Sampath* corroborated the virtual complainant.

The reason for the issuance of such a threat was attributed to the two criminal matters that were pending in Courts against the Appellant. They were initiated by the virtual complainant. He was accused of committing rape on virtual complainant (who was a minor at that point of time) in one, while in the other, he was accused of committing cheating in respect of gold jewellery worth Rs. 1,600,000.00.

It was revealed during the evidence of the virtual complainant that she and the Appellant were in a relationship for some time and, when she became pregnant as a result, he refused to marry her. It was also revealed that by then the Appellant was already married and had two children from that marriage. Thereupon, she lodged a complaint against the Appellant resulting in the said two prosecutions.

Despite the lengthy cross examination of the virtual complainant by the Appellant on several other aspects of her evidence, in respect of his *alibi,* the Appellant merely suggested to her that by 1.00. p.m. on the day

of the alleged incident he was nowhere near that place (“ **ඔය කියන සිද්ධිය වූ දවසෙ ප.ව.1.00 වෙද්දි මෙම විත්තිකරු ඔය කියන ස්ථානය අසලකවත් සිටියෙ නැහැ කියල යෝජනා කරනවා?**”) She totally rejected that suggestion. Strangely, this suggestion was not put to the other prosecution witness called by the Appellant. However, it is noted that the Appellant had elicited from the WSI *Sanjeewani Perera* that, in his statement to the Police, he had taken up the position that he was “*elsewhere*” (**සිටියෙ වෙන තැනක**). The official witness’s reply was the Appellant was well within the *Wellawatta* Police area.

The Appellant gave evidence under oath. In his evidence the Appellant stated that he was employed as a supervisor at the *Ocean Colombo* Hotel during the relevant time. He had reported to work on the day of the incident at 8.00 a.m. and worked for continuous twelve hours until his sign off at 8.00 p.m. He was emphatic that after reporting to work, he had no way of leaving his workplace. He added that his movements could be checked from CCTV camera footage and one could even make enquiries from his department head, whether he left workplace during any time.

During cross examination by the prosecution, the Appellant maintained the position that even in an emergency he was not allowed to leave his workplace. According to the Appellant, an employee could leave in an emergency only after properly applying for leave. He conceded that there was only a distance of two kilometres between *KFC Wellawatta* and his place of work. He also admitted that when the Police wanted to record his statement over this incident, he was represented by an Attorney-at-Law.

The Magistrate's Court, in consideration of the evidence relating to the plea of *alibi,* devoted a separate segment in its judgment under that heading to reason out the conclusions it had reached. The trial Court, on its part had guided itself with the applicable principles of law in relation to dealing with an *alibi* and reproduced citations from a long list of judicial precedents. Having rejected the Appellant's evidence, the trial Court arrived at the conclusion that no reasonable doubt had arisen on the case presented by the prosecution ("**මෙම නඩුවට අදාලව පැමිණිල්ලේ නඩුව පිළිබඳව කිසිදු සැකයක් මතුවී නැති අතර, පැමිණිල්ල විසින් විත්තිකරුට එරෙහිව තම ස්ථාවරය තහවුරු කර ඇත. එසේ ඔප්පු කොට ඇති බවට මම තීරණය කරමි.**"). It is clear from this quotation, the trial Court correctly stated the applicable law and its decision as "**පැමිණිල්ලේ නඩුව පිළිබඳව කිසිදු සැකයක් මතුවී නැති අතර,**".

However, the Appellant referred instances in the 90-page judgment of the trial Court, where references were made relating to the *alibi* of the Appellant, which tends to indicate that it had taken the view that the Appellant had failed to raise a reasonable doubt in the prosecution case. In page 215 of the appeal brief the finding of Court that "**පැමිනිල්ල පිළිබඳව අන්‍යාස්ථනියභාවය පදනම් කර ගෙන සැකයක් මතු කිරිමට සමත් වී නොමැති බවද සඳහන් කල යුතුය**" could be found. In addition, at page 218, another finding to the effect " **එසේම පැමිණිල්ලේ නඩුව පිළිබඳ සැකයක් මතු කිරීමට විත්තියේ සාක්ෂි මගින් පදනමක් ඉදිරිපත් නොවේ නම් අධිකරණයට පැමිණිල්ලේ ස්ථාවරය පිලිගැනීමට හැකි බව පහත සඳහන් කොටසෙන් පෙනී යයි**" is followed by " **ඒ අනුව විත්තිය කිසිදු ආකාරයකට පැමිණිල්ලේ නඩුව පිලිබඳ සැකයක් මතු කිරීමට සමත් වී නැත**" .

The Provincial High Court, in dealing with the ground of appeal raised by the Appellant on his *alibi,* considered the question whether the Appellant presented any evidence to satisfy Court of his *alibi* (**අධිකරණය**

සෑහීමකට පත්වන අයුරින්) and thereupon concurred with the conclusion reached by the trial Court that the Appellant failed to substantiate his *alibi*.

Learned Counsel for the Appellant heavily relied on the wording used by the trial Court as well as the appellate Court, in order to impress upon this Court that in fact there was an undue burden imposed by the Courts below. He sought to buttress the said contention by stating that he was convicted by the trial Court due to his failure to raise a reasonable doubt and that too by substantiating his *alibi*.

The principles of law that are applicable in an instance where an accused takes up an *alibi* had been laid down by superior Courts in multiple judicial pronouncements. Suffice to quote one such instance, where a divisional bench of this Court in ***Mannar Mannan v Republic of Sri Lanka*** (1990) 1 Sri L.R. 280, held (at p. 285) that *"… it was sufficient for the appellant to have raised a reasonable doubt as to the truth of the case for the prosecution, namely that it was the appellant who shot and caused the death of the deceased; that there was no burden whatsoever on the appellant to prove his denial " or to prove that he was elsewhere at the time of the shooting".*

Despite clear pronouncements made by the Courts of Record as to the applicable legal principles, the determinations made by trial Courts on plea of *alibi* are regularly challenged in appeal. As evident from the instant appeal, the primary reason for challenging the determination of the trial Court is not its application of those principles to the given set of circumstances but the way in which the trial Court described its process of reasoning by using certain terminology. The Appellant before us too relies on such references in support of his contention of imposition of a burden.

After perusing the judgment of the trial Court, for the reasons given below, I am of the view that the pronouncements reproduced above were made regarding nature of the evidence presented by the Appellant on his *alibi*.

When the Appellant put across his *alibi* to the virtual complainant, he merely suggested that he was nowhere near the place of the alleged incident. The Appellant did not suggest to any of the prosecution witnesses that he remained within his place of work, *Ocean Colombo* Hotel premises, during the time he was said to have seen near the *KFC*. Only in his examination in chief did the Appellant disclose for the first time where he was during the relevant time.

The Appellant also called the Human Resource Manager of *Ocean Colombo* Hotel, *Madhurangi Fernando,* to give evidence on his behalf. During her evidence, the witness stated that the registers maintained at *Ocean Colombo* Hotel indicate that the Appellant had reported to work on 02.08.2014 at 8.00 a.m. and left at 8.00 p.m. She tendered a copy of an attendance sheet marked as V2, into which the Appellant himself had entered the said details. She further stated that if an employee were to leave the Hotel during office hours, he could do so only after informing the security post located at the rear entrance, being the only exit point available for employees other than the main entrance.

The prosecution, during its cross examination of the defence witness, elicited that she had joined the said establishment at a later point of time and could only state in evidence what the documents indicate. Importantly, she conceded that any employee could leave the workplace

during lunch break. She was unable to state from the records whether or not the Appellant had left the premises during daytime on 02.08.2019.

It appears that the purpose of calling the Human Resource Manager was to support the fact that the Appellant did report to work on 02.08.2019 and left his workplace only at 8.00 p.m. However, the witness conceded to the suggestion by the prosecution that she is unable to provide any evidence whether the Appellant remained within his workplace during 12.30 p.m. to 1.00 p.m.

Interestingly, the efforts made by the Appellant in his evidence to emphasise that it is a near impossibility to leave his workplace during office hours were botched by his own witness, *Madhurangi,* when she conceded to the position suggested by the prosecution that one could leave workplace during office hours without formally applying for leave. She, however, offered a clarification that one could go out in like manner in instances such as to buy a packet of lunch.

On the other hand, the prosecution presented clear unambiguous evidence that the incident had taken place around 12.30 p.m. or 1.00 p.m. near *KFC Wellawatta*. The Appellant himself conceded that there was only a distance of two kilometres from his workplace to the place of the incident. He was also content with merely stating to Court that if needed his position could be verified by viewing CCTV footage and also with his sectional head.

The prosecution that must discharge its burden of proof, in establishing a criminal charge by which it alleged the Appellant had committed an offence. Of the many factors the prosecution must establish

in this regard, the identity of the accused is an important element, which must be established beyond reasonable doubt. In other words, the prosecution must establish that it was the accused, who is present in Court, committed the alleged criminal acts or omission at the crime scene. When a prosecution witness identifies an accused in Court and states that it was that accused, who committed the acts or omissions which constitute the alleged offence, it is inbuilt in that testimony that the accused was physically present at that place to commit the alleged offence.

The question that arises in these circumstances is whether the evidence relating to the *alibi* was sufficient to raise reasonable doubt in the prosecution case ?

When the prosecution alleged that the Appellant was present at the place of the incident to commit the alleged offence, and if the Appellant takes up the plea of *alibi,* that would make his alleged presence at the crime scene, inconsistent with the prosecution claim. The place where the accused claims to be in during the relevant time therefore becomes a relevant fact in issue. This conflict could be termed as an instance of "inconsistent fact" in terms of Section 11 of the Evidence Ordinance.

Illustration (a) of Section 11 of the Evidence Ordinance reads thus;

> "*The question is whether A committed a crime at Colombo on a certain day. The fact that on that day A was at Galle is relevant. The fact that near the time when the crime was committed A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.*"

In relation to the instant appeal, the fact in issue is whether the Appellant was on *Marine Drive* at about 12.30 or 1.00 p.m. near *Wellawatta KFC* threatening the virtual complainant. The prosecution alleges that he was, but that would be inconsistent with the position of the Appellant, who said to have remained within the premises of *Ocean Colombo* Hotel during that time.

The *alibi* set up by the Appellant should be in relation to the place and time period the prosecution had alleged he was. *Coomaraswamy,* in his treatise titled *Law of Evidence* (Vol I, page 278) describing the underlying rationale as to why an *alibi* succeeds as an exception to criminal liability, states thus;

> *"If the element of the time of the crime is definitely fixed, and the accused is shown to have been at some other place at that time, the two facts are mutually inconsistent and the truth of the charge cannot be established."*

In this context, learned author added that "*[T]he alibi should cover the time of the alleged offence, so as to exclude presence at the place of the offence."*

It is already noted that there was only a distance of two kilometres between the place of offence and the Appellant's workplace and he could have reached there within a half an hour. In such a situation, the requirement insisted by *Coomaraswamy* assumes greater significance. If the distance between the two places itself makes it impossible for the accused to be present at the scene during the relevant time period, the specifics of time might lose some of its significance. Perhaps this factor could be clarified with an example.

If the Appellant had taken up the position that he was in *Jaffna* in that morning and if there was evidence, which tends to support that position, then that *alibi* might have been sufficient to raise a reasonable doubt in the prosecution's allegation that he was at *Wellawatta.* This is because of the physical impossibility of the Appellant being present in the two given locations during the same time interval, due to sheer distance between the two places. But here is a situation where the Appellant could walk up to *Wellawatta KFC* from his workplace within a matter of and return to the workplace in less than thirty minutes, as his witness conceded. The Appellant did not specifically claim that he was at the Hotel during the relevant time interval. He expected the Court to infer that fact from his evidence. The witness called by him did not clearly support this position either. In fact, her evidence could be taken to be consistent with that of the prosecution.

It is this aspect that the trial Court had commented on by stating **"මෙම නඩුවේ දී විත්තිකරු අදාල ස්ථානයට නොගිය බවට තහවුරු කිරීම සඳහා තමා සේවය කලා වූ ආයතනයේ නිලධාරිනියක් සාක්ෂියට කැඳවා ඇති නමුත් එම සාක්ෂිකාරියගේ සාක්ෂියෙන් පැමිනිල්ල පිළිබඳව අන්‍යාස්ථනියභාවය පදනම් කර ගෙන සැකයක් මතු කිරීමට සමත් වී නොමැති බවද සඳහන් කල යුතුය."**

Furthermore, the requirement of "*[T]he alibi should cover the time of the alleged offence, so as to exclude presence at the place of the offence*" too received consideration of the trial Court. The trial Court, by reproducing the reasoning of the judgment of the Court of Appeal in ***Rupasinghe v Republic of Sri Lanka*** (CA Appeal No. 179/2005), concluded that the said

requirement is not fulfilled by the Appellant in adducing evidence on *alibi*. The Court stated thus;

> **" එය පැමිණිල්ලෙන් විස්තර කරන සිද්දිය සිදු වන වේලාවේ ඔහු එම සිද්ධිය සිදු වූ ස්ථානයේ නොව වෙනත් ස්ථානයක සිටි බවත්, එකී විස්තර කරන වේලාවේ ඔහුට එම ස්ථානයට ලගා වීමට හැකියාව නොමැති තැනක සිටි බවත්, අධිකරණයට අනුමිතියක් ඇති වන ආකාරයෙන් ප්‍රබල සැකයක් විය යුතු බව සඳහන් කර ඇත."**

The trial Court, although used the terms such as "**ප්‍රබල සැකයක්**" and "**සැකයක් මතු කිරීමට සමත් වී නොමැත**" in translating the quoted text from the judgments, unwittingly left room for the Appellant to contend that a burden was imposed. What the Court really expected from the Appellant was to place sufficient evidence which might create a reasonable doubt in the prosecution case. The process of reasoning adopted by the Court, in to finding the Appellant guilty to the 1st count, negates any such apprehensions that it imposed a burden on him. The relevant pronouncement is reproduced below;

> **"පැමිණිල්ලේ නඩුව පිළිබඳ සැකයක් මතු කිරීමට විත්තියේ සාක්ෂි මගින් පදනමක් ඉදිරිපත් නොවේ නම් අධිකරණයට පැමිණිල්ලේ ස්ථාවරය පිලිගැනීමට හැකි බව ... පැමිණිල්ලේ පැසා 01, පැසා 02, පැසා 03, යන සියලුම සාක්ෂිකරුවන්ගේ සාක්ෂි මගින් චූදිතගේ අනන්‍යතාවය සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කර ඇත."**

Having carefully perused the impugned judgment of the trial Court, it is my considered view that it had not imposed any burden on the Appellant on his *alibi* and rightly applied the applicable burden of proof beyond reasonable doubt on the prosecution to prove its case before arriving at the verdict of guilty.

It is a fundamental tenet in Criminal Law, that the prosecution must prove its case beyond reasonable doubt while the accused remain silent as there is absolutely no burden on him to establish anything, unless he relies on a general exception. The fact that an accused opted to cross examine the prosecution witnesses, made suggestions to them or even opted to offer evidence does not ordinarily mean that he is obliged to do any of these. The purpose of cross examination of prosecution witnesses by an accused is to provide material for the Court to properly evaluate credibility and reliability of the evidence presented by that witness and not an attempt to "raise" a reasonable doubt in the prosecution case. Upon the material elicited from prosecution witnesses through cross examination by an accused, a Court may or may not entertain a reasonable doubt in the prosecution's case.

Cross examination also is a tool for an accused to elicit from a prosecution witness that there could have been another version to the narrative, as spoken to by that witness. Having suggested a different version to the one presented by the prosecution; an accused may opt to give evidence in support of the positions he suggested. If he failed to offer any evidence in support of the suggestions put to the prosecution, those suggestions would lose its value both in its consistency and content.

Thus, the decision to enter a conviction against the Appellant by the Magistrate's Court as well as the decision to affirm that conviction by the Provincial High Court were made, based on the consideration of the totality of the available evidence. Both Courts found the prosecution evidence to be credible and reliable and opted to reject the Appellant's version of events.

The use of the terms “ප්‍රබල සැකයක්” and “ සැකයක් මතු කිරීමට සමත් වී නොමැත” by the trial Court should be considered in the light of the context in which they were used. Here the trial Court commenting on the insufficiency of the evidence presented before that Court by the Appellant to arise a reasonable doubt in the prosecution version. Similarly, the Provincial High Court too, having identified the issue to be determined in the appeal as whether there was sufficient material presented before Court in relation to plea of *alibi,* went on to state that (“එකී නොහැකියාව හෝ අන්‍ය ස්ථානිකභාවය පිළිබඳව අධිකරණය සෑහීමකට පත්වන අයුරින් චූදිත වෙනුවෙන් කරුණු ඉදිරිපත් වී තිබේද යන්න සලකා බැලිය යුතුවේ.”)

Learned Deputy Solicitor General, during her submissions referred to the judgment of this Court in ***Asela De Silva & Others v Attorney General*** (SC Appeal No. 14 of 2011 – decided on 17.01.2014). In that appeal, the High Court, commenting over the failure of the appellants to go to the Police and state that they were elsewhere, used the words (“ඔවුන්ගේ නිර්දෝෂී භාවය ඔප්පු කරන්නට”).

It was contended on behalf of the appellants in that appeal, these words clearly indicative of a serious misdirection on the part of the High Court over the question of burden of proof of an *alibi*. Rejecting this contention, *Marsoof J* stated that “ *[I]t is clear from a fuller reading of the judgment of the High Court that the learned High Court Judge was conscious of the fact that the burden of proof was on the prosecution to prove its case beyond reasonable doubt and that in particular the Judge was mindful of the principles of law applicable to the proof of alibi. It is trite law that in a case where an alibi has been pleaded, the Court has to arrive at its finding on a consideration of all*

evidence led at the trial and on a full assessment of all that evidence" and proceeded to dismiss their appeal .

However, in the instant appeal, in relation to the Appellant's evidence, no similar words that are indicative of any imposition of a burden of proof were used by either of the two Courts. Those references referred to earlier on in this judgment were made only when commenting on the nature of evidence that had been adduced by the Appellant on his plea of *alibi*. It is preferable if the Courts used the words " සාධාරණ සැකයක් මතු නොවීය", instead of using "සැකයක් මතු කිරීමට" or "මතු නොකළේය" leaving room for similar challenges. However, when considered in the proper context in which they were used by the Courts below, it is evident that these references were made only to signify the fact that no reasonable doubt had arisen in the prosecution case and not to justify an attempt to impose any burden of proof on the Appellant.

In view of the reasoning contained in the preceding paragraphs, I proceed to answer the question of law on which the instant appeal was argued, namely; did the learned High Court Judge of *Colombo* and the learned Additional Magistrate of *Colombo* fail to properly consider the defence of *alibi* presented by the Appellant? in the negative.

Accordingly, the Judgments of the Magistrate's Court as well as of the Provincial High Court are affirmed along with the enhanced sentence imposed by the appellate Court on 13.03.2019. The order made by this Court on 06.05.2019, in enlarging the Appellant on bail pending appeal is hereby vacated.

The appeal of the Appellant is dismissed.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PC.J.

I agree.

JUDGE OF THE SUPREME COURT

S.THURAIRAJA, PC.J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an appeal under and in terms of Section 5 (c) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No.54 of 2006.

SC / APPEAL / 83 / 2013
SC / HCCA / LA / 113 / 2013
High Court (Civil Appeal)
SP / HCCA / RAT / 81 / 2010 [F]
DC Ratnapura 19229/Possessory

P. R. Michael Gunaratne,

67, Hospital Road,

Ratnapura

(deceased)

PLAINTIFF

1(a) **Omanthage Malkanthi Fernando,**

22/28, Hospital Road

Ratnapura.

1(b) **Pathberiya Ranasinghege Kasun Irosha Ranasinghe,**

1(c) **Pathberiya Ranasinghege Kavidu Ashan Ranasinghe,**

SUBSTITUTED PLAINTIFFS

Vs.

Delkadura Danapala Mudiyanselage Sarathchandra Bandara,

17, Hospital Road

Ratnapura.

DEFENDANT

AND

1(a) Omanthage Malkanthi Fernando,

22/28, Hospital Road

Ratnapura.

1(b) Pathberiya Ranasinghege Kasun Irosha Ranasinghe,

1(c) Pathberiya Ranasinghege Kavidu Ashan Ranasinghe,

SUBSTITUTED PLAINTIFFS – APPELLANT

Vs.

Delkadura Danapala Mudiyanselage

Sarathchandra Bandara,

17, Hospital Road

Ratnapura.

DEFENDANT – RESPONDENT

AND NOW

Delkadura Danapala Mudiyanselage

Sarathchandra Bandara,

17, Hospital Road

Ratnapura.

DEFENDANT – RESPONDENT -

APPELLANT

Vs.

1(a) Omanthage Malkanthi Fernando,

22/28, Hospital Road

Ratnapura.

1(b) Pathberiya Ranasinghege Kasun

Irosha Ranasinghe,

1(c) Pathberiya Ranasinghege Kavidu Ashan Ranasinghe,

SUBSTITUTED PLAINTIFFS – APPELLANTS – RESPONDENTS

BEFORE	**:**	Priyantha Jayawardena PC. J, A.H.M.D. Nawaz, J & Kumudini Wickremasinghe, J
COUNSEL	**:**	Chathura Galhena with Dhareni Weerasinghe for the Defendant – Respondent – Appellant. Anuruddha Dharmaratne with Indika Jayaweera for the Substituted Plaintiff – Appellant – Respondents.
ARGUED ON	**:**	17/05/2022
DECIDED ON	**:**	29/02/2024

A. H. M. D. Nawaz, J.

1. The quintessential issue that arises in this case is whether a possessory action would afford a remedy when a Plaintiff was only disturbed but not ousted from the land in his occupation. When this matter came up for argument, both Counsel proceeded to condense the pith and substance of their rival contentions in the following question of law.

   Did the Civil Appellate High Court err in law by holding that a possessory action can be filed in law if the Plaintiff is not physically dispossessed and/or ousted from the corpus?

2. The judgements of the District Court of Ratnapura and the Civil Appellate High Court of Ratnapura which are in contra distinction to each other have both reached different conclusions on identical facts that were established in the case.

3. It becomes important to ascertain the proved facts in this case for the purpose of answering the question of law that has been formulated as above. The original Plaintiff who has since been substituted by the substituted Plaintiff – Appellant – Respondents (the substituted Plaintiffs) instituted this action seeking a declaration that the Defendant – Respondent – Appellant (the Defendant) disturbed their peaceful possession of improvements that they had made to the land as depicted and described in two survey plans given in the schedule to the amended plaint. The substituted Plaintiffs also prayed for ejectment of the Defendant and those who were holding under him from the said portion of land described in the schedule to the amended plaint. As the original Plaintiff had passed away during the pendency of this

action in the District Court of Ratnapura, the 1 (a) to 1 (c) substituted Plaintiffs stepped into his shoes and prosecuted the said action through their amended plaint dated 27.06.2007. The original answer of the Defendant did not even contain a prayer but it is an amended answer filed seven months afterwards that contained a prayer for a dismissal of the plaint. It appears that even this amended answer was rejected by Court. However, it bears repeating that the Defendant failed to describe in his abortive pleadings by way of a schedule, the land he allegedly possessed.

4. The substituted Plaintiffs took out a commission to survey the corpus in dispute and the parties agreed to abide by the survey plan prepared by a commissioned surveyor called Prasanna Rodrigo bearing no.2007/61 and dated 5 June 2007. At the trial it was only the substituted 1 (a) Plaintiff namely the widow of the original Plaintiff and the commissioned surveyor who gave evidence to buttress the case of the Plaintiffs and it has to be noted that the Defendant did not elect to give evidence or call evidence or mark any documents.

5. After trial the learned District Judge of Ratnapura dismissed the action of the substituted Plaintiffs. On appeal to the Civil Appellate High Court the High Court Judges allowed the appeal of the Plaintiffs and set aside the judgment of the District Court holding in favor of the substituted Plaintiffs in the end. It is against the judgment of the Civil Appellate High Court dated 13.02.2013 that the Defendant – Respondent – Appellant has preferred this appeal to this Court.

6. As the above summary of facts and chronology indicates, the action filed by the substituted Plaintiff – Respondents displays the elements of a possessory

action and the evidence given by the 1 (a) substituted Plaintiff namely Malkanthi Fernando shows that the Defendant had disturbed the possession of the Plaintiffs by obstructing the further improvement of the land undertaken by them but the fact remains that the Plaintiffs were not physically dispossessed or ousted. The evidence of Malkanthi Fernando [1 (a) substituted Plaintiff] is quite unequivocally unambiguous that the original Plaintiff and the substituted Plaintiffs were obstructed in their peaceful enjoyment of possession of the buildings and improvements in their control and custody but there is irrefragable evidence that there was no ouster of the Plaintiffs from the land they occupied. Confronted with these established facts, the learned District Judge of Ratnapura by his judgment dated 24.06.2010 dismissed the plaint of the Plaintiffs solely on the ground that the Plaintiffs had not proved the requirement of dispossession – an ingredient that the learned District Judge classified as an indispensable component of **Section 4 of the Prescription Ordinance.**

7. When the substituted Plaintiffs took the matter on appeal to the Civil Appellate High Court of Ratnapura, the learned High Court Judges set aside the judgement of the court *a quo* and declared that the proved facts in the case do support the view that the obstruction of the Plaintiffs by the Defendant in their peaceful possession and enjoyment of the improvements and further development thereof would come within the statutory requirement of "dispossession".

8. Mr. Chathura Galhena the learned Counsel for the Defendant – Respondent – Appellant strenuously argued that Section 4 of the Prescription Ordinance entails the proof of dispossession and restoration of possession upon proof of such dispossession and thus in such a situation the Plaintiffs in this case

could not maintain an action for a possessory remedy because they were not physically dispossessed. It was the argument of the learned Counsel that the use of the words ''dispossession'' and "restoration of possession" in Section 4 of the Prescription Ordinance is indicative of the fact that the Plaintiffs in this case must prove their ouster by the Defendant and such an element of proof is absent from the facts and circumstances of this case.

9. Admittedly there is ample evidence upon the pleadings and testimony offered in the case that the Defendant did not physically defenestrate the Plaintiffs from the land in their occupation. There was *though* an illegal entry with the view to obstructing the Plaintiffs and preventing them from further constructing the improvements that they had already been making from time to time and according to the argument of the learned Counsel for the Defendant, these established facts would not lend themselves to a finding of dispossession. It was the contention of the learned Counsel for the Defendant that the word dispossession in Section 4 required a literal interpretation and thus only an overt act of ouster would afford the foundation for a possessory remedy.

10. On the other hand, Mr. Anuruddha Dharmaratne the learned Counsel for the substituted Plaintiff – Appellant – Respondents argued that even disturbance or obstruction to possession would in appropriate circumstances amount to dispossession and this has been the *cursus curiae* in cases such as ***Perera v. Wijesuriya*** **(1957) 59 NLR 529**.

11. I must observe at the outset that the curial interpretation that has been placed on Section 4 of the Prescription Ordinance has not been exclusively confined to the literal words of the statutory provision. The fact that Roman-

Dutch law principles have been imported into the law of Sri Lanka pertaining to possessory remedies is traceable to the very words of Section 4 itself. It behoves us in such circumstances to recall that development vis-à-vis Section 4 of the Prescription Ordinance.

Analysis of the statutory provision introducing possessory remedies into the law of Sri Lanka.

Section 4 of the Prescription Ordinance

12. The substantive law governing the availability of possessory relief in respect of immovable property is embodied in Section 4 of the Prescription Ordinance No.22 of 1871. According to the Section;

> *It shall be lawful for any person who shall have been dispossessed of any immovable property otherwise than by process of law, to institute proceedings against the person dispossessing him at any time within one year of such dispossession. And on proof of such dispossession within one year before action brought, the Plaintiff in such action shall be entitled to a decree against the Defendant, for the restoration of such possession without proof of title.*
>
> *Provided that nothing contained shall be held to affect to the other requirements of the law, as respects possessory cases.*

13. Upon a reading of the above provision it becomes clear that the principles regulating the grant of a possessory remedy are not confined to the very words of the statutory provision. The proviso to Section 4 makes it clear that the relevant Roman - Dutch common law principles will continue to be

applicable by virtue of the proviso. In order to arrive at the right decision on the interpretation contended for by both Counsel, a brief analysis of the common law possessory interdicts which form the fulcrum of Section 4 of the Prescription Ordinance is warranted.

Roman and Roman - Dutch law possessory interdicts

14. The three principal Roman law interdicts were the *uti possidetis, utrubi and unde vi.* The *uti possidetis* apply to immovable property when there was disturbance without actual deprivation of possession. The remedy was available to the actual possessor in order to ensure the retention of property except when possession had been acquired *vi clam vel precario* in which event the remedy was available to the other.

15. Similarly, the interdict *utrubi* applied when there was disturbance of possession of movable property. Acquisition of possession *nec vi nec clamnec precario* was a requirement of this remedy and the procedure was the same as that for the interdict *uti possidetis*.

16. The *unde vi* was the only interdict available for the recovery of possession when dispossession was effected by the use of force. It applied not only to land but also be *"quaeque ibi habuit".*

17. Analogous remedies were available to a possessor in the Roman - Dutch law. The *mandament van maintenue* resembles the interdict *uti possidetis*, and the *mandament van complainte* and the *mandament van spolie* were similar to the interdict *unde vi* of the Roman law.

18. Disturbance of possession was protected by the *mandament van maintenue.* The applicant for such a relief had to give a concise account of his possession and of the disturbance caused by the other party. Proof of positive disturbance was not essential as the remedy was granted even in the case of apprehended disturbance. The *mandament van complainte* applied to both disturbance and dispossession of property. The applicant had to prove that he possessed the property:

    a) *ut dominus* ;
    b) quietly and peaceably ;
    c) for a year and a day ; and
    d) that the ouster or disturbance took place within the year in which the action was instituted.

19. As the above indicates, the proceeding to obtain possession is termed a *mandament, or* writ of *immission (mandament van immissie),* which is scarcely ever used except in the case when one co-heir is ousted of his possession by another.

20. The instant action filed by the Plaintiffs to retain quiet possession would come within the Roman - Dutch law remedy of a *mandament van maintenue.* To found this writ, a possession obtained neither secretly, nor by force, nor on condition of quitting on first notice, is necessary on the part of the applicant.

21. Thus, a common law interdict to protect possession from disturbance has always been available and upon an examination of both the substantive provision of Section 4 and its proviso, it is manifest that the ambit of Section 4 of the Prescription Ordinance is sufficiently wide to include within its

scope the different categories of possessors and varying situations dealt with in the common law. It has been customary for our Courts to refer continually and to apply the Roman - Dutch law requirements via the proviso. It is in these circumstances that Basnayake, CJ in ***Perera v Wijesuriya*** (*supra*) clearly stated that the word "dispossession" in Section 4 could also be treated as embracing disturbance of possession as well - see ***Rowell Appuhamy v. Moises Appu*** *(1899) 4 NLR 225;* ***Contra Pattirigey Carlina Hamy v. Mugegodagey Charles De Silva*** *(1883) 5 S.C.C 140.*

22. It is interesting to note that the tenor of the long line of judgements in Sri Lanka is in favour of an extended scope of applicability for this provisional remedy. This would suffice to dispose of the argument of the Counsel for the Defendant that the requirement of dispossession had not been proved because there had been no physical eviction from the land. In order to succeed in a possessory action, there is no such requirement to establish deprivation of possession at all times. It is sufficient if disturbance of possession is proved.

23. In ***Edirisuriya v Edirisuriya*** (1975) 78 N.L.R.388 the Counsel for the Defendant had made the same argument as his counterpart in this case - namely the requirement of dispossession had not been proved because there had been no physical eviction from the land. Justice Vythialingam, however, rightly pointed out that the need to establish deprivation of possession would be satisfied if the possessor was deprived from exercising his right of possession. This interpretation of the term dispossession may be traced to *Perera v. Wijesuriya (supra)* which case was cited with approval by Vythialimgam J.

24. I must say that dispossession may be by force or by not allowing the possessor to use at his discretion what he possesses whether it is done by sowing, or ploughing or by building or repairing something or by doing anything at all by which they do not leave the free possession of the person who was dispossessed.

25. As Vythialingam J. held in ***Edirisuriya v Edirisuriya*** *(supra)* (with Samerawickrame A.C.J. and Walpita J. agreeing)

> *"The essence of the possessory action lies in unlawful dispossession committed against the will of the plaintiff and neither force or fraud is necessary. Dispossession may be by force or by not allowing the possessor to use at his discretion what he possesses."*

26. Moreover, dicta from cases like ***Changarapillai v. Chelliah*** (1902) 5 N.L.R. 270 and ***Sameem v. Dep*** (1954) 55 N.L.R 523 which stressed the policy considerations underlying this remedy, are also worth taking cognizance of.

27. Thus, the Courts have inclined towards a wider applicability of this remedy by adopting a liberal interpretation of the word "dispossession" and the overarching consideration appears to be the need to prevent a breach of the peace by the use of self-help. Consistently, this provisional remedy in terms of section 4 of the Prescription Ordinance should be assured of a wide scope of applicability. Moreover, by its very nature, this is a tentative remedy which does not in any way prejudice the Defendant's right to bring a *rei vindicatio* on proof of title.

28. As I have demonstrated, the difference between the judgments of the District Court and the Civil Appellate High Court has revolved around the word "dispossession" and the error of the court *a quo* has been the failure to equiparate dispossession on the one hand, and disturbance of possession on the other hand, and treating them separately. For purposes of Section 4 of the Prescription Ordinance, both these acts would fall within the term dispossession in appropriate circumstances.

29. I answer the question of law in the negative and proceed to set aside the judgment of the District Court dated 24.06.2010 and affirm the judgment of the Civil Appellate High Court dated 13.02.2013. The appeal of the Defendant – Respondent – Appellant is thus dismissed.

Judge of the Supreme Court

Priyantha Jayawardena, PC. J

I agree, Judge of the Supreme Court

K. 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 Appeal under Section 31DD of the Industrial Disputes Act (as amended)

P. R. S. E. Corea,

No. 343/14, Ranwala,

Kegalle.

Applicant

S.C. Appeal No. 91/2017

SC/HC/LA/77/2016

HCALT No. 672/2013

L.T. Case No. 21/Add/483/2005

Vs.

Sri Lankan Airlines Limited,

Level 19-22, East Tower, World Trade Center,

Echelon Square, Colombo 1.

Respondent

AND BETWEEN

Sri Lankan Airlines Limited,

Level 19-22, East Tower, World Trade Center,

Echelon Square, Colombo 1.

Respondent-Appellant

Vs.

P. R. S. E. Corea,

No. 343/14, Ranwala,

Kegalle.

Applicant-Respondent

AND NOW BETWEEN

Sri Lankan Airlines Limited,

Level 19-22, East Tower, World Trade Center,

Echelon Square, Colombo 1.

(also of Bandaranaike International Airport, Katunayake)

Respondent-Appellant-Appellant

Vs.

P. R. S. E. Corea,

No. 343/14, Ranwala,

Kegalle.

Applicant-Respondent-Respondent

Before: Hon. P. Padman Surasena, J.

Hon. Janak De Silva, J.

Hon. Mahinda Samayawardhena, J.

Counsel:

Manoli Jinadasa for the Respondent-Appellant-Appellant

T.I Sapukotanage for the Applicant-Respondent-Respondent

Written Submissions:

04.08.2017 by the Applicant-Respondent-Respondent

Argued on: 05.05.2022

Decided on: 02.02.2024

Janak De Silva, J.

The Applicant-Respondent-Respondent ("Respondent") was employed as a Ground/cum Flight Steward with the Respondent-Appellant-Appellant ("Appellant") from 21.09.1992.

On 17.03.2005 whilst operating as the Senior Flight Steward in UL 505 CMB/LON flight, the Respondent was accused of sexually harassing a Flight Stewardess, who for the purposes of this appeal shall be referred to as "X". The factual circumstances constituting sexual harassment by the Respondent as alleged by X is set out in the charge sheet as follows:

i. The Respondent did hold X from her midriff and did kiss her on the cheek on two occasions.

ii. The Respondent did grab her by the buttocks in the galley as well as in the cabin on several occasions.

iii. The Respondent did stick his tongue out and lick his lips in an insinuating manner several times.

iv. By acting in the manner referred to in i, ii, and iii above, the Respondent did tarnish the image of the Appellant and caused the Appellant to lose confidence in the Respondent.

The Respondent was found guilty of the charges at a disciplinary inquiry conducted on 07.09.2005. His services were thereafter terminated.

The Respondent filed an application at the Labour Tribunal ("Tribunal") on 28.11.2005, seeking reinstatement with back wages.

The Chief Steward (Purser) of the flight, In-Flight Services Delivery Manager and Production Development Manager of the Appellant testified on behalf of the Appellant. The Respondent testified on his behalf and summoned another Cabin Manager to testify.

After the inquiry, the Tribunal held that the termination of services of the Respondent was not just and equitable. The Tribunal ordered reinstatement without back wages subject to one year of probation on the premise that being without work for a period of 8 years, is sufficient punishment as there had been other employees who had received lesser punishment for similar misconduct. The Tribunal order is dated 22.10.2013.

The Appellant appealed to the Provincial High Court of the Western Province holden in Negombo which was dismissed.

Leave to appeal has been granted on the following questions of law:

a. Whether the relief awarded to the applicant by the Provincial High Court and the Labour Tribunal is just and equitable and/or consistent with the principles of law, considering the facts and circumstances of the case?

b. Whether the Provincial High Court and the Labour tribunal erred in law in the analysis of the evidence and reached findings that are unsupported by evidence and/or perverse?

Let me address these two questions by reference to the following extract from the order of the Tribunal:

> "ඉල්ලුම්කරු විනිශ්චය සභාව ඉදිරියේ සාක්ෂි දෙමින්; තමන්ට එරෙහි යථෝක්ත චෝදනා ප්‍රතික්ෂේප කර තිබුනද [redacted] නැමැති සිය සහෝදර ගුවන් සේවිකාව තමන්ට එරෙහිව වාචිකව මෙන්ම ලිඛිතව (ආර්.1) මෙවන් බරපතළ අසත්‍ය චෝදනාවක් ඉදිරිපත් කිරීමට පැහැදිලි හේතුවක් විනිශ්චය සභාවට ඉදිරිපත් කිරීමට අපොහොසත් වී ඇත. ස්වකීය තරබාරුකම හා බර වැඩිවීම හේතු කොටගෙන වගඋත්තරකරු තමන් හා අමනාපයෙන් පසුවූ බැවින් යථෝක්ත ගුවන් සේවිකාව ලවා තමන්ට එරෙහිව මෙවැනි අසත්‍ය චොදනාවන්

ඉදිරිපත් කර ඇති බව ඉල්ලුම්කරු තවදුරටත් විනිශ්චය සභාව ඉදිරියේ සාක්ෂි දෙමින් ප්‍රකාශ කර තිබුනද; එකී හේතුව මත ඔහුට එරෙහිව මෙවන් බරපතළ චෝදනාවක් ඉදිරිපත් කර ඔහුගේ සේවය අවසන් කිරීමට වගඋත්තරකරු කටයුතු කළ බවට වූ ඉල්ලුම්කරුගේ සාක්ෂිය මෙම විනිශ්චය සභාවට එලෙසින්ම පිළිගත නොහැකි බවත්, ඉල්ලුම්කරු තවදුරටත් විනිශ්චය සභාව ඉදිරියේ සාක්ෂි දෙමින් ප්‍රකාශ කළ අන්දමින් ප්‍රශ්නගත ගුවන් ගමනේදී ඉල්ලුම්කරුගේ ඉහළ නිළධාරියා වශයෙන් සේවය කළ ප්‍රධාන ගුවන් සේවක ██████ යන අය ඉල්ලුම්කරුට එරෙහිව මෙම විනිශ්චය සභාව ඉදිරියේ අසත්‍ය සාක්ෂි ප්‍රකාශ කළ බවට පිළිගත හැකි කිසිදු සාක්ෂියක් ඉල්ලුම්කාර පක්ෂය විසින් විනිශ්චය සභාවට ඉදිරිපත් කර නොමැති බවත්, ඉල්ලුම්කරු ගුවන් ගමන් වලදී තමන් හා සේවයේ නියුක්ත ගුවන් සේවිකාවන් අපහසුතාවයට පත්වන අන්දමින් කටයුතු කර ඇති බවට වගඋත්තරකාර පක්ෂයේ සාක්ෂිවලින් තවදුරටත් අනාවරණය වන බවත් සහ ප්‍රශ්නගත දිනයේ ඉල්ලුම්කරු මත්පැන් සහ සිගරට් ගඳ වහනය වෙමින් සේවයේ නියුක්තව සිට ඇති බවට සාක්ෂි වලින් අනාවරණය වන බවත් මෙහිලා සැලකිල්ලට ගතයුතුව ඇත.

ඉහත මා විසින් දක්වා ඇති සියළුම කරුණු හා මෙම නඩුවේ දෙපාර්ශවය විසින් මෙහෙයවා ඇති සියලුම සාක්ෂි සැලකිල්ලට ගනිමින්; ඉල්ලුම්කරුට ඉදිරිපත් කර ඇති චෝදනා පත්‍රයෙහි දක්වා ඇති අන්දමේ බරපතළ හා පිළිකුල් සහගත ලිංගික හිරිහැරයක් ඉල්ලුම්කරු විසින් උක්ත ගුවන් සේවිකාවට සිදුකර ඇති බවට සත්‍යතා වඩිබර සාක්ෂි මත මෙම විනිශ්චය සභාව ඉදිරියේ ඔප්පු කිරීමට වගඋත්තරකාර පක්ශය අපොහොසත් වී ඇතද **<u>ඉල්ලුම්කරු යථෝක්ත දින වාචිකව හා සිය කායික හැසිරීමෙන් උක්ත ගුවන් සේවිකාවගේ දෛනික රාජකාරි වලට බධාවන අන්දමින් හා ඇයගේ පුද්ගලිකත්වයට හානිවන අන්දමින් හැසිරී ඇති බවත්</u>**, එදින මේ හා සමාන සිදුවීමක් ප්‍රශ්නගත ගුවන් ගමනේදී සිදුව ඇති බවට වාර්තා වී තිබුනද ඊට වගකිවයුතු සේවකයාට එරෙහිව කිසිදු විනයානුකූල ක්‍රියාමාර්ගයක් ගැනීමට අපොහොසත් වීමෙන් හා ඉල්ලුමකරුගේ සේවය අවසන් කිරීමෙන් අනතුරුව වාර්තා වී ඇති ඒ හා සමාන සිදුවීම් වලට වගකිවයුතු නිලධාරීන් හට ලසු විනයානුකූල ක්‍රියාමර්ග අනුගමනය කිරීමෙන් වග උත්තරකරු සිය සේවකයින් හට දෙයාකාරයකින් සළකා ඇති බවත්, ඉල්ලුම්කරුගේ මෙන්ම සාක්ෂි මගින් නම් අනාවරණය වී ඇති අනෙකුත් සේවකයින්ගේ හැසිරීමෙන්ද වගඋත්තරකාර ආයතනයේ කීර්තිනාමයට කැළලක් සිදුවී

තිබුනද ඉල්ලුම්කරුගේ සේවය පමණක් අවසන් කිරීමට වගඋත්තරකරු විසින් ගන්න ලද තීරණය යුක්ති සහගත හා සාධාරණ නොවන බවත් මා තීරණ කරමි.” (emphasis added)

The Tribunal holds that the Respondent has failed to explain why X had made a grave and false complaint against him. Indeed, it is inconceivable why X, against whom the Respondent made no allegations of malice or bad faith, would come forward to make such a grave complaint without any foundation. It is certainly not a path that a women will lightly take in our society without any basis due to the stigma it brings unless motivated by mala fides.

The Tribunal further holds that the Respondent has failed to tender any evidence to establish that the Purser of the flight had given false testimony against him. The Purser testified that another flight stewardess had told him of the incident and he immediately went and spoke to X to inquire about the incident. He found her in a state of distress overcome with sadness and unable to explain the incident in detail. It was a natural state of mind for a young flying stewardess who had to face such a situation after being in service for just about a year. The Purser further testified that the Respondent appeared to be intoxicated and that his breath smelled of cigarettes and alcohol. In terms of the company policy of the Appellant, a crew member cannot consume alcohol within ten hours of a scheduled flight. The Purser had made an entry of this incident in the Voyage Report which was marked in evidence.

However, the Tribunal concluded that the Appellant had failed to establish, on a balance of probability, the grave and disgusting sexual harassment charges against the Respondent. Nevertheless, the Tribunal has concluded that the Respondent has, by his physical and verbal actions, acted in a manner that disrupted the work of X and harmed her personality.

In this context, we must examine what is meant by sexual harassment. It is a criminal offence in terms of section 345 of the Penal Code which reads as follows:

> *"Whoever, by assault or use of criminal force, sexually harasses another person* ***or by the use of words or actions, causes sexual annoyance or harassment to such other person commits the offence of sexual harassment****…"* (emphasis added)

Explanation 1 therein states that unwelcome sexual advances by words or action used by a person in authority, to a working place or any other place, shall constitute the offence of sexual harassment.

Given that sexual harassment is a criminal offence, such conduct amounts to a serious misconduct at the workplace. I must hasten to add that sexual harassment can take place against both men and women.

In ***Vishaka v. State of Rajasthan and Ors.*** **[AIR 1997 Supreme Court 3011]**, The Supreme Court of India held that:

> *"Sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:*
>
> *a) physical contact and advances;*
>
> *b) a demand or request for sexual favours;*
>
> *c) sexually coloured remarks;*
>
> *d) showing pornography;*
>
> *e) any other unwelcome physical verbal or non-verbal conduct of sexual nature."*

Female sexuality includes issues pertaining to personality. Hence it is evident that the conclusions of the Tribunal support a finding of sexual harassment of X by the physical and verbal actions of the Respondent.

Nevertheless, the Tribunal concluded that the termination of his services was not just and equitable. It was so held as the Appellant had allegedly treated other employees who were similarly situated to the Respondent differently without terminating their services.

However, as the learned counsel for the Appellant submitted, the other instances relied on by the Respondent cannot be put on equal footing with the misdemeanor of the Appellant.

One such instance was where another flying stewardess, who is referred to as Y for the purposes of this judgment, who was on the same flight had complained of having been harassed by another flying steward. However, evidence was led to establish that although Y had also initially complained to the Purser, she had later refused to make any written complaint of the incident. She had indicated that she is capable of handling herself and does not wish to pursue with a complaint. The Appellant cannot be expected to take further steps in the absence of a complaint from the aggrieved party.

In this case, X made a written complaint that was marked as R1 at the inquiry without any objection. In fact, the Respondent identified it as having been signed by X. No doubt, X did not testify before the Tribunal. However, the Appellant explained the absence. X had by then resigned from service. The complaint R1 had the full details of the incident as narrated by X. Although the Appellant gave an undertaking sometime after R1 was marked, that X would be summoned as a witness, that cannot negate the evidentiary value of the contents of R1 which was marked without subject to proof. Moreover, R1 was shown to the Respondent during cross-examination and he admitted that it was given by X.

Another incident relied on by the Respondent is where another flying stewardess had complained that a Purser had visited her room on a stopover in Bangkok and propositioned her. The said Purser had apologized to the flying stewardess and had not been assigned duties for over six months and had only short flights for a year. This incident happened off duty and moreover, there was no written complaint made by the flying stewardess.

In ***General Manager, Ceylon Electricity Board & Another v. Gunapala*** **[(1991) 1 Sri.L.R. 304]** the applicant was proved to have consumed liquor in contravention of the circular while on duty. It was held that the fact that other employees who were found to have consumed liquor were not similarly-dismissed from service is not relevant in deciding whether the termination of the services of the Applicant was just and equitable.

Moreover, in ***Ceylon Transport Board v. Samastha Lanka Motor Sevaka Samithiya*** **(65 NLR 566)**, a workman employed by the Ceylon Transport Board was dismissed because he had broken a rule which provided that any employee who removed a vehicle belonging to the Board, either without authority, or without a driving licence, would be dismissed. It was held that the fact that, about a year later, the Board did not dismiss, but merely transferred and warned, another employee for a similar offence was not proof of discrimination against the workman in that case.

A similar approach has been taken by the Employment Appeals Tribunal of UK. In ***Kay v. Cheadle Royal Healthcare Ltd.*** **[Appeal No. UKEAT/0060/11/CEA, Decided on: 12.09.2011]** it was held:

> *"The Tribunal plainly thought that Ms. Thomas ought also to have been disciplined, and it was critical of part of the reasoning given by the Respondent for not doing so. But in the end, the true question was whether it was unfair to dismiss the Claimant, applying of course the test under section 98(4) of the 1996 Act. The Tribunal correctly asked itself this question and concluded that the inconsistent*

treatment was not such as to make the dismissal unfair. We see no error of law in this conclusion. Indeed on the basis of the findings in the letter of dismissal while the Respondent may be criticised for not disciplining Ms. Thomas it cannot in our view be criticized for dismissing the Claimant. The findings in that letter plainly merited dismissal."

The burden to be discharged by the Appellant then is to establish that the impugned misconduct justifies the termination of the Respondent. As the learned counsel for the Appellant correctly submitted, the question that the Tribunal should have asked is whether the termination of the Respondent is just and equitable for such misconduct. If the termination is just and equitable, it matters not that other employees have not been punished.

However, if termination may not be the only punishment that could have been meted out, then the fact that others who are similarly circumstanced have been given a different punishment is a relevant factor.

Let me now consider the gravity of sexual harassment. In so far as sexual harassment in general is concerned, I would like to quote with approval Gooneratne J. in ***Manohari Pelaketiya v. H.M. Gunasekera, Secretary, Ministry of Education and Others*** **[S.C. (F/R) 76/2012, S.C.M. 28.09.2016]** where he observed (at page 13):

"I observe that continuous abuse and sexual harassment over a period of time would cause physical and mental damage to any human being. It is not possible for a female to resist such abuses unless she is a strong personality who could react and retort to such abuses and harassment and make the abuser to shamelessly withdraw, being exposed to the public at large of his indecency. Continuous threats and abuses could also make a person unwell both physically and mentally. My views expressed on the aspect of abuses would be endorsed by any law abiding citizen, and it should be so."

I had occasion previously to pen down my views on sexual harassment at the workplace in ***Brandix Apparel Solutions Limited v. Fernando*** **[S.C. Appeal 60/2018, S.C.M. 05.05.2022]**, where I held that:

> *"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."*

It is important to observe that Article 11(1) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which Sri Lanka has signed and ratified without any reservation, requires States Parties to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on basis of equality of men and women, the same rights including the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

The CEDAW General Recommendation No. 19: Violence against Women, in its recommendation on Article 11, states that equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

Article 14(1)(g) of the Constitution recognizes that a citizen has the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise. The fundamental right to engage in a lawful occupation, profession, trade, business or enterprise is dependent on the creation of an environment free from sexual harassment.

In ***Manohari Pelaketiya v. H.M. Gunasekera, Secretary, Mininstry of Education and Others*** (supra.), Court was of the view (at page 16) that sexual harassment or work place stress and strain occasioned by oppressive and burdensome conduct under colour of executive office would be an infringement of the fundamental rights of the Petitioner in that case.

Article 4(d) of the Constitution requires the fundamental rights which are by the Constitution declared and recognized to be respected, secured and advanced by all the organs of government. The Appellant is a state-owned enterprise and hence bound by this positive obligation. Thus, it must adopt a zero-tolerance policy towards any form of sexual harassment. Where any employee is found guilty of such sexual harassment, even for the first time, the Appellant is justified in terminating his or her services. In my view, this applies to both the public and private sectors.

The conduct of the Respondent amounts to grave misconduct. It formed part of a revolting culture amongst some flying stewards at Sri Lanka Airlines. There had been many oral complaints of sexual harassment during the period 2004-2005. In addition to the complaints, around 100-200 flight stewardesses had resigned during this period. Later the management of Sri Lanka Airlines had taken necessary steps to constitute a committee to further investigate these complaints. There it was observed that a majority of the complaints were directed against the Respondent which consisted of about 80 complaints.

In fact, the witness, a Cabin Manager, summoned on behalf of the Respondent testified that a lot of complaints on sexual harassment had been received during his service period. He stated that a lot of complaints were received against the Respondent on sexual harassment [Appeal Brief page 691].

Moreover, the bad record of the Respondent was clearly manifest in the evidence. The Respondent had been warned repeatedly, punished and grounded on several occasions due to misconduct including neglect of duties, leave without notice and excessive absenteeism. His probationary period had been extended due to his poor performance, he had to re-sit all exams as he could not meet the standards when tested and on a second appraisal he was found wanting.

The Respondent also constantly took no pay leave, was warned for reporting late for flights and did not follow the rules and regulations of the Appellant. He was even transferred to the airport service department (grounded) due to misconduct.

For the foregoing reasons, I answer the two questions of law in the affirmative.

The learned President of the Tribunal erred in holding otherwise. So did the High Court in affirming the order of the Tribunal.

Accordingly, I set aside both the judgment of the High Court of Negombo dated 19.10.2016 and order of the Tribunal dated 22.10.2013.

I hold that the termination of the services of the Respondent is just and equitable.

Appeal allowed. Parties shall bear their costs.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Mahinda Samayawardhena, J.

I agree.

Judge of the Supreme Court

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

In the matter of 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.

SC Appeal No: 91/2020

SC/HCCA/LA No: 93/2019

WP/HCCA/MT No.01/2016/RA

D.C. Moratuwa Case No: 647/L

Muthuthantrige Rienzie alias Riyenze Jagath Cooray,
No. 10, Uyana Road,
Moratuwa.

Plaintiff

Vs.

Sellapperumage Anne Elizabeth Fernando, No. 78/1,
Koralawella North,
Moratuwa.

Defendant

Application under Section 328 of the Civil Procedure Code

1. Mahamendige Ranjan Mendis
2. Werahennedige Mary Claris Shyamalie both of No.550, 3rd Lane, Koralawella, Moratuwa

Petitioners

Vs.

Muthuthantrige Rienzie alias Riyenze Jagath Cooray,
No. 10, Uyana Road,
Moratuwa.

Plaintiff- Judgment Creditor Respondent

And Between

Muthuthantrige Rienzie alias Riyenze Jagath Cooray,
No. 10, Uyana Road,
Moratuwa.

Plaintiff- Judgment Creditor Respondent-Petitioner

Vs.

1.Sellapperumage Anne Elizabeth Fernando, No. 78/1,
Koralawella North,
Moratuwa.

Defendant- Respondent

1. Mahamendige Ranjan Mendis
2. Werahennedige Mary Claris Shyamalie both of No.550, 3rd Lane, Koralawella, Moratuwa

Petitioners-Respondents

And Now Between

Muthuthantrige Rienzie alias Riyenze Jagath Cooray,
No. 10, Uyana Road,
Moratuwa.

Plaintiff- Judgment Creditor Respondent-Petitioner-Appellant

Vs.

1.Sellapperumage Anne Elizabeth Fernando, No. 78/1,
Koralawella North,
Moratuwa.

Defendant-Respondent-Respondent

1. Mahamendige Ranjan Mendis
2. Werahennedige Mary Claris Shyamalie both of No.550, 3rd Lane, Koralawella, Moratuwa

Petitioners-Respondents-Respondents

BEFORE: **MURDU N.B.FERNANDO, PC, J.**
K.KUMUDINI WICKREMASINGHE, J.
MAHINDA SAMAYAWARDHENA, J.

COUNSEL: Rohan Sahabandu, PC with Sachini Senanayake For Plaintiff-Appellant.

Thilan Liyanage with Shehan De Vas Gunawardhena for the Petitioner- Respondent.

WRITTEN SUBMISSIONS: By the Plaintiff-Judgment Creditor Respondent-Petitioner-Appellant on 24th of September 2020 and 2nd of December 2021.

By the Petitioners- Respondents-Respondents on 1st of November 2021.

ARGUED ON: 08.11.2021.

DECIDED ON: 22.02.2024.

K. KUMUDINI WICKREMASINGHE, J.

This is an appeal to set aside the judgment of the Provincial High Court of the Western Province holden in Mount Lavinia dated 06.02.2019 which affirmed the order of the District Court of Moratuwa dated 08.03.2016.

The Plaintiff- Judgment Creditor Respondent- Petitioner -Appellant (hereinafter referred to as the "Appellant") instituted an action in the District Court of Moratuwa against the Defendant-Respondent-Respondent (hereinafter referred to as the "Defendant") based on an agreement to sell bearing No. 682 dated 15.11. 2007 with regard to the land and premises morefully described in the schedule to the Plaint. The Defendant was absent and unrepresented when the case came up in open court. The Appellant gave *ex-parte* evidence and the District Court delivered the Judgment dated 24.08.2009 in favour of the Appellant.

The decree was served on the Defendant and she did not take any steps to get the said *ex-parte* judgment and the decree vacated. The Appellant thereafter made an application for the execution of the decree. On 08.07.2010, the Fiscal Officer of the District Court of Moratuwa proceeded to the premises in suit and executed the writ of possession by handing over the peaceful and vacant possession of the premises to the Appellant. The Fiscal had reported to the Court by her report dated 08.07.2010 that the Petitioners-Respondents-Respondents (hereinafter referred to as the "Respondents") were in the occupation of the premises in suit and vacant possession had been handed over peacefully and voluntarily by them.

Thereafter, the Respondents made an application under Section 328 of the Civil Procedure Code to the District Court of Moratuwa seeking restoration of the Respondent's possession of a part of the premises in suit. After the conclusion of the inquiry, the Learned Additional Judge of the District Court of Moratuwa delivered the order dated 08.03.2016 in favour of the Respondents.

The Appellant made a Revision application before the Civil Appellate High Court of Mount Lavinia against the said order. The High Court dismissed the Revision application on the basis that the Appellant has failed to plead the existence of exceptional circumstances. In the Judgment of the High Court, it was held that the Respondents were in possession of the premises in suit on their own right and not under the leave and license of the Defendant. Thus, the Respondents were not a party to the District Court action bearing No. 647/L and the application under Section 328 of the Civil Procedure Code is made when a person who is not a party to an action is dispossessed in the execution of a decree.

The Appellant is before this Court challenging the said Judgment. This Court by Order dated 19.06.2020 granted Leave to Appeal on the questions of law stated in paragraph 34 (a) and (b) of the Petition dated 15.03.2019, as set out below,

(a) Did the Learned High Court Judges as well as the Additional District Court Judge err in law and fact in not considering that there are exceptional circumstances?

(b) Did the Learned High Court Judge as well as the Additional District Court Judge err in law and fact in not considering the documents V1 and V2 as admissible evidence in the correct perspective?

My analysis hereafter will be confined to examine the aforesaid question of law based on which leave was granted.

The first matter for consideration by this court is whether there are exceptional circumstances to file a revision application against the Order of the District Court dated 08.03.2016.

It is a trite law that the revisionary powers of the courts are exercised only if exceptional circumstances are shown by the party filing such an application.

In **Dharmaratne and another vs Palm Paradise Cabanas Ltd and others [2003] 3 SLR 24**, Amaratunga J. stated that,
"existence of exceptional circumstances is the process by which courts select the cases in respect of which the extraordinary method of rectification should be adopted. ***If such a selection process is not there, revisionary jurisdiction of this Court will become a gateway of every litigant to make a second appeal in the garb of a Revisionary Application*** *or to make an appeal in situations where the legislature has not given a right of appeal.*

The practice of court to insist in the existence of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which would not be lightly disturbed." [emphasis added]

In **Wijesinghe vs Tharmaratnam, Srikantha's LR (IV) at page 49**, the court held that,
"Revision is a discretionary remedy and will not be available unless the application discloses circumstances which shocks the conscience of court."

In the present case, the Respondents have argued that the Appellant failed to provide exceptional circumstances at the High Court and therefore, the application should be rejected *in limine.*

On the other hand, the counsel for the Appellant stated that the grounds of appeal relied upon by the Appellant in paragraph 14 of the revision application filed before the High Court dated 08.04.20016 constitute exceptional circumstances.

The Appellant has submitted following questions of law when pleading exceptional circumstances.

" (g) the said judgment is contrary to law and against the weight of evidence led at the said inquiry.

(h) the Learned Additional District Judge misdirected himself in holding that the petitioners were not holding a part of the premises in suit occupied by them under the defendant.

(i) the Learned Additional District Judge misdirected himself on the said deed of declaration and the said plan produced by the petitioners.

(j) the Learned Additional District Judge failed to properly evaluate the evidence adduced at the inquiry by me.

(k) the petitioners were in occupation of the said land under the defendant, and the Learned Additional District Judge erred grossly in arriving at the contrary.

(l) the Learned Additional District Judge erred and misdirected himself both on the law and facts of this case. .."

The above grounds set out in the revision application by the Appellant are merely grounds of appeal which are centered on the issues framed in the trial **and not exceptional circumstances**.

Section 329 of the Civil Procedure code sets out the following; "No appeal shall lie from any order made under section 326 or section 327 or section 328 against any party other than the judgment debtor. Any such order shall not bar the right of such party to institute an action to establish his right or title to such property."

In light of the abovementioned section the Appellant has no right of appeal against the order of the District Judge however, this does not prevent him

from invoking revisionary jurisdiction of the High Court. However, invoking such revisionary jurisdiction is subject to the Appellant proving the existence of exceptional circumstances.

It is an obvious fact that revisionary jurisdiction of this court is exercised if and when only exceptional circumstances are proved by the Appellant which is an extraordinary power vested in court. This power is vested in court in order to prevent miscarriage of justice being done to a person and also for due administration of justice **as discussed below**.

In **Rustom vs. Hapangama and Co., 1978-79 Sri LR 225**, Ismail J. stated that,
"the powers by way of revision conferred on the Appellate Court are very wide and can be exercised whether an appeal has been taken against an order of the original Court or not. However, such powers would be exercised only in exceptional circumstances where an appeal lay and as to what such exceptional circumstances are is dependant on the facts of each case."

In the case of **A. R. G. Fernando vs. W. S. C. Fernando 72 NLR 549** availability of revision where the appeal lies has been considered and it was held that;
"Where a right of appeal lies, an application in revision will not be entertained unless there are exceptional circumstances which require the intervention of the Court by way of revision."

In **Bank of Ceylon vs Kaleel and others [2004] 1 SLR 284**, it was stated that,
"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it; ***the order complained of is of such a nature which would have shocked the conscience of court****."[emphasis added]*

From the above case laws, it is evident that our courts have consistently held that the revisionary power of Courts is an extraordinary power. The Courts must exercise revisionary jurisdiction only if there are exceptional circumstances, when the law has expressly provided the aggrieved party a right of appeal.

Some examples for exceptional circumstances were given in **Attorney General vs. Podi Singho (1950) 51 NLR 381** where Dias J. held that the revisionary powers should be exercised only in circumstances such as:
(a) Miscarriage of justice;
(b) Where a strong case for interference by the Supreme Court is made out;
(c) Where the applicant was unaware of the order.

In **Caroline Nona and Others vs. Pedrick Singho and Others, (2005) 3 Sri L.R 176**, it was stated that,
"This Court possesses the power to set aside in revision an erroneous decision of the District Court which amounts to a miscarriage of justice in an appropriate case even though an appeal against such decision has been available to the petitioner and he has not resorted to that remedy."

The above case laws elucidates that the court can allow revision application even when the right of appeal has not been wielded when such decision amounts to a miscarriage of justice.

The argument of the Appellant is that the said order of the District Court under Section 328 of the Civil Procedure Code amounts to a miscarriage of justice, and therefore, the revision application filed should be allowed. In support of this argument, the counsel for the Appellant has referred to **Bengamuwa Dhammaloka Thero vs. Dr. Cyril Anton Balasuriya 2010 1 S.L.R 195** where Dr. Shirani A. Bandaranayake, J stated at 206 that,
"It is apparent that the decision of the District Court was not only erroneous but also amounts to a miscarriage of justice. In such circumstances, notwithstanding the provisions contained in Section 329 of the Civil Procedure

Code, the Court of Appeal is empowered to set right an erroneous decision of the District Court for the purpose of exercising due administration of justice and for such purpose could exercise its power of revision."

In the above case, the Respondent was displaced and his application in the District Court under Section 328 of the Civil Procedure Code was dismissed. The Respondent thereafter filed a Revision Application in the Court of Appeal against the District Court order instead of filing an appeal. The Court of Appeal allowed the application on the basis that the Respondent had been dispossessed consequent to an invalid decree. The Supreme Court in upholding the above position stated that the Respondent's revision application should be allowed as the dismissal of Respondent's application amounts to a miscarriage of justice.

Nevertheless, it is noteworthy that the facts and the circumstances in the above case differ from that of the case at hand as the basis of the former is an invalid District Court action whereas, the District Court action in the present case is a valid one.

However, in order to ascertain whether the order of the District Court in the present case amounts to a miscarriage of justice, it is pivotal to analyze Section 328 of the Civil Procedure Code which states as follows,

"Where any person other than the judgment-debtor or a person in occupation under him is disposed of any property in execution of a decree, he may, within fifteen days of such dispossession, apply to the court by petition in which the judgment-creditor shall be named respondent complaining of such dispossession….."

Accordingly, a person making a claim under section 328 must prove that,
i. he or she was not a party to the initial action,
ii. the possession of the subject matter on his own account, or on account of some person other than the judgment-debtor,

iii. he or she was dispossessed of the property in question in execution of a decree.

The first argument of the Appellant in this regard is that the Petitioner-Respondents- Respondents did not resist the Fiscal Officer who came to the said property on 08.07.2010 to execute the writ of possession granted by the District Court. Hence, the Respondents cannot institute an action under section 328 of the Civil Procedure Code as they were not 'dispossessed' of the property in execution of the decree but rather the vacant possession had been handed over peacefully and voluntarily by them.

In defining the term 'dispossession' in **Edirisuriya vs. Edirisuriya (1975) 45 NLR 288,** Vythialingam J. held that neither force or fraud is necessary in dispossession as it can be *"by force or by not allowing the possessor to use at his discretion what he possesses".*

In **Perera vs. Wijesuriya, (1957) 59 NLR 529, Basnayake, C.J** at page 532 stated that, *"Any act which deprives a person from exercising his rights of possession would be deprivation of his possession or an ouster of him."*

In the present case, the Fiscal Officer has admitted in the cross-examination that two lawyers arrived on behalf of the Respondents at the time of executing the writ even though such incident was not mentioned in her report. (page 246 to 248 of the brief) Thus, the Fiscal Officer admitted that the Defendant was not present at the subject matter of this case when executing the writ. (page 249 of the brief) This elucidates that the Respondents resisted and were dispossessed of the property even though no force was involved.

In the recent case of **Fawsan v Majeed Mohamed and Others (SC/APPEAL/135/2017 decided on 31.03.2023)** Justice Mahinda Samayawardhena held that, "*In terms of section 328, where any person other*

than the judgment debtor or a person in occupation under him is dispossessed of any property in execution of a decree, he may, within 15 days of such dispossession, apply to Court by way of a petition in which the judgment creditor shall be named as the respondent, complaining of such dispossession. The Court shall thereupon serve a copy of the petition on the respondent and require such respondent to file objections, if any, within 15 days of service. Upon objections being filed or after the lapse of the period in which objections were directed to be filed, the Court shall hold an inquiry. The present section is different from the previous one. Section 328 cannot be invoked by the judgment-debtor or a person under him. According to the literal interpretation of this section, if after the inquiry the Court is satisfied that the person dispossessed was in possession of the whole or part of the property on his own account or on account of some person other than the judgment-debtor, the petitioner shall be restored to possession. However, this section shall be given purposive interpretation. It may be recalled that under section 324(1), the fiscal can remove any person bound by the decree who refuses to vacate the property. Mere proof of possession on his own account or on account of some person other than the judgment-debtor cannot and should not, in my view, entitle such petitioner to be restored to possession. In addition, he shall prove that he was in possession in good faith and by virtue of any right or interest. This is not to say that he shall prove title to such property, which is not possible given the time frame for the conclusion of the inquiry. As I stated earlier, those are the requirements of a claimant who is or claims to be in possession under sections 325-327, and a claimant under section 328 need not or cannot be placed at a more advantageous position."

The aim of this court is to ensure that justice has been done to all parties concerned. The question of law that is before this court is the existence of exceptional circumstances where the court's revisionary powers are exercised. Therefore, based on the circumstances of the case, it can be distinguished from the above mentioned case as the questions of law for which leave has been granted revolves around the existence of exceptional

circumstances for invoking revisionary jurisdiction and not on whether the right of invoking revisionary jurisdiction existed.

As the second argument, the Appellant contends that the order of the District Court amounts to a miscarriage of justice which considered as exceptional circumstance by the Appellant as the Learned District Court judge has failed to recognize V1 and V2 and this is the second question of law for which leave was granted by this court. The Appellant contends that the Respondents were in possession of the land on leave and license of the Defendant and their possession was not independent. In order to support this position, the Appellant has produced the documents marked V1 and V2.

The document marked V1 is a letter signed by the 1st Respondent dated 08.10.2010 addressing the Learned District Court Judge. In this letter, the 1st Respondent has admitted that he has been in possession of the premises in the suit under the leave and license of the Defendant and he has vacated the premises with consent. The letter further states that the 1st Respondent intends to withdraw the petition and affidavit dated 22.07.2010 and he is going to revoke the proxy filed on his behalf in the District Court.

The document marked V2 is a complaint made to the Police dated 07.09.2010 by the 1st Respondent stating that he has been in possession of the premises in the suit under leave and license of the Defendant and he has given his consent to vacate the same.

When these documents were formally produced at the inquiry before the District Court, the 2nd Respondent who is the wife of the 1st Respondent admitted the signature of the 1st Respondent in the said two documents. However, the 2nd Respondent has rejected the position taken in the above two documents. In cross-examination, the 2nd Respondent stated that subsequent to the dispossession the 1st Respondent started wandering from place to place consuming alcohol excessively and the above two documents

have been signed by him under the influence of alcohol. (page 232 of the brief)

Further, it is noteworthy that the letter marked V1 had been forwarded to the court by the 1st Respondent himself without sending such through the Attorney-at-Law representing him in the District Court on the same matter. The 1st Respondent has never revoked the proxy filed on behalf of him. Hence, this elucidates that both Respondents are continued to be represented by the same Attorney-at-Law since the commencement of this action and the content of said documents does not represent the position of both Respondents.

Accordingly, the Respondents only have to prove that they were in the possession of the subject matter of their own right and not under the license of the Defendant. In order to prove the independent possession of the subject matter, the Petitioner-Respondents- Respondents have produced an Electricity Bill (X3), Water Bill (X4), and the Notice of Assessment (X7) sent by the Municipal Council of Moratuwa in the name of the 1st Petitioner-Respondent-Respondent.

Further, the Petitioners-Respondents- Respondents have presented a Deed of Declaration No. N137 (X1) dated 08.03.2007 executed by L.P. Weerakkodi Notary Public with regard to the disputed land. It is important to note that the above Deed of Declaration had been executed one year prior to the institution of the initial action in the District Court by the Appellant and the Petitioners-Respondents- Respondents were not made a party to this case. According to this deed, the father of the 1st Respondent had been in independent possession of the property in dispute for more than four decades. Hence, if the Appellant had done an initial investigation in the relevant land registry before entering into the agreement with the Defendant, this matter could have been avoided.

The Petitioners-Respondents-Respondents have also produced a certificate issued by the Grama Niladhari (X5) to the 2nd Petitioner-Respondent-Respondent dated 14.09.2000 as proof of residency. Furthermore, the Respondents have produced a reply letter sent by a lawyer on behalf of the 1st Respondent dated 31.05.2004 in answer to a Letter of Demand sent by the lawyer of the Defendant. In this letter (X6), the 1st Respondent has specifically stated that he does not admit the alleged entitlement of the Defendant to the premises in suit.

In addition to these documents, the 2nd Respondent has given evidence stating that she came to the property in the suit on 25.03.1981 after getting married to the 1st Respondent and she had been in uninterrupted possession of the same with the 1st Respondent until July 2010. (page 217 of the brief) The above facts have been verified by the oral evidence adduced by the Grama Sewaka of the relevant division. (pages 234 and 235 of the brief)

From the above oral and documentary evidence, it is clear that the Respondents have successfully proved the independent and bona fide possession of the property in question. Hence, I am of the opinion that the Respondents have fulfilled the requirements of an application under section 328 of the Civil Procedure Code and the order of the District Court does not constitute a miscarriage of justice.

The above analysis elucidates that the both questions of law in the present case are based on the existence of exceptional circumstances and the Appellant failed to plead 'exceptional' grounds which shock the conscience of the court. In the absence of exceptional grounds, my considered view is that revisionary jurisdiction will not lie in the present case.

In the case of **Ameen vs. Rasheed (1936) 38 NLR 288,** the revision application was dismissed for not having exceptional circumstances in an appealable order and it was held that,

*"It has been represented to us on the part of the petitioner that even if we find the order to be appealable, we still have discretion to act in revision. It has been said in this Court often enough that revision of an appealable order is an exceptional proceeding, and **in the petition no reason is given why this method of rectification has been sought rather than the ordinary method of appeal**." [emphasis added]*

In **Attorney General v Gunawardena [1996] 2 SLR 149**, it was held that,

*"Revision like an appeal is directed towards the correction of errors but it is supervisory in nature and its object is the due administration of justice and **not primarily or solely the relieving of grievances of a party**." [emphasis added]*

In the present case, the Appellant has not been successful in convincing the Court that the grounds he had urged have any exceptional nature which is sufficient to move the Court to exercise its discretionary revisionary power. Therefore, this Court has no reason to disagree with the conclusion of the Provincial High Court.

In these circumstances and for the foregoing reasons, the appeal is hereby dismissed without costs.

JUDGE OF THE SUPREME COURT

MURDU N. B. FERNANDO, 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

1. Bopage Martin
2. Indrani Bopage

Both of Kadaveediya,
Horawapathana
Plaintiffs

SC APPEAL NO: SC/APPEAL/92/2014
SC/HCCA/LA NO: SC/HCCA/LA/457/2013
HC NO: NCP/HCCA/ARP/968/2012
DC ANURADHAPURA NO: 19194/RE

Vs.

Abdul Fareed Mohamed Malik
(Deceased)

1. Abdul Fareed Mohamed Malikge Nawaz
2. Abdul Fareed Mohamed Malikge Riyaz
3. Abdul Fareed Mohamed Malikge Farees

All of New Lanka Stores,
Trincomalee Road,
Kadaveediya,
Horawapathana
Defendants

AND BETWEEN

Indrani Bopage,
Kadaveediya,
Horawapathana
Plaintiff-Appellant

Vs.

1. Abdul Fareed Mohamed Malikge Nawaz
2. Abdul Fareed Mohamed Malikge Riyaz
3. Abdul Fareed Mohamed Malikge Farees

All of New Lanka Stores,
Trincomalee Road, Kadaveediya,
Horawapathana
Defendant-Respondents

AND NOW (BY AND BETWEEN)

1. Abdul Fareed Mohamed Malikge Nawaz
2. Abdul Fareed Mohamed Malikge Riyaz
3. Abdul Fareed Mohamed Malikge Farees

All of New Lanka Stores,
Trincomalee Road, Kadavediya,
Horawpathana
Defendant-Respondent-Appellants

Vs.

Indrani Bopage,
Kadaveediya,
Horawpathana
Plaintiff-Appellant-Respondent

Before: Hon. E.A.G.R. Amarasekara, J.
Hon. Yasantha Kodagoda, P.C., J.
Hon. Mahinda Samayawardhena, J.

Counsel: Nuwan Bopage for the Defendant-Respondent-Appellants.
Hirosha Munasinghe for the Plaintiff-Appellant-Respondent.

Written Submissions:
By the Defendant-Respondent-Appellants on 14.08.2014
By the Plaintiff-Appellant-Respondent on 25.08.2016 and 20.12.2023

Argued on: 24.11.2023

Decided on: 12.02.2024

Samayawardhena, J.

The two plaintiffs, the father and the daughter respectively, filed this action more than 21 years ago by plaint dated 16.01.2003, seeking ejectment of the defendant from the premises known as "New Lanka Stores" described in the schedule to the plaint and damages on the basis that the defendant is the overholding tenant. The defendant filed answer seeking the dismissal of the plaintiffs' action and a declaration of title to the premises described in the schedule to the answer on "long possession". In other words, he was claiming title to the premises by prescription. However, he did not specify against whom he was seeking

prescriptive possession. He never denied in the answer that he is in possession of "New Lanka Stores". The plaintiffs filed a replication seeking the dismissal of the claim in reconvention. The plaintiffs also averred that the premises described in the answer is the same premises described in the schedule to the plaint. They further averred that after the institution of the action, the defendant removed the business name "New Lanka Stores" to another place in the Horawpathana town but continued to carry on a similar business in the premises in suit.

During the pendency of the case, the 1st plaintiff and the defendant died. The 1st plaintiff had transferred the premises to the 2nd plaintiff prior to the institution of the action by Deed marked P10. Hence the 2nd plaintiff (hereinafter "the plaintiff") proceeded with the case. The three children of the defendant (hereinafter "the defendant") were substituted in place of the deceased defendant.

The case for the plaintiff is that the plaintiff rented out the premises to the defendant on a monthly rent of Rs. 500. The defendant was informed by letter dated 11.08.2002 marked P1 that the rent would be increased to Rs. 6000 from 01.01.2003 and if he was unable to pay the said sum, the monthly tenancy would be terminated from that date. The defendant did not reply to this letter. He refused to pay even the old rent from September 2002. Thereafter, the plaintiff sent the letter dated 02.01.2003 marked P3 terminating the monthly tenancy and demanding the defendant to hand over the premises on 15.01.2003. The defendant neither replied to this letter nor handed over the premises. It is thereafter the action was filed in the District Court.

At the trial, on behalf of the plaintiff, nine witnesses (including the plaintiff) have given evidence and documents P1-P22 have been produced. The plaintiff's case had been formally closed on 21.02.2007. I must observe that most of those witnesses have been called as a matter

of course. Documents have been marked subject to proof for no reason. Witnesses have been called to prove documents which were not marked subject to proof.

On behalf of the defendant no witnesses have been called but two documents marked V1 and V2 have been produced. The defendant's case had been formally closed on 29.02.2012.

No evidence whatsoever had been led before the judge who pronounced the judgment. By judgment dated 10.08.2012 the plaintiff's case has been dismissed on the sole basis that the premises in suit has not been identified by the plaintiff. The defendant's cross-claim has also been dismissed on the basis that it has not been proved.

On appeal, the High Court of Civil Appeal set aside the judgment of the District Court and entered judgment for the plaintiff as prayed for in the plaint. This appeal by the defendant is against the judgment of the High Court.

This Court has granted leave to appeal mainly on two questions of law:

(a) Has the High Court of Civil Appeal failed to consider that the plaintiff has not identified the subject matter of the action?
(b) Has the High Court of Civil Appeal failed to consider that the plaintiff has not discharged the burden of proof in a civil action?

Let me now consider those two questions of law.

As the High Court has correctly pointed out, there was no reason for the District Judge to dismiss the plaintiff's action on the basis that the premises in suit has not been identified by the plaintiff when there was no such issue raised by the defendant at the trial. When the defendant described the premises in suit in his answer differently, the plaintiff in

the replication stated that it is the same premises. Thereafter, the defendant did not raise an issue on the identification of the premises.

I will reproduce below the English version of the defendant's issues and the answers given by the District Judge thereto to make this point clear:

> (10) Has the defendant been in possession of the premises described in the schedule to the answer for a long time?
> Not proved.
>
> (11) If the answer to that question is in the affirmative, is the defendant entitled to the relief as prayed for in paragraph (a) to the answer?
> In view of the above answer, does not arise.
>
> (12) Has a cause of action accrued to the plaintiff against the defendant?
> The cause of action against the defendant has not been proved.
>
> (13) Has the plaintiff filed this action maliciously?
> Not proved.
>
> (14) Has the case No. 19049/RE been filed by the plaintiff against the defendant in the same Court on the same cause of action?
> Not proved.
>
> (15) If so, can the plaintiff maintain this action?
> In view of the above answer, does not arise.
>
> (16) If one or several of the above issues are answered in favour of the defendant, is the defendant entitled to the reliefs prayed for in the prayer to the answer?
> The defendant is entitled to the relief for the dismissal of the plaintiff's action.

The District Judge did not answer the plaintiff's issues on the basis that the premises in suit have not been identified.

When the identification of the subject matter was not put in issue at the trial, the District Judge cannot find an easy way out to write the judgment stating that the subject matter has not been properly identified by way of an assessment number.

It is true that the plaintiff has not identified the premises in suit in the schedule to the plaint by an assessment number. But in almost all the correspondence, including the ones attached to the plaint, the premises have been identified as No. 45. This includes the letter of termination of tenancy. The plaintiff has marked several letters including P4, P5 and P6 sent by none other than the defendant's lawyer to the plaintiff with money orders as monthly rentals for premises No. 45.

P9 dated 14.02.1988 is a statement made by the defendant to the Horowpathana police station. This was not marked subject to proof although a police officer who typed it was called as a witness. Martin referred to therein is the plaintiff. It reads as follows:

> මම දැනට අවුරුදු 04 ක පමන සිට මෙම බෝපගේ මාටින් යන අයට අයිති හොරොව්පොතාන නගරයේ ඇති වරිපනම් අංක 45 දරණ කඩය කුලියට මසකට රු: 100/= ක් දෙන පොරොන්දුවට ගත්තා. නමුත් මෙම කඩය වෙනුවෙන් මීට වඩා වැඩි කුලී මුදලක් මට ගෙවීමට නොහැක. උසාවියේ නඩුවකින් පසුව අවශ්‍ය වේ නම් කුලිය වැඩි කරදීමට කැමතියි. මට කීමට ඇත්තේ මෙපමනයි.

This puts the matter beyond doubt that the defendant was the monthly tenant of the plaintiff at assessment No. 45 and there is no issue regarding the identification of the subject matter.

At the argument, learned counsel for the defendant drew the attention of the Court to the Fiscal's Report marked P17 to say that there is an issue

regarding identification of the premises. I cannot agree. This Fiscal's Report is in respect of another case No. 12581/L filed by the plaintiff against another person, namely Karunaratne. According to the Fiscal's Report, the possession of the entire land described in the schedule to the plaint in extent of 19.37 perches had been handed over to the plaintiff on 08.09.1999. Learned counsel for the defendant argues that, if the possession of the entire land was handed over to the plaintiff on 08.09.1999, the plaintiff's version that the defendant is in part of the land even now cannot be believed.

This matter has been explained by the plaintiff during the cross-examination and in answer to the Court's questioning. In answering the Court's questioning the plaintiff has stated that within 19.37 perches, there are five business premises in a row belonging to the plaintiff. Case No. 12581/L was in respect of No. 37. In the execution of the decree in case No. 12581/L, the defendant was not ejected from his premises (No. 45) because there was no issue with the defendant at that time – *vide* pages 14-16 of the District Court proceedings dated 09.11.2005.

I affirm the finding of the High Court of Civil Appeal that there was no issue in the District Court trial as to the identity of the subject matter.

Learned counsel for the defendant did not press the argument on the second question of law. The second question of law is on the burden of proof. The plaintiff did not file a *rei vindicatio* action. The plaintiff filed the action as the landlord against the defendant as the overholding monthly tenant. As I explained earlier, the monthly tenancy has unequivocally been admitted by the defendant. The termination of monthly tenancy was proved by P3 and P3(a). The plaintiff's action is based not on ownership but on the violation of the privity of contract. The plaintiff's main relief is the ejectment of the defendant, not the declaration of title to the premises. In cases of this nature, seeking a declaration of title is customary, yet it

is superfluous. Although the plaintiff produced the title deed, it was not necessary as the defendant tenant cannot question the plaintiff's ownership to the property by operation of the principle of estoppel embodied in section 116 of the Evidence Ordinance.

Section 116 of the Evidence Ordinance states:

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

In *Ruberu v. Wijesooriya* [1998] 1 Sri LR 58 at 60, Gunawardana J. held:

> *Whether it is a licensee or a lessee, the question of title is foreign to a suit in ejectment against either. The licensee (the defendant-respondent) obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of him, i.e. the plaintiff-appellant without whose permission, he (the defendant-respondent) would not have got it. The effect of the operation of section 116 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must, first, quit the land. The fact that the licensee or the lessee obtained possession from the plaintiff-appellant is perforce an admission of the fact that the title resides in the plaintiff. No question of title can possibly arise on the pleadings in this case, because, as the defendant-respondent has stated in his answer that he is a lessee under the plaintiff-appellant, he is estopped from denying the title of the plaintiff-appellant. It is an inflexible rule of law that no lessee or licensee will ever be permitted*

> *either to question the title of the person who gave him the lease or the licence or the permission to occupy or possess the land or to set up want of title in that person, i.e. of the person who gave the licence or the lease. That being so, it is superfluous, in this action, framed as it is on the basis that the defendant-respondent is a licensee, to seek a declaration of title.*

The difference between a *rei vindicatio* action based on ownership and an action for ejectment based on the breach of the contract was lucidly explained by Gratiaen J. in *Pathirana v. Jayasundara* (1955) 58 NLR 169 at 172-173:

> *In a rei vindicatio action proper the owner of immovable property is entitled, **on proof of his title**, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation. "The plaintiff's ownership of the thing is of the very essence of the action". Maasdorp's Institutes (7th Ed.) Vol. 2, 96.*
>
> *The scope of an action by a lessor against an overholding lessee for restoration and ejectment, however, is different. Privity of contract (whether it be by original agreement or by attornment) is the foundation of the right to relief and **issues as to title are irrelevant to the proceedings**. Indeed, a lessee who has entered into occupation is precluded from disputing his lessor's title until he has first restored the property in fulfilment of his contractual obligation. "The lessee (conductor) cannot plead the exceptio dominii, although he may be able easily to prove his own ownership, but he must by all means first surrender his possession and then litigate as to proprietorship…" Voet 19.2.32.*
>
> *Both these forms of action referred to are no doubt designed to secure the same primary relief, namely, the recovery of property. But*

> *the cause of action in one case is the violation of the plaintiff's rights of ownership, in the other it is the breach of the lessee's contractual obligation*.
>
> *A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner*.

The plaintiff proved his case as required by law. The defendant manifestly failed to prove his case or resist the plaintiff's claim successfully.

I answer the two questions of law on which leave to appeal was granted in the negative and affirm the judgment of the High Court of Civil Appeal. The appeal is accordingly dismissed.

The defendants are in unlawful possession since 15.01.2003. The premises in suit are business premises. In addition to the reliefs as prayed for in the prayer to the plaint, each substituted defendant shall pay Rs. 200,000 (Rs. 600,000 in total) as costs of this appeal to the plaintiff.

Judge of the Supreme Court

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

I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.

I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

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

Thuraiappah Nithyanandan
No. 12902/1, Nawala Road,
Narahenpita,
Colombo 5.

Plaintiff

SC Appeal No: 101/2009
SC/SPL/LA Application No. 47/2009
CA/LA Application No: 223/2003
District Court of Colombo
Case No. 27115/M

Vs.

Sherman Sons Limited.
No.23, Sri Sangaraja Mawatha,
Colombo 10.

Defendant

AND BETWEEN

Sherman Sons Limited.
No.23, Sri Sangaraja Mawatha,
Colombo 10.

Defendant-Appellant

Vs.

Thuraiappah Nithyanandan.
No. 12902/1, Nawala Road,
Narahenpita,
Colombo 5.

Plaintiff-Respondent

AND NOW BETWEEN

Sherman Sons (Private) Limited.
(formerly known as Sherman Sons Limited.)
No.23, Sri Sangaraja Mawatha,
Colombo 10.
Presently of No. 194F, Nawala Road,
Narahenpita,
Colombo 5.

Defendant-Appellant-Appellant

Vs

Thuraiappah Nithyanandan
No. 12902/1, Nawala Road,
Narahenpita,
Colombo 5.

Plaintiff-Respondent- Respondent

Before : Priyantha Jayawardena PC, J
Achala Wengappuli, J
Arjuna Obeyesekere, J

Counsel : Sanjeewa Jayawardena, PC with Ms. Lakmini Warusewitane, Gimhani Aththanayake and Punyajith Dunusinghe for the Defendant-Appellant-Appellant

Plaintiff-Respondent-Respondent was absent and unrepresented

Argued on : 18th of July, 2023

Decided on : 29th of February, 2024

Priyantha Jayawardena PC, J

This is an appeal filed against the judgment of the Court of Appeal dated 2nd of February, 2009 which affirmed the Order of the District Court of Colombo dated 11th of June, 2003, where it was held that the alleged cause of action pleaded in the District Court was not prescribed.

The plaint

The plaintiff-respondent-respondent (hereinafter referred to as the "respondent") filed a plaint in the District Court dated 27th of April, 2001. In the said plaint, he stated that on the 22nd of December, 1986, the defendant-appellant-appellant (hereinafter referred to as the "appellant-company"), made a false complaint to the Fraud Investigation Bureau of the Police alleging that the respondent attempted to fraudulently obtain a sum of Rs. 950/- from the said appellant-company through a letter dated 17th of December, 1986 by fraudulently and falsely entering a trade advertisement of the appellant-company in a diary for the year 1987.

The Police stated that the respondent attempted to cheat the appellant-company of Rs. 950/-. It was alleged that this was done by producing the forged letter dated 17th of December, 1986, signed by the manager of the appellant-company stating that the said manager had approved the publication of an advertisement by the appellant company.

Subsequently, based on said complaint, the respondent was arrested on the 22nd of December, 1986 by the Police and was produced in the Magistrate's Court of Maligakanda. Thereafter, the learned Magistrate remanded him. Therefore, the Police instituted proceedings in the Magistrate's Court for the offence of attempting to cheat the appellant-company of a sum of Rs. 950/-.

The respondent had pleaded not guilty to the said charge, and the case proceeded to trial. However, at the end of the trial the learned Magistrate, by judgment dated 7th July, 1999 acquitted the respondent of the said charge. Further, the appellant-company had not appealed against the said judgment.

At the trial, the respondent stated that he never claimed any money in respect of the said advertisement published by the appellant-company. He further stated that the letter under reference was neither written by him nor did it contain his signature.

Moreover, the respondent stated that, though the appellant-company was well aware that he never cheated, charges were pursued against him, without a valid reason. Further, the respondent stated that the appellant-company maliciously set the law in motion against him without a reasonable cause and initiated the said action bearing No.72587 in the Magistrate's Court against him.

Furthermore, he stated that he was arrested and remanded, and as a result, it adversely affected his professional work. Further, he suffered loss and damage to his profession, personality, character, and reputation, and it caused him mental and physical pain. Accordingly, the respondent stated that he suffered loss and damage valued at Rs.50, 000,000/-.

Further, the respondent stated that he sent a letter of demand to the appellant-company, demanding a sum of Rs.50,000,000/- as damages. However, the appellant company neglected and/or failed to pay the said sum of money. Hence, a cause of action has accrued to him to sue the appellant-company to recover damages valued at Rs.50, 000,000/- with legal interest. In the circumstances, the respondent prayed, *inter alia*, for the recovery of Rs.50,000,000/- with legal interest from the 22nd of December, 1986.

Answer filed in the District Court

The appellant-company filed its answer on the 22nd of January, 2002 denying the allegations stated in the plaint. Further, it was stated that the respondent's action is prescribed in terms of section 9 of the Prescription Ordinance, and the plaint should be rejected in limine, in terms of section 46 (2) (i) of the Civil Procedure Code.

The said section 9 of the Prescription Ordinance reads as follows;

> *"No action shall be maintainable for any loss, injury, or damage, unless the same shall be commenced within two years from the time when the cause of action, shall have arisen."*

The answer filed by the appellant-company further stated that the appellant-company was unaware of the allegation stated in the plaint and therefore denied the said allegations. Further, the appellant-company stated that it was unaware that the respondent was an Attorney-at-law and the fact that he was practicing as an Attorney-at-Law.

Furthermore, the appellant-company denied that on the 22nd of December, 1986, it made a false complaint to the Police alleging that the respondent attempted to fraudulently obtain a sum of Rs.950/- from the said appellant-company by sending the letter dated 17th December, 1986. Moreover, the appellant-company stated that it was unaware that, on the basis of a complaint made by it, the respondent was taken into custody by the Police on 22nd of December, 1986.

The appellant-company further stated that the Police investigated the complaint made by the appellant-company against the respondent because the Police officers were of the opinion that there was a prima facie case against the respondent. Accordingly, the appellant-company denied that it falsely initiated the criminal proceedings against the respondent. However, the appellant-company admitted that the respondent was acquitted after the trial of the said case. Further, the appellant-company admitted that it did not appeal against the said judgment. In the circumstances, the appellant-company pleaded, *inter alia*, for the plaint to be rejected and to dismiss the respondent's action.

Subsequently, the appellant-company had moved the court to answer the selected issues No. 9 and 10 as questions of law in terms of section 147 of the Civil Procedure Code which states;

> *"When issues both of law and of fact arise in the same action, and the court is of the opinion that the case may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."*

Order of the District Court

The District Court delivered its Order dated 11th of June, 2003 in respect of the aforementioned issues No. 9 and 10 and held that it is not clear whether the cause of action is based on malicious prosecution or setting the law in motion. The learned District Judge in his judgement held as follows;

> *"මෙම අධිකරණයට පෙනී යනුයේ, පැමිණිල්ල පවරා ඇත්තේ ද්වේශ සහගතව නඩු පැවරීමට පෙළඹවීම් පාදක කර ගෙන බවයි. එලෙස එකී නඩුව මෙහෙයවීමට පෙළඹවීම ද්වේශ සහගත යැයි කියමින් නඩු*

පැවරිය හැක්කේ එකී නඩුවේ තීන්දුව දුන්නායින් පසුව ය. එකී නඩුවේ තීන්දුව දී ඇත්තේ, එක්ස්:02 දරණ ලේඛණයට අනුව 1999.07.07 දින දී ය. නඩු පැවරීමේ කාලය ගිණිය යුත්තේ 1999.07.07 වන දින සිට වන අතර, 2001.04.27 දින වන විට අවුරුදු දෙකක කාලයක් තුළ මෙම නඩුව පවරා ඇති බවට මෙම අධිකරණයට පෙනී යයි. එසේ හෙයින් 09 වන විසදිය යුතු ප්‍රශ්නයට "නැත" යනුවෙන් පිළිතුරු දෙන අධිකරණය 10 වන විසදිය යුතු ප්‍රශ්නයට ද "නැත" යනුවෙන් පිළිතුරු දෙනු ලබයි. විත්තිකරු ගේ 11 වන විසදිය යුතු ප්‍රශ්නයද 09 වන විසදිය යුතු ප්‍රශ්නය හා සබැදි විසදිය යුතු ප්‍රශ්නයක් වන හෙයින් මෙම අවස්ථාවේදී 11 වන විසදිය යුතු ප්‍රශ්නයටද මෙම අධිකරණය "නැත" යනුවෙන් පිළිතුරු දෙනු ලබයි."

Further, it was held that the respondent's action is not prescribed under and in terms of section 9 of the Prescription Ordinance and the case was fixed for further trial on the 29th of September 2003.

Appeal to the Court of Appeal

Being aggrieved by the said judgment of the District Court, the appellant-company made an application for leave to appeal to the Court of Appeal against the said judgment of the District Court. Thereafter, the Court of Appeal granted leave to appeal and heard the appeal.

Judgment of the Court of Appeal

After considering the submissions made by the parties, the Court of Appeal upheld the said judgment of the District Court, which stated that the cause of action set out in the plaint is on the delict of malicious prosecution.

It was further held that in order to institute an action to recover damages in respect of malicious prosecution, the criminal case should be terminated, and only if it is terminated in favour of the accused. Further, the cause of action arises from the date of the acquittal of the accused by the court.

Moreover, it was held that making a complaint to the Police does not give rise to a cause of action, and a cause of action would accrue to the respondent only upon criminal proceedings being terminated in his favour.

Appeal to the Supreme Court

Being aggrieved by the said judgment of the Court of Appeal, the appellant made an application for Special Leave to Appeal to the Supreme Court, and after considering the submissions of the appellant company, this court granted Special Leave to Appeal on the following questions of law;

"

1. *Did the Court of Appeal err by failing to recognise the fact that no action could be maintained for damages for delict/tort unless there is (a) injuria and malicious intent and (b) patrimonial loss?*
2. *Did the Court of Appeal err by failing to recognise and identify that there is only one paragraph in the plaint which speaks of patrimonial loss and that paragraph is paragraph 12, which speaks of setting in motion, the law, as a result of which the Respondent was arrested and remanded, thereby directly resulting in alleged loss and damage in a sum of Rupees Fifty Million (Rs. 50,000,000/-) (patrimonial loss?)*
3. *Did the Court of Appeal fail to appreciate that the Respondent had elected, of his own volition not to seek damages nor to claim patrimonial loss for the criminal action/prosecution, but limited his claim of loss and damage (patrimonial loss) and recovery of money on account of the arrest and remand alone?*
4. *Did the Court of Appeal fall into substantial error by failing to consider that the "wrong for redress of which an action was brought," was the tort of abuse of process and not malicious prosecution, on the Respondent's own showing?*
5. *Did the Court of Appeal fall into substantial error by completely ignoring the provisions of Section 9 of the Prescription Ordinance?*

6. *Did the Court of Appeal err by failing to appreciate that the Respondent's action is prescribed in terms of section 9 of the Prescription Ordinance, in as much as on the respondent's own admission, his stated cause of action that patrimonial loss of Rupees Fifty Million (Rs. 50,000,000/-) has only been claimed in respect of setting the law in motion by an allegedly unjustified complaint, leading to the Respondent's arrest and remand?"*

Did the Court of Appeal fall into substantial error by failing to consider that the "wrong for redress of which an action was brought," was the tort of abuse of process and not malicious prosecution, on the Respondent's own showing?

Trial in the District Court begins with making admissions and raising issues under section 146 of the Civil Procedure Code

Once the admissions are marked and the issues are raised in a trial, the trial will proceed based on the said admissions and issues marked at the trial. However, if a need arises the parties may mark new admissions and raise new issues during the course of the trial with the permission of court. Further, once the admissions and issues are raised, the pleadings filed in the court will not be taken into consideration in deciding the case. A similar view was expressed in ***Dharmasiri vs. Wickrematunga* (2002) 2 SLR 218,** where it was held;

> *"1. Once issues are framed and accepted, pleading recede to the background…."*

Further, in ***Bank of Ceylon vs. Chellaiahpilli* 64 NLR 25**, it was held;

> *"A case must be tried upon the issues on which the right decision appears to the court to defend, and it is well settled that the framing of such issues is not restricted by pleadings."*

Accordingly, the admissions marked and issues raised at the trial will be considered first in this judgment in considering the questions of law where Special Leave to Appeal was granted by this court.

The respondent instituted action in the District Court of Colombo against the appellant-company, seeking damages in a sum of Rs. 50 million and legal interest from the 22nd of

December, 1986. Thereafter, the appellant-company filed its answer denying the averments in the plaint and raised preliminary objections with regard to the maintainability of the plaint.

After the pleadings were completed, the trial had commenced by marking admissions and raising issues.

Admissions marked at the trial

The admissions marked in the District Court were as follows;

> *"1) අධිකරණ බලය.*
>
> *2) පැමිණිල්ලේ 2 අ, ආ ඡේදයන්හි පරිදි විත්තිකාර සමාගම ශ්‍රී ලංකාවේ සමාගම් නීතිය යටතේ නිසි ලෙස සංස්ථාපනය කරන සීමාසහිත වගකීමක් සහිත එහි ප්‍රධාන ව්‍යාපාරික ස්ථානය පැමිණිල්ලේ ශීර්ෂයේ දක්වා ඇති බවත්, නෛතික පුද්ගල බව හිමි ප්‍රාදේශීය බල සීමා තුල පිහිටා ඇති බව පිළිගනී*
>
> *3) පැමිණිල්ලේ 9 වන ඡේදයේ දක්වා ඇති පරිදි පැමිණිලිකරු මාළිගාකන්ද මහේස්ත්‍රාත් අධිකරණයේ නඩු අංක 72857 දරණ නඩුවේ චූදිත ලෙස ඉදිරිපත් වී විත්ති වාචක ඉදිරිපත් කර එයින් නිදෝස කොට නිදෝස් කළ බව පිළිගනී.*
>
> *4) එම නියෝගයට එරෙහිව විත්තිකාර සමාගම අභියාචනයක් ඉදිරිපත් කර නොමැති බව පිළිගනී."*

Issues raised in the District Court

After the admissions were marked, the following issues were raised by the respondent and were accepted by the District Court;

"1) පැමිණිල්ලේ 1වන ඡේදයේ සඳහන් පරිද පැමිනිල්කරු වෘත්තියෙන් නිතිඥවරයෙකු වන්නේද?

2) විත්තිකාර සමාගම විසින් පැමිණිල්ලේ 4වන ඡේදයක් දක්වා ඇති පරිදි පැමිණිලිකරුට එරෙහිව රු: 950/- ක මුදලක් වංචාවෙන් ලබා ගැනීමට තැත් කාලය යනුවෙන් පොලිසියේ වංචා විමර්ශන අංශයට පැමිණිල්ලක් කරන ලද්දේද?

3) පැමිණිල්ලේ 5වන ඡේදයේ දක්වා ඇති පරිදි එකී පැමිණිල්ල හේතුකොටගෙන 1986.12.22 වන දින පොලීසිය විසින් පැමිණිලිකරු අත් අඩංගුවට ගෙන රිමාන්ඩ් බන්ධනාගාරගත කරන ලද්දේද?

4) පැමිණිලිකරුගේ පැමිණිල්ලේ සඳහන් මාලිගාකන්ද මහේස්ත්‍රාත් අධිකරණයේ නඩු අංක 72857 දරන නඩුකරය පැවරීමට සහ හෝ පවත්වාගෙන යාමට පැමිණිල්ලේ 4 වන ඡේදයේ සඳහන් විත්තිකාර සමාගම විසින් පොලිසියට යවන ලද ලිපිය අනුව නොහැකිය?

5) පැමිණිල්ලේ 11වන ඡේදයේ සඳහන් පරිදි පැමිණිලිකරුට එරෙහිව එවැනි පැමිණිල්ලක් කිරීමට තරම් කිසිඳු සාධාරන හේතුවක් හෝ කාරණයක් නොමැතිව විත්තිකරු විසින් පැමිණිලිකරුට එරෙහිව ද්වේශ සහගත ලෙස පැමිණිලි කරන ලද්දේද?

6) ඉහත සඳහන් 72857 දරණ මාලිගාකන්ද මහේස්ත්‍රාත් අධිකරණ නඩුකරය පවරා පවත්වාගෙන යාමට විත්තිකාර සමාගම වක්‍රව හෝ සෘජුව කටයුතු කරන ලද්දේද?

7) පැමිණිල්ල ඉහත සඳහන් අංක 72857 දරන නඩුකරය හේතුකොටගෙන පැමිණිලිකරුට පැමිණිල්ලේ 12 වන පරච්ඡේදයේ සඳහන් පරිදි බලවත් අලාභ හා පාඩු සිදුවීද?

8) ඉහත සඳහන් පිළිගැනීම හේතුකොටගෙන සහ විසඳනාවන්ගෙන් එකකට හෝ කිහිපයකට හෝ සියල්ලටම පැමිණිලිකරුගේ වාසියට පිළිතුරු ලැබෙන්නේ නම් පැමිණිලිකරුගේ පැමිණිල්ල ඉල්ලා ඇති සහනයන් ලබා ගැනීමට හිමිකමක් ඇත්ද?"

The prayer to the plaint, stated as follows;

"රුපියල් මිලියන පනහක (රු. 50,000,000/=) මුදලක් ද, වර්ෂ 1986 ක්වූ දෙසැම්බර් මස 22 වන දින සිට තීන්දු ප්‍රකාශයේ දින දක්වා, එම මුදල මත වූ නෛතික පොළිය ද සහ එතැන් පටන් තීන්දු ප්‍රකාශයේ මුළු මුදල සම්පූර්ණයෙන් ගෙවා, නිමවන තෙක්, එම මුළු මුදල මත නෛතික පොළිය ද සමග අයකර ගැනීම සඳහා ඉහත කී විත්තිකරුට එරෙහිව නඩු තීන්දුවක් ඇතුලත් කරන ලෙසත්"

Thereafter, the following issues, *inter alia,* were raised on behalf of the appellant-company and were accepted by the District Court;

"09) උත්තරයේ 1(අ) ඡේදයේ අයැද ඇති පරිදි පැමිණිල්ලෙහි සඳහන් ප්‍රකාශය අනුව පැමිණිලිකරුගේ නඩුව කාලාවරෝධී පනතේ 9 වන වගන්තිය යටතේ කාලාවරෝධ වන්නේද?

10) එසේ නම් පැමිණිලිකරුගේ නඩුව සිවිල් නඩු විධාන සංග්‍රහයේ 46(2) වගන්තිය යටතේ ඉවතලිය යුතුද?

11) උත්තරයේ 1(අ) ඡේදයේ අයැද ඇති පරිදි පැමිණිලිකරුගේ නඩුව කාලාවරෝධ වන්නේද?

12) (අ) උත්තරයේ 12 වැනි ඡේදයේ අයැද ඇති පරිදි විත්තිකරු මාලිගාකන්ද මහේස්ත්‍රාත් උසාවියේ නඩු අංක 72857 නඩුවේ පාර්ශවකරුවකු නොවූනිද?

(ආ) එකී නඩුවේ නඩු තීන්දුවට විරුද්ධව අභියාචනයක් ඉදිරිපත් කිරීමට විත්තිකරුට හිමිකමක් නොතිබුනේද?

13) ඉහත කී විසඳනා 9 සිට 13 සහ හෝ ඉන් කිහිපයකට විත්තිකරුගේ වාසියට පිළිතුරු ලැබෙන්නේ නම් පැමිණිලිකරුගේ නඩුව නිෂ්ප්‍රභා කළ යුතුද?"

Paragraph 1(අ) of the Answer filed by the appellant company stated;

> *"1. පැමිණිල්ලට මූලික විරෝධතාවක් වශයෙන් විත්තිකරු මෙසේ ප්‍රකාශ කර සිටි :-*
>
> *(අ) පැමිණිලිකරුගේ නඩුව, පැමිණිල්ලේ ප්‍රකාශ වලින්, කාලාවිරෝධී ආඥා පනතේ 9 වන වගන්තිය ප්‍රකාරට කාලාවිරෝධී වී ඇති බව පෙනී යන බවත්, එබැවින් එය නීතියේ තථ්‍ය රීතියකින් බාධනය කරන ලද නඩුවක් වන බවත් එමනිසා, පැමිණිල්ල ප්‍රමාද දෝෂයකින් පිළිගෙන ඇති බවත් එබැවින්, සිවිල් නඩු විධාන සංග්‍රහයේ 46(2)(1) වන වගන්තිය යටතේ සහ ඒ ප්‍රකාරව ප්‍රතික්ෂේප කළ යුතුය."*

The learned President's Counsel for the appellant-company submitted that the cause of action and relief prayed by the respondent were based **not** on the delict of malicious prosecution but on the delict of abuse of process/setting the law in motion and as such, on the face of the plaint the alleged cause of action is prescribed. Further, it was submitted that the delict of malicious prosecution is distinct and different to the delict of abuse of process/setting the law in motion.

In Roman Dutch Law, which is the common law in Sri Lanka, there is a clear distinction between the delict of setting the law in motion and abuse of process, as opposed to malicious prosecution.

In ***"The Law of Delict"*** **by R. G. McKerron (7th Edition),** at page 259, it states;

> *"Every person has a right to set the law in motion, but a person who institutes legal proceedings against another maliciously, without reasonable and proper cause abuses that right and commits an actionable wrong.*
> *The chief classes of proceedings to which the rule applies are: 1. malicious criminal prosecution: 2. malicious imprisonment or arrest 3. malicious*

execution against property 4. Malicious insolvency and liquidation proceedings and 5. malicious civil actions."

Furthermore, at page 259 it states;

> *"It is also an actionable wrong to procure the imprisonment or arrest of anyone by setting the law in motion against him maliciously and without reasonable cause."*

Section 5 of the Civil Procedure Code as amended, defined the cause of action as;

> *" "cause of action" is the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfill an obligation, the neglect to perform a duty and the infliction of an affirmative injury"*

A careful consideration of the aforementioned issues show that the cause of action is set out in issue number 5 raised at the trial. Further, the issue numbers 2, 3, 4, 5, 6, and 7 were based on the delict of setting the law in motion with the intent of malice.

The plaint filed in the District Court

In the plaint filed in the District Court, the respondent alleged that the arrest and remand affected his profession, and the damages are claimed from the date of his arrest, which took place on the 22nd of December, 1986. Moreover, the claim of damages pleaded in the prayer to the plaint is linked to the averments in the plaint in respect of the arrest and remanding of the respondent.

Further, the cause of action set out in averments 12, 13 and 14 of the plaint, was based on the delict of setting the law in motion and the claim for damages is linked to the arrest and remanding of the respondent. Thus, the cause of action stated in averment 12 of the plaint are followed by averments 13 and 14, and also connected to the prayer (a), which stated that the respondent sought damages in a sum of Rs. 50 million and interest to be calculated from the 22nd of December, 1986.

Furthermore, the cumulative effect of the issues raised by the respondent show that the 22nd of December, 1986 was the date on which the respondent was arrested and remanded upon the

complaint made by the appellant-company. Thus, it is apparent that the cause of action is based on the appellant-company making a complaint to the Police against the respondent, and setting the law in motion against the respondent which resulted in arresting and remanding him.

Did the Court of Appeal fall into substantial error by completely ignoring the provisions of Section 9 of the Prescription Ordinance?

Moreover, in terms of section 9 of the Prescription Ordinance, action for damages should be filed within 2 years of the arrest. However, the alleged arrest and remanding of the respondent had taken place on the 22nd of December, 1986 and he filed the action on the 27th of April, 2001. Hence, the alleged cause of action is *ex facie* time barred by a positive rule of law.

However, the District Court and the Court of Appeal have held that, the cause of action pleaded by the respondent is for damages arising from the delict of malicious prosecution and that the prescriptive time period, should be calculated not from the date of arrest and remanding him, but from the date of acquittal from the Magistrates' Court which was the 7th of July, 1999. Hence, the action instituted on 27th of April, 2001 was within the two year prescriptive period as set out in the Prescription Ordinance. As stated above, a careful consideration of the averments in the plaint and particularly the issues raised at the trial shows that the District Court and the Court of Appeal erred in law by holding that the cause of action pleaded by the respondent is the delict of Malicious Prosecution.

In the circumstances, I set aside the judgments delivered by the learned District Judge dated 11th of June, 2003 and the learned Judges of the Court of Appeal dated 2nd of February, 2009 and answer the questions of law as follows;

"4. Did the Court of Appeal fall into substantial error by failing to consider that the "wrong for redress of which an action was brought," was the tort of abuse of process and not malicious prosecution, on the Respondent's own showing?"

Yes

"5. Did the Court of Appeal fall into substantial error by completely ignoring the provisions of Section 9 of the Prescription Ordinance?"

Yes

Further, taking into consideration the aforementioned legal position, I answer the 6th question of law as follows;

"6. Did the Court of Appeal err by failing to appreciate that the Respondent's action is prescribed in terms of section 9 of the Prescription Ordinance, in as much as on the respondent's own admission, his stated cause of action that patrimonial loss of Rupees Fifty Million (Rs. 50,000,000/-) has only been claimed in respect of setting the law in motion by an allegedly unjustified complaint, leading to the Respondent's arrest and remand?"

Yes

In view of the answers given to the above questions of law, it is not necessary to answer the other questions of law where Leave to Appeal was granted. In these circumstances, I answer the following issues raised in the District Court as follows;

Issue no. 9; "*උත්තරයේ 1(අ) ඡේදයේ අයැද ඇති පරිදි පැමිණිල්ලෙහි සඳහන් ප්‍රකාශය අනුව පැමිණිලිකරුගේ නඩුව කාලාවරෝධී පනතේ 9 වන වගන්තිය යටතේ කාලාවරෝධ වන්නේද?*

Yes

Issue no. 10; "*එසේ නම් පැමිණිලිකරුගේ නඩුව සිවිල් නඩු විධාන සංග්‍රහයේ 46(2) වගන්තිය යටතේ ඉවතලිය යුතුද?"*

Yes

Issue no. 11; "*උත්තරයේ 1(අ) ඡේදයේ අයැද ඇති පරිදි පැමිණිලිකරුගේ නඩුව කාලාවරෝධ වන්නේද?"*

Yes

Issue no. 13; "*ඉහත කී විසඳනා 9 සිට 13 සහ හෝ ඉන් කිහිපයකට විත්තිකරුගේ වාසියට පිළිතුරු ලැබෙන්නේ නම් පැමිණිලිකරුගේ නඩුව නිෂ්ප්‍රභා කළ යුතුද?"*

Yes

Appeal is allowed. The aforementioned plaint filed in the District Court is dismissed.

No costs.

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 appeal against the judgment dated 09.12.2014 of the Civil Appeals High Court of the Western Province holden in Gampaha 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.

P.V. Munasinghe
No. 248, Old Road, Minuwangoda.

SC Appeal No: 102/2017 **Plaintiff**
SC/HC/CA Leave to Appeal
Case No. 32/2015

WP/HCCA/GAMPAHA
Case No: 111/2009 (F)

District Court NEGOMBO **Vs.**
Case No. 8457/M

1. A. M. Newton Kulasuriya
   Chairman, Urban Council, Minuwangoda

2. L. N. A. P. Kumarasinghe
   Superintendent of Works,

Urban Council, Minuwangoda

Defendants

AND

1. A. M. Newton Kulasuriya
   Chairman, Urban Council, Minuwangoda.

2. L. N. A. P. Kumarasinghe
   Superintendent of Works
   Urban Council, Minuwangoda.

Defendant-Appellants

Vs.

P. V. Munasinghe
No. 248, Old Road, Minuwangoda.

Plaintiff-Respondent

AND NOW BETWEEN

1. A. M. Newton Kulasuriya
Chairman, Urban Council, Minuwangoda

2. L. N. A. P. Kumarasinghe
   Superintendent of Works
   Urban Council, Minuwangoda

Defendants-Appellants-Appellants

Vs.

P. V. Munasinghe

No. 248, Old Road, Minuwangoda.
Currently No. 248, Pathaha Road, Veediyawatta, Udugampola

Plaintiff-Respondent-Respondent

Before : Jayantha Jayasuriya PC, CJ
Priyantha Jayawardena PC, J
Yasantha Kodagoda PC, J

Counsel : P. Radhakrishnan for the 1st and 2nd Defendants-Appellants-Appellants.

Dr. Sunil Coorey with Sudarshani Coorey for the Plaintiff-Respondent-Respondent

Argued on : 22nd of November, 2022

Decided on : 29th of February, 2024

Priyantha Jayawardena PC, J

This is an appeal arising from an action instituted in the District Court of Negombo, claiming damages from the defendants-appellants-appellants (hereinafter referred to as the “appellants”)

on the basis of malicious prosecution of the plaintiff-respondent-respondent (hereinafter referred to as the "respondent").

Facts of the Case

The plaintiff-respondent-respondent (hereinafter referred to as the "respondent") was the principal of Minuwangoda Nalanda (Boys) Madhiya Maha Vidyalaya at the time material to the subject matter of the instant appeal.

The 1st and 2nd appellants were the Chairman and the Superintendent of Works respectively of the Urban Council in Minuwangoda. They initiated the institution of proceedings against the respondent in the Magistrate's Court, alleging that he constructed a parapet wall along the northern boundary of the school playground, (facing Kurunegala-Minuwangoda Road) without obtaining the approval of the said Urban Council, and thereby violated section 71(1) of the Urban Councils Ordinance No. 61 of 1939 as amended.

After the conclusion of the trial, the learned Magistrate acquitted the respondent on the basis that the appellants failed to prove the case. Upon the said acquittal, the respondent instituted action against the appellants in the District Court of Negombo claiming a sum of Rs. 2,500,000/- as damages for malicious prosecution.

Thereafter, the appellants filed an answer and stated that the respondent had not obtained approval from the Urban Council prior to constructing the wall as required by the Municipal Councils Ordinance, and thereby he violated the provisions of the said Ordinance, which is an offence punishable under the said Ordinance.

Judgment of the District Court

After an *inter-parte* trial, the learned District judge delivered the judgment in favour of the respondent and ordered the appellants to pay a sum of Rs. 2 million as damages to the respondent.

The learned District Judge in her judgment, *inter-alia,* held;

> *"...එනම් 1995.06.07 දින වන විට මෙම තාප්පය සම්බන්ධයෙන් සියළු කටයුතු කරනු ලැබුවේ අධ්‍යාපන අධ්‍යක්ෂක බවට ලිඛිතව ඒත්තු ගැන්වෙන පරිදි ලේඛණ නගර සභාව වෙත ඉදිරිපත් කර තිබියදීත් මිනුවන්ගොඩ මහේස්ත්‍රාත් අධිකරණයේ 96944/පි. දරණ නඩුව 1995.06.13 දින වන විට එනම් පැ.2 ලේඛණය සභාපති වරයා හා නගර සභාව වෙත ලැබීමෙන් අනතරුව නියෝජ්‍ය අධ්‍යාපන අධ්‍යක්ෂකට නඩු නොපවරා පැමිණිලිකරුට නඩු පවරා ඇති බවට ඔහුම පිළිගන්නා කරුණකි. ඊට අමතරව 1995.06.30 වන දින මුණසිංහ මහතා, එනම් පැමිණිලිකරු අලාභ හානි කළ බවට අධිකරණයට වාර්තාවක් ඉදිරිපත් කරයි. මුණසිංහ මහතා එවැනි සිද්ධියක් නොකළ බවට මෙම පැමිණිලිකරු පිළි ගනියි. එයින් පෙනී යන්නේ බලය ඇත්තේ මෙම පැමිණිලිකරුට නොවන බව හොදාකාරවම දනිමින්ම පැමිණිලිකරුට නඩු පැවරුවා පමණක් නොව, ඉන් අනතුරුව ඔහු සම්බන්ධ නැති ගොඩනැගිල්ලක් සම්බන්ධව ඔහුට විරුද්ධව අධිකරණයට කරුණු ඉදිරිපත් කර ඇති බවයි. සාක්ෂිකරු කී ආකාරයට මෙම විත්තිකරු ප්‍රදේශයේ විදුහල්පතිවරයෙකු වශයෙන් යම්කිසි හොඳ නමක් දිනාගත් අයෙකු බව පැහැදිළිය. තමා ද්වේශයෙන් කටයුතු නොකළා යයි කීවද, ඔහු ද්වේශයෙන් කටයුතු කර ඇති බව ඉහත කරුණු දෙක මත, එනම් නිසි පුද්ගලයා දැන දැනම නිසි පුද්ගලයාට නඩු නොපැවරීම හා කිසිදු අළාභ හානියක් කර නැති බව දැන දැනම එවැනි වාර්තාවක් අධිකරණයට ගොනු කිරීමෙන් ඔහු ද්වේශ සහගතව කටයුතු කර ඇති බව පැහැදිලි වේ...."*

> *"....එපමණක් නොව, එම අවස්ථාවේදී තාප්පය සම්බන්ධයෙන් ක්‍රියා කරනු ලැබුවේ අධ්‍යාපන අධ්‍යක්ෂක කණ්ඩම්බි බව ඔහුට පිළි ගැනීමට සාධාරන හේතු තිබියදී, එනම් එකී කණ්ඩම්බි මහතා සභාපති අමතමින්ම හෝ සභාපති මාර්ගයෙන් කටයුතු කිරීම සඳහා ලිපි ඉදිරිපත් කර තිබියදී විදුහල්පති වරයාට විරුද්ධව ක්‍රියා කිරීම ඇත්තවශයෙන්ම ද්වේශ සහගතව ක්‍රියා කිරීමක් බව පිළි ගැනීමට සිදු වේ. ඒ අනුව පැමිණිල්ල පිලිගනිමි. පැමිණිල්ලේ වාසියට නඩුව තීන්දු කරමි. එක් එක් විත්තිකරු විසින් පැමිණිලිකරුට රුපියල් ලක්ෂ දහයක්*

(රු: 10,00,000/- ක්) වූ වන්දි මුදලක් එක්ව ගෙවීමට නියම කරමි. නඩු ගාස්තු අය කර ගැනීමේ අයිතියද පැමිණිල්ලට රඳවා තබමි."

Appeal to the High Court of Civil Appeal

Being aggrieved by the said judgment of the District Court, the appellants preferred an appeal to the High Court of Civil Appeals of the Western Province holden in Gampaha (hereinafter referred to as the "High Court").

After the hearing of the said appeal, the High Court by its judgement dated 9th of December, 2014, partially allowed the appeal and varied the damages awarded by the District Court by reducing the amount from Rs.1,000,000/- to Rs. 500,000/- payable jointly and severally by the appellants to the respondent.

In the aforementioned judgment, the learned judges of the High Court of Civil Appeal held,

> *"... නඩුව පවැරීමෙන් අනතුරු ව නඩු කටයුතු පවත්වා ගෙන යන අතර - තුර මෙය අනවසර ඉදිකිරීමක් නොවන බවට කරුණු තහවුරු වී තිබියදීත් 2 වන විත්තිකරු විසින් මහේස්ත්‍රාත් අධිකරණය ඉදිරියේ පැවති නඩු විභාගය තව දුරටත් ඉදිරියට පවත්වා ගෙන ගොස් ඇත්තේ ද්වේශ සහගත හේතූන් නිසා බව අපට හැඟී යයි. නොඑසේ නම් මෙම පොදු කාර්යය සඳහා ඇත්ත වශයෙන්ම නීත්‍යානුකූල ව අනුමැතියක් ලබා දී තිබූ බව 1995.07.25 දිනට පසුව පැ.1 දරන ලිපිය ලැබීමෙන් අනතුරු ව හොඳාකාරවම දැන ගැනීමට විත්තිකරුවන්ට ඉඩ - කඩ තිබුණත් එම ලිපියේ දක්වා තිබෙන කරුණු කෙරෙහි කිසිදු සැළකිල්ලක් නො දක්වා මහේස්ත්‍රාත් අධිකරණය ඉදිරියේ නඩු විභාගය තව දුරටත් පවත්වා ගෙන ගොස් ඇත්තේ ද්වේශ සහගත හේතුවකින් මිස අන් කවර හේතුවක්වත් නිසා නොවේ යැයි අප නිගමණය කරමු.*
>
> *මෙම නඩුවේ විශේෂයෙන් සළකා බැලිය යුතු තවත් වැදගත් කරුණක් තිබෙන බව අපට පෙනී යයි. පී.5 ලෙස ලකුණු කොට නඩුවට ඉදිරිපත් කරන ලද 1995.06.09 දිනැති මිනුවන්ගොඩ නගර සභාවේ විශේෂ රැස්වීම් වාර්තාව කියවා ගෙන යාමේ දී අනාවරණය වන්නේ*

පැමිණිලිකාර විදුහල්පතිවරයාට එරෙහි ව නීතිය ක්‍රියාත්මක කිරීමේ කාර්යය සඳහා නගර සභාවේ විශේෂ රැස්වීමක් හදිසියේ කැඳවා තිබෙන බවයි. එදින වෙනත් කිසිදු මාතෘකාවක් සාකච්ඡා කොට නැත. නඩු පැවරීම සඳහා අනුමැතිය ලබා ගැනීමට පමණක් ලහි - ලහියේ ම මෙම රැස්වීම විශේෂයෙන් කැඳවා ඇත්තේ කිසියම් ද්වේශ සහගත අරමුණක් නිසා බව වී.5 ලේඛනය කියවා ගෙන යාමේ දී ඕනෑම පෘථග්ජන පුද්ගලයෙකුට තේරුම් ගැනීමට හැකියාවක් තිබේ...".

"... නගර සභාවේ සභාපතිවරයා ඇත්ත වශයෙන්ම ක්‍රියා කොට ඇති ආකාරය සළකා බලන විට නගර සභා ආඥා පනතේ 221 (1) උප වගන්තියේ රැකවරණය ඔහුට හිම වන්නේ නැත. එයට හේතුව වන්නේ "යහපත් චේතනාවෙන් " (bona fide) විත්තිකරුවන් විසින් මෙම නඩු පැවරීම සිදු කොට නො මැති බව නඩුවේ කරුණු අනුව පැහැදිළිවම හෙළි දරව් වන බැවිනි...."

"... 1 වන විත්තිකරු අසාධාරණ ලෙස ක්‍රියා කරමින් 2 වන විත්තිකරු මෙහෙයවා ඇති බව හෙළිදරව් වී තිබේ. දිසා අධිකරණය ඉදිරියේ පැවති නඩු විභාගයේ දී ඉදිරිපත් වූ සාක්ෂි අනුව 2 වන විත්තිකරු ක්‍රියා කොට ඇත්තේ 1 වන විත්තිකරු විසින් ලබාදුන් උපදෙස් මත පමණක් බව අප වැඩිදුරටත් තීරණය කරමු. නගර සභාවේ විශේෂ රැස්වීම් වාරයක් කැඳවීමට 1 වන විත්තිකරු පෙළඹී ඇත්තේ ප්‍රමාණවත් සාධාරණ හේතුවක් තහවුරු කිරීමෙන් තොර ව බව වැඩිදුරටත් පෙනී යන හෙයින් පැමිණිල්ලේ වාසියට උගත් අතිරේක දිසා විනිසුරුවරිය විසින් 2009.09.29 වන දින ප්‍රකාශයට පත් කරන ලද තීන්දුව දෝෂ සහගත තීන්දුවක් නොවන බවට නිගමණය කරමු.

මීළඟට සලකා බැලිය යුතු වන්නේ ඇත්ත වශයෙන් ම සිදු වූ හාණිය සඳහා ලබා දී ඇති වන්දි මුදල් අධිකතර වන්දියක ද යන්නයි.

පැමිණිලිකරු මහේස්ත්‍රාත් අධිකරණයේ චූදිතයෙකු ලෙස නඩු විභාගයට පෙනී සිටිය ද ඔහු නවුවෙන් නිදොස් කොට නිදහස් කිරීමෙන් අනතුරු ව තම නිර්දෝෂී භාවය ඔප්පු වී ඇත. ඔහුට සිත් වේදනාවක් ඇති වුනි නම් එම සිත් වේදනාව ප්‍රමාණවත් වන්දි මුදලකින් සමනය කළ

යුතු බව අප ගේ නිගමණය වේ. 1, 2 විත්තිකරුවන් විසින් පැමිණිලිකාර විදුහල්පතිවරයාට එරෙහි ව මහේස්ත්‍රාත් අධිකරනයේ දී නගා ඇති චෝදනාවන් ඇත්ත වශයෙන්ම වැරදි පුද්ගලයෙකුට එරෙහි ව නගා ඇති චෝදනාවන් යැයි නඩු විභාගය හමුවේ දී අනාවරණය වුවත් නඩුවේ කරුණු සළකා බලන විට තීරණය කළ හැකි වන්නේ මෙම සිද්ධියට අදාලව කිසිම තැනැත්තෙකුට එරෙහි ව අනවසර ඉදිකිරීමක් යටතේ නඩු පැවරීමට නගර සභාවට නීතියෙන් අයිතියක් නො තිබූ බවයි. එයට හේතුව වන්නේ පැ.1 දරන ලේඛනය මගින් එකී ඉදිකිරීම නීත්‍යානුකූල ඉදිකිරීමක් බවට තහවුරු කොට තිබෙන බැවිනි.

1, 2 විත්තිකරුවන් ක්‍රියා කොට ඇති ආකාරය සද්භාව පුද්ගලයන් විසින් ක්‍රියා කරන ආකාරයක් නොවේ. එබැවින් ඔවුන් දෙදෙනා පැමිණිලිකරුට වන්දි ගෙවීමට බැඳී සිටින බව අපගේ තීරණය වේ...."

"... රුපියල් ලක්ෂ 10 ක වන්දි මුදල, සිදු වී ඇති හාණිය සමග සංසන්දනාත්මක ව සළකා බලන විට ඉතා අධිකතර වන්දියක් බව අපගේ නිගමණය වේ. රුපියල් ලක්ෂ 10 ක වන්දි මුදලක් ලබා ගැනීම සඳහා ප්‍රමාණවත් කරුණු පැමිණිලිකාර පාර්ශවය විසින් තහවුරු කොට නො මත. නමුත් පැමිණිලිකරුට කිසියම් වූ පාඩුවක් සහ අපකීර්තියක් මහේස්ත්‍රාත් අධිකරණයේ නඩු පැවරීම තුල සිදු වී තිබෙන බව තහවුරු වන හෙයින් රුපියල් ලක්ෂ 10 ක වන්දි මුදල වෙනුවට රුපියල් ලක්ෂ 5 ක වන්දි මුදලක් 1, 2 විත්තිකරුවන් විසින් පැමිණිලිකරු වෙත ගෙවිය යුතු බවට තීන්දු කරමු. එකී වන්දි මුදල පමණක් සංශෝධනය කරමින් උගත් අතිරේක දිසා විනිසුරුවරිය ගේ 2009.09.29 දිනැ 'ති තීන්දුව සංශෝධනය කරමු. තීන්දුවේ සඳහන් අනෙකුත් කරුණු සියල්ල ම එලෙස ම තබමු..."

Appeal to the Supreme Court

Being aggrieved by the said judgment of the High Court, the appellants sought special leave to appeal from this court and the Supreme Court granted special leave to appeal on the following questions of law,

> "(e) *Their Lordships of the Civil Appeals High Court erred in law in not taking cognizance of the fact that the acts of the Petitioners were done in bona fides upon a decision and directive of the Minuwangoda Urban Council*
>
> *(f) Their Lordships in the Civil Appeals High Court have erred in law in holding that a letter issued by the Road Development Authority amounts to a valid permit for the construction of the boundary wall."*

Application of section 220 of the Urban Councils Ordinance

The learned counsel for the appellants submitted that the District Court and the High Court failed to hold that the statutory protection afforded to any Urban Council, or any member, or any officer for acts done *bona fide* in terms of section 220 of the Urban Councils Ordinance requires one month's notice to be given prior to the institution of legal action.

The learned counsel for the appellants further submitted that the respondent did not comply with section 220(1). Therefore, the District Court and High Court should have dismissed the action for non-compliance of section 220(1) of the Urban Councils Ordinance.

However, the learned counsel for the respondent submitted that section 220(1) deals with only *bona fide* acts of the Urban Council or its officers. Further, the respondent alleged and later established mala fides on the part of the appellants, and submitted that it is not necessary to give notice under section 220(1) of the said Ordinance.

Section 220(1) of the Urban Councils Ordinance reads as follows:

> *"**No action shall be instituted against any Urban Council or any member or any officer of the Council or any person acting under the direction of the***

> ***Council*** *for anything done or intended to be done under the powers conferred by this Ordinance, or any by-law made thereunder**, until the expiration of one month next after notice in writing shall have been given to the Council or to the defendant,** stating with reasonable certainty the cause of such action and the name and place of abode of the plaintiff and of his attorney-at-law or agent, if any, in such action."*
>
> [emphasis added]

The phrase "anything done or intended to be done under the powers conferred by this Ordinance or any by-law made thereunder" shows that section 220(1) of the said Ordinance provides protection only to the acts carried out or intended to be carried out under the said Ordinance. However, any acts carried out or intended to be carried out outside the provisions of the said Ordinance or with *malice* do not come within the protection afforded in section 220(1) of the said Ordinance.

Section 461 in the Civil Procedure Code is a similar provision to section 220(1) of the said Ordinance. It states,

> *"**No action** shall be instituted against the Attorney-General as representing the State, or against a Minister, Deputy Minister or public officer in respect of an act purporting to be done by him in his official capacity**, until the expiration of one month next after notice in writing has been delivered to such Attorney-General, Minister, Deputy Minister, or officer** (as the case may be), or left at his office, stating the cause of action and the name and place of abode of the person intending to institute the action and the relief which he claims; and the plaint in such action must contain a statement that such notice has been delivered or left."*
>
> [emphasis added]

In ***Appusingo Appu vs. Don Aron*** **9 NLR 138** at page 140, the court considered the applicability of the notice requirement stipulated in section 461 of the Civil Procedure Code

as well as other privileges accorded in the said Code to the public servants acting in official capacity and held;

> *"It would be intolerable if these privileges could be claimed by a public officer who is acting wrongfully and for the gratification of private malice, whose official authority appears only in his badge as police vidane or in his possession of those Government diaries…."*

In the circumstances, having considered the facts and circumstances of the instant appeal, I am of the opinion that section 220(1) of the said Ordinance has no application to the appellants as the respondent proved the appellants acted outside the provisions of the said Ordinance and with malice in prosecuting him in the said Magistrate's Court. This aspect is considered in detail later in this judgment.

Did the appellants act bona fide in instituting the Magistrate's Court Case against the respondent and prosecuting him?

The learned counsel for the appellants submitted that in or around June, 1995, the respondent commenced the construction of an unauthorised boundary wall in front of the school. Hence, the 2nd appellant had informed the respondent to stop the construction as it was in violation of the provisions of the Urban Council Ordinance as no valid permit had been issued by the Urban Council for the said construction.

However, as the said construction was not stopped, the Municipal Council, at a special council meeting held on the 9th of June, 1995, resolved to institute legal action under section 72(2) for violating section 72(1) of the aforementioned Ordinance. Further, the counsel for the appellants submitted that in implementing the Council Resolution, the 1st appellant had issued a letter dated 11th June, 1995 authorising the 2nd appellant to institute legal action against the respondent. Accordingly, on the 13th of June 1995, proceedings were instituted in terms of section 136(1) (a) of the Criminal Procedure Code by the 2nd appellant against the respondent for committing an offence punishable under section 72(2) of the Urban Councils Ordinance.

The minutes of the said special council meeting held on the 9th of June, 1995 stated;

> *"මෙම අවස්ථාවේදී සභාවට කරුණු දැක්වූ උප සභාපතිතුමා අනවසර මායිම් තාප්පයක් ඉදි කිරීමට එරෙහිව තීරණයක් ගැනීමට ප්‍රථම අනවසර ඉදිකිරීම කරනු ලබන්නේ කව්රුත් විසින් ද යන්න අනාවරණය කර ගත යුතු බවත්, යෝජිත පදික වේදිකාව ඉදිකිරීම සඳහා අවශ්‍ය බිම් කොටස් සභාවට පවරා ගෙන තිබේද යන්න ගැන සභාවේ අවධානය යොමු කල යුතු බවත්, දැනට ඉදි කරනු ලබන මායිම් තාප්පය රජයේ දෙපාර්තමේන්තුවක් මගින් ඉටු කරනු ලබන හෙයින්, එය ඉවත්කිරීම සම්බන්ධව තීරණ ගැනීමේදී ඉතාමත් දුරදර්ශීව කරුණු අධ්‍යයනය කිරීමෙන් පසුව තීරණයක් ගත යුතු බවත්, අඩුපාඩු සහිතව අධිකරණය වෙත පැමිණිලි ඉදිරිපත් කිරීමේද යම් යම් පුද්ගලයින් විසින් සභාවට විරුද්ධව නඩු මාර්ගයට පිවිසීමට අවකාශ ඇති බවත් ප්‍රකාශ කලේය."*

Furthermore, at the said meeting, the 1st appellant was requested to find out who is responsible for investigating issue.

The above minute shows that the appellants were cautioned by the members of the Municipal Council with regard to taking legal action in respect of the construction of the wall. However, the appellants have failed and/or neglected to ascertain the person who was responsible for the construction of the wall prior to the institution of the proceedings in the Magistrate's Court.

The evidence led at the trial before the Magistrate's Court shows that the respondent had produced the letter issued by the Road Development Authority, stating that construction of the boundary wall was permitted subject to demolition without compensation. Further, the Road Development Authority had informed it by letter dated 25th July, 1995 to the Director of Education, with a copy to the 1st appellant of the Urban Council of Minuwangoda. Nonetheless, the 2nd appellant had continued with the prosecution against the respondent.

Section 72(1) of the Urban Councils Ordinance states as follows;

> *"(1) It shall not be lawful for any person to commence any building, boundary wall, gateway of fence along any thoroughfare within any town, or to erect any temporary fence or enclosure on any such thoroughfare for the purpose of commencing or repairing any such building, boundary, wall or gateway without giving one calendar month's previous notice in writing to the Urban Council of that town."*
>
> *(2) Any person neglecting to give the notice prescribed by subsection (1) or* ***to remove any building, boundary wall, gateway or fence erected without such notice when he is required in writing to do so by the Urban Council under this subsection****, shall be guilty of an offence, punishable with a fine not exceeding five hundred rupees, and with a further fine not exceeding two hundred rupees for each day he suffers or allows such building, boundary wall, gateway or fence to remain after he is required to remove it as aforesaid."*

[emphasis added]

However, neither the Urban Council nor the appellants had given notice to the respondent in writing to demolish the wall in terms of section 72(2) of the said Ordinance prior to the institution of the said proceedings in the Magistrate's Court. Moreover, if the said Municipal Council or the appellants complied with the said section 72(2) and given notice to the respondent, he could have informed the fact that he was not responsible for the construction of the wall under consideration.

Further, it was revealed that during the year 1995, a Japanese Company known as "Hashima Corporation" had started to construct the parapet wall along the Northern Boundary of the said school, at the behest of the Ministry of Education and other relevant authorities. Moreover, when the 2nd appellant came to the school, the respondent had informed the 2nd appellant that he was only the principal of the school but had no proprietary rights to the school property as it comes under the Department of Education.

Furthermore, on the first day in the Magistrate's Court, it was brought to the notice of the prosecution that the Urban Council was prosecuting the wrong person. However, the appellants had failed to look into it and proceeded with the trial.

Did the Civil Appellate High Court err in law in not taking cognizance of the fact that the acts of the Appellants were done bona fide upon a decision and directive of the Minuwangoda Urban Council?

The issue that needs to be considered in the instant appeal is whether the appellants committed the delict of malicious prosecution of the respondent.

"The Law of Delict" by R. G. McKerron ***at page 259***, states;

> *"That every person has a right to set the law in motion, but a person who institutes legal proceedings against another maliciously, without reasonable and proper cause abuses that right and commits an actionable wrong."*
>
> *"The chief classes of proceedings to which the rule applies are: 1. malicious criminal prosecution: 2. malicious imprisonment or arrest 3. malicious execution against property 4. Malicious insolvency and liquidation proceedings and 5. malicious civil actions."*

Further, it states;

> *"It is an actionable wrong to institute, or cause to be instituted criminal proceedings against any person maliciously and without reasonable cause. To entitle the accused to succeed in a subsequent civil action for damages, however, he must in principle show either that the proceedings caused him patrimonial loss or that the offence with which he was charged was calculated to injure his reputation. But this requirement is of little practical importance; because in nearly every case he would have incurred legal costs in defending himself against the charge brought against him, and it has been held that he can recover any such costs reasonably incurred as patrimonial loss."*

Hence, the following facts should be proved to succeed in a malicious prosecution case;

(i) The prosecution should have failed.

(ii) The prosecution ended up in an acquittal on merits,

(iii) The absence of reasonable and probable cause, and

(iv) Malice

A similar view was held in the case of ***Moss v Wilson*** **8 NLR 368 at page 369,** where it was held,

> *"There is no doubt as to what the essential elements of the action for malicious prosecution are. The plaintiff must prove that a charge was made to a judicial officer, that the charge was false-its falsity being demonstrated, where prosecution has followed, by the plaintiff's acquittal-that the charge was made without reasonable cause, and that the defendant himself did not honestly believe it to be true."*

Further, the case of ***Karunaratne v Karunaratne*** **63 NLR 365**, held;

> *"To succeed in an action of this nature, the Plaintiff must establish that the charge was false and false to the knowledge of the person giving the information that it was made with a view to prosecution, that it was made 'animo injuriandi' and not with a view to vindicate public justice and that it was made without probable cause…"*

Upon a careful consideration of the aforementioned evidence, it is apparent that the appellants acted not only contrary to the provisions of the Urban Councils Ordinance in prosecuting the respondent, but also acted without a reasonable and probable cause to believe that the respondent was responsible for the construction of the wall. Particularly, notwithstanding the fact that it was brought to their notice that the respondent had no control over the construction of the wall, the appellants continued with the prosecution in the Magistrate's Court. In the circumstances, the evidence led at the trial shows that the appellants acted with *malice* by instituting criminal proceedings against the respondent and prosecuting him.

Conclusion

In view of the above findings, I am of the opinion that the District Court and the High Court did not err in holding that the appellant acted with *mala fide* in prosecution the respondent. In the circumstances, I answer the following question of law as follows;

"Did the Civil Appellate High Court err in law in not taking cognizance of the fact that the acts of the Appellants were done bona fide upon a decision and directive of the Minuwangoda Urban Council?"

No

Accordingly, the appeal is dismissed.

No costs.

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 for leave to appeal from the Order of the High Court of the Western Province (Exercising Civil jurisdiction and Holden at Colombo) dated 30.08.2019, made under and in terms of Section 5 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 read together with the provisions contained in chapter LVIII of the Civil Procedure Code between

V. Watumal (Private) Limited
No. 21,
2nd Cross Street,
Colombo 11

SC APPEAL 105/2020
SC HC LA No. 64/2019
HC (Civil) No. CHC 84/2018/CO

Petitioner

Vs.

1. LOLC Finance PLC
   Registered Office
   No. 100/1,
   Sri Jayawardenapura Mawatha,
   Rajagirya.
   (1st Intervenient Petitioner)

1st Respondent

2. LOLC Factors Limited
Registered Office
No. 100/1,
Sri Jayawardenapura Mawatha,
Rajagirya.

Principal Business Office
No. 504,
Nawala Road,
Rajagiriya.
(2nd Intervenient Petitioner)

2nd Respondent

AND NOW BETWEEN

V. Watumal (Private) Limited
No. 21,
2nd Cross Street,
Colombo 11.

Petitioner-Appellant

Vs.

1. LOLC Finance PLC
Registered Office
No. 100/1,
Sri Jayawardenapura Mawatha,
Rajagirya.

1st Respondent-Respondent

2. LOLC Factors Limited
Registered Office
No. 100/1,

Sri Jayawardenapura Mawatha,
Rajagirya.

Principal Business Office
No. 504,
Nawala Road,
Rajagiriya.

2nd Respondent-Respondent

Before : **P. Padman Surasena, J**
Kumudini Wickremasinghe, J
K. Priyantha Fernando, J

Counsel : Shamalie de Silva with Vishwaka Peiris for the Petitioner-Appellant.

Priyantha Alagiyawanna with Heshani Gunarathna and Sahan Gunasekera instructed by Nuwan Jayasinghe for the 1st and 2nd Respondents-Respondents.

Argued on : 13.02.2024

Decided on : 13.03.2024

K. PRIYANTHA FERNANDO, J

1. The Petitioner-Appellant (hereinafter referred to as the Petitioner) instituted proceedings in the High Court of the Western Province Exercising Civil Jurisdiction in *Colombo* (Commercial High Court), for the winding up of the Petitioner through Court in terms of Part XII of the Companies Act No. 07 of 2007 (the Act).

2. The first and the second Respondents-Respondents (hereinafter referred to as the Respondents) objected to the winding up application on the basis that this winding up application is an attempt to deny the creditors of the Petitioner of their dues. Upon inquiry, the learned High Court Judge of the Commercial High Court of *Colombo* by his order dated 30.08.2019 dismissed the application of the Petitioner for winding up of the Company. Being aggrieved by the said order of the learned High Court Judge, the Petitioner preferred the instant appeal to this Court. Upon hearing the application for leave to appeal on 28.09.2020, this Court granted leave to appeal on the questions of law (b), (f), and (h) of paragraph 18 of the Petition dated 11.09.2019. Those questions of law are;

   (1) Has the learned High Court Judge erred in failing to appreciate that by dismissing the application of the Petitioner all stakeholders including the creditors shall be gravely prejudiced in as much as (a) the company has ceased to conduct business; (b) there is no process of collection of its debts on behalf of the Petitioner and (c) no steps are being taken for dissolution of the Petitioner and consequently (d) no distribution can be effected?

   (2) Has the learned High Court Judge erred in failing to appreciate that the Petitioner has no legal obligation to follow procedure set out in Section 319 and 320 of the Companies act which is applicable only to voluntary winding up procedure and not winding up by Court?

   (3) Has the learned High Court Judge erred in holding that the winding up procedure is tainted with

illegality for failure to adhere to Section 319(1)(a) of the Companies Act which is entirely inapplicable to a winding up by Court?

3. At the hearing of the appeal, the Counsel for the Petitioner submitted that the learned High Court Judge in the impugned order has come to the conclusion that the Petitioner has failed to comply with the mandatory requirements mentioned in section 319 of the Act and therefore the entire process is tainted with illegality. It is the contention of the learned Counsel for the Petitioner that, section 319 of the Act is relevant to voluntary winding up of a Company, and that it has no application to this case as this is an application for winding up with the assistance by Court.

4. The learned Counsel for the Petitioner further contended that the shareholders of the Company have passed a special resolution that the Company be wound by Court and therefore that is sufficient for the Court to make an order to wind up the Company. It is the position of the learned Counsel that, the grounds (a) to (f) in section 270 of the Act are alternative grounds and therefore, the basis of the resolution being passed by the Company as per section 270(a) of the Act, is in itself sufficient for the Court to make the order for winding up.

5. At the hearing of this appeal, the learned Counsel for the Respondents submitted that the resolution passed by the Company [P-6] was passed on the basis of the audited financial statement [P-4], hence, it is the submission of the learned Counsel for the Respondents that the Petitioner has failed to prove to the satisfaction of the Court that the Petitioner is unable to pay the debts. The learned Counsel further contended that, no material was placed before Court to enable the Court to form such opinion.

6. This winding up application of the Petitioner has been made consequent to the special resolution [P-6] resolved by the shareholders of the Petitioner Company on 31st October 2018, in terms of Section 270 (a) of the Act. [P-6] was passed on the basis of the auditor's report marked [P-4] dated 30th October

2018. It is observed that, the resolution has been circulated among the directors on the day after the auditor's report was issued. On the same day, the shareholders who were also the directors of the Petitioner Company have passed the resolution. On the following day, which was the 1st of November 2018, the application for winding up has been filed in Court.

7. The special resolution [P-6] clearly states that as per the auditor's report the Company is unable to pay the debts as they fall due and therefore the Company be wound up by Court in the best interest of the Company and its shareholders. Thus, it is clear that this winding up application was made in terms of Section 270 (d) of the Act as the Company is unable to pay its debts and the resolution has been passed on that basis. Therefore, it is incumbent upon the Petitioner to prove to the satisfaction of the Court, the inability of the Petitioner to pay its debts as defined in Section 271 of the Act.

Section 271

"A company shall be deemed to be unable to pay its debts where—

(a) a creditor by assignment or otherwise, to whom the company is indebted in a sum exceeding fifty thousand rupees then due, has served on the company by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks from the date of so leaving, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company, is returned unsatisfied in whole or in part; or

(c) it is proved to the satisfaction of the court that the company is unable to pay its debts, and in

determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company."

8. There is no evidence of any demand being served on the Petitioner by a creditor as per Section 271(a) of the Act. There is also no evidence of any judgment or decree in favour of a creditor for execution, in terms of Section 271 (b) of the Act. Hence, it is for the Petitioner to prove to the satisfaction of the Court that the Company is unable to pay its debts, taking into account the contingent and prospective liabilities of the Company as per Section 271(c) of the Act.

9. In **Company Law by Kanaganayagam Kang-Isvaran**, section 271(c) of the Act was discussed as follows:

> *"… A "contingent liability" is a liability that will occur only if a specific event happens; a liability that depends on the occurrence of a future and uncertain event. …*
>
> *A "prospective" liability is a legal or accounting term of art, which has been defined as a present debt not yet finally established or quantified. …*
>
> *A company's contingent or prospective liabilities have to be taken into account, and therefore it may be unable to pay its debts although it has been paying its debts as they become due, if its existing or probable assets will be insufficient to meet its liabilities, including its contingent and prospective liabilities.*
>
> *What has to be proved under section 271(c) is not whether the Company's assets exceed its liabilities, but whether it is unable to meet its current demands. If a company's assets are insufficient to meet its liabilities, and it is found that the company is heavily indebted, all its assets being under mortgage or pledge, and there is no chance of the business progressing*

or making a profit, there is a case made out for winding up by the Court."

10. Section 273 of the Act provides for the powers of Court on hearing a winding up petition. As per section 273(2) of the Act, where a winding up Petition is presented by shareholders of the Company on the ground that it is just and equitable that the Company should be wound up, where the Court is of the opinion that it is just and equitable that the Company should be wound up, the Court shall make such order, unless the Court is of the opinion that some other remedy is available and they are seeking to wind up without pursuing the other remedy.

11. It was submitted by the learned Counsel for the Petitioner that taking into account the current financial position of the Petitioner Company as exhibited by the Auditor's report [P-4] and the prevailing economic situation of the country, there is no reasonable prospect of earning a profit.

12. As submitted by the learned Counsel for the Respondent, the audited accounts of the Petitioner Company have not been produced. The report [P-4] simply states that if the Company does not take steps to improve its cash flow position, it will be unable to finance its short-term liabilities and debt repayments. Without taking any steps to improve its cash flow position as stated in the report [P-4], the directors who are also the shareholders of the Company hurriedly passed the resolution to wind up the Company on the following day itself and made the application to Court the next day. The Petitioner Company has therefore failed to submit sufficient material to prove to the satisfaction of the High Court, that the Company is unable to pay its debts as defined in Section 271(c) of the Act. The learned High Court Judge has correctly concluded that the Petitioner has not annexed the audited accounts or has not set out the contingent or prospective liabilities of the Petitioner. The auditor's report [P-4] has not set out the assets and liabilities of the Company to satisfy the Court that the Company is unable to pay its debts.

13. The Petitioner has therefore failed to satisfy Court that it is just and equitable that the Company should be wound up. In the

above premise, the question of law (1) is answered in the negative.

14. Although it is not necessary to discuss the questions of law (2) and (3), as per the above reasoning and the answer given to question of law No. (1), for the sake of completeness I will resort to discuss them.

15. The learned High Court Judge in his judgment has said that the Petitioner Company has failed to comply with the requirements provided in sections 319 and 320 of the Act, thereby the entire winding up process is tainted with illegality.

16. The Act provides for winding up by Court, the relevant sections commence with section 270 of the Act. This application was made clearly in terms of section 270 of the Act for the winding up of the Company by Court. That is why the application was filed in Court and moved to follow the procedure laid down for Court assisted winding up.

17. Sections commencing from section 319 of the Act provides for voluntary winding up. As it is not assisted by Court, certain additional safeguards such as the requirement that the resolution passed be published in the Government Gazette within fourteen days, are provided. In terms of section 320, the Company and every officer of the Company who fails to comply with the said provision shall be guilty of an offence.

18. Such requirement to give notice by publication in the Government Gazette is not provided for applications for Court assisted winding up. Therefore, sections 319 and 320 has no application to the instant case.

19. While questions of law No. (2) and (3) will be answered in the affirmative, I must state that no prejudice has been caused to the appellant by the said findings of the High Court as the learned Judge of the High Court has considered the application on its merits.

20. As per the reasons stated above and the answer provided for the question of law No. (1), the appeal stands dismissed with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE KUMUDINI WICKREMASINGHE

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 dated 26th June 2014 of the Civil Appellate High Court of the Western Province Holden in Kalutara 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 106/2016
SC(HCCA)LA No.367/14
WP/HCCA/KAL/102/2012(f)
DC Panadura No. 17914/L

1. Waduge Adlin Fernando(Deceased)
2. Waduge Anni Fernando(deceased)
   both of
   No. 432, Nalluruwa, Panadura.
   Plaintiffs

Waduge Buddhini Manel Fernando
No. 24, Dibbede Road , Nalluruwa,
Panadura

1.A and 2A substituted Plaintiff

Vs.

1. Waduge Lionel Fernando(Deceased)

1(a) Waduge Jeewani Priya Fernando

1(b) Waduge Wasantha Kalyana Fernando

1 (c) Waduge Vijith Vishvanath Fernando

1(d) Waduge Suhaas Surendra Fernando
All of "Gimhana" Nalluruwa
Panadura.

2. Waduge Vijith Vishvanath Fernando
"Gimhana" Nalluruwa, Panadura.

3. Waduge Suhaas Surendra Fernando
"Gimhana" Nalluruwa, Panadura

4. Waduge Palitha Piyasiri Fernando
No. 434, Nalluruwa, Panadura.

Defendants

AND NOW BETWEEN

Waduge Vijih Vishvanath Fernando
"Gimhana" Nalluruwa, Panadura

1A(C) and 2 Defendant-Respondent-Appellant-Appellant

Vs.

Waduge Buddhini Manel Fernando
No. 24, Dibbede Road , Nalluruwa, Panadura

1A and 2A Substituted Plaintiff-Petitioner-Respondent-Respondent-

Before	:	Jayantha Jayasuriya, PC, CJ S. Thurairaja, PC, J. A.L. Shiran Gooneratne, J.
Counsel	:	Rohan Sahabandu, PC. with Ms. Sachini Senanayake for the 1A(C) and 2 Defendant-Respondent- Appellant-Appellant. Dr. Romesh de Silva, PC, with Harsha Soza, PC for the 1A and 2A Substituted Plaintiff-Petitioner-Respondent-Respondent.
Written submissions	:	2nd Defendant-Appellant-Petitioner on 27.06.2019 1A(C) and 2nd Defendant- Respondent- Petitioner-Appellant on 24.08.2023 1A and 2A Substituted Plaintiff-Petitioner-Respondent-Respondent 05.07.2016, 07.08.2023
Argued on	:	14.07.2023
Decided on	:	19.02.2024

Jayantha Jayasuriya, PC, CJ

This appeal is in relation to an order of the Civil Appellate High Court of Kalutara dated 26th June 2014. The Civil Appellate High Court by the impugned order dismissed an appeal against an order of the District Court. The learned judge of the District Court of Panadura by his order dated 19th March 2012 had allowed an application of the substituted plaintiffs to execute the decree and restore possession of the property in question. This impugned order was made by the learned District Judge having heard submissions of all relevant parties.

The impugned orders referred to above relate to the legal proceedings that were initiated by two sisters in the District Court of Panadura in the year 1982. One of the two plaintiff sisters was

deaf and dumb by birth. Plaintiffs invoked the jurisdiction of the District Court naming four defendants. The first defendant is the elder brother of the two plaintiffs. Second and the third defendants are children of the first defendant. The fourth defendant's father is a brother of the two plaintiffs and the first defendant. The two plaintiffs *inter alia* whilst invoking jurisdiction of the District Court sought a declaration that four deeds of gift that are described in the plaint are null and void. Plaintiffs claimed that the said deeds were fraudulently executed. Plaintiffs pleaded that all four properties described in the four schedules belonged to them. The first defendant and his children – the second and third defendants contested the claim of the two plaintiffs. However, the fourth defendant did not contest the claim of the plaintiffs. Furthermore, he contended that he came to know about the existence of a deed of gift by which the first plaintiff had donated the property described therein to him (subject to the life interest of the said plaintiff) only after the proceedings were initiated by the two plaintiffs in the District Court. According to this impugned deed, the first defendant had accepted the said gift on behalf of the fourth defendant. The fourth defendant pleaded that he does not expect such a gift from the two plaintiffs and therefore has no objection for the court granting relief to the plaintiffs.

A brief description of the four impugned deeds is as follows. Deed No 335 (P2) - the first plaintiff purports to gift a land in the extent of 1R 20P and the house situated thereon (corpus described in the second schedule of the plaint) to the fourth defendant; Deed No. 336 (P3) - the second plaintiff purports to gift a land in the extent of 2R (corpus described in the first schedule of the plaint) to the third defendant; Deed No 337 (P4) – the first plaintiff purports to gift a land in the extent of 15P (corpus described in the third schedule of the plaint) to the second defendant; Deed No 338 (P5) – the first and the second plaintiffs purports to gift a land in the extent of 2R and the buildings situated thereon (corpus described in the fourth schedule of the plaint) to the first defendant.

The District Court by its judgment dated 15th September 2003 held in favour of the plaintiffs and declared that the four impugned deeds are null and void. Furthermore, the court proceeded to cancel those four deeds. In addition, the District Court ordered damages against first to the third defendants. The court ordered the decree be entered accordingly. While the trial is in progress the two plaintiffs had passed away and the respondent had been substituted in the room and place

of the two plaintiffs as 1A and 2A substituted plaintiffs. Second defendant, third defendant and two others were substituted as 1A(C), 1A(D), 1A(A), and 1A(B) substituted defendants, in the room and place of the deceased first defendant.

The second defendant (who was also the 1A(C) substituted defendant) appealed against the judgment of the District Court and the said appeal was dismissed by the Civil Appellate High Court by its judgment dated 4th August 2009. On 22nd February 2010 the judgment of the Civil Appellate High Court was pronounced in the District Court. The Supreme Court refused Special Leave to Appeal on 01st September 2010. The said order of the Supreme Court was pronounced in the District Court on 8th February 2011.

Thereafter, the 1A & 2A substituted plaintiffs-respondent had sought a writ to eject the 1A(C) and second defendant - appellant and restore the respondent in possession in the corpus described in the fourth schedule to the plaint. The District Court issued a writ of possession dated 30th January 2012 as prayed for by the plaintiffs-respondent. The 1A(C) and 2nd defendant – appellant thereafter objected to the issuance of the writ of possession and moved the District Court to recall the writ. The District Court by its Order dated 19th March 2012 overruled the objections of the 1A(C) and second defendant appellant and granted the application of the 1A and 2A substituted plaintiffs – respondent and issued the writ to execute the decree and restore the 1A & 2A substituted plaintiffs - respondent in possession.

The said order of the District Court was unsuccessfully challenged by the 1A(C) substituted defendant who is also the second defendant in the Civil Appellate High Court. He is impugning the aforesaid orders of the District Court and the judgment of the Civil Appellate High Court in these proceedings.

The main contention of the appellant is that the District Court had no power to issue the writ of possession as no such relief was prayed for by the plaintiffs in their plaint. He contended that the relief granted by the judgment in the main matter as discussed hereinbefore is confined to the cancellation of the four impugned deeds of gift and awarding damages. Examination of all the

material filed in the District Court shows that the plaintiffs – respondent invoked section 777 of the Civil Procedure Code when seeking the writ of possession.

When this Court granted Special Leave to Appeal the following two questions of law had been identified.

1. Could a court grant relief not prayed for, either by the plaintiff or the defendant?

2. Even if the question No.01 above is answered in the affirmative, taking into account the facts and circumstances of the instant case, would Section 777 of the Civil Procedure Code apply to the execution proceedings of this case?

The learned President's Counsel for the respondent submitted that the unique facts in the instant case justifies the course of action adopted by the District Court even though, there was no prayer to restore possession in the plaint. It is his contention that the two plaintiffs were in the possession of the property described in the fourth schedule of the plaint, which was the subject matter in the impugned deed of gift No 338. Furthermore, there is no contest that the two plaintiffs became the owners of the corpus described in the fourth schedule of the plaint from 11th May 1963, by the deed no. 3361. Therefore, he contended that there was no necessity for the plaintiffs to have sought specific reliefs of declaration of title or ejectment as they were already in the possession of the corpus as rightful owners when the jurisdiction of the District Court was invoked in 1982. The only basis on which the first to the third defendants claimed title to the lands and buildings described in the plaint was that the two plaintiffs transferred the title and all other interests by the impugned four deeds of gift. Whereas, the plaintiffs sought that the said four deeds be declared null and void. In these circumstances there was no necessity to have sought an additional relief of declaration of title as they were continuing in the possession of the relevant properties as lawful owners. The learned President's Counsel for the respondents further submitted that the conduct of the second defendant while the appellate proceedings were in progress warranted the District Court to issue the writ of possession to enabling the plaintiffs enjoying the benefit of the judgment and the decree entered in the case.

The contention of the learned President's Counsel for the second defendant-appellant is that a court could grant relief only when it is prayed for. He submitted, that the claim in the plaint and relief prayed for is setting aside the deeds, and the absence of any prayer for declaration of title and eviction of the defendants precludes the plaintiffs obtaining a writ of possession for the execution of the decree based on the judgment by which the four impugned deeds were declared null and void.

However, as set out hereinbefore, the two plaintiffs obtained the judgment cancelling the four impugned deeds, from the District Court after the lapse of twenty-two years from the time the jurisdiction of the said court was invoked. Thereafter, the contesting defendant (appellant) unsuccessfully invoked the jurisdiction of both the Civil Appellate High Court and the Supreme Court which took another eight years for the conclusion of the judicial proceedings. Accordingly, the decree was entered after the lapse of eight years from the delivery of the judgment by the trial court. Yet the conduct of the appellant while the appeal proceedings were in progress had prevented the plaintiffs from enjoying their lawful rights to the properties concerned despite the judgment of the District Court which declared all deeds null and void. The appellant having lost their claim to the property had illegally gained possession after ejecting the plaintiffs forcibly. This conduct of the appellant cannot be condoned but should be condemned. The injustice caused to the plaintiffs who had been unlawfully deprived of the fruits of the judicial process should be remedied. It is also pertinent to observe that this is not the only instance in which the appellant had attempted to disturb the rights of the plaintiffs by unlawful means while the judicial process was in progress. Examination of the docket in the District Court reveals that on 10th March 2003 the District Court while the trial was in progress had issued an enjoining order preventing the appellant from causing any damage to the property and the building situated thereon. On 21st April 2003, the appellant had undertaken that he would not construct any buildings or would not cause any damage to the property. Based on this undertaking the learned trial judge had ordered the appellant not to construct any new buildings or cause any damage to the plantation until the conclusion of the trial. Two months thereafter, the defence case was closed and the judgment was reserved. The appellant by his conduct has demonstrated his propensity to secure possession of the relevant properties by illegal means and deprive the

plaintiffs their right to possession even if the court declares the impugned deeds through which the first to the third defendants were claiming rights, null and void. It is through a similar process the second defendant appellant gained possession of the land and the building concerned while the appeal process was on and deprived the plaintiffs from enjoying the fruits of the judicial process. The appellant should not be permitted to take advantage of his wrongful conduct.

When all the circumstances relating to this case are considered it is apparent that the two plaintiffs invoked the jurisdiction of the District Court to preserve and secure their rights interests and entitlements to the four properties described in the schedules to the plaint. It is their claim that the defendants had caused disturbance to the peaceful enjoyment of their rights to the properties by their fraudulent conduct – the execution of the four impugned deeds. When the plaintiffs secured their lawful rights and entitlements to the properties through judicial process, the appellant had deprived the plaintiffs from the full enjoyment of benefits derived from the rights secured through such process by resorting to unlawful means.

The District Court after the conclusion of the appeal process issued the decree confirming the cancellation of the four impugned deeds that adversely affected rights and title of the plaintiffs to the lands described in the four schedules in the plaint. Thereafter the plaintiffs sought the assistance of court to execute the decree by way of writ of possession. Plaintiffs had to seek this relief from court due to the change of circumstances caused by the unlawful conduct of the appellant. If this relief is not granted, the plaintiffs are denied of the benefit of a lawful order of a court due to deplorable and unlawful conduct of the appellant while the judicial process was in progress. If this situation is not effectively remedied, such failure would cause irreparable harm to the effectiveness of the entire judicial process. The District Court having heard the plaintiff-respondents and the contesting defendant-appellant exercising jurisdiction vested on it by the Civil Procedure Code allowed the application for the writ of possession and ordered that the plaintiffs be restored in possession.

By this process the learned District judge - by his order dated 19th March 2012 - had given effect to the judgment and the decree of the court. The learned President's Counsel for the appellant claims that the respondent could not have invoked the jurisdiction of the District Court under

section 777 of the Civil procedure Code in the absence of any order by an appellate court. The learned Counsel contends that the respondent should have obtained an order from the appellate court first and thereafter moved the trial court for a writ of possession under section 777. However, it is pertinent to note that section 839 of the Civil Procedure Code recognizes the 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".

Right to possession and right to be restored in possession inter alia are two attributes of the ownership as recognized by the general principles of law. The Privy Council in ***The Attorney-General v Herath*** 62 NLR 145 at 148 cited with approval Volume 2 of Maasdorp which described that the rights of an owner "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".* A rightful owner of a property who was dispossessed by illegal means has the right to obtain an order from court for eviction and restoration.

In my view, if the court fails to remedy the injustice caused to the respondents (two plaintiffs in the District Court) who sought the protection of the judicial process in an effective manner it facilitates the illegal conduct of a wrongdoer who acted with utmost disrespect to the judicial process and gained possession by forcibly displacing the lawful owners from the property, while the judicial process was in progress. Such unlawful conduct of the appellant is an abuse of process of court. Permitting the appellant to continue enjoying the benefit secured through an abuse of process of court causes grave injustice to the respondent who had placed full faith in the justice system and sought assistance to remedy the injustice caused due to the wrongful conduct of the appellant. The appellant with total disrespect to the judicial process resorted to a conduct that completely negates the effects of the judgment of court.

The District Court when made the impugned order based on an application made under section 777 of the Civil Procedure Code had not acted without authority. Section 839 of the Civil Procedure Code empowers the court to make orders that are necessary for the end of justice or to prevent abuse of process. In ***Seneviratne v Abeykoon*** [1986] 2 SLR 1 the Supreme Court did not hold with the proposition that section 839 was intended to repair errors committed by the court

itself and not by the parties. The Supreme Court further held that *"Not only have our courts used their inherent powers to repair injuries done to a party …… they have also used their inherent powers where a party was in error…"* (at page 6)

In ***Peiris v The Commissioner of Inland Revenue*** 65 NLR 457 at 458 held *that "It is well-settled that an exercise of power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory…".*

Considering the facts and circumstances of this case as discussed hereinbefore, I am of the view that there is no basis to interfere with the aforesaid order (impugned order) of the District Court. The first question of law is therefore answered in the affirmative. In view of my aforesaid findings, I do not proceed to examine the second question of law as it will be just an academic exercise.

The appeal is dismissed with costs.

Chief Justice

S. Thurairaja,, PC, 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

Wille Arachchige Madushani Perera
or Mille Arachchige Madushani
Perera,
No. 231/2, School Lane,
Wedamulla, Kelaniya.
Plaintiff

SC APPEAL NO: SC/APPEAL/107/2023
HCCA NO: WP/HCCA/GAMPAHA/44/2019 (F)
DC GAMPAHA NO: 2789/L

Vs.

Indrani Silva,
No. 99, Naramminiya Road,
Kelaniya.
Defendant

AND

Indrani Silva,
No. 99, Naramminiya Road,
Kelaniya.
Defendant-Appellant

Vs.

Wille Arachchige Madushani Perera
or Mille Arachchige Madushani
Perera,
No. 231/2, School Lane,
Wedamulla, Kelaniya.
Plaintiff-Respondent

AND NOW BETWEEN

Wille Arachchige Madushani Perera
or Mille Arachchige Madushani
Perera,
No. 231/2, School Lane,
Wedamulla, Kelaniya.
Plaintiff-Respondent-Appellant

Vs.

Indrani Silva,
No. 99, Naramminiya Road,
Kelaniya.
Defendant-Appellant-Respondent

Before: Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Achala Wengappuli
Hon. Justice Mahinda Samayawardhena

Counsel: Dinesh de Alwis for the Plaintiff-Respondent-Appellant.
Defendant-Appellant-Respondent is absent and
unrepresented.

Written Submissions:

By the Appellant on 28.12.2023

Argued on: 16.01.2024

Decided on: 13.02.2024

Samayawardhena, J.

The plaintiff filed action in the District Court of Gampaha seeking a declaration of title to, and ejectment of the defendant from, the land described in the schedule to the plaint, and damages. The defendant filed answer seeking dismissal of the plaintiff's action and a declaration that the defendant is the owner of the land.

On the 5th date of trial, the defendant being absent and unrepresented, the case was fixed for *ex parte* trial. After the *ex parte* trial, the judgment was pronounced on 17.11.2017. Upon the *ex parte* decree being served on the defendant, the defendant made an application under section 86(2) of the Civil Procedure Code to vacate the *ex parte* decree.

At the inquiry into this application, learned counsel for the plaintiff raised a preliminary objection to the maintainability of the application on the basis that the application was bad in law since the defendant had not prayed for setting aside the *ex parte* judgment and the decree. This preliminary objection was upheld by the District Court and the plaintiff's application was dismissed *in limine* by order dated 31.05.2019.

The defendant filed a final appeal against this order in terms of section 754(1) read with section 754(5) of the Civil Procedure Code (by way of Notice of Appeal followed by Petition of Appeal as stipulated in section 755 of the Civil Procedure Code).

The defendant did not participate in the argument before the High Court of Civil Appeal.

As seen from the post-argument written submissions filed on behalf of the plaintiff before the High Court of Civil Appeal, the principal submission of learned counsel for the plaintiff before the High Court was that the final appeal filed against the order of the District Court dated 31.05.2019 was misconceived in law. By citing *Chettiar v. Chettiar* [2011] 2 Sri LR 70 in support, his argument was that the defendant ought to have come before the High Court by way of a leave to appeal application, not by way of final appeal.

The second submission of learned counsel before the High Court was that the application filed by the defendant before the District Court under section 86(2) was misconceived in law, as there was no relief seeking to set aside the *ex parte* judgment and the decree.

The learned High Court Judge identified these two arguments presented before him in the impugned judgment but, for reasons best known to him, only dealt with the second submission and allowed the appeal by judgment dated 31.05.2022. The learned High Court Judge completely ignored the first submission.

This appeal by the plaintiff is against the judgment of the High Court. This Court granted leave to appeal against the said judgment mainly on two questions of law:

(a) Did the High Court of Civil Appeal err in law by not dismissing the final appeal filed by the defendant since the correct remedy would have been to file a leave to appeal application against the impugned order dated 31.05.2019?
(b) Did the High Court of Civil Appeal err in law by concluding that the defendant intended to set aside the *ex parte* judgment and the

decree dated 17.11.2017 in the absence of a prayer to that effect in the application filed under section 86(2)?

The approach of the learned High Court Judge is completely erroneous. He ought to have initially decided on the first submission, and thereafter considered the second submission, if he ruled against the plaintiff on the first. If he accepted the first submission, he had no choice but to dismiss the appeal *in limine*. In such circumstances, consideration of the second submission does not arise. The High Court cannot decide only on the second submission and allow the appeal.

The main statutory provisions relevant to the first question of law are sections 754(1), (2) and (5) of the Civil Procedure Code and section 5 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990.

Sections 754(1), (2) and (5) of the Civil Procedure Code read as follows:

754 (1) Any person who shall be dissatisfied with any judgment, pronounced by any original court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law.

(2) Any person who shall be dissatisfied with any order made by any original court in the course of any civil action, proceeding or matter to which he is, or seeks to be a party, may prefer an appeal to the Court of Appeal against such order for the correction of any error in fact or in law, with the leave of the Court of Appeal first had and obtained.

(5) Notwithstanding anything to the contrary in this Ordinance, for the purposes of this chapter—

"judgment" means any judgment or order having the effect of a final judgment made by any civil court; and

"order" means the final expression of any decision in any civil action, proceeding or matter, which is not a judgment.

According to Article 154P to the Constitution introduced by the 13th Amendment, there shall be a High Court for each Province. The High Court of the Provinces (Special Provisions) Act, No.19 of 1990, made provisions regarding the procedure to be followed in, and the right to appeal to and from, such High Court, and for matters connected therewith. By this Act, the High Courts of the Provinces were granted appellate jurisdiction primarily against the judgments and orders of the Magistrates' Courts, Primary Courts and Labour Tribunals within the respective Provinces.

By the High Court of the Provinces (Special Provinces) (Amendment) Act, No. 54 of 2006, sections 5A, 5B and 5C were introduced to Act No. 19 of 1990. This was done to grant appellate jurisdiction to the Provincial High Courts against the judgments and orders of the District Courts within the respective Provinces. Those High Courts, although it is a misnomer, are conveniently known as High Courts of Civil Appeal.

After the said amendment by Act No. 54 of 2006, section 5A of the principal Act, No.19 of 1990 (without the proviso) reads as follows:

5A(1) A High Court established by Article 154P of the Constitution for a Province, shall have and exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be.

(2) The provisions of sections 23 to 27 of the Judicature Act, No. 2 of 1978 and sections 753 to 760 and sections 765 to 777 of the Civil

> *Procedure Code (Chapter 101) and of any written law applicable to the exercise of the jurisdiction referred to in subsection (1) by the Court of Appeal, shall be read and construed as including a reference to a High Court established by Article 154P of the Constitution for a Province and any person aggrieved by any judgment, decree or order of a District Court or a Family Court, as the case may be, within a Province, may invoke the jurisdiction referred to in that subsection, in the High Court established for that Province:*

According to section 5A(2), the appellate procedure to be adopted in the High Court of Civil Appeal is the same procedure which is being followed in the Court of Appeal.

The issue of whether an appeal or leave to appeal is permissible against an order of the District Court has been a matter of prolonged controversy. Two approaches emerged: the order approach and the application approach.

In the Supreme Court case of *Siriwardena v. Air Ceylon Ltd* [1984] 1 Sri LR 286, Sharvananda J. (later C.J.) followed the order approach adopted by Lord Alverstone C.J. in *Bozson v. Altrincham Urban District Council* [1903] 1 KB 547.

Conversely, in the Supreme Court case of *Ranjit v. Kusumawathie* [1998] 3 Sri LR 232, Dheeraratne J. followed the application approach adopted by Lord Esher M.R. in *Salaman v. Warner* [1891] 1 QB 734 and Lord Denning M.R. in *Salter Rex & Co. v. Ghosh* [1971] 2 QB 597.

The order approach solely considers the nature of the order. If the order, when taken in isolation, conclusively disposes of the matter in litigation without leaving the suit alive, it is deemed final, and a final appeal is the appropriate remedy against such an order.

The application approach solely considers the nature of the application made to Court by a party, not the order delivered by Court on that application. Following this approach, if the order, given in one way, will conclusively dispose of the matter in litigation, but if given in the opposite way, will allow the action to continue, the order is considered interlocutory, in which event, leave to appeal is deemed the appropriate remedy.

The Full Bench of the Supreme Court, consisting of five Justices, was tasked with deciding this contentious issue in *Chettiar v. Chettiar* [2011] 2 Sri LR 70. After discussing both approaches derived from English decisions, the Supreme Court unanimously decided that the application approach, as opposed to the order approach, shall be the criterion for deciding whether an appeal or leave to appeal is the proper remedy against an order of the District Court.

This Full Bench decision of the Supreme Court was consistently followed in later Supreme Court decisions (*Yogendra v. Tharmaratnam* (SC/Appeal/87/2009, Supreme Court Minutes of 06.07.2011), *Ranasinghe v. Madilin Nona* (SC/Appeal/03/2009, Supreme Court Minutes of 16.03.2012), *Prof. I.K. Perera v. Prof. Dayananda Somasundara* (SC/Appeal/152/2010, Supreme Court Minutes of 17.03.2011).

However, despite *Chettiar v. Chettiar* being a Full Bench decision of the Supreme Court, doubts about the correctness of the decision persisted.

Hence, in *Priyanthi Senanayake v. Chamika Jayantha* [2017] BLR 74, a Fuller Bench of the Supreme Court, consisting of seven Justices, revisited the decision in *Chettiar's* case. In the end, the Fuller Bench also arrived at the same conclusion, namely, that the test to be applied is the

application approach and not the order approach. Chief Justice Dep, with the concurrence of the other six Justices of the Supreme Court, held:

> *In order to decide whether an order is a final judgment or not, it is my considered view that the proper approach is the approach adopted by Lord Esher in Salamam v. Warner [1891] 1 QB 734, which was cited with approval by Lord Denning in Salter Rex & Co. v. Ghosh [1971] 2 QB 597. It stated: "If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for that purpose of these Rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."*

It is abundantly clear that a direct appeal does not lie against the impugned order of the District Court dated 31.05.2019, whereby the Court rejected the application of the defendant made under section 86(2) of the Civil Procedure Code upholding the preliminary objection raised by the plaintiff. A direct appeal does not lie against that order because, had the District Court overruled the preliminary objection, the main inquiry would have proceeded, and the application would have been decided on its merits. If I may repeat the test, if the order, given in one way, will conclusively dispose of the matter in litigation, but if given in the opposite way, will allow the action to continue, the order is considered interlocutory, in which event, leave to appeal is deemed the appropriate remedy.

To avoid any confusion, let me add one more point in connection with *Chettiar's* judgment. A Fuller Bench of the Supreme Court, comprising seven Justices, held in *Iranganie De Silva v. Indralatha* [2017] BLR 68 that when the language of a statute is clear and the right of appeal is given in express terms, as seen in section 88(2) of the Civil Procedure

Code prior to the Civil Procedure Code (Amendment) Act, No. 5 of 2022, which stated, "*The order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made, and shall be liable to an appeal to the Court of Appeal*", the decision in *Chettiar's* case has no application. This is despite the fact that, under ordinary circumstances, the application approach does not allow for a final appeal to be filed against such an order.

The Petitioner should have gone before the High Court against the order of the District Court not by way of a final appeal made under section 754(1) read with section 754(5) of the Civil Procedure Code and section 5A of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, but by way of a leave to appeal application made under section 754(2) read with section 754(5) of the Civil Procedure Code and section 5A of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990.

I answer the first question of law in the affirmative. The consideration of the 2nd question of law does not arise. The judgment of the High Court of Civil Appeal is set aside and the appeal is allowed. The final appeal filed in the High Court against the order of the District Court dated 31.05.2019 shall stand dismissed.

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 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: 121/2021
SC/HC/LA/ Case No: 27/2020
UVA/HCCA/BDL Case No: 51/17(F)
D.C Mahiyanganaya Case No: SPL/57/15

Hatton National Bank PLC.,
No. 479, T.B. Jayah Mawatha,
Colombo 10.

Petitioner

- Vs -

1. Kodikara Gedara Seetha Sriyani Kumari

2. Attanayake Mudiyanselage Malki Sumudu Attanayake

3. Attanayake Mudiyanselage Malshan Nethsarani Attanayake

4. Attanayake Mudiyanselage Hirusha Deshan Adithya Attanayake

All are at, 2nd Mile Post,
Morayaya, Minipe.

Respondents

And between

Hatton National Bank PLC.,
No. 479, T.B. Jayah Mawatha,
Colombo 10.

Petitioner – Appellant

- Vs -

1. Kodikara Gedara Seetha Sriyani Kumari

2. Attanayake Mudiyanselage Malki Sumudu Attanayake

3. Attanayake Mudiyanselage Malshan Nethsarani Attanayake

4. Attanayake Mudiyanselage Hirusha Deshan Adithya Attanayake

All are at, 2nd Mile Post,
Morayaya, Minipe.

Respondents – Respondents

And Now between

Hatton National Bank PLC.,
No. 479, T.B. Jayah Mawatha,
Colombo 10.

Petitioner – Appellant – Appellant

- Vs -

1. Kodikara Gedara Seetha Sriyani Kumari

2. Attanayake Mudiyanselage Malki Sumudu Attanayake

3. Attanayake Mudiyanselage Malshan Nethsarani Attanayake

4. Attanayake Mudiyanselage Hirusha Deshan Adithya Attanayake

All are at, 2nd Mile Post,
Morayaya, Minipe.

Respondents – Respondents – Respondents

Before: **S. Thurairaja, PC, J**
Janak De Silva, J
Arjuna Obeyesekere, J

Counsel: Priyantha Alagiyawanna with Isuru Weerasooriya, Kavindu Liyanage and Sayuri Senanayake for the Petitioner – Appellant – Appellant

A M E B Atapattu for the Respondents – Respondents – Respondents

Argued on: 30th October 2023

Written Submissions: Tendered by the Petitioner – Appellant – Appellant on 25th January 2022

Tendered by the Respondents – Respondents – Respondents on 23rd June 2022

Decided on: 15th February 2024

Obeyesekere, J

This is an appeal against a judgment of the Provincial High Court of the Uva Province holden at Badulla [the High Court] delivered on 19th February 2020 by which the High Court affirmed the decision of the District Court of Mahiyanganaya to reject the petition filed by the Petitioner – Appellant – Appellant [the Petitioner] in terms of Section 14A of the Civil Procedure Code on the basis that the affidavit attached to the said petition is not in accordance with the law.

On 3rd December 2021, this Court granted leave to appeal on the following question of law:

> "Have the learned Judges of the Civil Appellate High Court failed to consider that the learned District Judge erred in dismissing the application of the Petitioner, when the Petitioner has filed a valid petition and affidavit which was duly executed before a Justice of the Peace in that the deponent of the said affidavit by opening paragraph as well as jurat of the said affidavit has sworn to the contents therein before a Justice of the Peace?"

Background facts

The Petitioner is a licensed commercial bank. Pursuant to an application made to its Mahiyanganaya Branch by Nayanananda Deshapriya Attanayake [the Borrower] and his wife, the 1st Respondent – Respondent – Respondent [the 1st Respondent], the Petitioner, the Borrower and the 1st Respondent had entered into an agreement on 21st June 2010 in terms of which *inter alia*:

(a) the Petitioner had agreed to grant the Borrower a sum of Rs. 1,300,000 by way of a 'Shanthi' housing loan to complete the ground floor of a building situated on a land belonging to the Borrower;

(b) the Borrower had agreed to repay the said sum of money together with interest in 120 equated monthly instalments;

(c) the Borrower had agreed to mortgage to the Petitioner the property on which the above building was situated as security for the said loan;

(d) the Borrower was required to tender a Mortgage Protection Policy to secure the payment of the monthly instalments in the event of his death or him becoming permanently disabled prior to the repayment of the loan.

Accordingly, (a) by Mortgage Bond No. 2034 executed on 16th June 2010, the Borrower had mortgaged the said land to the Petitioner; (b) the Borrower had submitted a Mortgage Protection Policy from HNB Assurance Limited [the Insurer]; and (c) the said loan had been disbursed to the current account of the Borrower in three instalments.

The Borrower had passed away on 18th January 2011, with the cause of death being declared as cardio respiratory failure and end stage renal failure. Upon the Insurer, an associate company of the Petitioner, declining to pay in terms of the aforementioned Mortgage Protection Policy, and in the absence of a testamentary case being filed in respect of the estate of the Borrower which would have enabled the Petitioner to make a claim in respect of the monies lent and advanced to the Borrower, the Petitioner had sent a letter of demand dated 21st May 2015 to the 1st Respondent and to the 2nd – 4th Respondents – Respondents – Respondents who are the three children of the Borrower and the 1st Respondent [collectively referred to as the Respondents], demanding the payment of a sum of Rs. 1,966,733.67, being the capital outstanding of the aforementioned loan and interest thereon as at 31st March 2015. It is admitted that the Respondents have not paid the sum so demanded.

Application under Section 14A

In terms of Section 14A(1) of the Civil Procedure Code, "*Where a person against whom the right to any relief is alleged to exist is dead and the right to sue for such relief survives, the person in whom such right is alleged to exist, may make an application by way of summary procedure supported by affidavit to the court in which an action for the same may be instituted …"* in the manner set out in paragraphs (a) or (b) of the said sub-section, seeking permission of Court to substitute in place of the deceased the person whom the

petitioner desires to be made the defendant in the proposed action. The procedure that should be followed by Court in dealing with such an application has been set out in Section 14A(2) – (5).

The Petitioner, acting in terms of Section 14A(1), filed a petition in the District Court of Mahiyanganaya on 10th August 2015 pleading the above matters and claiming that even though the Borrower has passed away, the right to sue to recover the said sum of money has survived, and therefore seeking an order of Court to permit the 1st Respondent to be named as the defendant in an action that the Petitioner intends filing in terms of the Debt Recovery (Special Provisions) Act, No. 2 of 1990, as amended. The said petition had been supported by an affidavit of Anton Jude Trevor Fernando, a Senior Manager of the Petitioner, who, being a Christian, had deposed to the facts contained in the petition. It is the alleged infirmities in the said affidavit that has culminated in this appeal.

Objections to the application

In her Statement of Objections, the 1st Respondent had pleaded that in terms of the aforementioned Mortgage Protection Policy, upon the death of the insured – i.e., the Borrower – the Insurer became liable to make the payments due from the Borrower to the Petitioner and that if the Insurer has repudiated liability, it is the responsibility of the Petitioner to take legal action against the Insurer, instead of pursuing legal action against the 1st Respondent. She had also disclosed that Case No. M/272 has been filed by her in the District Court of Mahiyanganaya against the Petitioner and the Insurer, seeking to enforce the terms of the said Mortgage Protection Policy, and stated that as the liability of the Insurer is the subject matter in Case No. M/272, it is futile to institute another action in respect of the '*same subject matter*'. The response of the Petitioner was that the claim of the Petitioner may be prescribed if it is to await the outcome of the said action. It must be noted that neither party has tendered to the District Court copies of the pleadings filed in the said case nor taken steps to apprise this Court of the present status of the said case.

Although not pleaded in the said Statement of Objections, the 1st Respondent had claimed in the written submissions that were tendered at the Inquiry held to consider the application of the Petitioner that the affidavit annexed to the petition is defective for the following reasons:

a) The jurat does not contain the name of the person making the affidavit;

b) It does not appear that the signature of the deponent has been placed before the Justice of the Peace;

c) The jurat does not reveal that the contents of the affidavit were read over to the deponent by the Justice of the Peace.

While I shall refer to in detail to the Order of the District Court and the Judgment of the High Court later in this judgment, it would suffice to state at this stage that the District Court had upheld the objections in paragraphs (b) and (c) above, and that the High Court, while affirming the said Order, had proceeded to reject the affidavit on grounds not referred to by the District Court.

Applicable legal provisions

In **Kumarasinghe v Ratnakumara and Others** [(1983) 2 Sri LR 393] Sharvananda, A.C.J., (as he then was) has observed that an "*Affidavit in support of the application thus serves the purpose of proof of facts stated therein. It furnishes the evidence verifying the allegation of facts contained in the petition. Affidavit evidence carries equal sanctity as oral evidence*." It has further been observed in **Kumarasiri and Another v Rajapakse** [(2006) 1 Sri LR 359] that "*… it is the flesh and blood of the affidavit which gives life to the skeleton in the petition. In the absence of a valid affidavit supporting the averments in the petition, the petition becomes a nullity*." Thus, it is important that an affidavit is prepared in accordance with the provisions of the applicable laws.

There are two laws that I must consider in determining the aforementioned question of law. The first is the Civil Procedure Code [the Code] and the second is the Oaths and Affirmations Ordinance [the Ordinance].

The starting point is Section 181 of the Code which provides that, "*Affidavits shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to, except on interlocutory applications in which statement of his belief may be admitted, provided that reasonable grounds for such belief be set forth in the affidavit*."

Section 183A(b) provides that:

> "*Where any person is required under the provisions of this Code, or under any other law for the time being in force, to make an affidavit, then-*
>
> *(b) where the action is brought by or against a corporation, board, public body, or company, any secretary, director or other principal officer of such corporation, board, public body or company;*
>
> *may make an affidavit in respect of these matters, instead of the party to the action:*
>
> *Provided that in each of the foregoing cases the person who makes the affidavit instead of the party to the action, must be a person having personal knowledge of the facts of the cause of action, and must in his affidavit* ***swear*** *or affirm that he deposes from his own personal knowledge of the matter therein contained and shall be liable to be examined as to the subject-matter thereof at the discretion of the Judge, as the party to the action would have been, if the affidavit had been made by such party*." [emphasis added]

In terms of Section 437 of the Code, "*Whenever any order has been made by any court for the taking of evidence on affidavit, or whenever evidence on affidavit is required for production in any application or action of summary procedure, whether already instituted or about to be instituted, an affidavit or written statement of facts conforming to the provisions of section 181 may be* ***sworn*** *or affirmed to* ***by the person professing to make the statement*** *embodied in the affidavit* ***before any court or Justice of the Peace*** *or Commissioner for Oaths, or in the case of an affidavit sworn or affirmed in a country outside Sri Lanka, before any person qualified to administer oath or affirmation according*

to the law of that country, and the fact that the affidavit bears on its face the name of the court, the number of the action and the names of the parties shall be sufficient authority to such court or Justice of the Peace, or Commissioner for oaths or such person qualified to administer the oath or affirmation." [emphasis added]

Section 183(c) provides further that, "*In the case of any affidavit under this Chapter, … any person qualified to administer an Oath or affirmation according to the law of the country, in which the affidavit is sworn or affirmed, may administer the oath to the declarant*."

In terms of Section 438, "***Every affidavit** made in accordance with the preceding provisions **shall be signed by the declarant in the presence of the** court, **Justice of the Peace** or Commissioner for Oaths, or person qualified **before whom it is sworn** or affirmed*." [emphasis added]

Form 75 of the Code sets out what is referred to as the "*Formal parts of an affidavit in an Action*" and is re-produced below:

> "*In the Supreme Court of the Republic of Sri Lanka.*
>
> *(or)*
>
> *In the District / Primary Court of Colombo (or as the case may be).*
>
> *(Title.)*
>
> ***I, A. B.** (full name and description of deponent, and if a married woman, full name and description of her husband), of (place of residence) (and if a party, say so, and in what capacity), being a Buddhist (or being a Hindu or being a Muslim etc., as the case may he, or having a conscientious objection to making an oath) solemnly, sincerely, and truly affirm and declare (or if the deponent is **a Christian, make oath and say**) as follows :-*
>
> *Affirmed (or **Sworn**), [or if there are more than one deponent, Affirmed (or Sworn) by the deponents A. B.] at............this..............day of....... 19.......*
>
> *Before me (name and office of person administering the affirmation or oath)"*

In terms of the above Form, (a) a Christian shall make an oath at the beginning of the affidavit; (b) it is only thereafter that the facts contained in the affidavit shall be stated; (c) the jurat shall specify that the declarant swore in the presence of the Justice of the Peace; (d) a Buddhist, Hindu or Muslim shall, instead of an oath, solemnly, sincerely and truly affirm to the facts in the affidavit and (e) the jurat shall confirm such fact of affirmation.

While Section 4 of the Ordinance requires a witness to take an oath, the requirement that a Buddhist, Muslim or a Hindu shall affirm instead of taking an oath is specified in Section 5 of the Ordinance, which is re-produced below:

> *"Where the person required by law to make an oath-*
>
> *(a) is a Buddhist, Hindu, or Muslim, or of some other religion according to which oaths are not of binding force; or*
>
> *(b) has a conscientious objection to make an oath,*
>
> *he may, instead of making an oath, make an affirmation*."

In **M. Tudor Danister Anthony Fernando v Rankiri Hettiarachchige Freddie Perera** [SC/HCCA/LA/Case No. 279/2012; SC minutes of 17th December 2014] Priyantha Jayawardena, PC, J, having referred to the provisions of the Oaths and Affirmations Ordinance No. 6 of 1841 which was replaced by the Oaths and Affirmations Ordinance No. 3 of 1842 and which in turn was replaced by the Oaths and Affirmations Ordinance No. 9 of 1895 which is currently in force, stated that, *"A comparison of the law relating to affidavits in Sri Lanka shows that the legislature has been conscious of the fact that Sri Lanka has a multi - racial and a multi - religious population and amended the law relating to oaths and affirmations to suit the requirements of the society. Therefore, it is necessary to be conscious of the said fact in interpreting the Oaths and Affirmation Ordinance."*

In **<u>Sooriya Enterprises (International) Limited v Michael White & Company Limited</u>** [(2002) 3 Sri LR 371] Mark Fernando, J referred with approval to the following passage from **<u>Rustomjee v Khan</u>** [18 NLR 120] where Pereira, J. (de Sampayo, J. agreeing) stated as follows:

> *"While the old Ordinance No. 3 of 1842, made it compulsory on witnesses who were non-Christians to make affirmations, the new Ordinance (the Oaths Ordinance, 1895) made it optional with them to do so. The primary provision of the new Ordinance is that all witnesses shall make oaths. It then enacts that a witness who, being a non-Christian, is a Buddhist, Hindu or Muhammadan, or of some other religion according to which oaths are not of binding force, "may", instead of making an oath, make an affirmation. To swear is no more than to assert, calling God to witness, or invoking His help to the deponent in the matter in connection with which the oath is taken, and it is open to any person, be he Hindu, Muhammadan or Zoroastrian, who believes in God, to claim to be sworn (rather than to affirm) ..."*

Fernando, J went on to state as follows:

> *"This view that "may" in section 5 is permissive, rather than mandatory, is supported by sections 7 and 9 of the Ordinance, which manifest a legislative intention to allow a witness or a deponent some choice as to whether he will swear or affirm; so much so that the substitution of an oath for an affirmation (or vice versa) will not invalidate proceedings or shut out evidence.* ***The fundamental obligation of a witness or deponent is to tell the truth*** *(section 10),* ***and the purpose of an oath or affirmation is to reinforce that obligation.***
>
> *The ratio decidendi of Rustomjee v. Khan that section 5 gave an option "to any person, be he Hindu, Muhammadan or Zoroastrian, who believes in God, to claim to be sworn (rather than to affirm)", has not been doubted for 80 years. The Oaths Ordinance was twice amended thereafter: in 1915, and again in 1954 when section 5 (a) was amended. If the judicial interpretation of section 5 was erroneous, the legislature had the opportunity to correct it."* [emphasis added]

In terms of Section 12 (3) of the Ordinance, "*Every Commissioner before* ***whom any oath or affirmation is administered****, or* ***before whom any affidavit is taken*** *under this Ordinance,* ***shall state truly in the jurat*** *or attestation at what place and on what date* ***the same was administered or taken****, and shall initial all alterations, erasures, and interlineations appearing on the face thereof and made before the same was so administered or taken*" [emphasis added]

What Section 12(3) requires to be stated in the jurat is the place and date on which the oath or affirmation was administered, which implicitly means that the jurat must specify that an oath or affirmation was administered to the declarant prior to such declarant stating the facts. It must be stated that there is no requirement for a further oath or affirmation to be administered once the facts have been stated and prior to the declarant placing his signature.

It would perhaps be important to refer to Section 9 of the Ordinance, in terms of which, "*No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of a witness to state the truth*."

The above provisions could therefore be summarised as follows:

(1) Where an affidavit is required to be made under the provisions of the Code, and where the action is brought by a company such as a bank, the affidavit must be made by the secretary, director or other principal officer of such company;

(2) The person who makes the affidavit must be a person having personal knowledge of the facts of the cause of action, and must **swear** or affirm (as the case may be) that the matters contained in the affidavit are within his own personal knowledge;

(3) A Christian must take an **oath** prior to stating the matters contained in the affidavit, unless he or she has a conscientious objection to taking an oath, in which event such fact shall be stated in the affidavit;

(4) A Buddhist, Hindu or Muslim shall, having stated so, and prior to narrating the facts contained therein, solemnly and sincerely affirm to the truthfulness of such facts;

(5) Such oath or affirmation shall be taken before a Justice of the Peace or a Commissioner for Oaths [collectively referred to as Justice of the Peace];

(6) The affidavit shall be signed by the declarant in the presence of the Justice of the Peace before whom the oath or affirmation is made;

(7) The jurat shall state the time and the place at which the affidavit was sworn or affirmed to;

(8) The Justice of the Peace shall thereafter cancel the stamp and place his signature and seal on the affidavit in the presence of the declarant.

The requirement that, prior to the declarant signing the affidavit before the Justice of the Peace, the contents of the affidavit must be read over to the declarant or that the declarant must read the contents of the affidavit or that the contents of the affidavit be explained to the declarant, are requirements that seek to ensure that the declarant has understood the contents of the affidavit, and is implied by the provisions of Section 12(3).

<u>The affidavit annexed to the petition</u>

The declarant in the impugned affidavit is Anton Jude Trevor Fernando, a Senior Manager of the Petitioner.

The said affidavit, which contains sixteen paragraphs, starts as follows:

> " කොළඹ 10, ටී.බී. ජයා මාවතේ අංක 479 දරණ ස්ථානයේ ඇන්ටන් ජූඩ් ට්‍රෙවර් ප්‍රනාන්දු වන **මම ක්‍රිස්තු භක්තිකයෙකු වශයෙන් පහත සඳහන් පරිදි දිවුරා ප්‍රකාශ කරමි.**"

Paragraphs 1 and 2 read as follows:

> "01. මම ඉහත නම් සඳහන් දිවුරුම් ප්‍රකාශක වෙමි.

02. පෙත්සම්කාර බැංකුවේ ණය අධික්ෂණ හා අයකිරීම් අංශයේ ජ්‍යෙෂ්ඨ කළමණාකරුවෙකු වශයෙන් සහ මා සන්තකයේ ඇති ලේඛණ කියවා බැලීමෙන් පසු හා **මාගේ පුද්ගලික දැනීම** හා විශ්වාසය අනුව පහත සඳහන් පරිදි ප්‍රකාශ කිරීමට මා හට බලය පවරා ඇති බව මම ප්‍රකාශ කරමි."

Paragraphs 3 -16 supports the averments of fact in paragraphs 1-14 of the petition.

Paragraph 16 is followed by the jurat, which reads as follows:

"ඉහත නම් සඳහන් දිවුරුම් ප්‍රකාශ විසින් කියවා)
තේරුම්ගෙන දිවුරුම් දි වර්ෂ 2015 ක් වු ජුනි මස 18)
වන දින කොළඹ දි අත්සන් තබන ලදී)"

Mr. Priyantha Alagiyawanna, the learned Counsel for the Petitioner did concede that the word, 'ප්‍රකාශ' in the jurat should have read as 'ප්‍රකාශක', but stated it is only a typographical error and does not in any manner affect the sanctity that should be attached to such affidavit.

The signature of Trevor Fernando has been placed thereafter, followed by the statement that the signature was placed before the Justice of the Peace [මා ඉදිරිපිටදිය], followed by the signature of the Justice of the Peace, the cancellation of the stamp and the affixing of the seal of the Justice of the Peace.

While there is no dispute that the impugned affidavit has been affirmed by a principal officer of the Petitioner who had personal knowledge of the facts contained therein, Mr. Alagiyawanna pointed out that:

(a) prior to stating the matters contained in the affidavit, Trevor Fernando has **sworn** to the truthfulness of what he is going to state, by taking an oath;

(b) the fact that he took an oath is borne out by the jurat, as well;

(c) the fact that the contents of the affidavit were read over and understood by Trevor Fernando is borne out by the jurat;

(d) the fact that he has understood the contents of the affidavit is borne out by the jurat;

(e) the deponent has placed his signature before the Justice of the Peace;

(f) the Justice of the Peace has placed his signature below the signature of the deponent and the stamp.

It was therefore his position that the affidavit is compliant with the provisions of the law, and that the District Court as well as the High Court erred in law when it rejected the affidavit of Trevor Fernando.

<u>Orders of the District Court and the High Court</u>

On the face of it, the submission of Mr. Alagiyawanna appears to be correct, giving rise to the question as to why the District Court and the High Court held otherwise.

In the order delivered on 9th June 2017, the learned District Judge had stated as follows:

> "දිවුරුම් ආඥා පනත ප්‍රකාරව පෙත්සම්කරුවන් විසින් ඉදිරිපත් කර ඇති දිවුරුම් ප්‍රකාශය සලකා බැලිමේදී දිවුරුම් ප්‍රකාශයේ දිවුරුම කර ඇත්තේ කා විසින්ද යන්න පැහැදිලිව දක්වා නොමැත. එමෙන්ම එකී දිවුරුම කර ඇත්තේ සමාදාන විනිශ්චය කාරවරයෙකු ඉදිරිපිටදී යන්න සහතික කර නොමැත."

Having considered the judgments in **<u>Ratwatte v Sumathipala</u>** [(2001) 2 Sri LR 55], **<u>Kumarasiri and Another v Rajapakse</u>** [supra], **<u>Navaratne v Wadugodapitiya and Others</u>** [(2006) 1 Sri LR 275] and **<u>Umma Anina v Jawahar</u>** [(2004) 2 Sri LR 1], the learned District Judge had concluded as follows:

> "ඉහත කී නඩු තීන්දු අනුව මෙම දිවුරුම් පත්‍රය දෝෂ සහගත බැවින් සිවිල් නඩු විධාන සංග්‍රහයේ 437 වගන්තිය ප්‍රකාරව නිසි පරිදි දිවුරුම් ප්‍රකාශය සකස් කර නොමැති බව තීරණය කරමි. තවද පෙත්සමේ ආයාචනයේ සඳහන් කරුණු දිවුරුම් ප්‍රකාශය මගින් සනාථ කිරීමට පෙත්සම්කරුවන් අපොහොසත් වී ඇත."

Aggrieved by the Order of the District Court rejecting its petition, the Petitioner had lodged an appeal in the High Court. By its judgment delivered on 19th February 2020, the High Court had affirmed the findings of the District Court for the following reasons:

> "ඒ අනුව එහි සඳහන් වන වචන කිහිපය සැළකිල්ලට ගැනීමේදි ඉහත සඳහන් "දිවුරුම් ප්‍රකාශ" විසින් තේරුම් ගෙන යන්නෙහිදි එය දිවුරුම් ප්‍රකාශක විසින් කියවා තේරුම් ගත්තේද නැත්නම් දිවුරුම් ප්‍රකාශකට කියවා තේරුම් කර දුන්නේද යන්න සම්බන්ධයෙන් නිශ්චිතව සඳහන්ව නැති බව බැලු බැල්මටම පෙනී යයි.
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> මෙම දිවුරුම් ප්‍රකාශයේ කිසිදු ස්ථානයක තමා විසින් දිවුරුම් ප්‍රකාශයේ සඳහන් කරනු ලබන කරුණු **සත්‍ය බවට හා නිවැරදි බවට වු කිසිදු ප්‍රකාශයක් ඇතුලත් කර නැත.**
>
> එය දිවුරුම් ප්‍රකාශය ආරම්භයේදි වු දිවුරා ප්‍රකාශ කිරීමේදිද ඉන් අනතුරුව ඇති 1 සිට 16 දක්වා වු ජේදවලද කිසිවක් සඳහන් නොවන අතර ඔහු විසින් ලේඛන සහ පුද්ගලික දැනීම හා විශ්වාසය අනුව කරනු ලබන ප්‍රකාශයක් පමණක් වන අතර, ඒ සුදහා වු ප්‍රකාශය ඔහු විසින් කරනු ලබන්නේ ඔහුට පවරා ඇති බලය මත පමණක් බවත් 2 වන ජේදය අනුව පෙනි යයි.
>
> **තමා කරනු ලබන ප්‍රකාශය සත්‍ය හෝ නිවැරදි බවට කිසිදු ප්‍රකාශයක් දිවුරුම් ප්‍රකාශයේ ඇතුලත්ව නැත.**
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> එසේම දිවුරුම් පෙත්සම අවසානයේදි සාමදාන විනිශ්චයකාරවරයා ඉදිරිපිටදි අත්සන් තබන අවස්ථාවේදි කියවා තේරුම් කර ගැනීමෙන් අනතුරුව හෝ කියවා තේරුම් කර දීමේන් පසුව පිලිගෙන අත්සන් තැබුවේද යන්න පිලිබදව වු අපැහැදිලි අවිනිශ්චිත භාවය නිසාම එම දිවුරුම් ප්‍රකාශය වලංගු දිවුරුම් ප්‍රකාශයක් ලෙස සලකා බැලිය නොහැක."

The above reasoning of the District Court and the High Court can be summarized as follows:

(a) The affidavit has not been sworn before a Justice of the Peace;

(b) The deponent has not stated anywhere in the affidavit that the facts contained therein are true;

(c) It is not clear if the contents of the affidavit have been read over to the deponent or whether the deponent read the contents himself.

Has the affidavit been sworn before a Justice of the Peace?

An allegation that is made time and again with regard to the validity of an affidavit is that (a) the declarant was never present before the Justice of the Peace; or (b) the affidavit was never read over to the declarant or by the declarant; or (c) the declarant did not sign the affidavit in the presence of the Justice of the Peace, and thus, the entire affidavit is a sham and lacks the sanctity that must be attached to an affidavit for a Court of Law to act upon it as evidence of the matters contained in the pleadings. What gives rise to such allegations are the multitude of "errors" committed in preparing an affidavit especially in the jurat of an affidavit, and with regard to the religion of the declarant and the oath or affirmation that is said to have been administered prior to stating the facts in an affidavit, with the argument being that such errors could not have either occurred or else gone unnoticed had both parties been present at the same time.

This Court has on numerous occasions stated that it is the responsibility of the Justice of the Peace who represents to the entire world that the declarant swore or affirmed to the truthfulness of the contents of such affidavit and placed his or her signature before him and that it is safe to act on the contents of such affidavit, to ensure that it is in fact so.

I would like to briefly consider the four judgments that the District Court has considered in order to ascertain if the District Court erred when it relied on such judgments. The first is **Ratwatte v Sumathipala** [supra], where in the affidavit filed along with the petition the declarant had stated that he is a Christian and made oath, but in the jurat it had been stated that the contents were "*Read over and explained to the deponent and the deponent having understood the contents thereof **affirmed** thereto in my presence in Colombo on this 19th day of June 1999*". [emphasis added]

The Court held that:

> "*If the contents of the affidavit were read and explained by the Justice of the Peace I cannot fathom how he could have, after having read that the deponent was a Christian and was making oath, at the end in the jurat clause could have stated that the deponent affirmed.*

I therefore hold that the Justice of the Peace did not read and explain to the deponent the contents of the affidavit as he claims he did in the jurat clause, nor did the deponent make oath and swear to the contents of the affidavit in the presence of the Justice of the Peace, but that the Justice of the Peace "blindly" signed an "affidavit" which had been already signed by the deponent in some other place at some other time, without even entering the date."

A similar situation arose in **Jeganathan v Safyath** [(2003) 2 Sri LR 372] where the Court of Appeal, while observing that, "*In a case of this nature where the plaintiff has commenced her affidavit after making an oath does not end the jurat in a manner consistent with the oath she has taken at the commencement it cannot be said that she has sworn to the contents of the affidavit in the true sense of the expression as expected by law.*", held that, "*Therefore a doubt arises, as to whether in fact the contents of the affidavit were read over and explained to the plaintiff, by the Commissioner of Oath before the plaintiff placed her signature.*"

An issue similar to that in **Ratwatte v Sumathipala** [supra] arose in **M. Tudor Danister Anthony Fernando v Rankiri Hettiarachchige Freddie Perera** [supra], where the petitioner having stated at the commencement of the affidavit that being a Christian, he "*make oath and state as follows*" stated in the jurat that he "*affirms*" to the facts. The question arose whether the said affidavit was valid since the petitioner, being a Christian, had not sworn in the jurat. This Court adopted a liberal approach when it held that:

"*In the affidavit filed along with the instant application, the jurat expressly sets out the place and date on which the affidavit was signed. These are essential requirements of an affidavit. There is no dispute that the affidavit was signed before a Commissioner of Oaths and she had the authority to do so.*

What is essential in an affidavit is to state that the person who is stating the facts therein does so after taking an oath or affirmation *as an affidavit is considered as evidence in law. Therefore, it is necessary to show that the person who swears or affirms to the facts stated in the affidavit did so before a competent authority or a*

person. For this reason the place of swearing or affirmation, the date on which the affidavit was signed are essential parts of the jurat. [emphasis added]

Apart from stating that the Petitioner signed the affidavit before a Commissioner for Oaths, Jurat states the place and the date on which the affidavit was signed. Jurat in an affidavit is an integral part of an affidavit and it cannot be considered in isolation. In other words an affidavit should be considered in its totality. In applying this test and considering the totality of the affidavit and applying the relevant law and accepted practices, the fair conclusion that could be arrived is that the Petitioner has stated the facts in the affidavit under oath before the Commissioner for Oaths as demonstrated at the beginning of the affidavit and, the affidavit filed along with the instant petition fulfills the requirements of the Oaths and Affirmation Ordinance."

In **De Silva and Others v L.B. Finance Ltd** [(1993) 1 Sri LR 371], even though the affidavit commenced with the words - " *We .... being Buddhists do hereby solemnly, sincerely and truly declare and affirm as follows:*", the jurat only stated that, "*The foregoing affidavit was duly read over and explained by me to the within-named affirmants who having understood the nature and contents signed same in my presence at Colombo on this 16th day of August 1991*". A preliminary objection was raised that the affidavit was invalid for the reason that the jurat did not contain the fact of affirmation.

Chief Justice G. P. S De Silva, having considered the provisions of Section 438, the averments in the affidavit and the wording of the jurat that the affidavit was *"duly read over and explained..... to the within-named affirmants ...."* held that *"section 438 of the Civil Procedure Code* ***does not require that the fact of affirmation should be expressly stated in the jurat of the affidavit***." [emphasis added]. I must however say that even though Section 438 is silent in this regard, Section 12(3) of the Ordinance, to which I have already referred to, suggests otherwise.

In each of the above cases, there was either a contradiction between the opening statement in the affidavit and the jurat as to whether what was administered was an oath or affirmation, or the jurat did not support the opening statement. The conservative and liberal approaches that our Courts have adopted over the years when confronted with

such errors and contradictions were considered by Amarasekara, J in **Weerawansa v Karunanayake** [SC Appeal No. 59A/2006; SC minutes of 29th July 2020], where having carried out a comprehensive survey of the cases in this regard including **Ratwatte v Sumathipala** [supra] and **Kumarasiri and Another v Rajapakse** [supra], he concluded as follows:

> "*The above decisions indicate that on some occasions where there was a defect in the jurat, our courts have acted somewhat strictly, and on other occasions more liberally. In some instances, our courts have expressed that even though technicalities should not be allowed to stand in the way of justice, the basic requirements of the law must be fulfilled; and in some cases the rationale behind making an oath or affirmation appears to have been considered and if it is visible from the affidavit as a whole that it is a responsible statement admitting the truth with regard to what is contained in the affidavit, it has been considered as valid. Thus, a mere declaration or statement of facts have been rejected. When there were contradictions between the contents of the affidavit and its jurat, in certain instances affidavit was not given the legal recognition, perhaps due to the doubt that the signing of the affidavit would have taken place blindly and not in a responsible manner. In some cases, even if there were contradictory statements as to whether it was affirmed or sworn, or when the jurat was silent as to whether it was affirmed or sworn, or when the contents indicated that either it was affirmed or sworn as required by law or when it was a responsible statement to vouch for the truth, the relevant affidavit was considered as valid*."

> "*After perusing the aforementioned decisions of our superior courts and the relevant provisions it is my view that what is necessary is whether the deponent made an oath or affirmed, as the case may be, as to the truthfulness of the contents of the affidavit, before the Justice of Peace or the Commissioner of oath. This has to be ascertained not only by looking at what is stated in the jurat but taking the affidavit as a whole*."

The second judgment relied upon by the District Court is **Kumarasiri and Another v Rajapakse** [supra] where the affidavit was rejected since "*it does not state where the affidavit was affirmed and thus violate the provisions contained in Section 12 (3) of the Oaths and Affirmation Ordinance*."

The third is **Navaratne v Wadugodapitiya and Others** [supra] where the purported affidavit tendered with the amended petition had not been signed by the petitioner, with the explanation being that the petitioner had by mistake placed the signature on the petition instead of placing the same on the affidavit. The Court of Appeal held that, "*the aforesaid mistake on the part of the plaintiff petitioner clearly indicates that the purported affidavit has not been read over and explained to the plaintiff-petitioner nor has the plaintiff - petitioner himself read the affidavit which is fatal to the validity of the said affidavit. If as the plaintiff-petitioner tries to make out that he placed his signature on the petition instead of on the affidavit then the purported affidavit has been signed by the Justice of Peace prior to the plaintiff - petitioner placing his signature on the petition, for it is obvious that the Justice of Peace should have observed that the affirmant's signature was not on the affidavit when he entered the jurat clause. In effect it is obvious that the purported affidavit does not comply with the provisions contained in section 438 of the Civil Procedure Code*…."

The fourth is **Umma Anina v Jawahar** [supra] where the affidavit filed by the power of attorney holder of the petitioner was rejected by Court since there was "*no averment in the affidavit that the facts stated therein are within the personal knowledge of the declarant and that he is able of his own knowledge and observation to testify to. … When there is no averment in the affidavit that the declarant deposes such facts from his personal knowledge, it contravenes the provisions of the proviso to section 183A of the Civil Procedure Code*."

It must be emphasised that the role played by a Justice of the Peace is sacred, and that when errors such as what I have referred to earlier do take place, it is not unreasonable to draw an inference that such errors occurred due to the declarant not being present before the Justice of the Peace as claimed in the jurat. Similarly, when there are no contradictions and on the face of it, the fact that an oath was taken before a Justice of

the Peace or the fact that the signature of the declarant was placed before the Justice of the Peace is borne out by the affidavit, it is not open for a Court to hold otherwise, unless there are cogent reasons for doing so.

The issue is, are the cases relied upon by the District Court relevant to the facts of this case? Trevor Fernando has stated at the beginning of the affidavit that he is a Christian and that he has taken an oath. The jurat does not contradict the above position but instead confirms that he has sworn in the presence of the Justice of the Peace on the date and place specified in the jurat. There is no mix-up as in the cases referred to by the learned District Judge. The Justice of the Peace has confirmed that Trevor Fernando placed his signature before him, prior to himself signing the affidavit. Thus, the said judgments had no relevance at all to the facts of this case.

Since what had been annexed to the appeal brief was only a black and white copy of the impugned affidavit and given the fact that on the face of it, the affidavit appeared to have been prepared in accordance with the law, I called for the record of the District Court out of an abundance of caution in order to examine the original of the impugned affidavit. Having done so, I am satisfied that nothing on the face of the affidavit could have given rise to the conclusion that Trevor Fernando did not present himself before the Justice of the Peace or that he did not take an oath or that he did not sign the affidavit in the presence of the Justice of the Peace.

In these circumstances, I am of the view that the District Court and the High Court erred (a) when it followed judgments which had no application to the facts of this case, and (b) when it failed to appreciate that the affidavit of Trevor Fernando has been prepared in accordance with the applicable legal provisions.

<u>Has the deponent stated that the facts are true?</u>

This brings me to the next ground on which the High Court rejected the affidavit, which is that Trevor Fernando has not stated in the affidavit that the facts contained in the affidavit are true.

Referring to the aforementioned statutory provisions, Mr. Alagiyawanna submitted that in the preparation of affidavits, the law draws a distinction between those who are of the Christian faith and those who are not. It was his position that if the person who makes an affidavit is a Christian, such person who is known as a deponent, is required to state so at the beginning of the affidavit, is required to take an oath that the material contained in such affidavit is within his personal knowledge and thereafter proceed to state the factual matters. He stated further that when a Christian makes an oath, he or she does so in the name of God, and therefore, it is presumed that once an oath is taken, what follows thereafter is the truth and that, that is the manner in which sanctity is attached to the contents of such affidavit.

The above submission is supported by the decision of this Court in **Sooriya Enterprises (International) Limited v Michael White & Company Limited** [supra] where it was held that, "*The fundamental obligation of a witness or deponent is to tell the truth and the purpose of an oath or affirmation is to reinforce that obligation*.", and the following definitions of the word, 'oath' referred to in **M. Tudor Danister Anthony Fernando v Rankiri Hettiarachchige Freddie Perera** [supra]:

> "Stroud's Judicial Dictionary of Words and Phrase [Sixth Edition (Volume 2)]: *'An oath is a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth (R. v. White, Leach, 430, 431)'.*
>
> The Oxford Dictionary of Law [Seventh Edition]: *A **pronouncement swearing the truth of a statement or promise, usually by an appeal to God to witness its truth**. An oath is required by law for various purposes, in particular for affidavits and giving evidence in court. The usual witness's oath is: "I swear by Almighty God that the evidence which I shall give shall be the truth, the whole truth and nothing but the truth". Those who object to swearing an oath, on the grounds that to do so is contrary to their religious beliefs or that they have no religious beliefs, may instead 'affirm.'"*

Longman Dictionary of Contemporary English*: 'a formal promise to tell the truth in a court of law'*."

This Court also referred to the definition of deponent in the Oxford Dictionary of Law [Seventh Edition], where a deponent had been defined as *'a person who gives testimony under oath, which is reduced to writing for use on the trial of a cause'.*

Mr. Alagiyawanna submitted further that a person who is not a Christian or being a Christian has an objection to taking an oath, will not make an oath and hence, in order to give validity to an affidavit, the declarant is required to affirm to the contents of such affidavit by stating that he does so solemnly, sincerely and truly.

It was therefore his position that:

(a) non-Christians are allowed to make an affirmation instead of an oath and it is only such an affirmation that must carry the words, "*solemnly, sincerely and truly*";

(b) non-Christians who believe in God may take an oath;

(c) a Christian who does not have a conscientious objection to make an oath does not have to say that he is doing so "*solemnly, sincerely and truly*" for the simple reason that such person is taking an oath before stating the matters in the affidavit and in-built in such oath is a sworn statement to tell the truth in the name of God and the fact that such contents are true.

Having examined the original of the impugned affidavit, I am satisfied that Trevor Fernando, being a Christian has taken an oath prior to stating the facts in paragraphs 1 – 16 of the affidavit. This is clearly borne out by the use of the words, "**මම ක්‍රිස්තු භක්තිකයෙකු වශයෙන් පහත සඳහන් පරිදි දිවුරා ප්‍රකාශ කරමි.**" The definitions that I have already referred to make it clear that in taking an oath, the deponent is swearing by God to tell the truth. Thus, there was no further necessity for Trevor Fernando to state elsewhere in the affidavit that he is stating the truth or for him to state that he is stating so sincerely and truly. The High Court clearly erred when it concluded that the deponent has not stated

anywhere in the affidavit that the facts contained in the affidavit are true or that it is not clear who has sworn the affidavit.

Were the contents of the affidavit read over to Trevor Fernando?

The third ground on which the affidavit was rejected was that it is not clear if the contents of the affidavit have been read over to Trevor Fernando or whether Trevor Fernando has read the contents himself. Whether the contents of the affidavit were read over by Trevor Fernando on his own or whether the contents were read over or explained to Trevor Fernando by the Justice of the Peace, what is important is that Trevor Fernando must understand the contents of the affidavit and that the contents of the affidavit have been stated under an oath which then assures the truthfulness of the contents of the affidavit.

The jurat makes it clear that Trevor Fernando has read the contents of the affidavit, **has understood the contents thereof**, has sworn before the Justice of the Peace and thereafter placed his signature on 18th June 2015 [ඉහත නම් සඳහන් දිවුරුම් ප්‍රකාශ විසින් කියවා තේරුම්ගෙන දිවුරුම් දි වර්ෂ 2015 ක් වු ජුනි මස 18 වන දින කොළඹ දි අත්සන් තබන ලදි]. It is also clear that Trevor Fernando has signed before the Justice of the Peace and that the Justice of the Peace has signed thereafter.

I am therefore of the view that the High Court erred when it rejected the affidavit on the ground that it is not clear if the contents of the affidavit have been read over to the deponent or whether the deponent read the contents himself.

Conclusion

In the above circumstances, I answer the aforementioned question of law in the affirmative. The judgment of the High Court dated 19th February 2020 and the Order of the District Court dated 9th June 2017 are hereby set aside. The District Court of Mahiyanganaya is directed to act in terms of Section 14A of the Civil Procedure Code and consider in accordance with the law the application of the Petitioner contained in the petition filed on 10th August 2015.

I make no order for costs.

JUDGE OF THE SUPREME COURT

S. Thurairaja, PC, J

I agree

JUDGE OF THE SUPREME COURT

Janak De Silva, J

I agree

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF

THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of section 5C of the High Court of the Provinces (Special provisions) Act No.19 of 1990 as amended by Act No. 54 of 2006 against a judgment delivered by the Provincial High Court exercising its jurisdiction under section 5A of the said Act.

SC Appeal No. 124/2022

SC Leave to Appeal Application No.
SC/HCCA/LA/332/2020

Civil Appellate High Court Case
Application No. 73/2019

District Court Kegalle Case No.6853/L

Bothalayage Athula Sumanasekara

Alawala, Thunthota.

PLAINTIFF

Vs

1. Mananalage Sumathipala
2. Dissanayake Ralalage Ajith Munaweera
3. A. Rapiel Singho (deceased)

3a. Ganthota Karagalage Nandawathie

All at:

Alawala, Thuntota

4. Galigamuwa Pradeshiya Sabhawa
   Pitagaldeniya

DEFENDANTS

AND THEN BETWEEN

Bothalayage Athula Sumanasekara

Alawala, Thunthota

PLAINTIFF-APPELLANT

Vs.

1. Mananalage Sumathipala
2. Dissanayake Ralalage Ajith Munaweera

3a. Ganthota Karagalage Nandawathie

4. Galigamuwa Pradeshiya Sabhawa
   Pitagaldeniya

DEFENDANT-RESPONDANTS

AND NOW BETWEEN

1. Mananalage Sumathipala

DEFENDANT-RESPONDANT-APPELANT

Vs.

Bothalayage Athula Sumanasekara

Alawala, Thunthota

PLAINTIFF-APPELLANT-RESPONDANT

1. Dissanayake Ralalage Ajith Munaweera
2. A Rapiel Singho
3. Ganthota Karagalage Nandawathie

All at:

Alawala, Thunthota.

4. Galigamuwa Pradeshiya Sabhawa
   Pitagaldeniya

DEFENDANT-RESPONDANT-RESPONDANTS

Before: **VIJITH K. MALALGODA, PC, J**

P. PADMAN SURASENA, J

MAHINDA SAMAYAWARDHENA, J

Counsel: Ms. Nishadi Wickramasinghe for the 1st Defendant-Respondant-Appellant

Ranjan Suwandaratne, PC with Anil Rajakaruna for the Plaintiff-Appellant-Respondent

Argued on: 27-03-2023

Decided on: 09-02-2024

P.Padman Surasena J:

According to the amended Plaint (dated 01-10-2003), the Plaintiff-Appellant-Respondent (hereinafter referred to as the Plaintiff) had instituted the instant action against the 1st Defendant-Respondent-Appellant (hereinafter sometimes referred to as the 1st Defendant), the 2nd Defendant-Respondent-Respondent (hereinafter sometimes referred to as the 2nd Defendant), the 3rd Defendant-Respondent-Respondent (hereinafter sometimes referred to as the 3rd Defendant), and the 4th Defendant-Respondent-Respondent (hereinafter sometimes referred to as the 4th Defendant or Pradeshiya Sabha of Galiamuwa). As the 3rd Defendant had passed away his wife Ganthota Karangalage Nandawathie has been added as (3a) Defendant-Respondent-Respondent. The Plaintiff in his action has prayed *inter alia* for the following relief:

(a) A declaration that he is the owner of the land more-fully set out in the schedule to the Plaint,
(b) A declaration that he is entitled to a judgment demarcating the eastern boundary of Lot 3 in Plan No. 6053/PA and also in terms of Plan No. 2143 dated 25-05-2003,
(c) A permanent injunction preventing the Defendants from disputing the demarcation of the boundary.

The Plaintiff, according to the amended Plaint, states that he is the lawful owner of the land more-fully described in the schedule to the amended Plaint. According to the said schedule this land is Lot 3 in extent of 3 Roods and 13.34 Perches (රූ: 03, පර්:13.34) which is depicted in the Plan No. 6053/PA dated 15-11-1975 prepared by L. A. D. C. Wijetunga Licensed Surveyor. The said Plan is the Final Plan prepared for the partition case No. 18733 in the District Court of Kegalle. The boundaries to said Lot 3 according to the schedule to the amended Plaint are as follows:

- *To the north – Veralugollena*
- *To the east – a footpath*
- *To the south – Lot X, Lot Y and Lot No. 04*
- *To the west – Lot No. 2*

Indeed, according to the Plaintiff, the District Court of Kegalle in the said partition action had allotted the said Lot 3 to Godayalage Lafi who stood as the 6th Defendant to that partition action. It is thereafter that the Plaintiff had purchased said Lot 3 from aforesaid Godayalage Lafi through the Deed No. 3575 attested by Earl Dunstant Milroy Jayawardhena Notary Public on 06-07-1997.

According to the Plaint, the roadway situated in the eastern boundary of this land had been in existence as a footpath in Plan No. 6053/PA dated 15-11-1975. The position taken up by

the Plaintiff in his amended Plaint is that the 1st and 2nd Defendants on or around 12-09-2000 had widened the said footpath to make it a four feet wide roadway by encroaching upon the Plaintiff's eastern boundary without his permission. It was the position of the Plaintiff on the Plaint that he had thereafter restored his boundary fence to its previous position by making a fence using about 20 concrete posts on or about 25-08-2002.

The Plaintiff has thereafter stated in the Plaint that on about 26-08-2002 1st, 2nd and 3rd Defendants had removed the concrete fence he had installed on his eastern boundary. He also has stated that on 28-08-2002, an officer from Galigamuwa Pradeshiya Sabha had come to the scene and told him that he had to take his boundary about 1 foot backwards to make the correct width of the road. It is in that backdrop that the Plaintiff had alleged that the 1st, 2nd and 3rd Defendant's had encroached upon his eastern boundary and widened this roadway on 28-08-2002.

At this stage, it is relevant to peruse the Plan No. 2143 dated 25-05-2003. In this Plan, the alleged encroached portion (by the 1st, 2nd and 3rd Defendants) has been depicted as Lot 1. The cause of action of the Plaintiff was on the basis that he is entitled to demarcate his boundary in accordance with the eastern boundary of Lot 3 in Plan No. 6053/PA.

1st, 2nd and 3rd Defendants have denied the positions taken up by the Plaintiff and taken up the following positions in their joint answer:

(i) The roadway relevant to this case which is Alawala-Egodadeniya Road has been in existence for a long time initially as a by-lane which was later widened into a 8 feet wide roadway.

(ii) The villagers had continuously and regularly used this roadway for a long time. The roadway was such that even the tractors had been travelling on that road.

(iii) The 1st, 2nd and 3rd Defendant's along with the other villagers had been using this 8-feet-wide road since about the year 1980 and as such they have acquired a prescriptive right to use this as a common roadway of the village.

(iv) Despite the fact that this road was a 8 feet wide roadway, the Plaintiff by misrepresenting facts, had attempted to extend his boundary by making the said roadway narrower than the existing 8 feet.

(v) The Defendants have admitted that the rest of the land is owned and possessed by the Plaintiff.

(vi) Even the Plaintiff is using the same road which is 8 feet wide, to access his land.

(vii) When the Plaintiff had obstructed this roadway by extending his eastern boundary, the 1st Defendant on 25-08-2002 had lodged a complaint to Pindeniya Police Station

The 4th Defendant, Galigamuwa Pradeshiya Sabha, in its answer, had taken up the position that the roadway relevant to this action is a roadway, which is 3.65 Metres wide and it is owned and maintained by the 4th Defendant. The 4th Defendant had relied on the Gazette dated 18-06-1993 and the Gazette dated 26-01-2001 to establish this fact.

The trial in the District Court had proceeded on 26 issues. At the end of the trial, the learned District Judge by his judgment dated 07-03-2019, had concluded the followings:

(i) The Plaintiff has established his paper title to the land described in the schedule to the Plaint.

(ii) The Plaintiff is not entitled to the relief prayed for in the other prayers as the Plaintiff had failed to properly identify his land.

(iii) The roadway more-fully depicted in the Plan No. 4818 dated 25-10-2004 produced marked **1V1**, has been a road which is 8 feet wide; the said roadway has been used in that manner for a long time; the said roadway is a roadway owned and maintained by Galigamuwa Pradeshiya Sabha.

Being aggrieved by the judgment dated 07-03-2019 pronounced by the District Court of Kegalle, the Plaintiff had appealed to the Provincial High Court. After the argument, the Provincial High Court of Civil Appeals for the reasons set out in its judgment, had proceeded to set aside the judgment of the learned District Judge and allowed the appeal.

Being aggrieved by the judgment of the Provincial High Court of Civil Appeals, the 1st Defendant-Respondent-Appellant sought Special Leave to Appeal from this Court. This Court, upon hearing the learned counsel for the 1st Defendant-Respondent-Appellant and the learned counsel for the Plaintiff-Appellant-Respondent, by its order dated 13-10-2022, had granted Leave to Appeal on the following questions of law:

a. Is the impugned judgment dated 10-09-2020 erroneous and contrary to law?

d. Did the Learned Judges of the High Court of Civil Appeals fail to consider and appreciate the evidence produced in case bearing No. 6853/L in the District Court of Kegalle?

f. Did the Learned Judges of the High Court of Civil Appeals fail to consider and appreciate the inconvenience caused to the villagers using the road relevant to the said application by setting aside the judgment of the District Court in case bearing No. 6853/L?

Perusal of Plan No. 6053/PA shows clearly the presence of a roadway along the eastern boundary of Lot 3. The said Plan had identified that roadway as a footpath (අඩිපාර). However, the plan does not give the width of that roadway. According to the Gazette dated 18-06-1993, the width of this road is mentioned as 2 meters which is approximately about 6.56 feet. According to the Gazette No. 1188 dated 08-06-2001, the 4th Respondent Pradeshiya Sabha, in terms of section 24 of the Pradeshiya Sabha Act No. 15 of 1987 has declared that this road is a 3.65 meter (approximately 12 feet) wide road owned and maintained by Galigamuwa Pradeshiya Sabha. The said Gazette notification had called for any objections by the owners of the lands relevant to this roadway within one month.

The District court had issued a commission on the Licensed Surveyor K.S. Panditharatne to prepare a plan pertaining to this roadway which was to be pointed out by the Defendants. The said surveyor (K.S. Panditharatne) had accordingly prepared Plan No. 4818 dated 25-10-2004 produced marked **1 V1**. The report submitted by the said surveyor was produced marked **1 V1 (අ)**.

The Licensed Surveyor Robert Perera was called to give evidence by the Plaintiff. The commission issued on him by the District Court was to superimpose the eastern boundary of Lot No. 03 in Plan No. 6053/PA. The Plan, the Licensed Surveyor Robert Perera has prepared is Plan No. 2143 dated 25-05-2000. This Plan has been produced marked **P2** in the District Court. He has gone to survey the land on 24-05-2003. It is his evidence that the relevant roadway was easily identifiable on the ground along the eastern boundary of Plaintiff's land Lot 3[1]. According to this surveyor's evidence it was a 10 feet wide road.

According to the Plaintiff, it was on or about 12-09-2000 that the Defendants had forcibly widened this road. He had stated further that he restored a fence using about 20 concrete posts on 25-08-2002. He had made a complaint to the Pindeniya Police Station on 25-08-2002 as the Defendants are alleged to have removed these concrete posts.

The Licensed Surveyor Sisira Panditharatne who had executed the commission obtained by the Defendants was called to give evidence on behalf of the Defendants. This surveyor also in his evidence had stated that the roadway relevant to this action is 8 feet wide from point A to D and 12 feet wide from point D to B. He too had observed and given evidence to the effect that this roadway had been in use for a long time. He also had taken a firm view according to his observation that it was a road used in common.

[1] Page 113 of the brief.

According to the Plaintiff's surveyor who was called upon to superimpose Lot 3 on the eastern boundary of the land, the roadway was definitely a roadway more than the width of a footpath.

In my view, there is no justification for the Provincial High Court to reject the position of the Defendants that such a roadway was in existence merely because several witnesses called by the Defendants had given slightly different measurements as to the widths of the roads as at different years. Indeed, it is a fact that the width of this road was increased from time to time. It is also in evidence that this has been declared as a public road owned and maintained by the 4th Defendant, Galigamuwa Pradeshiya Sabha. Despite calling for objections as per the Gazette No 1188, the Plaintiff had not offered any resistance for such declaration of this road as a Pradeshiya Sabha Road. Indeed, it is the evidence of all surveyors that they had observed that this is a roadway which had minimum width of 8 feet at one point and is a roadway used by people for a long time. The Plaintiff had not taken any action to challenge the declarations published in the relevant Gazettes. In the absence of such a challenge or any objections, it is also not justifiable and lawful for the Provincial High Court Judge to hold that these declarations are not valid. I see no justification for such conclusion. Thus, it is a mere statement not supported by any factual or legal position and cannot have a place in this case.

Having regard to the evidence adduced in this case, I am of the view that there is sufficient evidence to prove that the impugned roadway was in existence for a long time. I have already held that the reasons given by the learned Judge of the Provincial High Court of Civil Appeals to reject the evidence of the Defendant are not acceptable. Therefore, there is no justification for the Provincial High Court of Civil Appeals to overrule the finding of the learned District Judge that the impugned roadway has been a road which is 8 feet wide; the said roadway has been used in that way for a long time; the said roadway is a roadway owned and maintained by the Galigamuwa Pradeshiya Sabha.

The Defendants have not disputed that the Plaintiff holds the title to the rest of the land described in the Schedule to the Plaint. What they dispute is the apparent encroachment by the Plaintiff moving his eastern boundary on to the disputed roadway which stands widened from a foot path to a much wider road. The evidence adduced in this case at the trial, both by the Plaintiff and the Defendants do not positively establish that the Plaintiff has been successful in establishing the eastern boundary of this land. In view of the above, there is no justification for the learned judge of the Provincial Hugh Court of Civil Appeals to overrule the conclusion of the learned District Judge that the Plaintiff is not entitled to the other relief prayed for, in the other prayers as the Plaintiff had failed to properly identify his land.

For the foregoing reasons, I am of the view that the learned Judge of the Provincial Hugh Court of Civil Appeals has erred when it had set aside the judgment of the learned District

Judge. Rather than answering the questions of law in respect of which this Court has granted Leave to Appeal individually and directly, I find it appropriate to provide a composite answer to all of them as follows:

> There is no justification for the learned Provincial Hugh Court judge to overrule the conclusion of the learned District Judge that the Plaintiff is not entitled to the other relief prayed for, in the other prayers in the plaint as the Plaintiff had failed to properly identify his land.

I proceed to set aside the judgment of the Provincial High Court of Civil Appeals and restore the judgment of the District Court. The Defendants are entitled to costs.

JUDGE OF THE SUPREME COURT

<u>VIJITH K. MALALGODA PC, J</u>

I agree,

JUDGE OF THE SUPREME COURT

<u>MAHINDA SAMAYAWARDHENA J</u>

I agree,

JUDGE OF THE SUPREME COURT

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

In the matter of an Application to Appeal from the Judgment dated 22.3.2012 in Appeal No. WP/HCCA/MT/67/2008(F) in terms of Section 5 C (1) of Act No. 54 of 2006.

Nilanthi Anula de Silva,
No. 152,
6th Cross Lane,
Borupana Road,
Ratmalana.

SC APPEAL 127/2013 **Plaintiff**
SC (HC) CALA No. 169/2012

WP/HCCA/MT/67/2008(F)

D.C.Mt.Lavinia
Case No. 2239/P

Vs.

1. Hagodage Selpi,
   No. 34/6,
   Gamini Lane,
   Casiya Avenue,
   Ratmalana.

1a. Urala Ralage Francis,
   No.34/7,
   6th Cross Street,
   Borupana Road,
   Ratmalana.

2. Hettiarachchige
   Carolina Abeysekara
   (nee Pinto Jayawardene),

No.18/3,
Cashiya Mawatha,
Ratmalana.

3. Hettiarachchige Newlia
   Thilakawathie Pinto
   Jayawardene,
   No.17,
   Cashiya Mawatha,
   Ratmalana.

4. Kuruppuge Dona Rosolin,
   No.32,
   Gamini Lane,
   Ratmalana,

5. Mahapathirage Ariyapala,
   No.32/A,
   Gamini Lane,
   Ratmalana.

6. S. Somawathie Jayaweera
   Bandara,
   No. 199,
   Hill Street,
   Dehiwala.

7. Sinhara Sam Silva,
   No.20/6,
   Gamini Lane,
   Ratmalana.

8. Weliketigedera Kemawathie,
   No.32/1,
   Gamini Lane,
   Ratmalana.

9. M.G.Hemawathie,
   No.67,
   St. Rita's Road,
   Ratmalana.

10. Sooriya Arachchige Simon Singho,
No. 75/25,
Walawwatte,
Nawala,
Rajagiriya.

10a. Suriyaarachchige Wimalaratne

11. Elabadage Josi Nona,
No.19/12,
Gamini Lane,
Ratmalana.

12. A.S.Somadasa,
No.19/2,
Gamini Lane,
Ratmalana.

13. A.H.Piyasena
No. 19/2,
Gamini Lane,
Ratmalana.

14. A.H.Sumith,
No.19/2,
Gamini Lane,
Ratmalana.

15. A.H.Lal,
No.19/2,
Gamini Lane,
Ratmalana.

16. S.Waidyatilake,
No.17/7,
Cashiya Mawatha,
Ratmalana.

17. Kuruppage Don Hendri Appuhami

Defendants

AND

Weliketigedera Kemawathie,
No. 32/1,
Gamini Lane,
Ratmalana.

8th Defendant-Appellant

Vs.

Nilanthi Anula de Silva,
No.152,
6th Cross Lane,
Borupana Road,
Ratmalana.

Plaintiff-Respondent

1. Hagodage Selpi,
   No. 34/6,
   Gamini Lane,
   Casiya Avenue,
   Ratmalana.

1a. Urala Ralage Francis,
    No.34/7,
    6th Cross Street,
    Borupana Road,
    Ratmalana.

2. Hettiarachchige
   Carolina Abeysekara
   (nee Pinto Jayawardene),
   No.18/3,
   Cashiya Mawatha,
   Ratmalana.

3. Hettiarachchige Newlia
   Thilakawathie Pinto
   Jayawardene,
   No.17,
   Cashiya Mawatha,

Ratmalana.

4. Kuruppuge Dona Rosolin,
   No.32,
   Gamini Lane,
   Ratmalana,

5. Mahapathirage Ariyapala,
   No.32/A,
   Gamini Lane,
   Ratmalana.

6. S. Somawathie Jayaweera
   Bandara,
   No. 199,
   Hill Street,
   Dehiwala.

7. Sinhara Sam Silva,
   No.20/6,
   Gamini Lane,
   Ratmalana.

9. M.G.Hemawathie,
   No.67,
   St. Rita's Road,
   Ratmalana.

10. Sooriya Arachchige Simon
    Singho,
    No. 75/25,
    Walawwatte,
    Nawala,
    Rajagiriya.

10a. Suriyaarachchige Wimalaratna

11. Elabadage Josi Nona,
    No.19/12,
    Gamini Lane,
    Ratmalana.

12. A.S.Somadasa,
No.19/2,
Gamini Lane,
Ratmalana.

13. A.H.Piyasena
No. 19/2,
Gamini Lane,
Ratmalana.

14. A.H.Sumith,
No.19/2,
Gamini Lane,
Ratmalana.

15. A.H.Lal,
No.19/2,
Gamini Lane,
Ratmalana.

16. S.Waidyatilaka,
No.17/7,
Cashiya Mawatha,
Ratmalana.

17. Kuruppage Don Hendri Appuhami

Defendants-Respondents

AND NOW BETWEEN

Nilanthi Anula de Silva,
No. 152,
6th Cross Lane,
Borupana Road,
Ratmalana.

Presently at,
No.21 A,
Borupana Road,
Ratmalana.

Plaintiff-Respondent-
Appellant

Vs.

Weliketigedara Kemawathie,
No. 32/1,
Gamini Lane,
Ratmalana.

8th Defendant-Appellant-
Respondent

1. Hagodage Selpi,
No.34/6,
Gamini Lane,
Cashiya Avenue,
Ratmalana

1a. Urala Ralage Francis,
No.34/7,
6th Cross Street,
Borupana Road,
Ratmalana.

2. Hettiarachchige
Carolina Abeysekara
(nee Pinto Jayawardene),
No.18/3,
Cashiya Mawatha,
Ratmalana.

3. Hettiarachchige Newlia
Thilakawathie Pinto
Jayawardene,
No.17,
Cashiya Mawatha,
Ratmalana.

4. Kuruppuge Dona Rosolin,
No.32,
Gamini Lane,
Ratmalana,

(Deceased)

4a. Mahapatiranage Gnanaratna,
No. 127/B,
Gammana Road,
Aluthgama,
Bandaragama.

5. Mahapathirage Ariyapala,
No.32/A,
Gamini Lane,
Ratmalana.

6. S. Somawathie Jayaweera Bandara,
No. 199,
Hill Street,
Dehiwala.

7. Sinhara Sam Silva,
No.20/6,
Gamini Lane,
Ratmalana.

9. M.G.Hemawathi,
No.67,
St. Rita's Road,
Ratmalana.

10. Sooriya Arachchige Simon Singho,
No. 75/25,
Walawwatte,
Nawala,
Rajagiriya.

10a. Sooriya Aracchige Wimalaratne,
No. 75/25,
Walawwatte,
Nawala,
Rajagiriya.

11. Elabadage Josi Nona,

No.19/12,
Gamini Lane,
Ratmalana.

12. A.S.Somadasa,
No.19/2,
Gamini Lane,
Ratmalana.

13. A.H.Piyasena
No. 19/2,
Gamini Lane,
Ratmalana.

14. A.H.Sumith,
No.19/2,
Gamini Lane,
Ratmalana.

15. A.H.Lal,
No.19/2,
Gamini Lane,
Ratmalana.

16. S.Waidyatilake,
No.17/7,
Kashiya Avenue,
Ratmalana.

17. Kuruppage Don Hendri Appuhami

Defendants-Respondents-Respondents

Before : **S. Thurairaja PC, J**
A. L. Shiran Gooneratne, J
K. Priyantha Fernando, J

Counsel :

D. P. Mendis, PC, with

J. G. Sarathkumara for the Plaintiff-Respondent-Appellant.

Ranjan Suwandarathna, PC, with Anil Rajakaruna & Ms. Shavindi Jayasooriya for the 8th Defendant-Appellant-Respondent and 4th & 5th Defendants-Respondents-Respondents.

Argued on : 14.12.2023

Decided on : 23.01.2024

K. PRIYANTHA FERNANDO, J

1. The Plaintiff-Respondent-Appellant (hereinafter referred to as the "appellant") filed the above partition action in the District Court of *Mount Lavinia* seeking to partition the land more fully described in the schedule to the plaint.

2. The learned District Judge by his judgment dated 31.10.2008 in answering the points of contest, held in favour of the plaintiff allocating shares to the plaintiff, 1st, 2nd and 3rd defendants while keeping 15/100 shares unallotted.

3. Being aggrieved by the above judgment of the District Court, the 4th, 5th and 8th defendants preferred an appeal to the High Court of Civil Appeal of *Mount Lavinia*. The learned Judges of the High Court of Civil Appeal by their judgment dated 22.03.2012, allowed the appeal and set aside the judgment of the District Court. In the said judgment of the High Court of Civil Appeal, the learned High Court Judges among other things held that the corpus to be partitioned was not properly identified.

4. The instant appeal was then preferred by the appellant against the said judgment of the High Court of Civil Appeal. This court on 05.07.2013, granted leave on the following question of law:

    1) Whether the corpus set out in the schedule to the plaint has been properly identified by metes and bounds in this partition case and would include the boundaries and the extents of the land.

5. At the hearing of this appeal, the learned President's Counsel for the appellant submitted that by Deed No. 15508 (P1), her predecessor in title, *Coranelis Pinto Jayawardhena* had obtained title to the corpus. It is the submission of the learned President's Counsel that the schedule given in the P1 deed and the schedule to the plaint in the District Court case are the same. It is his submission that therefore, the corpus has been properly identified.

6. Learned President's counsel for the respondents submitted that, the boundaries mentioned in the preliminary plan No. 1279 and the boundaries mentioned of the land depicted in the schedule to the plaint are different. Therefore, the learned President's Counsel for the respondents submitted that the corpus has not been properly identified. It was further submitted that the extent of the land given in the schedule to the plaint and the land mentioned in the preliminary plan are totally different, in that, it is the submission of the learned President's Counsel that the extent of the land sought to be partitioned in the plaint is a land on which fifty coconut trees can be planted. However, the extent of the land surveyed and mentioned in the preliminary plan is 47.97 perches. Therefore, fifty coconut trees cannot be planted in a 47.97 perches land.

7. On behalf of the appellant, it was submitted that in a partition action, if the extent of the corpus is reduced, the co-owners in terms of the title will get affected by the division of a smaller land but that would not affect the trespassers. It was further submitted that physical changes such as roads coming up would change the boundaries over time. The learned District Judge has analysed the above facts, however, the High Court of Civil Appeal has failed to analyse the same. It was further submitted in the written submissions that, although the appellants say that the preliminary plan does not show in its entirety, the appellant never attempted to show at the trial what the larger land is.

8. In the written submissions filed on behalf of the respondents it was submitted that, the extent of the land depicted in the preliminary plan is 47.9 perches and at least five main buildings are situated within the said portion of land occupied by parties who were not made defendants originally. It is their submission that a land which is sufficient to plant 60 to 70 coconut trees is considered as a land approximately about 1 acre. Hence, the extent of a land sufficient to plant 50 coconut trees would therefore be around 3 roods. It is further submitted that, boundaries of the land described in the schedule to the plaint and the land depicted in the preliminary plan are different. Therefore, it is the submission on behalf of the respondents that the learned Judges of the Civil Appellate High Court were correct when they decided that the corpus has not been properly identified.

9. The boundaries of the land described in the schedule to the plaint are as follows:

North	:	Ovita owned by Rambukkana Maggonage Mahasen Perera and Others.

East and South : Land called Thombagahawaththa.

West : Land owned by Norman Mendis and Others.

Extent : A land that 50 coconut trees can be planted.

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10. The boundaries of the land depicted in the preliminary plan No.1279, drawn by *B. H. A. De Silva*, Licensed Surveyor and Court Commissioner:

North : Gamini Lane.

East : Road and premises bearing assessment No.17/7 of Dombagahawaththa.

South : Land bearing assessment No. 20/16, Gamini Lane.

West : Premises bearing assessment No.s 20/11, 20/2, 30A, and 30 of Gamini Lane.

Extent : 47.97 perches (includes Lots 1, 2 and 3).

11. On perusing the above boundaries, it is clear that the boundaries mentioned in the land sought to be partitioned in the plaint, and the land depicted in the preliminary plan do not tally.

12. The report of the Commissioner who prepared the preliminary plan is marked and produced at the trial as ['X1']. According to the Commissioner's report, it is clearly mentioned that the plaintiff (appellant) did not know the exact Eastern and the Southern boundaries.

The plaintiff has also informed the Commissioner that part of the premises in assessment no. 17/7, which is in the Eastern side of the corpus in the preliminary plan, should also be part of the corpus. Further, the appellant has clearly stated that the extent of the corpus to be partitioned should be 110 perches.

13. In the case of ***Sopaya Silva v. Magilin Silva*** **[1989] 2 Sri LR 106 at 108 ,** his Lordship Justice S. N. Silva held that,

"Section 16(1) of the Partition law requires that a commission be issued "to a surveyor directing him to survey the land to which the action relates". It implies that the land surveyed must conform substantially, with the land as described in the plaint (and in respect of which a lis pendens has been registered), as regards the location, boundaries and the extent. Further, it is for this reason that section 18(1)(a)(iii) requires the surveyor to express an opinion in his report "whether or not the land surveyed by him……is substantially the same as the land sought to be partitioned as described in the schedule to the plaint". Considering the finality and conclusiveness that attach in terms of section 48(1) of the Partition Law to the decrees in a partition action, the Court should insist upon a due compliance with the requirement by the surveyor.

If the land surveyed is substantially different from the land as described in the schedule to the plaint, the Court has to decide at that stage whether to issue instructions to the surveyor to carry out a fresh survey in conformity with the commission or whether the action should be proceeded with in respect of the land surveyed.

In the case of Brampy Appuhamy v. Monis Appuhamy (supra) it was held that the Court acted wrongly in proceeding with a partition action where the land surveyed was substantially smaller than the land as described in the plaint."

14. In the instant case as stated in paragraph 12 of this judgment, the Commissioner who prepared the preliminary plan has failed to mention in his report that the land depicted in the preliminary plan is the land sought to be partitioned in the plaint. Further, the plaintiff (appellant) herself has failed to identify the land and has stated to the Surveyor that the extent of the land should be 110 perches.

15. In the above premise it is clear that the corpus has not properly been identified at the trial and that the learned Judges of the Civil Appellate High Court has correctly concluded that the corpus has not been identified properly. Hence, the question of law, will be answered in the negative.

Appeal dismissed with costs.

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA, PC.

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 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.

The Democratic Socialist Republic of Sri Lanka

Complainant

SC Appeal 129/2017

SC SPL LA 132/2016

CA Appeal 12/2015

HC 6153/2012

Vs,

Arumugam Sebesthiyan

Accused

And Now

Arumugam Sebesthiyan

Accused-Appellant

Vs,

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

Complainant-Respondent

And now between

Arumugam Sebesthiyan

Accused-Appellant-Appellant

Vs,

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

Complainant-Respondent-Respondent

Before: **Justice Vijith K. Malalgoda, PC**
Justice A.H.M.D. Nawaz
Justice Achala Wengappuli

Counsel: Amila Palliyage with Tharindu Rathwatte and Mrs. S. Udugampola and Ms. Sandeepani Wijesooriya for the Accused-Appellant-Appellant

Dilan Ratnayake, SDSG for the Hon. Attorney General

Argued on: 18.05.2023

Decided on: 12.03.2024

Vijith K. Malalgoda PC J

The Accused-Appellant-Appellant (hereinafter referred to as 'Appellant') who was indicted before the High Court of the Western Province holden in Colombo on two counts for Possession and Trafficking of 2.42 grams of Diacetyl Morphine, had appealed to the Court of Appeal against the Judgment of the High Court when the learned High Court Judge convicted him of both counts and sentenced him for life. Their lordships of the Court of Appeal by order dated 06.06.2016 dismissed the appeal and affirmed the conviction and the sentence imposed by the High Court. The Appellant, being dissatisfied with the said decision, had sought special leave from this Court on several grounds.

When this matter was supported before the Supreme Court on 14.06.2017, this Court granted special leave on questions of law referred to in paragraphs 12 (i), 12 (ii), 12 (iii) and 12 (iv) of the Petition dated 15.07.2015 and also on two additional questions raised by the Counsel when supporting the matter before the Supreme Court.

The six questions of law considered by this Court when granting special leave are as follows;

1. Has the learned trial Judge erred in law by failing to evaluate the evidence of the defence from the correct perspective?
2. Has the learned trial judge erred in law by rejecting the defence on the wrong premise?
3. Has the learned trial judge erred in law by failing to consider that the defence evidence suffices to create a reasonable doubt on the prosecution's case?

4. Did their lordships err in law by failing to consider the grounds of appeal raised on behalf of the Petitioner?
5. Has the learned trial judge erred in law, by failing to consider the discrepancy in the chain of custody?
6. Has the learned trial judge erred in law by perusing the investigation notes and referring to them in the impugned judgment of the learned trial judge?

The questions of law referred to above are based on three areas namely, the defence evidence, chain of custody, and the procedure followed by the trial judge. However as observed by this Court, all four questions of law referred to in paragraph 12 of the Petition were based solely on the defence evidence, and in fact, the appeal before the Court of Appeal was argued only on those issues. At the time this appeal was supported for special leave, this Court permitted the Appellant to add two additional questions from the other two areas referred to above.

In those circumstances, I will reduce the questions of law that are to be considered in the instant appeal to the following three questions.

1. Has the prosecution failed to establish the chain of custody (inward journey) beyond a reasonable doubt?
2. Has the Learned judge erred in law by perusing the notes of the Police officer and referring them in the impugned judgment under sec 110 of the Criminal Procedure Code?
3. Has the Learned judge erred in law by rejecting the defence in the wrong premise?

Consideration of facts;

The Police Inspector, Rangajeewa (PW2) after receiving a tip off, that a person called Sebastian was getting ready to go to Bandaranayakepura in Rajagiriya to prepare heroin packets for trafficking, arranged for a raid with a team of police officers. For that purpose, he prepared two vehicles of which one was a jeep and the other was a three-wheeler. As per the prosecution evidence, it was revealed that the Jeep stopped at Sri Jayewardenepura Road around 3.20 p.m. and PW2 with 2 other police sergeants namely Fernando and Ajith proceeded in the three-wheeler and turned to Sarana Mawatha and stopped near the election commissioner's office so that the intersection was visible.

At 06.25 pm PW2 spotted the Appellant coming towards the police officers. As Appellant got closer to the three-wheeler, PW2 had got off and held him. When the Appellant was searched, PW2 found a light pink cellophane bag in the Appellant's hand which contained a brown-coloured powder that was identified by PW2 to be heroin.

While denying the version of PW2, the Counsel for the Appellant in the trial court suggested that the arrest of the accused was made at the Nawala junction consequent to a phone call given by PW2 requesting the accused to come. However, the Appellant giving evidence at the trial stated that when

he was at home, the police officers had taken him near Nawala Caters and had told him to show one Chutti who sells heroin and when the Appellant could not assist the Police, he was arrested. Thereafter he had been taken to the Police station and was asked to sign a statement. The wife of the Appellant had also given the evidence as a defence witness and stated that the Appellant was arrested by PW2 when he was at home on 22.05.2022.

Has the prosecution failed to establish the inward journey of prosecution beyond a reasonable doubt?

Chain of custody refers to the process that tracks the movement of evidence through its collection, safeguarding, and analysis lifecycle by documenting each person who handled the evidence, the date/time it was collected or transferred, and the purpose for the transfer. In ***Witharana Doli Nona vs Republic of Sri Lanka,***[1] his Lordship Sisira De Abrew noted that:

> *It is a recognized principle that in drug-related cases the prosecution must prove the chain relating to the inward journey. The purpose of this principle is to establish that the productions have not been tampered with. The prosecution must prove that the productions taken from the accused-appellant were examined by the government analyst. To prove this, the prosecution must prove all the links of the chain from the time it was taken from the accused-appellant to the Government Analyst's department*

The importance of the inward journey has been stated in ***Perera vs AG***[2]as follows;

> *It is a recognized principle that in this case of nature, the prosecution must prove that the production had been forwarded to the analyst from proper custody, without allowing room for any suspicion that there had been any opportunity for tampering or interfering with the production till they reach the Analyst. Therefore, it is correct to state that the most important journey is the inward journey because the final analyst report will depend on that. The outward journey does not attract the same importance.*

[1] (CA 19/19)

[2] (1998 1 SLR 378)

In ***Mahasarukkalige Chandrani vs AG***[3] Court observed,

> *Government Analyst Report which is the principal evidence in a drug offense is entirely dependent on the inward journey of the production chain and therefore, there is a duty cast on the prosecution to establish the inward journey of the production with reliable evidence. In this regard, it is important to note that, calling a witness who was at a police reserve to establish that he was functioning as a reserve officer during the particular time is not sufficient to establish a production chain but he has to give evidence confirming that the production referred to the said case was properly received by him and handed over by him in good condition*

As contended by the Learned Counsel for the Appellant, the prosecution has failed to establish the chain of custody beyond reasonable doubt due to two reasons; firstly, as per the evidence of PW2 and SI Samarakoon (PW5), PW2 took charge of the substance that had been recovered from the appellant in this matter at the time of the arrest and the productions were duly sealed and handed over to SI Samarakoon on the following day around 3.40 p.m. Until such time the sealed productions were in the custody of PW2.

PW5 in his evidence confirms that after production was handed over by PW2 with seals on the parcel intact, on 23.06.2010 he kept the productions in his custody until it was handed over to C.P. Kumarapedi, of the Government Analyst Department from whom he received the receipt marked P5 which is the confirmation of official acceptance of the production by Government Analyst. Senior Assistant Government Analyst Ms. Rajapaksha in her evidence confirms the handing over of the production to the Government Analyst by PW5 and goes on to give an analysis of the production she received under the Government Analyst Report which is marked as P6. It could be said that the analyst receipt that PW5 received from the Analyst department which has already been submitted to the court itself could be admitted as a piece of primary evidence under sec 62 of the Evidence Ordinance that is sufficient to establish the chain of production even without having to call Ms. C.P. Kumarapedi as a witness.

However, as submitted by the learned Counsel for the Appellant, concerning the process that took place in the Police Narcotic Bureau, Shanthi Fernando (PW3) who took part in the raid as well as the sealing process has given a slightly different version which reads as follows;

> ඒ නඩු බඩු පොලිස් පරීක්ෂක සමරකෝන් මහතාට බාරදෙන තෙක් පොලිස් පරීක්ෂක රංගජීව මහතා බාරයේ තබාගත් නඩු බඩු සැකකරු ඒ වගේම උපසේවයේ යෙදී සිටි පොලිස් සැරයන් කුමාරසිංහ නිලධාරියාට බාර දුන්නා.

[3] (CA 213/2009 C.A.M. 30.09.2016)

In the evidence given by PW2 during the cross-examination, he clearly said, that he had entrusted the personal belongings of the suspect to the reserve officer.

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උඃ එහෙමයි.

ප්‍රඃ මොනවද ඒ බඩු?

උඃ ශ්‍රී ලංකාවේ වලංගු මුදල් රු 100 ක්ද සෝනි එරික්සන් වර්ගයේ ජංගම දුරකථනයක්ද එම සිම්පතද අංක 681983716 දරන ජාතික හැඳුනුම්පතද සැකකරු දේපල කුවිතාන්සි අංක 65/10 යටතේ ඉදිරිපත් කළා.

On the other hand, it is very much clear from the evidence of PW5, that he received the productions, the sealed envelope from PW2 on 23.06.2010, and thereafter handed over the same to the Government Analyst on 29.06.2010. If the production was handed over to the reserve officer Kumarasiri by PW2 as argued by the learned Counsel for the Appellant, PW5 will have to take over the production not from PW2 but from Kumarasiri. However, PW5 had given clear evidence on this issue and we see no reason to reject the evidence of PW5.

On this note, it could be said that in the instant case prosecution has established the inward journey of the prosecution beyond reasonable doubt.

Has the Learned judge erred in law by perusing the notes of the Police officer and referring them in the impugned judgment?

The Learned trial judge referred to the investigating officers' notes to ascertain whether there was a contradiction between the two main witnesses. Having observed the investigation notes, the learned trial judge concluded that there was no such contradiction.

According to sec 110(3) of the Criminal Procedure Code, the court has the power to use a recorded statement in the course of investigation to '*assist it in a trial*' but not as evidence. On the other hand sec 110(4) of the Criminal Procedure Code states as follows;

> *Any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial.*
>
> *Save as otherwise provided for in section 444 neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them*

merely because they are referred to by the court but if they are used by the police officer or inquirer or witness who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer or witness the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply

Jayawardene J. commenting on the use of the notes of investigating officers in ***King v Soysa***[4] stated that '*A Judge is not entitled to use statements, made to the police and entered in the Information Book, to corroborate the evidence of the prosecution.'* Similarly, In *Pavlis Appu v Don Davit*[5] where at the close of a case, the Police Magistrate reserved judgment, noting that he wished to peruse the information book, it was held that the use of the information book for the purpose of arriving at a decision was irregular.

However, Justice Sisira De Abrew in ***Brian Anthony Samuel and Others vs AG,***[6] despite the error done by the trial judge in pursuing the Information Book and deciding on the issue, contended that,

When I consider the evidence led at the trial I hold the view that the above misdirection has not occasioned a miscarriage of justice. I, therefore, decide to act on the proviso to section 334 of the Criminal Procedure Code which reads as follows: "Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

Sec 436 of the Criminal Procedure Code states as follows,

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 the 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

Since in the instant case, the misdirection of the trial judge had no bearing on the judgment or caused any prejudice to the parties, as observed by Sisira de Abrew J in the case **of *Brian Anthony***

[4] 26 NLR 324.

[5] 32 NLR 335

[6] CA 60-61 A-B/2008 (C.A.M. 11.02.2013)

Samuel and Others vs AG *(supra)* this Court should not interfere with the decision of the learned trial judge.

Has the Learned judge erred in law by rejecting the defence on the wrong premise?

At the trial before the High Court, Appellant Arumugam Sebastian gave evidence from the witness box and called his wife Velu Ramani to give evidence on his behalf.

During his evidence the Appellant took up the position that PW2 had searched his house on 20.06.2020 but did not arrest him on that day, on 22.06.2020 he was arrested at his house and taken near Nawala Caters and wanted him to show one Chutti. Since he did not know who Chutti was, he could not show him to the officers and thereafter he was taken to the PNB. The fact that the Accused-Appellant was arrested at his residence was confirmed by his wife when she was giving evidence.

The witness's position that he did not know Chutti was contradicted by him under cross-examination in the following manner;

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උඃ ඒ 60 වත්තේ.

ප්‍රඃ කොහේ වත්තේද ඉන්නේ?

උඃ අපේ වත්තේ.

ප්‍රඃ අපේ වත්තේ කියන්නේ කොහේද?

උඃ අරුනෝදය මාවතේ.

ප්‍රඃ අරුනෝදය මාවත කොහේද තිබෙන්නේ?

උඃ රාජගිරියේ.

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ප්‍රඃ අරුනෝදය මාවතේ ඉන්නවා කියලා තමා දන්නවද?

උඃ ඔව්.

ප්‍රඃ වෙන කොහේවත් ඉන්නවා කියල කිසි දෙයක් දන්නේ නැහැ?

උඃ නැහැ.

ප්‍රඃ ඉතින් මහත්තයාව රංගජීව මහත්තයා නාවලට එක්කන් ගියා කියලා නේද කිව්වේ?

උඃ එයා එක්කන් ගියා. රංගජීව මහත්තයා කිව්වා එහේ ඉන්නව කියලා.

However, the above position taken by the Accused-Appellant was not suggested to PW2 when he was giving evidence but what was suggested to him was recorded in the proceedings as follows;

ප්‍රශ්: මම මහත්තයාට යෝජනා කරනවා ඒ විත්තිකරුට මහත්තයා දුරකථන ඇමතුමක් ලබා දී නාවල හන්දියට ආපු වෙලාවේ විත්තිකරුව අල්ලාගත්තා කියලා?

උ: එම යෝජනාව ප්‍රතික්ෂේප කරනවා.

ප්‍රශ්: විත්තිකරුට බලකලා හෙරොයින් නඩුවක් අල්ලා දුන්නොත් එහෙම නැවත නඩුවක් පවරන්නේ නැහැ කියා ඒ යෝජනාවට එකඟවුනේ නැති නිසා හෙරොයින හඳුන්වා දුන්නා?

උ: එම යෝජනාව තරයේ ප්‍රතික්ෂේප කරනවා.

The learned trial judge has rejected the evidence of the Appellant and his wife for two reasons; firstly, the position taken up in the defence evidence has not been suggested to the prosecution witness, and secondly in contrast to the position suggested to the prosecution witnesses, the Appellant has taken up a contradictory position in his evidence and therefore defence evidence ought to be rejected.

In the instant case, Learned Counsel for the Respondent contends that the trial judge had the advantage of all the witnesses being led before him and therefore had the opportunity of observing the demeanor and deportment of all the witnesses. Whilst referring to the decision *d* in ***Alwis v Piyasena Fernando***[7] Learned Counsel for the Respondent further contends that '*It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not lightly disturbed in appeal'* In ***R v. Paul***[8] it was observed that,

> *There is simply no jurisdiction in an appellate court to upset trial findings of fact that have evidentiary support. A court of appeal improperly substitutes its view of the facts of a case when it seeks for whatever reason to replace those made by the trial judge. It is also to be noted that the state is not obliged to disprove every speculative scenario consistent with the innocence of an accused.*

Similarly, in ***Gunasiri and 2 others v Republic of Sri Lanka,***[9] Sisira De Abrew J. has stated that

> *It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted.*

[7] 1993 1 SLR 119

[8] [1977]1 SCR 181

[9] [2009] 1 SLR 39

Moreover, there are patent inconsistencies in the Appellant's version which poses questions about his credibility. As already referred to in the evidence given by the Appellant under cross-examination when Police officers asked him to show where one 'chutti' was, the Appellant took the position that he could not show where chutti was as he did not know. However, the Appellant admitted having known where Chutti lives in detail. The defence taken by the Appellant is solely supported by the Appellant's wife.

In ***AG vs Sanadanam Pitchy Mary Theresa***[10] Shiranee Thilakwardene J. commenting on the credibility of a witness stated as follows;

> *A key test of credibility is whether the witness is an interested or disinterested witness. Rajaratnam J. in Tudor Perera v. AG (SC 23/75 D.C. Colombo Bribery 190/B – Minutes of S.C. Dated 1/11/1975) observed that when considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinized with some care. The independent witness will normally be referred to an interested witness in case of conflict. Matters of motive, prejudice, partiality, accuracy, incentive, and reliability have all to be weighed (Vide, Halsbury Laws of England 4th Edition para 29).*

Considering the ulterior motives that could have an influence on the evidence of the Appellant's witness owing to the close relationship between the Appellant's witness and the Appellant, it seriously casts doubt upon the probability of her version being true against the independent evidence presented to the court by prosecution witnesses, who were official witnesses with no possible personal interest in the arrest of the Appellant.

In the said circumstances it is observed that there are no serious flows relating to the manner in which the learned trial judge analyzed the evidence and the premise upon which the prosecution version was accepted over the Appellant's version.

For the above reasons, we see no basis to interfere with the findings of the Court of Appeal. The conviction and the sentence imposed by the trial judge based on the evidence placed before the trial court is affirmed.

The appeal is dismissed. No costs.

Judge of the Supreme Court

Justice A.H.M.D. Nawaz,

I agree,

[10] *AG vs Sanadanam Pitchy Mary Theresa* (n 6).

Judge of the Supreme Court

Justice Achala Wengappuli,

I agree,

Judge of the Supreme Court

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

Sunil Sirimanne,
Koratuhena Road,
Badugama, Matugama.
Applicant

SC APPEAL NO: SC/APPEAL/131/2019
SC LA NO: SC/SPL/LA/341/2018
HCA NO: HC/Rev/18/2016
LT NO: LT/18/KT/509/16

Vs.

1. Manager,
   Brave Guard Security and
   Investigations Services,
   No. 194, Sri Jayawardenapura
   Mawatha, Welikada, Rajagiriya.
2. Deputy Chief Security Officer,
   Bank of Ceylon, Kalutara Branch,
   Kalutara.

Respondents

AND

Deputy Chief Security Officer,
Bank of Ceylon, Kalutara Branch,
Kalutara.
2nd Respondent-Petitioner

Vs.

Sunil Sirimanne,
Koratuhena Road,
Badugama,
Matugama.
Applicant-Respondent

Manager,
Brave Guard Security and
Investigations Services,
No. 194, Sri Jayawardenapura
Mawatha, Welikada,
Rajagiriya.
1st Respondent-Respondent

AND NOW BETWEEN

Deputy Chief Security Officer,
Bank of Ceylon, Kalutara Branch,
Kalutara.
2nd Respondent-Petitioner-
Appellant

Vs.

Sunil Sirimanne,
Koratuhena Road,
Badugama, Matugama.
Applicant-Respondent-Respondent

Manager,
Brave Guard Security and
Investigations Services,
No. 194,
Sri Jayawardenapura Mawatha,
Welikada,
Rajagiriya.
1st Respondent-Respondent-
Respondent

Before: Hon. Justice Murdu N.B. Fernando, P.C.
Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Mahinda Samayawardhena

Counsel: D.W. Johnthasan with Malani Gallage for the 2nd Respondent-Petitioner-Appellant.
Kushan Illangatilleke for the Applicant-Respondent-Respondent.
Hafeel Farisz for the 1st Respondent-Respondent-Respondent.

Written Submissions:

By the 2nd Respondent-Petitioner-Appellant on 02.09.2020
By the Applicant-Respondent-Respondent on 11.06.2020 and 04.01.2021
By the 1st Respondent-Respondent-Respondent on 06.01.2021

Argued on: 20.01.2023

Decided on: 07.03.2024

Samayawardhena, J.

The applicant-employee filed an application dated 08.01.2016 in the Labour Tribunal of Kalutara under section 31B of the Industrial Disputes Act, No. 43 of 1950, as amended, naming two employers as respondents, alleging unlawful termination of his services from 20.02.2015. At the material time, he was attached to the Matugama branch of the Bank of Ceylon as a junior security officer of Brave Guard Security & Investigation Services (Private) Limited. The 1st respondent is the Manager of Brave Guard Security & Investigation Services (Private) Limited, while the 2nd respondent is the Deputy Chief Security Officer at the Bank of Ceylon, Kalutara branch.

The applicant stated in his application that following a minor altercation between him and two Bank officers of the Matugama branch, the management of the Bank informed him not to report for duty until he was transferred to another place. Subsequently, the applicant informed the 1st respondent of this situation. The 1st respondent then informed the applicant that his services had been terminated, effective from 31.03.2015.

The applicant in his application to the Labour Tribunal sought reinstatement. In the alternative, he sought reasonable compensation in lieu of reinstatement.

The 1st respondent in his answer took up the position that the Brave Guard Security & Investigation Services (Private) Limited did not terminate the services of the applicant but the applicant vacated the post on his own. He has further stated that, in any event, the 1st respondent is willing to employ the applicant in any Bank or any other institution at any moment.

The 2nd respondent in his answer took up the position that he was not the employer of the applicant. On that basis, he moved that he be discharged from the proceedings before fixing the main matter for the inquiry.

In the replication filed in response to the answer of the 1st respondent, the applicant stated that he applied for leave from 16.02.2015-20.02.2015 upon the request of the 2nd respondent, and thereafter he was asked not to report for duty by the 2nd respondent until the complaint received from the Matugama branch was inquired into. He further stated that when he inquired this from the 1st respondent, the 1st respondent informed him that he should sort out the question of re-employment with the 2nd respondent, and there was nothing the 1st respondent could do about it. This implies that the applicant did not consider the offer of re-employment by the 1st respondent as genuine. It is not clear why the Labour Tribunal did not try to settle the matter at that point.

In the replication filed in response to the answer of the 2nd respondent, the applicant stated that the approval of leave, transfers, termination of services etc. were carried out with the knowledge and under the control of the 2nd respondent.

It is against this backdrop, the 2nd respondent had moved that he be discharged from the proceedings forthwith as he was not the employer of the applicant.

The Labour Tribunal in its order dated 29.06.2016 refused to discharge the 2nd respondent from proceedings at that stage stating that it can be decided at the end of the main inquiry.

The revision application filed against this order was dismissed by the High Court by order dated 04.09.2018.

Hence this appeal by the 2nd respondent.

Section 31B(1)(a) of the Industrial Disputes Act enacts that a workman or a trade union on behalf of a workman who is a member of that union, may make an application in writing to the Labour Tribunal for relief or redress in respect of the termination of his services by his employer.

Section 48 of the Industrial Disputes Act provides broad definitions for the terms "employer" and "workman".

> *"employer" means any person who employs or on whose behalf any other person employs any workman and includes a body of employers (whether such body is a firm, company, corporation or trade union) and any person who on behalf of any other person employs any workman;*
>
> *"workman" means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and includes any person whose services have been terminated.*

In addition, the objective of adding a party to a legal proceeding is not necessarily to seek relief. If a person whose presence is necessary to effectively and completely adjudicate upon the matter before the court, he can be made a party (*Susil Perera v. Kelly* [2002] 3 Sri LR 163).

On the facts and circumstances of this case, the 2nd respondent is a necessary party. The 1st respondent does not consent to release the 2nd respondent accepting that the 1st respondent was the employer of the

applicant at the material time. Nor does the 1st respondent accept that he terminated the services of the applicant.

The 2nd respondent refers to the control test as a method of resolving this issue. Such matters cannot be addressed at this stage of the case. If necessary, those matters should be raised during the main inquiry, which is yet to commence.

The control test, integration test, economic reality test, mutuality of obligation test, dominant impression test etc., have been formulated mainly to decide whether a person is an employee or an independent contractor. The matter in issue in this case is somewhat different. In any event, such tests have no conclusive effect. The determination of the employer and employee depends on the unique facts and circumstances of each individual case. In this process, labels, designations, particular terms used by parties in their correspondence, the admissions made by parties therein etc. are, more often than not, misleading and not binding.

Who is the employer of the applicant is a question of fact. When the applicant cites two employers, and the Industrial Disputes Act gives broader definitions to the terms "employer" and "workman", the Labour Tribunal could not have decided on the purported preliminary question before the commencement of the inquiry. That can only be done after the inquiry.

The two questions upon which leave has been granted are as follows:

> (1) Did the High Court and the Labour Tribunal err in failing to consider that the employment of the applicant by the 1st respondent has been admitted both by the applicant and the 1st respondent?

(2) Did the High Court err in failing to consider that the Labour Tribunal order was made without considering the control test applicable to employees?

I answer both questions in the negative.

I affirm the orders of the Labour Tribunal and the High Court and dismiss the appeal. Due to the unwarranted application made by the 2nd respondent on 16.03.2016, which was pursued all the way up to the Supreme Court, the applicant faced an almost 8-year delay in progressing with his case before the Labour Tribunal. The 2nd respondent shall pay Rs. 100,000 to the applicant as costs of this appeal.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., 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. Wewegedarage Lilli
2. Wewegedarage Hemapala
3. Wewegedarage Seetha Ranjanee
   All of Kandangoda, Pugoda.
4. Wewegedarage Neil Chandana,
   Thunnana, Hanwella.
   Plaintiffs

SC APPEAL NO: SC/APPEAL/132/2015
SC HCCA LA NO: SC/HCCA/LA/122/2014
HCCA NO: WP/HCCA/AV/785/2008(F)
DC PUGODA NO: 108/P

Vs.

1. Paseema Durage Saviya
2. Paseema Durage Gunathilaka
3. Paseema Durage Agee (Deceased)

3A. Wedikkarage Anoma Chithralatha

4. Paseema Durage Meri (Deceased)

4A. Wedikkarage Kusuma

5. Wedikkarage Podi
6. Wedikkarage Vaijiya

6A. Hapan Pedige Piyaseeli

7. Wasthuwa Durage Meri

8. Kuda Kompayalage Simo (Deceased)
8A. Kuda Kompayalage Simon Wickramarathna
9. Mannalage Rosana
10. Weerappulige Simiyon Singho
11. Wedikkarage Simon (Deceased)
11A. Wedikkarage Podi

All of Kandangoda, Pugoda.

Defendants

AND BETWEEN

8. Kuda Kompayalage Simo (Deceased)
8A. Kuda Kompayalage Simon Wickramarathna
9. Mannalage Rosana

Both of Kandangoda, Pugoda.

8th and 9th Defendant-Appellants

Vs.

1. Wewegedarage Lilli
2. Wewegedarage Hemapala
3. Wewegedarage Seetha Ranjanee

All of Kandangoda, Pugoda.

4. Wewegedarage Neil Chandana,
Thunnana, Hanwella.
Plaintiff-Respondents

1. Paseema Durage Saviya
2. Paseema Durage Gunathilaka
3. Paseema Durage Agee (Deceased)
3A. Wedikkarage Anoma Chithralatha
4. Paseema Durage Meri (Deceased)
4A. Weddikkarage Kusuma
5. Weddikkarage Podi
6. Weddikkarage Vaijiya
6A. Hapan Pedige Piyaseeli
7. Wasthuwa Durage Meri
10. Weerappulige Simiyon Singho
11. Weddikkarage Simon (Deceased)
11A. Weddikkarage Podi
All of Kandangoda, Pugoda.
Defendant-Respondents

AND NOW BETWEEN

9. Mannalage Rosana (Deceased)
Kandangoda, Pugoda.
9A. Pasimahaduragesede
Chandrawathie
9B. Jayakody Premasinghe

9C. Sunethra Premasinghe
All of Kandangoda, Pugoda.
Substituted 9th Defendant-
Appellant-Appellants

Vs.

8. Kuda Kompayalage Simo
(Deceased)
8A. Kuda Kompayalage Simon
Wickramarathna,
Kandangoda, Pugoda.
8th Defendant-Appellant-
Respondent

1. Wewegedarage Lilli
2. Wewegedarage Hemapala
3. Wewegedarage Seetha Ranjanee
All of Kandangoda, Pugoda.
4. Wewegedarage Neil Chandana,
Thunnana, Hanwella.
Plaintiff-Respondent-Respondents

1. Paseema Durage Saviya
2. Paseema Durage Gunathilaka
3. Paseema Durage Agee (Deceased)
3A. Wedikkarage Anoma Chithralatha

4. Paseema Durage Meri (Deceased)
4A. Wedikkarage Kusuma
5. Wedikkarage Podi
6. Wedikkarage Vajiiya
6A. Hapan Pedige Piyaseeli
7. Wasthuwa Durage Meri
10. Weerappulige Simiyon Singho
11. Wedikkarage Simon (Deceased)
11A. Wedikkarage Podi

All of Kandangoda, Pugoda.

Defendant-Respondent-Respondents

Before: Hon. Justice A.H.M.D. Nawaz
Hon. Justice Kumudini Wickremasinghe
Hon. Justice Mahinda Samayawardhena

Counsel: S.N. Vijithsingh for the Substituted 9th Defendant-Appellant-Appellants.
Romesh Samarakkody for the Plaintiff-Respondent-Respondents and 3rd-7th Defendant-Respondent-Respondents.

Argued on: 05.12.2023

Written Submissions:

By the Substituted 9th Defendant-Appellant-Appellants on 09.10.2015 and 31.01.2024

Decided on: 07.03.2024

Samayawardhena, J.

The four plaintiffs filed this action on 15.06.1990 in the District Court of Pugoda seeking partition of the land known as Ketakelagahawatta in extent of one rood among the plaintiffs and the four defendants. The 5th-11th defendants later intervened. After trial, the District Court delivered judgment on 07.02.2006 declaring undivided shares of the land to all the parties except the 8th and 9th defendants.

The appeal filed by the 8th and 9th defendants against the said judgment was dismissed by the High Court of Civil Appeal of Avissawella by judgment dated 22.01.2014.

Being dissatisfied with the judgment of the High Court, only the 9th defendant appealed to this court.

The 9th defendant sought exclusion of Lot 3 of the Preliminary Plan No. 4686 contending that it is part of Delgahawatta, not Ketakelagahawatta.

The 9th defendant categorically admitted that she has no rights to Ketakelagahawatta, for the partition of which this action was filed.

Even a cursory look at the Preliminary Plan makes it evident that Lot 3 cannot be part of a different land, as that Lot sits in the middle of the land to be partitioned.

On what basis does the 9th defendant seek exclusion of Lot 3? The 9th defendant says she is entitled to Lot 3 by maternal inheritance and by deed marked 9D1. It is not clear how her mother, Laisa, got rights to Delgahawatta. In any event, it is not necessary to understand the devolution of title to Delgahawatta, as it is not the land sought to be partitioned.

Deed 9D1 was executed on 16.05.1985 – only five years before the institution of the partition action. By this deed the 9th defendant has purchased about 10 perches from Delgahawatta bounded on the North and West by Ketakelagahawatte agala and live fence, East by Gamsabha road and South by the live fence separating a portion of this land owned by Paseemadurage Seety. None of these boundaries tally with Lot 3 of the Preliminary Plan. Notably, Lot 3 is not bounded on the East by Gamsabha road.

The 9th defendant in her evidence admitted that, despite objections, she put up the building in Lot 3 about three years before her giving evidence (page 273 of the brief). That means, she constructed the building pending partition under protest. According to the surveyor's report it is a wattle and daub house.

It was elicited during cross-examination that the 9th defendant's husband transferred his rights on Ketakelagahawatta by deed marked 10D2.

It is clear that the land described in deed 9D1 is not included in Lot 3 of the Preliminary Plan.

The 9th defendant, by way of issues or in evidence, did not claim Lot 3 by prescription.

This court has granted leave on the following questions of law:

(a) Did the High Court of Civil Appeal err in law by not excluding Lot 3 from the corpus?
(b) Did the High Court of Civil Appeal err in law by not excluding Lot 3 from the corpus when two boundaries of the Preliminary Plan do not tally with the schedule to the plaint?
(c) Did the High Court of Civil Appeal err in law by not considering the prescriptive title of the 9th defendant?

I answer the said questions in the negative.

I affirm the judgment of the High Court of Civil Appeal and dismiss the appeal with costs.

Judge of the Supreme Court

A.H.M.D. Nawaz, 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 made in terms of Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

1. Kanangara Koralage Dona Anurushhika,

2. Kanangara Koralage Don Lessly Kanangara

Both of:
No. 09, Siddhamulla,
Piliyandala.

SC Appeal No. 133/12

WP/HCCA/MT/51/2005 (F)

DC Moratuwa Case No. 987/02/M

PLAINTIFFS

Vs

Bank of Ceylon,
Head Office,
New Building,
Janadhipathi Mawatha,
Colombo 01.

DEFENDANT

AND

Bank of Ceylon,
Head Office,
New Building,
Janadhipathi Mawatha,

Colombo 01.

DEFENDANT-APPELLANT

Vs

1. Kanangara Koralage
   Dona Anurushhika,

2. Kanangara Koralage Don Lessly
   Kanangara

Both of:
No. 09, Siddhamulla,
Piliyandala

PLAINTIFFS-RESPONDENTS

AND NOW BETWEEN

Kanangara Koralage
Dona Anurushhika,
No. 09, Siddhamulla, Piliyandala
PLAINTIFF-RESPONDENT-PETITIONER

Kanangara Koralage Don Lessly
Kanangara. (Deceased)

Vs

Bank of Ceylon,
Head Office,
New Building,

Janadhipathi Mawatha,

Colombo 01.

DEFENDANT-APPELLANT-RESPONDENT

Before : Priyantha Jayawardena PC, J
Kumudini Wickremasinghe, J
A.L. Shiran Gooneratne, J

Counsel : Chathura Galhena with Darani Weerasinghe for the Plaintiff-Respondent-Appellant

Suren Gnanaraj with Wathsala Kekulawala for the Defendant-Appellant-Respondent

Argued on : 5th September, 2023

Decided on : 29th February, 2024

Priyantha Jayawardena PC, J

This is an appeal to set aside the judgment of the Civil Appellant High Court of the Western Province of Mount Lavinia dated 13th of June, 2011 which set aside the judgment of the District Court of Moratuwa dated 3rd of June, 2005, where it was held that the newspaper advertisement published by the defendant-appellant-respondent (hereinafter referred to as the "respondent-bank") was an invitation to treat and not an offer.

Facts of the case

The respondent-bank published an advertisement in several newspapers, including the newspaper "Sirikatha" to invest money in minors' accounts with the respondent-bank.

After seeing the said newspaper advertisement, the 2nd plaintiff-respondent-appellant (hereinafter referred to as the "2nd appellant") opened an account with the respondent bank and deposited a sum of Rs. 5,400/- on behalf of his daughter, the 1st plaintiff-respondent-appellant (hereinafter

referred to as the "1st appellant"), who was a minor at that time. The appellant stated that in terms of the conditions stipulated in the advertisement published on the 12th of July, 1981, the 1st appellant was entitled receive a sum of Rs. 351, 519/- after 21 years from the date of the said deposit.

Upon the 1st appellant reaching 21 years of age on the 17th of July, 2002 she had requested the respondent-bank to remit the said sum of Rs. 351, 519/- to her account maintained at the Piliyandala Branch of the respondent bank. Responding to the said letter, the said bank by its letter dated 18th of September, 2002 had informed the 1st appellant that she is only entitled for a sum of Rs. 72, 244.96/-. However, the appellants stated that they were not informed of any conditions regarding the variations of the interest rate and expected to receive the fixed benefits set out in the said advertisement. Hence, the appellants have insisted that they be paid the amount agreed between the parties which is Rs. 351, 519/-.

As the respondent-bank failed to pay a sum of Rs. 351, 519/-, the appellants instituted action in the District Court of Moratuwa seeking to recover the said sum. Thereafter, the respondent bank filed its answer stating that the said advertisement was an invitation to treat and not an offer and sought for a dismissal of the plaint.

After the conclusion of the trial, the learned District Judge, by his judgment dated 3rd of June, 2005 granted the reliefs prayed for in the prayer to the plaint on the basis that the said newspaper advertisement and the Certificate of Deposit marked 'P2' constitutes a contract binding on the parties.

Being aggrieved by the said judgment of the learned District Judge, the respondent-bank appealed to the Civil Appellant High Court of the Western Province of Mount Lavinia (hereinafter referred to as the "High Court") to have the said judgment set aside.

After hearing the submissions of the parties, the High Court delivered its judgment dated 13th of June, 2011 setting aside the judgment of the District Court on the basis that the newspaper advertisement produced marked as 'P1' is only an advertisement inviting the public to make offers and thus, it cannot constitute a contract between the parties.

Being aggrieved by the judgment of the High Court, the appellants sought leave to appeal from this court and the court granted leave to appeal on the following questions of law;

"a) Whether the learned High Court Judges have misconceived the legal definition for an offer and invitation to treat?"

b) Whether the learned High Court Judges erred in law setting aside the judgment of the learned District Judge who had pronounced it on proper analysis of law of Contract?

c) Whether the learned High Court Judges have misinterpreted the contractual obligations arising out of offer and acceptance and duty and obligation of a banker who opens accounts on prior invitations?"

Submissions of the appellant

The learned counsel for the appellant submitted that all the conditions relating to the said account have been set out in the said newspaper advertisement marked and produced as 'P1'. Thus, the said advertisement is an offer and not an invitation to treat.

The learned counsel drew the attention of court to the word 'offer' referred to in *The Law of Contracts* Volume 1 at page 110 by C.G. Weeramantry where it states;

> *"an offer is a proposal by one person to another of certain terms of performance, which proposal is made with the intention that it be accepted by such other person."*

It was further submitted that an account holder/investor and the respondent-bank are bound by the terms and conditions stipulated in the said advertisement. Further, internal circulars of the respondent-bank, which are not known to such account holders/investors have no application to the said deposits. Moreover, the learned counsel contended that acceptance of an offer may take place by express words or by conduct of the parties. In support of the above contention, the learned counsel cited ***Carlill v Carbolic Smoke Ball Company*** **(1893) 1 QB 256**

Hence, it was submitted that the advertisement marked and produced as 'P1' is an offer, and therefore, the respondent-bank is bound by the terms and conditions set out in it as it constitutes a valid contract between the parties. In the circumstances, it was submitted that the said judgment of the High Court should be set aside and the judgment of the learned District Judge should be affirmed.

Submissions of the respondent bank

The learned counsel for the appellants submitted that the main distinction between an offer and an invitation to treat is that an offer can be accepted, and upon acceptance of an offer, it constitutes a contract, whereas an invitation to treat is not capable of being accepted.

In support of the above submission, the learned counsel cited *Chitty on Contracts,* 27th edition, Volume 1 at page 94, which states;

> *"A communication by which a party is invited to make an offer is commonly called an invitation to treat it is distinguishable from an offer primarily on the ground that it is not made with the intention that it shall become binding as soon as the person to whom it is addressed simply communicates his assent to its terms. A statement is clearly not an offer if it expressly provides that the person who makes it is not be bound merely by the other party's notification of assent but only when he himself has signed the document in which the statement is contained."*

It was further submitted that the said newspaper advertisement invited any person interested in the scheme referred to the advertisement to visit the bank, obtain further information, and thereafter, submit a formal application to the bank to open an account referred to in the advertisement. Hence, the advertisement was clearly an invitation to visit the bank and for customers to make an offer to the bank to accept his application to open an account. Further, the learned counsel for the respondent-bank contended that it is trite law that an advertisement published in a newspaper is generally considered an 'invitation to treat' and not an offer. In support of the above contention, he cited ***Partridge v Crittenden* [1968] 2 AER 421.**

The learned counsel also cited *Law of Contracts* Volume 1 at page 114 by C.G. Weeramantry which refers to "Tradesmen's Puff". It states;

> *"Tradesmen often endeavor to increase their sales by extolling the virtues of their goods. Common human experience teaches us that the laudatory expressions used by vendors must not be literally accepted. Consequently, offers by a tradesman to sell goods which he describes as being of a high order of excellence must not be seriously taken to be offer terms. In order that an assertion regarding his willingness to sell goods of the description indicated be regarded as a serious offer, it must fall outside the pale of puffery."*

The learned counsel further submitted that the 2nd appellant's evidence given at the trial shows that the said newspaper advertisement was only an invitation to treat and not an offer. Further, the said newspaper advertisement was not capable of being accepted as it was not an offer but an invitation to treat. Thus, the actual offer was made by the 2nd appellant when he visited the Moratuwa branch on the 17th of July, 1981 and signed the mandate marked and produced as 'V1', which was accepted by the respondent-bank, resulting in a binding contract between the parties on the terms and conditions set out in 'V1'.

The learned counsel contended that in the instant case, the respondent-bank did not convey an intention to be bound with a reader of its advertisement. On the contrary, it invited the reader to obtain further details from the nearest branch of the respondent-bank with regard to the Savings Scheme and to submit an application to the bank for its acceptance.

Hence, it was submitted that the High Court was correct in law in setting aside the judgment of the learned District Judge. Therefore, it was submitted that the instant appeal should be dismissed with costs.

Whether the learned High Court Judges have misconceived the legal definition for an offer and invitation to treat?

The learned Judges of the High Court held that the newspaper advertisement marked and produced as 'P1' is only an invitation to treat. Hence, it cannot be accepted by the public. Thus, the issue that needs to be considered is whether the said advertisement was an offer or an invitation to treat.

An offer is part of contract negotiations where a party agrees to carry out a specific act or refrain from doing it in exchange for consideration. Further, if an offer is accepted, it would form a binding contract. However, an invitation to treat is an invitation to start negotiations with the intention to create a contract. An invitation to treat cannot be accepted and thus, it does not create a contract. Further, the distinction between an offer and an invitation to treat was referred to in *The Law of Contracts* Volume 1 by C.G. Weeramantry at page 109, where it states;

> *"The main distinction is that whereas an offer ripens into a contract upon acceptance, an invitation to treat on the other hand, "is not capable of being accepted and is certainly not intended to be binding"."*

Does the advertisement marked 'P1' constitute an offer or an invitation to treat?

Generally, advertisements are *considered* as invitations to treat as it is considered that an effective offer cannot be made to the public at large.

In ***Partridge v Crittenden* [1968] 2 EAR 421** at 424, Lord Parker C.J. held;

> *"I say "with less reluctance" because I think that when one is dealing with advertisements and circulars, unless they indeed come from manufacturers, there is business sense in their being construed as invitations to treat and not offers for sale."*

However, an advertisement would be considered as an offer where one party makes it clear expressly or impliedly that he is prepared to be bound by the said advertisement as soon as the offer is accepted by a person. A similar view was observed in ***Carlill v Carbolic Smoke Ball* [1892] 2 QB 256** where Bowen L.J. held;

> *"It is an offer to become liable to anyone who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement."*

Thus, an offer could be made to the public at large and such offers are known as unilateral offers. Further, such offers can be accepted by performing the conditions set out in the advertisement.

Hence, in order to consider whether an advertisement is an offer or an invitation to treat, the wording of the advertisement should be considered to ascertain whether it contains an offer intended to be legally bound when anyone accepts it. Moreover, an advertisement would be considered as an offer where it contains all the terms that are required to formulate a contract.

Further, once an advertisement is published in a newspaper to be read by the public, the wording in the said advertisement should be read in its plain meaning, as the public would read and understand it. In the circumstances, the court needs consider the said advertisement in the way an ordinary person reading it would understand it.

The wording in the advertisement produced at the trial marked as ‘P1’ stated as follows;

> “ඔබේ දුවට පුතාට අනාගතයක් හිමි කරදීම ඔබේ එකම අභිලාශය විය හැක, ඔබේ ඒ අභිලාෂය මුදුන් පත් කර ගැනීම සඳහා උදව් දීමට දැන් ලංකා බැංකුව සුදානම්. **ඔබ විසින් කළ යුත්තේ සුළු මුදලක් ඔබේ දරුවා වෙනුවෙන් අප වෙත වෙන් කර තැබීමයි. අපි ඒ සුළු මුදල අති විශාල මුදලක් කොට ඔහු හෝ ඇය වැඩිවිය පැමිණ සමාජයට පිවිසෙන අවස්ථාවේදී ඔහුට හෝ ඇයට පිරිනම්න්නෙමු. ඔබේ දරුවා ලක්ෂපතියකු කරන්න**.
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> **ලංකා බැංකුවේ ජාතික තිළිණ ක්‍රමය පිහිටුවා ඇත්තේ මේ සඳහාය, රු. 600/-ක අවම තැන්පතුවකින් හෝ රු. 600.-ක දෙගුණ, තෙගුණ, සිව්ගුණ ආදී (600/- න් බෙදෙන ඕනෑම ගණනකින්) ඔබට මේ තිළිණ ගිණුම් සඳහා මුදල් තැන්පත් කළ හැකිය**. ලංකා බැංකුවේ තිළිණ ගිණුම් ක්‍රමය සඳහා තැන්පත් කළ හැකි අවම තැන්පත් ප්‍රමාණය රු. 600/-කි. එයද රු. 25/- මගින් මාසික වාර 21කින් හෝ එකවර හෝ තැන්පත් කළ හැකිය. **ලංකා බැංකු තිළිණ ක්‍රමය යටතේ රු. 600ක මුදලක් තැන්පත් කළහොත් අවුරුදු 21ක් ගෙවුණු පසු ඔහුට රු. 40,000කට ආසන්න මුදලක් ලැබේ**. අවු. 21ක අවසානයේදීත් එම මුදල ඔබේ දරුවා ආපසු නොගෙන තිබෙන්නට හැරියොත් ඔබ ආරම්භයේදී තැන්පත් කළ මුළු මුදල වන රු. 600/-ක් වූ මාස් පතා ගෙවීමක් වශයෙන් ඔහුට ලැබේ. ඔහු කැමති කාලයක් ඒ මුදල තිබෙන්නට හැරිය හැකි අතර අවශ්‍ය ඕනෑම විටෙක මුළු මුදලම ලබා ගත හැකිය.
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> **අද උපදින දරුවකු වෙනුවෙන් රු. 2,400/-ක තිළිණ ගිණුමක් විවෘත කළහොත්, ඔහුගේ 21 වැනි උපන් දිනයේදී ඔහුට රුපියල් එක් ලක්ෂ පණස් හය (රු. 1,56,231ක්) දහසකට වැඩි මුදලක හිමිවේ**. එම මුදල අවශ්‍ය නම් මාසික තැන්පතුවක් වශයෙන් රු. 100/- බැගින් වූ මාස 21ක් ගෙවා සම්පූර්ණ කළ හැකිය.
>
> **ඔබ අද ලංකා බැංකුවේ තිළිණ ගිණුම ක්‍රමය යටතේ තැන්පත් කිරීමට බලාපොරොත්තු වන මුදල අනුව ඔබට ඔබේ දරුවා අනාගතයේදී ලක්ෂපතියෙකු කළ හැකිය**.

ලංකා බැංකුව සමග හවුල් වී ඔබේ දරුවාට රත්තරන් අනාගතයක් හිමිකර දෙන්න. **වැඩි විස්තර සහ අයදුම්පත් ළගම ඇති ලංකා බැංකුව ශාඛාවකින් ලබා ගන්න**."

[emphasis added]

The advertisement published in the Sirikatha Newspaper stipulated the sum to be deposited and the amount to be received after 21 years, i.e.;

ඔබ තැන්පත් කරන සුළු මුදල කිසිම වෙහෙසක් නොමැතිව රුපියල් ලක්ෂ ගණන් වන අයුරු මේ චක්‍රයෙන් බලා ගන්න								
	රුපියල්	රුපියල්	රුපියල්	රුපියල්	රුපියල්	රුපියල්	රුපියල්	රුපියල්
එකවර තැන්පතුව හෝ මාසික වාරික 21	600	1,200	2,400	4,800	9,600	12,000	15,600	18,000
	25	50	100	200	400	500	650	750
අවුරුදු 21 කින් ලැබෙන මුදල	39,057	78,115	156,231	312,462	624,924	781,155	1,015,501	1,171,731
මුදල ආපසු ගන්නා තෙක් මාසිකව ලැබෙන මුදල	600	1,200	2,400	4,800	9,600	12,000	15,000	18,000

It is pertinent to note that the above advertisement specifically stated the amount that should be deposited, how the money should be deposited, and the amount that will be paid after 21 years. It also stated, **"ඔබ තැන්පත් කරන සුළු මුදල කිසිම වෙහෙසක් නොමැතිව රුපියල් ලක්ෂ ගණන් වන අයුරු මේ චක්‍රයෙන් බලා ගන්න".** Accordingly, by the said advertisement the public was informed how a small sum deposited by them could turn into a large sum, as shown in the said schedule.

After seeing the above advertisement in the Sirikatha Newspaper, the 2nd appellant deposited a sum of Rs. 5,400/- on behalf of the 1st appellant in the Moratuwa branch of the respondent bank. Thereafter, the respondent-bank issued a 'Deposit Certificate' which was produced marked as a receipt of the said sum. It stated as follows;

"BANK OF CEYLON

NATIONAL ENDOWNMENT (MINORS & ADULTS) SCHEME

DEPOSIT CERTIFICATE

Date: 17th July 1981

Received the sum of Rs. 5400/- (Rupees FIVE THOUSAND FOUR HUNDRED ONLY) to be placed to the credit of the NATIONAL ENDOWNMENT (MINORS AND ADULTS) Account of KANNANGARA KORALALAGE DONA ANURUDDHIKA (Name of Account holder) No. 9, Siddhamulla Piliyandala (Address).

*~~The account holder shall make further 20 monthly instalments of identical sums shown on the opposite page overleaf"~~

BANK OF CEYLON

RAWATAWATTE, MORATUWA BRANCH

……………………….. ……………………….

Accountant Manager

The above 'Deposit Certificate' shows that it is specifically prepared to acknowledge payments made by the public who wants to participate in the investment plan stated in the said advertisement. Further, the manager and the accountant who signed the said 'Deposit Certificate' had struck off the phrase "The account holder shall make further 20 monthly instalments of identical sums shown on the opposite page overleaf" as it has no application to the appellant since he has deposited a lump sum.

Hence, taking into consideration the terms set out in the said advertisement and the aforementioned 'deposit certificate', it is evident that the said advertisement contained all the terms and conditions that are required to formulate a contract and could be accepted without any negotiations.

However, it was held by the learned High Court Judge that the document marked 'V1' was the contract between the parties and not the advertisement marked 'P1'. Further, it was contended by the learned counsel for the respondent-bank that the document marked 'V1' was a mandate given

by the appellants to the respondent-bank with regard to the deposit made in the name of the 1st appellant and the respondent bank had the discretion to convert the said account opened by the 2nd appellant into a renewal fixed deposit.

As a banking practice, whenever interest rates vary, such variations are communicated to the depositors by the bank. It was submitted by the learned counsel for the respondent-bank that variation in interest rates was stipulated in the document marked and produced as 'V1' and the circulars marked and produced as 'V3' and 'V4' in evidence. Upon a perusal of the said documents, it is apparent that the said documents are formal documents maintained by the respondent-bank with respect to general deposit schemes. However, the deposit under consideration in the instant appeal falls under a special scheme, and thus, the documents marked 'V1', 'V3' and 'V4' have no application to the advertisement under reference though the 2nd appellant has signed 'V1'.

It is pertinent to note that the variation in interest rates stipulated in the said document and the circulars were not referred to in the advertisement marked 'P1'. Thus, it is not possible for the respondent-bank to offer totally different terms and conditions when the public goes to the bank to make a deposit under the scheme stated in the said advertisement. If the respondent-bank intended to offer different terms and conditions that were different from those of the said advertisement, it should have cancelled the said advertisement and informed the public regarding the new deposit scheme.

Moreover, the case of ***Partridge v Crittenden*** *(supra)* cited by the learned counsel for the respondent has no application to the instant appeal as the advertisement under reference was a unilateral offer made to the public at large and not an invitation to treat as submitted by him.

In the circumstances, I am of the opinion that the advertisement marked 'P1' was an offer made by the respondent bank to the public, and when the 2nd appellant deposited the sum of Rs. 5,400/- a binding contract was created between the respondent-bank and the appellants.

Therefore, I hold that the 1st appellant is entitled to a sum of Rs. 351, 519/- as agreed between the parties.

Conclusion

In light of the above, the following question of law is answered as follows;

Whether the learned High Court Judges have misconceived the legal definition for an offer and invitation to treat?

Yes

In the circumstance, the other questions of law need not be answered.

In view of the aforementioned answer given to the question of law stated above, and the reasoning given in this judgment, I set aside the judgment of the Civil Appellate High Court dated 13th of June, 2011 and affirm the judgment of District Court dated 3rd of June, 2005.

The appeal is allowed. No costs.

Judge of the Supreme Court

Kumudini Wickremasinghe, 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 to the Supreme Court under the Constitution of the Democratic Socialist Republic of Sri Lanka

Magret Karunasinghe,
No. 16/1, Amunuwatta, Henamulla, Kurunegala.

Plaintiff

SC Appeal 135/2016
SCHCCALA/34/2016
Provincial High Court of
Civil Appeal Case No. 08/2011 (F)
DC-Kurunegala Case No. 6249/L

Vs,

Jayalathge Srimathi Mangalika Jayasinghe,
Amunuwatta, Henamulla, Kurunegala.

Defendant

And

Magret Karunasinghe, (Deceased)
R.P. Wijeratne,
No. 16/1, Amunuwatta, Henamulla, Kurunegala.

Substituted Plaintiff-Appellant

Vs,

Jayalathge Srimathi Mangalika Jayasinghe,
Amunuwatta, Henamulla, Kurunegala.

Defendant -Respondent

And now between

Jayalathge Srimathi Mangalika Jayasinghe, (Deceased)
1. Sunil Jayantha Amarasinghe
2. Iresha Nayomi Amarasinghe

Amunuwatta, Henamulla, Kurunegala.

Substituted Defendant –Respondent-Petitioner

Vs,

R.P. Wijeratne,
No. 16/1, Amunuwatta, Henamulla, Kurunegala.

Substituted Plaintiff-Appellant-Respondent

Before: **Justice Vijith K. Malalgoda, PC**
Justice K.K. Wickremasinghe,
Justice Janak De. Silva,

Counsel: Lakshman Perera. PC with Lakmali Fernando for the Defendant-Respondent-Petitioner

K.G. Jinasena with Chathubha Abeywickrama for the Substituted Plaintiff-Appellant-Respondent.

Argued on: 11.05.2023

Decided on: 12.03.2024

Vijith K. Malalgoda PC J

The instant appeal was instituted by the Original Defendant (hereinafter sometimes referred to as the "Defendant-Appellant" or "Appellant") against the Judgment dated 07th January 2016, delivered by the High Court of Civil Appeal of the North Western Province holden at Kurunegala.

The initial action which is the basis for the instant appeal was filed by the Original Plaintiff (hereinafter sometimes referred to as the "Plaintiff-Respondent" or "Respondent") against the Defendant-Appellant in the District Court of Kurunegala praying for a declaration of title to the property described in the plaint and to declare that the Deed No 5414 dated 13th March 2000 and the Deed No 7568 dated 10th April 2003, both of which are attested by Edmond Kularatne, Notary Public are null and void.

In the said plaint, the Plaintiff-Respondent pleaded *inter alia* that she became entitled to the land described in the schedule to the plaint by final decree entered in DC Kurunegala case No 1931/P and continued to possess the same. However, while the said case was pending, the Plaintiff-Respondent obtained a loan of Rs. 15,000 from the Original Defendant at a rate of 1.5% interest per month. Thereafter subject matter to this action was transferred by the Original Plaintiff to the Original Defendant by Deed of Transfer No 989 dated 14th April 1992 as a security to the said loan transaction. After Original Plaintiff became entitled to the said land by the said final decree, she had

communicated to the Original Defendant that she was ready to settle the said loan of Rs, 15,000 along with the interest accrued upon on the said loan.

Thereafter by Deed No 5413 dated 13th March 2000 attested by Edmond Kularatne, Notary Public, the Original Defendant transferred the aforesaid subject matter back to the Original Plaintiff after receiving the money thereon. The Original Plaintiff had contended that at the time of executing the said Deed and completing the said loan transaction, the Original Defendant had obtained the signature of the Original Plaintiff on some blank papers. After some time, the Original Defendant came to the Original Plaintiff's house and informed that she had the title to the subject matter and requested the Original Plaintiff to hand over the vacant possession to the Original Defendant. The Original Plaintiff contends that only after searching the registers at Kurunegala land registry that she come to know that the Deed of Transfer No 5414 dated 13th March 2000 attested by Edmond Kularatne, Notary Public had been executed. The said Deed was concerning a loan obtained by the Original Plaintiff to a value of Rs. 325,000 to be paid in 1 ½ years at the interest rate of 18% per annum. The Original Plaintiff's position was that she neither obtained a loan of Rs. 325,000 from the Original Defendant nor executed the said Deed. Therefore Learned Counsel of the Respondent pleads that the actions of the Original Defendant are fraudulent and that both the Original Defendant and the Notary Public have acted in collusion in the guise of settling the outstanding transaction created by Deed No 989 in the year 1992, got the Original Plaintiff to sign blank sheets which have been later converted into a conditional transfer Deed which the Original Plaintiff was unaware of until she obtained the copy of the same from the land registry.

The story of the Original Defendant is quite different from that of the Original Plaintiff. The Original Defendant took up the position that after the said final decree in case No 1931/P the said Deed No 989 took effect and the Original Defendant received the title to the subject matter in question. After the said final decree, the Original Plaintiff requested a further loan of Rs. 75,000 from the Original Defendant; by agreement of both parties, the Original Defendant transferred the said land back to the Original Plaintiff upon Deed No 5413 and executed a fresh Deed No 5414 by giving the Original Plaintiff Rs. 75,000 and by adding the loan amount of Rs. 15,000 previously obtained, along with the interest thereon. The agreement between the parties when executing the said Deed was for the Original Plaintiff to pay the total amount within a period of 1 1/2 years at an interest rate of 18% per

annum. Since the Original Plaintiff had not acted in accordance with the said agreement the Original Defendant contends that she has now become the owner of the subject matter.

At the conclusion of the trial, the Additional District Judge of Kurunegala delivered the judgment *inter alia* holding that the Original Defendant is the owner of the subject matter of the action upon the Deed No 5414 and Deed No 7568, both of which were attested by Edmond Kularatne, Notary Public and therefore is entitled to eject the Original Plaintiff from the subject matter and to be placed on the peaceful possession thereof.

Being aggrieved by the said judgment, the Original Plaintiff appealed to the High Court of Civil Appeal of the North Western Province holden at Kurunegala. Pending the appeal, the Original Plaintiff died and was substituted by one R.P. Wijeratne in her place. The Learned Judges of the High Court of Civil Appeal allowed the appeal with costs and set aside the judgment of the District Court on the ground that there is a strong possibility that the said Deed No 5414 being a fraudulent Deed.

This Court granted Leave to Appeal against the judgment of the High Court of Civil Appeal of North Western Province holden at Kurunegala on a series of questions of law set out in paragraph 19 (ii) to (x) of the Petition dated 18.01.2016, which states as follows;

ii. have the learned Judges of the High Court of Civil Appeals erred in law by failing to appreciate and consider that the Defendant called the Notary who executed the impugned Deed No. 5414 and the witnesses thereto who testified as to the due execution thereof and that the Notary and witnesses in Deed No. 5414 were the same as those in Deed No. 5413?

iii. a) has the court failed to appreciate that the said judgment of the learned District Judge in coming to a finding on questions of fact is based upon the credibility of witnesses on the footing of the trial judge's perception of such evidence?

b) if that be the case whether such findings are entitled to great weight and utmost consideration?

iv. in reversing the said judgment has the High Court of Civil Appeal failed to come to a finding that the Trial Judge has failed to make the full use of the Trial Judge's advantage of seeing and listening to the witnesses?

v. has the court failed to come to a conclusion in the said judgment that the Trial Judge has failed to make the full use of the opportunity given to him when hearing the *viva voce* evidence?

vi. has the High Court of Civil Appeal failed to appreciate that there was evidence before the Trial Judge, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanor of the witnesses a useful and necessary operation?

vii. has the High Court of Civil Appeal failed to appreciate that there was no glaring improbability about the story accepted, sufficient in itself to constitute a governing fact which in regulation to others has created a wrong impression or any specific misunderstanding or disregard of a material fact, or any 'extreme and overwhelming or disregarded of a material fact, or any 'extreme and overwhelming pressure' that had the same effect?

viii. has the High Court of Civil Appeal of Civil Appeals in delivering the said judgment dealt with probabilities and not come to a conclusion as to whether the impugned Deed No. 5414 is fraudulent on the evidence and the documents produced and has not examined the findings of the learned District Judge in relation to the documents and evidence led at the trial?

ix. Is the said Judgment contrary to Section 774 (2) of the Civil Procedure Code in that the said judgment has not given reasons as to why the District Court judgment is wrong in fact and law?

x. has the High Court of Civil Appeal failed to consider that the burden of proof in terms of Section 101 and 102 of the Evidence Ordinance rests on the Plaintiff which the Plaintiff has failed to discharge?

While the application was pending before the Supreme Court, the Original Defendant also passed away and her husband and a daughter were substituted as the Substituted Defendant – Respondent– Appellant (hereinafter referred to as "the Appellant").

When considering the several questions of law under which the leave was granted, the crux of the matters referred to in those issues can be reduced to two main issues for the convenience of analysis. They are,

1. Has the High Court of Civil Appeal failed to consider that the burden of proof in terms of sec 101 and 102 of the Evidence Ordinance rests with the Respondent to this case to prove that the said Deed 5414 is fraudulent, which the Respondent has failed to discharge?
2. Has the Judges of the High Court of Civil Appeal failed to appreciate the findings of the Learned District Judge in relation to questions of facts as to the credibility of witnesses and material placed before the Court?

Has the High Court of Civil Appeal failed to consider that the burden of proof in terms of sec 101 and 102 of the Evidence Ordinance rests with the Respondent to this case to prove that the said Deed 5414 is fraudulent, which the Respondent has failed to discharge?

In a civil case burden of proof usually rests with the proving of facts essential in establishing his claim, rests on the Plaintiff as clearly stated in sec 101 and 102 of the Evidence Ordinance.

Sec 101 of the evidence Ordinance provides that,

> *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*
> *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

Section 102 of the Evidence Ordinance states:

> *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.*

Sec 102 illustration (b) further elaborates on it as follows:

> *A sues B for money due on a bond. The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed, as the bond is not disputed, and the fraud is not proved. Therefore, the burden of proof is on B*

Hence in the present case, the burden is with the Original Plaintiff to prove that Deed No 5414 dated 13th March 2000 is a fraudulent deed. To claim that the said Deed is fraudulent, Original Plaintiff relied on 2 main arguments; Firstly, she contended that Notary Public was a relative of the Original Defendant and acted in collusion in executing the said Deed. To support her version she further stated that she never knew Mr. Kularatne.

ප්‍රඃ එඩ්මන් කුලරත්න මහතා තමුන් දන්නවද?
උඃ මම අදුනන්නේ නෑ

However, when the Original Plaintiff was cross-examined, she admitted that she had previously obtained the services to attest several Deeds from the said Notary. In cross-examination, it was further revealed that the Notary who attested the said Deed was not only a relative of the Original Defendant but also the Original Plaintiff as well.

Secondly, the Original Plaintiff challenges the way her signature was obtained on Deed No. 5414. In her police statement, the Original Plaintiff claimed that her signature was obtained after having drugged her.

අත්සන් කරන මොහොතේ මා කොළ කිහිපයකට අත්සන් කළා. මගේ මානසිකත්වය වෙනස් වෙන්න වතුර වගයක් බොන්න දීලා තවත් කොළ කීපයකට අත්සන් ගත්තා.

The Original Plaintiff contradicted herself with regard to the placing of her signature in sheets of papers which were later used to produce Deed No 5414.

ප්‍රඃ තමුන්ගෙන් මොනව හරි ලියකියවිලි වලට අත්සන් ගත්තාද?
පිඃ මට පොළිය ගෙවන්න තිබුනේ නැති නිසා ගනුදෙනුව සනාථ කිරීම සම්බන්ධව ලියකියවිලි වගයකට අත්සන් කරලා දුන්නා.
ප්‍රඃ ඒ අනුව අත්සන් කළාද?
පිඃ ඔව්

....

ප්‍රඃ තමා අත්සන් කල පිටු හිස් පිටුවක්ද?
පිඃ ඔව්

When analyzing the above evidence, it is quite clear that the Original Plaintiff had past experiences in taking loans and transferring land. Therefore, it is quite difficult to assume that the Original Plaintiff was unaware of the other Deed she had to sign and reckless enough to put her signature on several blank documents. In focusing on the Notary's evidence led at the trial, the Counsel for the Plaintiff has not challenged his evidence to prove that the signatures were obtained fraudulently at his office moreover as there is no complaint against the Notary or the Original Defendant that they have obtained her signatures into several blank pages to the Police until three years have passed.

The argument of Learned President's Counsel for the Appellant is quite convincing that Deed No. 5414 is a printed form Deed and there was no possibility of the said sheet being signed in blank considering the fact that the entire Deed is a standard form printed Deed and the signature of the Original Plaintiff appears at the proper place. Therefore, the position of the Original Plaintiff that she placed her signature on the blank sheet is unacceptable. The Trial Judge has quite rightly observed that if the Original Plaintiff had signed on a blank sheet, the Original Defendant need not have executed a conditional transfer in her favour but could have easily prepared an absolute transfer in her favour.

According to section 2 of the Prevention of Frauds Ordinance No. 7 of 1840, ***if the relevant deed or instrument is in writing and signed by every executant and attested by a notary public before two witnesses present at the same time, it is considered to be having force in law*** (*emphasis added*). Here the Original Plaintiff's position was that she never signed the said Deed No 5414 and that the said Deed was not properly executed before a notary and two witnesses and therefore the said Deed is null and void.

Though the Original Plaintiff must discharge the burden of proof in this case, the Original Defendant instead called the Notary Public and the two witnesses thereto who testified as to the due execution of the Deed.

In the case of ***Hemathilake vs Alina and Others,***[1] it was held that "*By calling the notary and the attesting witness the defendants-respondents have led the best possible evidence, and that too coming from independent witnesses*."

[1] [2003] 2 Sri LR 144.

In the case of ***Piyadasa v. Binduva alias Gunasekara,***[2] Ananda Coomaraswamy J citing the case of ***W. Branchy Appu v. Poidohamy***[3] in his judgment stated that,

> *But when 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.*

However according to T.S. Fernando J in the case of ***Solicitor General v. Ava Umma***[4]

> *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 the 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.*

In the aforementioned case, T.S. Fernando J further stated that,

> *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 required in Section 68.*

In considering the evidence of one of the witnesses to the alleged Deeds namely Rampati Dewayalage Peduru who was also the notary's clerk, it was revealed that he was well acquainted with the Original Plaintiff and identified the Original Plaintiff in open court and also identified the Deeds in which he placed his signature as a one witness.

> ප්‍රඃ පැ 4 ඔප්පුවේ තමාගේ අත්සන තිබෙනවා?
>
> උඃ ඔව්, පළවෙනියට තිබෙනවා
>
> ප්‍රඃ එහි තමා පැමිණිලිකාරිය හඳුනන පුද්ගලයෙක් ලෙස අත්සන් කර තිබෙනවා?
>
> උඃ ඔව්

[2] (1992) 1 SLR 108

[3] (1902) 2 Br. Rep 221

[4] 71 NLR 512

Then the other witness who was also the notary's clerk namely Rankonege Wijeratne who placed his signature as a witness to the impugned Deed No. 5414 testified that he signed as a witness to the impugned Deed and also admitted that he was acquainted with the Original Plaintiff.

ප්‍රශ්න: මෙම වි 5 ඔප්පුවේ මහත්මයා අත්සන් කර තිබෙනවාද සාක්ෂිකරුවෙක් හැටියට ?
උ: ඔව්

ප්‍රශ්න: කී වෙනි අත්සනද?
උ: දෙවැනි අත්සන

When scrutinizing the aforesaid evidence, it could be observed that the Deed in question has been properly executed in terms of section 2 of the Prevention of Frauds Ordinance.

During the cross-examinations of the Notary and the two witnesses, the Counsel for the Original Plaintiff did not raise any questions regarding how the signature was obtained from the Original Plaintiff. The only question that was put to the notary with regard to obtaining the signature was denied by the notary as follows;

ප්‍රශ්න: මම තමාට යෝජනා කරනවා පැ 4 කියන ඔප්පුව ලියාගත්ත අවස්ථාවේදී මෙම නඩුවේ වි 5 පසුව අංක කරන ලද මුද්‍රිත විකුණුම්කර ඔප්පුවකට මෙම පැමිණිලිකාරියගේ අත්සන ලබා ගත්තා කියලා?
උ: මම පිළිගන්නේ නැහැ

This position is clearly in contradiction to the version given by the Original Plaintiff in her evidence before the District Judge.

For the above reasons, it can be concluded that the Plaintiff has failed to challenge the deeds before the District Court.

Learned Counsel for the Respondent contended that the sum of Rs. 216,000 stated as '' අවු 8ට පොළීය" is far in excess of the interest due on such a small amount of Rs. 15,000 and therefore has no relevancy to Deed No 989. It was further contended that even if the interest was calculated at 11/2 per month, at this rate the interest due on Rs. 15,000 was only 21,000 and not Rs. 216,000 as shown in වි 3. However, in the evidence, it was confirmed that this document was in the handwriting of the Original Plaintiff.

Even if there is a calculation error of the interest in වි 3, it does not vitiate the Deed as evident in the case of ***Nadarajah vs Nadarajah***[5] where it was held that if a party contradicted the attestation the other party also can lead the evidence to show the real nature of the transaction which in this case is depicted by the documents marked වි 3 and වි 6 read along with the Deed No 5414.

In ***Jayawardene vs Amerasekara,***[6] Lascelles C.J held that,

> *On the execution of a notarial conveyance, the sale is complete, and the mere fact that the whole of the consideration has not been paid cannot, in the absence of fraud or misrepresentation, afford ground for the rescission of the sale and the cancellation of the conveyance.*

In ***Mohamadu vs Hussim***[7] Pereira J held as follows,

> *Where a person obtains a conveyance of property without fraud, but afterward fraudulently refuses to pay the consideration stipulated for, the grantor is not entitled to claim cancellation of the conveyance, but his remedy is an action for the recovery of the consideration.*

When considering the above facts, the question of whether the High Court of Civil Appeal failed to consider that the burden of proof in terms of sec 101 and 102 of the Evidence Ordinance rests with the Respondent to this case to prove that the said Deed 5414 is fraudulent, which the Respondent has failed to discharge could be answered in affirmative.

> ***Has the Judges of the High Court of Civil Appeal failed to appreciate the findings of the Learned District Judge in relation to questions of facts as to the credibility of witnesses and materials placed before the Courts?***

In the case of ***Gamini Perera vs Don Joseph***[8] A. Goonerathne J. noted that,

> *All primary facts and truth of the matters in dispute are best to be left in the hands of the Trial Judge…………. It is the Trial Judge who hears the evidence, sees the witness in the witness box, and observes the witness's demeanor at all times in Court. As such the learned District Judge's*

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[5] 21 NLR 38
[6] 15 NLR 280
[7] 16 NLR 368
[8] S.C. Appeal 04/2012

views on disbelieving the Plaintiff on items of evidence as above need not be interfered with by this Court

When it comes to the credibility of witnesses in the instant case, it is quite evident that the Original Plaintiff had contradicted herself and has given false evidence several times. The Original Plaintiff in the plaint stated that the defendant obtained her signature on blank sheets and it was these sheets that were later used to produce Deed no 5414. Here the Learned Trial Judge has quite rightly observed that if the Plaintiff signed on the blank sheets the Original Defendant need not to have executed a conditional transfer and that the Original Defendant could have used the blank sheets to prepare an absolute transfer in her favour.

However, in appeal, High Court Judges overturned the findings of the Trial Judge and noted that,

That it is very probable that no such transaction took place on 13.03.2000... and her claim that she was asked to sign on a blank document is possible and there is a strong possibility that Deed No 5414 is fraudulent

This is a serious mistake when considering the fact that the Respondent has failed to discharge the burden of proof that Deed No 5414 is null and void in the eyes of the law when concrete evidence reinforces the legal validity of the said Deed.

Further in reversing the judgment of the Learned Trial Judge, the High Court of Civil Appeal has failed to come to a finding that the Trial Judge has failed to make the full use of the Trial Judge's advantage of seeing and listening to the witnesses.

In the case of ***De Silva and Others vs Senevirathne and Another***[9] Ranasinghe J. noted that,

..it seems to me: that, where the trial judge's findings on questions of fact are based upon the credibility of witnesses, on the footing of the trial judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration, and will be reversed only if it appears to the appellate Court that the trial judge has failed to make full use of the "priceless advantage" given to him of seeing and listening to the witnesses giving viva voce

[9] [1981] 2 SLR 7

evidence, and the appellate Court is convinced by the plainest consideration that it would be justified in doing so

In the case before us, the Learned District Judge appears to have made use of the advantage he had in considering the demeanor of the witnesses which the Learned District Judge was fully entitled to do so.

Hence, the question of whether the Judges of the High Court of Civil Appeal have failed to appreciate the findings of the Learned District Judge in relation to questions of facts as to the credibility of witnesses and materials placed before the Courts is also answered in affirmative.

In the said circumstances I answer the several questions of law raised on behalf of the Defendant-Appellant in the affirmative.

Thus, I hereby set aside the judgment of the High Court of Civil Appeal dated 07.01.2016 and affirm the Judgment of the District Court dated 24.11.2010. The learned District Judge of Kurunegala is directed to enter decree accordingly.

Appeal allowed. I make no order for cost.

Judge of the Supreme Court

Justice K.K. Wickremasinghe,

I agree,

Judge of the Supreme Court

Justice Janak De. Silva,

I agree,

Judge of the Supreme Court

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

Wijesekera Weerawickrema
Wickremasinghe Mudiyanselage
Dharmapala
188/8, Pathiragoda Road,
Navinna, Maharagama
Plaintiff

SC/APPEAL/137/2019
SC/HCCA/LA/447/2016
WP/HCCA/MT/59/2013(F)
DC NUGEGODA 116/08/SPL

Vs.

1. Thanippuli Achchige Seelawathie
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
2. Polgahawattage Upali Sigera
   No. 92, Kanatta Road, Nugegoda
3. Polgahawattage Swarna Sigera
   No. 92, Kanatta Road, Nugegoda
4. W.W.W.M. Shalika Prasadi
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
5. W.W.W.M. Sarika Krishadi
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
6. W.W.W.M. Chanaka
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita

Defendants

AND BETWEEN

Wijesekera Weerawickrema
Wickremasinghe Mudiyanselage
Dharmapala
188/8, Pathiragoda Road,
Navinna, Maharagama
Plaintiff-Appellant

Vs.

1. Thanippuli Achchige Seelawathie
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
2. Polgahawattage Upali Sigera
   No. 92, Kanatta Road, Nugegoda
3. Polgahawattage Swarna Sigera
   No. 92, Kanatta Road, Nugegoda
4. W.W.W.M. Shalika Prasadi
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
5. W.W.W.M. Sarika Krishadi
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
6. W.W.W.M. Chanaka
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita

Defendant-Respondents

AND NOW BETWEEN

1. Thanippuli Achchige Seelawathie
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
2. Polgahawattage Upali Sigera
   No. 92, Kanatta Road, Nugegoda
3. Polgahawattage Swarna Sigera
   No. 92, Kanatta Road, Nugegoda
4. W.W.W.M. Shalika Prasadi
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
5. W.W.W.M. Sarika Krishadi
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
6. W.W.W.M. Chanaka
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita

Defendant-Respondent-Petitioners

Vs.

Wijesekera Weerawickrema
Wickremasinghe Mudiyanselage
Dharmapala
188/8, Pathiragoda Road,
Navinna, Maharagama
Plaintiff-Appellant-Respondent

Before: Hon. Murdu N.B. Fernando, P.C., J.
Hon. Shiran Gooneratne, J.
Hon. Mahinda Samayawardhena, J.

Counsel: Rohan Sahabandu P.C. with Chathurika Elvitigala for the Defendant-Respondent-Petitioners.

Ranjan Suwandaratne with Anil Rajakaruna for the Plaintiff-Appellant-Respondent.

Written Submissions:

By the Appellant on 16.08.2019 and 10.04.2023

By the Respondent on 07.10.2019

Argued on: 27.02.2023

Decided on: 29.01.2024

Samayawardhena, J.

Background

Wilson was the owner of the property in dispute. He had no children. He and his wife legally adopted Rupawathie as their child. Wilson gifted the property to Rupawathie. Rupawathie married to Ariyaratna. They too had no children. When Rupawathie died on 10.12.2006, both her parents and her husband had already died. Then the property should devolve on brothers and sisters of her parents and their children, in accordance with the Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876, as amended.

Wilson has had several brothers and sisters. One of them is Dharmasena who had 10 children. Out of those 10, one is Kiribanda and another is the plaintiff. After Rupawathie's demise, Seelawathie, the wife of Kiribanda, filed testamentary case No. 2684/07/08 in the District Court of Mt. Lavinia (as seen from the administrative conveyance No. 300 dated 30.04.2006 marked P5), on the basis that Kiribanda, and Rupawathie's husband's brother and sister are the only three heirs of Rupawathie.

Although the plaintiff and Kiribanda are brothers and the plaintiff is in possession of the property in dispute and the plaintiff also was an heir of Rupawathie, the plaintiff was not made a party to the testamentary case. The District Court granted letters of administration to Seelawathie and Seelawathie in turn transferred the property in dispute to the said three parties by the aforesaid administrative conveyance, which was registered in the land registry.

The plaintiff filed the instant action against the six defendants including the aforementioned three parties in the testamentary case, on the basis that Seelawathie fraudulently filed the testamentary action and obtained orders in her favour without disclosing the lawful heirs of the deceased, including himself. He sought cancellation of the administrative conveyance P5 as the main relief.

The defendants do not deny that the plaintiff is an heir of Seelawathie and he (the plaintiff) is in possession of the property. They took up the position in the District Court that the testamentary action was concluded following the proper procedure and therefore the plaintiff could not challenge the executive conveyance in a separate action.

After the closure of the plaintiff's case, the defendants closed their case without leading any evidence.

The learned District Judge by judgment dated 20.05.2013 dismissed the plaintiff's action for want of jurisdiction on the sole basis that the plaintiff ought to have made the application for recalling letters of administration in the same testamentary proceedings in terms of sections 537 and 538 of the Civil Procedure Code rather than filing a separate action to cancel the executive conveyance.

On appeal, the High Court of Civil Appeal set aside the judgment of the District Court and directed the District Court to enter the judgment in

favour of the plaintiff on the basis that, in the circumstances of this case, a separate action can be maintained to cancel the executive conveyance. The High Court relied on the Full Bench decision in *Adoris v. Perera* (1914) 17 NLR 212.

This Court has granted leave to appeal on several questions but learned President's Counsel for the defendant-appellants at the argument correctly acceded that the essential question to be decided on this appeal is:

> *Did the High Court of Civil Appeal err in law when it decided that the plaintiff could seek to cancel the executive conveyance prepared on letters of administration issued by another Court without making an application under sections 537 and 538 of the Civil Procedure Code to recall letters of administration in the previous action?*

The principal submission of learned President's Counsel for the defendants is that the dicta in *Adoris v. Perera* are inapplicable to the facts of the instant case since the law was changed by Civil Procedure Code (Amendment) Act, No. 14 of 1993.

The law relating to the recalling of probate was extensively discussed by me in the case of *Sammuarachchi v. Siriwardhena and Others* [2021/22] BLR 469.

The question in this case revolves around the recalling of letters of administration.

The mode of application for letters of administration

If a person dies without leaving a last will having left property in Sri Lanka exceeding four million rupees, administration of such property is compulsory. Any person interested in administering the property can

apply for the grant of letters of administration. If no one is forthcoming, the Court can appoint some person.

Sections 525-527 reads as follows:

> *525. When any person shall die in Sri Lanka without leaving a will, it shall be the duty of the widow, widower, or next of kin of such person, if such person shall have left property in Sri Lanka amounting to or exceeding in value four million rupees, within one month of the date of his death to report such death to the District Court of the district in which he shall have so died, and at the same time to make oath or affirmation or produce an affidavit verifying the time and place of such death, and stating if such is the fact, that the intestate has left property within the jurisdiction of that or any other, and in that event what court, and the nature and value of such property.*
>
> *526. When any person shall die without leaving a will or where the will cannot be found, and such person shall have left property in Sri Lanka-*
>
> *(a) any person interested in having the estate of the deceased administered may apply for the grant to himself of letters of administration; or*
>
> *(b) any heir of the deceased may apply for the issue of certificates of heir ship to each of the heirs entitled to succeed to the estate of the deceased.*
>
> *Such application shall be made in accordance with section 528 to the District Court of the district within which the applicant resides, or within which the deceased resided at the time of his death, or within which any land belonging to the deceased's estate is situate.*

> *527. In case no person shall apply for the grant of letters of administration or for the issue of certificates of heirship, as the case may be, and it appears to the court necessary or convenient to appoint some person to administer the estate or any part thereof, it shall be lawful for the court in its discretion, and in every such case where the estate amounts to, or exceeds in value, four million rupees, the court shall in accordance with the procedure set out in this Chapter appoint some person, whether he would under ordinary circumstances be entitled to take out administration or otherwise, to administer the estate, and the provisions of sections 518 to 521, both inclusive, shall apply, so far as the same can be made applicable, to any such appointment.*

What constitutes a proper application for letters of administration is set out in section 528.

> *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.*

The procedure for newspaper publication and the timeline for objections are specified in section 529.

> *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.

If no objections are received, in terms of section 531, the Court can make an order for the grant of letters of administration to the applicant.

If objections are received, in terms of section 532-534, the Court shall hear the parties and make a suitable order.

Recalling letters of administration

In terms of section 529, the objections to the grant of letters of administration shall be tendered not later than sixty-seven days from the first newspaper publication.

However, this is not the only occasion an objection could be raised against the grant of 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*" do not, with respect, represent the correct position of the law.

The law has provided for various windows to intervene, object and make applications for recall of probate or letters of administration 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.

In *Biyanwila v. Amarasekere* (1965) 67 NLR 488, Sirimane J. stated at page 494 that although some provisions of the testamentary procedure are only directory, "*in an appropriate case a party may ask the court for relief under section 839 of the Civil Procedure Code*."

In *Actalina Fonseka v. Dharshani Fonseka* [1989] 2 Sri LR 95 at 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.*

In terms of section 537, the Court can recall the letters of administration if the Court is satisfied that the grant of letters of administration ought not to have been made or 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.*

Section 537 deals with the grounds upon which letters of administration can be recalled, and section 538 stipulates that such application shall be made by way of summary procedure.

> *538. All applications for the cancellation, recall or revocation of certificates of heirship, probate or grant of administration shall be made by petition, in pursuance of the rules of summary procedure, and no such application shall be entertained unless the petitioner shows in his petition that he has such an interest in the estate of the deceased person as entitles him in the opinion of the court to make such application.*

There is no time limit for an application under section 537 to be made. However, if the applicant claims to have been unaware of the newspaper

publication calling for objections, such an application shall be made at the earliest possible opportunity upon the applicant becoming aware of the case.

In *Biyanwila v. Amarasekere*, the appellant became aware of the fact that her mother had obtained probate as the 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."*

Before the Civil Procedure Code (Amendment) Act, No. 14 of 1993, which replaced Chapter 38 titled 'Testamentary Actions', the testamentary procedure had, *inter alia*, the following notable attributes:

(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.

Fraud as a ground for recalling letters

Under the repealed procedure, as held by the Full Bench of the Supreme Court in *Adoris v. Perera*:

> *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 last will in the case of testacy or letters of administration in the case of intestacy, whether under the old procedure or the new procedure, the person applying to recall probate or letters of administration has two options: he can either make the application in the same proceedings or institute a separate action.

In *Actalina Fonseka v. Dharshani Fonseka*, 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. Kulatunga J. stated at page 102:

> *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.*

The defendants do not want to contest the case on the merits. They do not say the allegation of fraud is false. Instead, they attempt to conceal fraud by technicalities. Such stratagem is not permitted in law.

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, Vythialingam J. at page 66 and Weeraratne J. 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 *Takhar v. Gracefield Developments Ltd. and Others* [2019] UKSC 13, a significant item of evidence led before the trial Court was a scanned copy of a profit share agreement, seemingly signed by the plaintiff-appellant, which supported the defendant-respondents' case. The appellant's pre-trial application to obtain evidence from a handwriting expert was denied. The trial Court held against the appellant. Following the trial, the appellant engaged a handwriting expert, who stated conclusively that the signature on the agreement had been transposed from an earlier document. The appellant moved to have the judgment set aside on the ground that it had been obtained by fraud. The respondents resisted it stating that it was an abuse of process. The Court did not agree that the claim was an abuse of process. However, the Court of Appeal set aside that order holding that a person who seeks to have a judgment set aside on account of fraud had to show that the fraud could not have been discovered by reasonable diligence. The Supreme Court of the United Kingdom did not agree with the Court of Appeal and unanimously allowed the appeal. Lord Kerr held at para 52:

> *The idea that a fraudulent individual should profit from passivity or lack of reasonable diligence on the part of his or her opponent seems antithetical to any notion of justice. Quite apart from this, the defrauder, in obtaining a judgment, has perpetrated a deception not only on their opponent and the court but on the rule of law.*

Lord Kerr further remarked at para 53:

> *It appears to me that the policy arguments for permitting a litigant to apply to have judgment set aside where it can be shown that it has been obtained by fraud are overwhelming.*

The principle, "fraud vitiates everything", is followed in Australian jurisdiction as well. In *Cabassi v. Vila* [1940] 64 CLR 130, Williams J. in the High Court of Australia stated at page 147:

> *A judgment which is procured by fraud is tainted and vitiated throughout. If the fraud is clearly proved the party defrauded is entitled to have the judgment set aside in an action [Hip Foong Hong v. Neotia & Co. (1918) A.C. 888; Jonesco v. Beard (1930) A.C. 298]. In some of the older cases in the House of Lords it has been stated that where a judgment has been so obtained it may be treated as a nullity [Shedden v. Patrick (1854) 1 Macq. H.L. 535; R. v. Saddlers' Co. (1863) 10 H.L.C. 404]. In the last-mentioned case at page 431, Willes J. said: "A judgment or decree obtained by fraud upon a court binds not such court, nor any other; and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding [Phillipson v. Lord Egremont (1844) 6 Q.B. 587; Bandon v. Becher (1835) 3 Cl. & Fin. 479; Shedden v. Patrick (1854) 1 Macq. H.L. 535: see also Tommey v. White (1853) 4 H.L.C. 313]."*

In *Pieris v. Wijeratne* [2000] 2 Sri LR 145 at 152, Jayawickrama J. held:

> *[A]lthough 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 to later make it absolute, issuance of order absolute in the first instance etc. are inapplicable. 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 after the inquiry.

For completeness, let me consider what happens:

(a) if the testator includes properties in the last will which do not belong to him; or
(b) if the executor or administrator disposes of such properties by way of executor conveyances; or
(c) if properties which do not belong to the deceased are included in the inventory and disposed of in the same way unknown to the true owners?

According to section 2(1) of the Wills Ordinance, No. 21 of 1844, as amended, a person can include in the last will "*any property which belong to him at the time of death*".

> *2(1). It shall be lawful for any person who has reached the age of eighteen years and residing within or outside Sri Lanka to execute a will bequeathing and disposing any movable and immovable property and all and every estate, right, share or interest in <u>any property which belong to him at the time of death</u> and which, if not so devised, bequeathed or disposed would devolve upon his heirs of such person not legally incapacitated from taking the same as he shall seem fit.*

The inclusion of properties in the last will or in the inventory filed in Court in testamentary proceedings, which the deceased did not own, does not confer any rights upon the purported beneficiaries.

In the case of *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 acquire title to such properties. In *Rosalin Nona's* case, the administratrix applied to the District Court for authority to sell certain immovable properties that were purportedly owned by the deceased. Two parties intervened, contending they had conclusive title to two lands through partition decrees and objected to the sale. The District Court dismissed these objections. On appeal, H.N.G. Fernando J. (later C.J.) with the agreement of T.S. Fernando J. whilst dismissing the appeal, had this to say:

> *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.*

In *Kalai Kumar v. Saraswathey and Others* [2005] 3 Sri LR 301, the respondent instituted testamentary action in respect of the estate of the deceased and the petitioner intervened to claim a certain land included in the inventory. This was application was refused by the District Court. Wimalachandra, J. in the Court of Appeal held at page 307:

> *In these circumstances when the accounting party (administrator or probate holder) has included a property in the inventory and prima facie if it appears to be a property not belonging to the deceased person, in my view, the District Court must hold an inquiry as to the genuineness of the claim of the petitioner. If the property does not form a part of the estate of the deceased person then it is not proper to administer the said property. Moreover, if the said property does not form a part of the estate of the deceased then the District Court has no jurisdiction to make any order with regard to that property.*

Conversely, the omission to include any property that actually belonged to the deceased in the inventory does not preclude the heirs from making a claim to that property on succession.

It was held in *Fernando v. Dabarera* (1971) 77 NLR 127:

> *When an action for declaration of title to a land belonging to a deceased person's estate is instituted by a person claiming to be a*

successor in title of the deceased, section 547 of the Civil Procedure Code does not expressly prohibit the maintenance of the action on the ground that the name of the land is not included in the Inventory filed in the testamentary action relating to the estate of the deceased owner.

The application of the law to the facts of this case

There cannot be a dispute that the plaintiff is one of the heirs of the deceased and the 1st defendant in connivance with the 2nd and 3rd defendants suppressed it in the testamentary proceedings filed to administer the estate of the deceased. She did not include in the petition the details of all the heirs of the deceased to the best of her knowledge as required by section 528. She made her husband a respondent and listed as an heir of the deceased. However, she did not make the plaintiff who is her husband's brother and the person in possession of the property a respondent and did not list him as an heir. There are several other heirs who were not made parties. The 1st defendant secured letters of administration on the false basis that the 1st defendant's husband and the 2nd and 3rd defendants are the only lawful heirs of the deceased Rupawathie and thereafter transferred the property in dispute to the said three parties by executive conveyance and registered the deed in the land registry. These are by all means fraudulent acts on the part of the 1st-3rd defendants. The defendants did not want to give evidence at the trial to rebut the allegation of fraud.

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 should constitute. Whilst section 528(1) 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.*"

While the provisions of section 528 are considered directory, not mandatory, as held in *Biyanwila v. Amarasekere* and *Pieris v. Wijeratne* [2000] 2 Sri LR 145, it is crucial to note that the Court will not countenance willful suppression of material particulars. It may be recalled that in *Biyanwila* case, Sirimane, J. at page 494 whilst stating that failure to strictly comply with section 524 (requisites of an application for probate) 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*".

Referring to the failure to name heirs as parties to the application for probate, in *Actalina Fonseka v. Dharshani Fonseka* at page 99, Kulatunga J. stated "*However, such failure is a relevant fact in determining whether probate had been obtained by fraud.*"

The argument of learned President's Counsel for the defendants that the High Court was wrong to have followed the dicta in *Adoris v. Perera* decided under the old procedure is devoid of merit. As I stated before,

when fraud is alleged, there is no difference between the old procedure and the new procedure.

In any event, the plaintiff did not file this action seeking to recall letters of administration. He filed the action seeking to cancel the executor conveyance on the ground of fraud and seeking a declaration that he is a co-owner of the property. As Lascelles C.J. stated in *Adoris v. Perera* at page 214 "*These provisions, of course, in no way effect the general jurisdiction of the Court to entertain actions to set aside judgments that are vitiated by fraud.*"

The argument of learned President's Counsel that the District Judge came to the firm finding that there was no fraud is also not correct. What the District Judge has stated in the judgment is that he who asserts fraud must prove it and not that the plaintiff has not proved fraud. The District Judge did not decide on the question of fraud on the erroneous basis that the Court had no jurisdiction to grant relief in a separate action.

Conclusion

I answer the question of law in the negative.

The judgment of the High Court of Civil Appeal is affirmed and the appeal is dismissed with costs.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., J.
I agree.

Judge of the Supreme Court

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 127(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka and Section 5(C) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006

SC Appeal No: 141/2012

SC. HCCA.LA No. 168/2011.

CP/HCCA/Kandy/125/2008(F).

D.C. Matale No. 5463/L

Abekoon Mudiyanselage Seelawathie Kumarihamy of
Yapa Niwasa, Millawana,
Matale.
Through her Power of Attorney Holder Yapa Mudiyanselage Chandana Yapa Bandara of
Yapa Niwasa, Millawana,
Matale.

PLAINTIFF

-VS-

Galakumburegedara Wijerathna of
Madagama,
Millawana,
Matale.

DEFENDANT

AND BETWEEN

Abekoon Mudiyanselage Seelawathie Kumarihamy of Yapa Niwasa, Millawana,
Matale.

Through her Power of Attorney Holder Yapa Mudiyanselage Chandana Yapa Bandara of

Yapa Niwasa, Millawana,
Matale.

PLAINTIFF -APPELLANT

-VS-

Galakumburegedara Wijerathna of Madagama,
Millawana,
Matale.

DEFENDANT -RESPONDENT

AND NOW BETWEEN

Abekoon Mudiyanselage Seelawathie Kumarihamy of Yapa Niwasa, Millawana,
Matale.

Through her Power of Attorney Holder Yapa Mudiyanselage Chandana Yapa Bandara of Yapa Niwasa, Millawana,
Matale.

PLAINTIFF -APPELLANT-

APPELLANT

-VS-

Galakumburegedara Wijerathna of

Madagama,

Millawana,

Matale.

DEFENDANT -RESPONDENT-

RESPONDENT

BEFORE : **JAYANTHA JAYASURIYA, PC, CJ.**

S. THURAIRAJA, PC, J.

YASANTHA KODAGODA, PC, J.

COUNSEL : Rohan Sahabandu, PC with Nathasha Fernando for the Plaintiff-Appellant-Appellant.

Amarasiri Panditharatne with Thushani Machado and Laknath Pieris for the Defendant-Respondent-Respondent.

ARGUED ON: 09th March 2022.

WRITTEN SUBMISSIONS: Plaintiff- Appellant -Appellant on 2nd September 2019 and 30th March 2022.

Defendant- Respondent- Respondent on 22nd of July 2019 and 27th April 2022.

DECIDED ON: 29th February 2024

S. THURAIRAJA, PC, J.

The Background of the Case

The Plaintiff-Appellant-Appellant, Abekoon Mudiyanselage Seelawathie Kumarihamy, (hereinafter referred to as the 'Plaintiff' or 'Appellant', as appropriate) instituted action in the District Court of Matale by Plaint dated 30.06.2000 seeking to vindicate her title against the Defendant-Respondent-Respondent, Galakumburegedara Wijerathna (hereinafter referred to as the 'Defendant' or 'Respondent', as appropriate) to a land called "Alawatta" aliases "Alawattehena" and "Medalanda" (in extent of A1-R1-P16), described in the schedule to the Plaint, for the ejectment of the Defendant-Respondent-Respondent and for damages.

The Plaintiff-Appellant-Appellant stated by her Plaint that she became the owner of the disputed corpus by Deed of Transfer bearing No. 73 dated 25.06.1996 attested by C. S. Wijeyratne Notary Public and her husband Yapa Mudiyanselage Agrapala was the transferor.

In establishing this position, the Plaintiff-Appellant-Appellant traced her title and pleaded that the land originally belonged to the State. She stated that in terms of the *Land Settlement Ordinance,* it was settled to one Jayawardena on 25.10.1941 and that the said Jayawardena came into possession of the land described in the Schedule to the Plaint. The corpus was shown as Lot 918 in the Surveyor General's Final Village Plan (FVP) No. 72, showing an extent of A1-R1-P16. It was the position of the Plaintiff-Appellant-Appellant that the said Jayawardena possessed the land in question and by Deed No.12703 dated 18.01.1946, he transferred same to Loku Manike. Subsequently, Loku Manike had transferred the corpus to the Plaintiff's Husband, Agrapala, by Deed No.1030 dated 24.7.1974. The Plaintiff-Appellant-Appellant stated that the said Agrapala then sold it to the Plaintiff-Appellant-Appellant by Deed of Transfer No.73 dated 25.7.1996 as stated above.

It was the position of the Plaintiff-Appellant-Appellant that she was in possession of the land in question and the Defendant-Respondent-Respondent had come to occupy the land as a servant of her Husband. She states that after she became the owner of the land, the Defendant-Respondent-Respondent continued to be in possession of the land as a servant of the Plaintiff-Appellant-Appellant. She mentions that following the termination of the services of the Defendant-Respondent-Respondent, he has been living in the land with the leave and license of the Plaintiff-Appellant-Appellant.

The Plaintiff-Appellant-Appellant states that the Defendant-Respondent-Respondent, on or about 14.01.2000, had disputed the rights of the Plaintiff-Appellant-Appellant and thereafter the matter had been referred to the Magistrate Court and the said case bearing No. 3331 was pending at the time of the filing of the Plaint. It is the position of the Plaintiff-Appellant-Appellant that she sent a notice dated 24.04.2000 through her Attorney-at-Law informing the Defendant-Respondent-Respondent that she had terminated the leave and license given to him and requesting him to vacate the premises on or before 31.05.2000 and hand over vacant possession of the land to the Plaintiff-Appellant-Appellant.

It was the position of the Plaintiff-Appellant-Appellant that, in spite of the said notice, the Defendant-Respondent-Respondent continued to be in possession of the land and that due to the notice, the said possession is illegal from 01.06.2000. In the circumstances, the Plaintiff-Appellant-Appellant sought a declaration that she is the owner of the land in dispute and to eject the Defendant-Respondent-Respondent and his agents therefrom. The Plaintiff-Appellant-Appellant further sought damages of Rs.3000/- per month from 01.06.2000 until the possession of the land is handed over. In addition to the above, the Plaintiff-Appellant-Appellant further claimed prescriptive rights to the land.

The Defendant-Respondent-Respondent thereafter tendered his answer denying the averments in the Plaint stating *inter alia* that the Plaintiff-Appellant-Appellant and her predecessor in title have never been in possession of the land, while the Defendant-

Respondent-Respondent has acquired prescriptive rights by being in possession of the land for more than 35 years. Further, the Defendant-Respondent-Respondent stated that he was never a servant of the Plaintiff-Appellant-Appellant and/or her predecessor in title and that he is not living in the land with leave and license of the Plaintiff-Appellant-Appellant.

In the circumstances, it was the position of the Defendant-Respondent-Respondent that no cause of action has accrued to the Plaintiff-Appellant-Appellant. The Defendant-Respondent-Respondent sought dismissal of the Plaint and sought a commission to prepare a Plan to show the area of land possessed by him and further, in his claim in reconvention, sought a declaration that he has acquired prescriptive rights to the land in dispute. The Defendant-Respondent-Respondent further claimed the improvements he has made to the land worth Rs. 500,000/-.

After the trial, the learned Judge of the District Court dismissed the action of the Plaintiff-Appellant-Appellant subject to cost. The learned District Judge further held that the Defendant-Respondent-Respondent was a licensee of the Plaintiff-Appellant-Appellant and entered the judgment accordingly dismissing the Defendant-Respondent-Respondent's claim in reconvention.

Thus, the Plaintiff-Appellant-Appellant had preferred an appeal to the Provincial High Court of the Central Province (Civil Appeals) holden in Kandy. The learned High Court Judges delivered the judgment on 21.04.2011 dismissing the action based on the non-identification of the land.

Being aggrieved by the judgment of the High Court, the Plaintiff-Appellant-Appellant has filed a Petition dated 30.05.2011 before this Court, and leave was granted on 03.08.2012 on the following questions of law referred to in paragraph 16 of the Petition as follows:

16\. I. *Was the identification of the corpus an issue in the present case?*

II. *In any event is there sufficient evidence adduced to identify the corpus?*

III. Did the High Court and the District Court err in law in not appreciating that the burden of proof that was shifted to the defendant was not discharged by him?

IV. In the circumstances are the judgments of the learned District Judge and the High Court according to law and according to the evidence adduced in the case?

Analysis

Issue No. 6, 7 and 8 raised before the District Court of Matale specifically dealt with the question of license and termination of license and the same were answered affirmatively, in favour of the Plaintiff. In effect, the learned Judge in his judgment holds that the Defendant is a licensee by answering issue No. 6 as pleaded by the Plaintiff. Said Issue No. 6 is as follows,

6. විත්තිකරු මෙම පැමිණිලිකාරියගේ සහ ඇයගේ පූර්වගාමීන්ගේ සේවකයෙකු වශයෙන් මෙම පැමිණිල්ලේ උපලේඛණ ගත දේපලේ පදිංචිව සිටියේද?

[6. Was the defendant residing in the property described in the schedule to the plaint as a servant of the plaintiff and her predecessors?]

[An approximate translation added]

Further, Issues No. 10 and 14 of the District Court were specifically in relation to prescription as follows:

10. විත්තිකරුට මෙම නඩුවේ විෂය වස්තු වන දේපල සම්බන්ධයෙන් කිසිඳු නීත්‍යානුකූල අයිතියක් නොමැතිද?

[10. Does the defendant have no legal right to the property which is the subject matter of this suit?]

....

14. නඩුවට විෂය වූ දේපල විත්තිකරු හා ඔහුගේ පූර්වගාමීන් විසින් පුරා 10 වසරකට අධික කාලයක් අඛණ්ඩව, නිරවුල්ව, අන් අයගේ අයිතිවාසිකම් වලට ප්‍රතිකූලව බුක්ති විඳ තිබේද?

[14. Have the defendant and his predecessors enjoyed possession of the property that is the subject matter of the case for more than 10 years prior in an uninterrupted, undisturbed manner, contrary to the rights of others over the land?]

[An approximate translation added]

In answering the aforementioned Issues No. 10 and 14, it was held that Defendant had not shown his prescriptive rights to the land in question.

I must note that despite a claim based on prescriptive rights being raised as enumerated above in the lower courts, it is unnecessary to decide whether the learned District Judge has duly evaluated the evidence on the question of prescription as the 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. Therefore, I do not wish to go into this question in depth, nor do I wish to disturb the findings of the lower courts.

Having decided the issues as to the prescriptive rights of the Defendant, the learned Judge nevertheless **dismissed the Plaintiff's action on the sole basis that the Plaintiff did not identify the land.**

At the very outset, it was submitted that Defendant-Respondent-Respondent sought the position that the instant matter is a *rei-vindicatio* action and that Plaintiff has not proved the essential requisites in a *rei-vindicatio* action. It was submitted that both the District Court and Provincial High Court of the Central Province have held that the identity of the corpus has been not established and it must be dismissed.

When this matter was argued before this Court, the Court inquired as to whether this is a *rei vindicatio* action or an action based on a licensee. Counsel for the Plaintiff-

Appellant-Appellant submitted that the Plaintiff comes to Court on the basis that the Defendant is her licensee who has acted in violation of her rights as the Defendant has not vacated and given vacant possession when the said license was terminated.

Moreover, as per paragraphs 9, 10, 11, 12, 14, 15, 16 and 17 of the Plaint, the Plaintiff stated that the Defendant worked on the land as a lessee and that he looked after the property while residing in the building constructed on the said land by her family. The Plaintiff by producing P16, P17 and P18 (payment receipts of money for plucking coconuts), submitted that the Defendant had worked for her family for a long time. The documents were produced to show the relationship that the Defendant had in 1981, 1982 and 1983 with one Agrapala who became the owner in 1974. It was submitted that the said Agrapala is the predecessor in title of the Plaintiff and the Plaintiff became entitled to the land in 1996 by virtue of the Deed marked P15.

The Defendant did not lodge a cross-appeal at the High Court on the issue of Prescription and license which were held against him by the learned District Judge; nor has he raised a question of law before this Court on the issue of Prescription. Furthermore, at the trial, the Plaintiff's title deeds were marked and accepted without challenge and it was proven that the Plaintiff has sufficient title over the land in question.

As such, no question with regard to prescription arises in the instant Appeal before this court as I have already noted and the findings of the learned District Judge as to the prescriptive title of the Defendant need not be disturbed at this stage.

The questions of law set out in this case directly relate to the dismissal of the Plaintiff's action by the learned District Judge, which as I noted previously, was done on the sole basis that the Plaintiff did not identify the land.

It is indeed true that in a *rei vindicatio* action, a Plaintiff is saddled with the burden of identifying the property as well as proving his/her entitlement thereto. As it was held in ***Wanigaratne v. Juwanis Appuhamy* (1962) 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) 2 SLR 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 expeditious method."*

As enumerated above, to succeed in a *rei vindicatio* 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. This exact position has been stressed in ***Jamaldeen Abdul Latheef and v. Abdul Majeed Mohamed Mansoor and Another*** (supra) as follows;

> *"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."*

> *"An important feature of the action rei vindicatio is that it has to necessarily fail if the plaintiff cannot clearly establish his title. To succeed in an action rei vindicatio, the owner must prove on a balance of probabilities, not only*

his or her ownership in the property, but also that the property exists and is clearly identifiable. The identity of the land is fundamental for the purpose of attributing ownership, and for ordering ejectment."

However, 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 a fact admitted. Similarly, where a Defendant does not object to the subject matter as identified by the Plaintiff and proceeds on the Plaintiff's identification, that would be tantamount to an admission as to the identification of the subject matter.

The identification of the land was not in dispute at the original trial. The Defendant in paras 10 and 11 of the answer identified the land where he claimed that he acquired prescriptive title to "මෙම නඩුවට අදාළ දේපල *[the property subject to this action]*". It is apparent that the Defendant had no difficulty in identifying the land nor did he have any objections to the Plaintiff's identification of the property. How can one claim title to that which had not been identified? If the land was not identified by the Plaintiff, the Defendant could not have claimed prescriptive title thereto.

Furthermore, if there were any questions as to the identification of the land, the Defendant could have raised Issues to that effect. *Per contra,* the Defendant's 14th Issue is "නඩුවට විෂය වූ දේපල විත්තිකරු හා ඔහුගේ පූර්වගාමීන් විසින් පුරා 10 වසරකට අධික කාලයක් අඛණ්ඩව, නිරවුල්ව ආණ්ඩ අයගේ අයිතිවාසිකම් වලට ප්‍රතිකූලව භුක්ති විඳ තිබේද?" If there was a problem as to the identification of the land, the Defendant would not have raised such an issue.

In testimonial evidence, too, the Defendant did not question the identification of land. In evidence-in-chief itself, at page 193 of the brief, he said that the case has been filed "නඩුවට අදාළ දේපලින් මාව ඉවත් කිරීමට". The evidence of the Defendant's wife was also to like effect. At no point did they question the identification of the land.

In light of the foregoing, it is clear that the identification of the corpus was not an issue in the instant case. Therefore, I answer the first question of law in the negative. Answering the first question of law negatively, I find that the second question of law—which questions whether, in any event, there is sufficient evidence adduced to identify the corpus—has no bearing on the case for the identification of land was not disputed at the District Court. For this reason, I see no need to answer the second question of law.

The third question of law raised by the Appellant was "Did the High Court and the District Court err in law in not appreciating that the burden of proof that was shifted to the defendant was not discharged by him?"

The question of law on its own is too ambiguous and does not sufficiently indicate the onus it is in reference to. However, it appears from the Petition dated 30.05.2011 of the Appellant that it is with reference to the onus on the Defendant of proving superior title once the paper title is proved by the Plaintiff.

It is perplexing why the Plaintiff-Appellant-Appellant raised this question of law, seeing as the learned District Judge has held in favour of the Plaintiff, having considered the Defendant's claim of prescriptive title from pages 20-24 of the Judgment dated 12.03.2008 (pages 298-302 of the brief). The Judgment of the High Court does not disturb this finding as the Defendant had not filed a cross appeal regarding the same. Therefore, the third question of law is answered in the negative. However, this need not disturb the outcome of the instant appeal.

Finally, the fourth question of law, i.e., whether, in the circumstances, the judgments of the learned District Judge and the High Court are according to law and according to the evidence adduced in the case, have to be answered negatively in light of the answer to the first question of law.

Conclusion of the Court

I am of the view that the learned trial Judge had correctly come to the conclusion when he concluded that the Plaintiff-Appellant-Appellant had established the contractual relationship between Plaintiff and Defendant in rejecting the Defendant's claim on prescriptive title. However, the learned Judge has committed a serious error in dismissing the Plaintiff's action on the basis that he failed to identify the land when the identification of the land was not in question. The learned Judge of the High Court, too, has failed to duly appraise this element.

Hence, I am of the view that the judgment entered in the High Court of Civil Appeal dismissing the appeal of the Plaintiff-Appellant-Appellant is incorrect in law and in fact. In these circumstances, I find merit in this application and accordingly allow this Appeal.

I direct the learned District Court Judge to enter the judgment for the Plaintiff as prayed for in paras (a) and (b) of the prayer to the plaint.

The Plaintiff is entitled to costs.

Appeal allowed with costs.

JUDGE OF THE SUPREME COURT

JAYANTHA JAYASURIYA, PC, CJ.

I agree

CHIEF JUSTICE

YASANTHA KODAGODA, PC, J.

I agree

JUDGE OF THE SUPREME COURT

<u>IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA</u>

DFCC Bank PLC,
No. 73/5, Galle Road,
Colombo 03.
1st Defendant-Appellant

SC APPEAL NO: SC/APPEAL/144/2022
SC LA NO: SC/HC/LA/45/2020
CHC CASE NO: HC/484/2018/MR

Vs.

Laththuwa Handi Harindu
Dharshana,
No. 35, Kandy Road,
Kiribathgoda, Kelaniya.
Plaintiff-Respondent

Schokman &
Samerawickreme,
No. 290, Havelock Road,
Colombo 05.
2nd Defendant-Respondent

Before: Hon. Justice Vijith K. Malalgoda, P.C.
Hon. Justice Janak De Silva
Hon. Justice Mahinda Samayawardhena

Counsel: N.R. Sivendran with Upendra Kalehewatta for the 1st Defendant-Appellant.
Mokshini Jayamanne for the Plaintiff-Respondent.

Argued on: 08.06.2023

Written Submissions:
By the 1st Defendant-Appellant on 13.01.2023
By the Plaintiff-Respondent on 05.06.2023 and 04.07.2023

Decided on: 27.02.2024

Samayawardhena, J.

The plaintiff filed this action in the Commercial High Court against the 1st defendant bank and the 2nd defendant auctioneer seeking a declaration that the resolution passed by the board of directors of the bank on 27.03.2018 in terms of section 4 of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, as amended, is a nullity. By this resolution the board of directors of the bank resolved that the mortgaged property of the plaintiff be sold by public auction to recover the dues to the bank.

The Commercial High Court by order dated 23.06.2020 issued an enjoining order followed by an interim injunction preventing the bank from auctioning the property on 07.08.2018 or on any subsequent date without following the proper procedure stipulated in the Act.

The Court took the view that the bank failed to give proper notice of sale in terms of section 9 of the Act, since notice of sale had been given by the auctioneer, not by the bank.

The short question to be decided by this Court is whether the notice of sale as mandated by section 9 must be given by the bank or if it can alternatively be given by the auctioneer.

In terms of section 4, the board of directors of the bank may by resolution to be recorded in writing authorize any person specified in the resolution to conduct the auction.

> *4. Subject to the provisions of section 7 the Board may by resolution to be recorded in writing authorize any person specified in the resolution to sell by public auction any property mortgaged to the bank as security for any loan in respect of which default has been made in order to recover the whole of the unpaid portion of such loan, and the interest due thereon up to the date of the sale, together with the money and costs recoverable under section 13.*

In the resolution relevant to this case, it is expressly stated that the board resolved to authorize the 2nd defendant auctioneer to conduct the public auction.

Section 8 requires the notice of resolution to be published in the gazette and newspapers, and copies of the same to be sent to the borrower.

> *8. Notice of every resolution under section 4 authorizing the sale of any property shall be published in the Gazette and in at least three daily newspapers, in the Sinhala, Tamil and English languages and copies of such notice shall be dispatched to the borrower, if he is alive, and to every person who has, in respect of that property, registered his address as required by section 2 and if that property consists of the interest of a lessee under a lease from the State, to the Land Commissioner.*

The requirements of section 8 have been complied with by the bank. In other words, the bank informed the plaintiff in writing that the board of directors of the bank passed a resolution authorizing the 2nd defendant to sell the mortgaged property by public auction to recover the dues to the bank.

Section 9 of the Act reads as follows:

> *9. Notice of the date, time and place of every sale authorized by a resolution under section 4 shall, not less than fourteen days before the date fixed for the sale be published in the Gazette and copies of such notice shall be–*
>
> *(a) dispatched to the borrower, if he is alive, and to every person to whom notice of any resolution is required to be dispatched under section 2,*
>
> *(b) pasted on or near the property which is to be sold.*

The requirements of section 9 have been complied with by the auctioneer, not by the bank. The crux of the matter is whether the auctioneer's compliance with the requirements of section 9 is sufficient, or if these requirements must specifically be fulfilled by the bank.

Section 9 requires the publication of a notice in the gazette 14 days before the date of the auction, specifying the date, time and place of the auction. The section further requires that a copy of the notice to be dispatched to the borrower and pasted on or near the property to be auctioned.

Section 9 does not state who should take these steps. The requirements under section 9 pertain to the actual conduct of the auction. As stated previously, section 4 empowers the board of directors of the bank to authorize any person specified in the resolution to conduct the public auction, as the board of directors cannot practically conduct the auction.

Accordingly, the person who was authorized by the board to conduct the auction can take required steps under section 9. When section 9 notice is given by the auctioneer specifying the date, time and place of the auction, the bank had already informed the borrower the name of the auctioneer in compliance with section 8 of the Act.

So long as the requirements of section 9 have been complied with by the person who was authorized by the board of directors to conduct the auction, the borrower cannot challenge the auction on the basis that the notice of sale as required by section 9 was given by such person, not by the bank.

No prejudice has been caused to the plaintiff by the fact that notice of sale was given by the auctioneer, not by the bank.

The questions of law upon which leave to appeal was granted are as follows:

(a) When the bank by resolution under section 4 of the Act authorizes "any person" to sell the property by public auction, whether that person could take steps to notify the date of sale under section 9 of the Act?
(b) Did the learned High Court Judge err in law by misinterpreting sections 4 and 9 of the Act?

I answer the questions of law in the affirmative.

The order of the Commercial High Court dated 23.06.2023 is set aside and the appeal is allowed with costs.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., 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 appeal from the Order dated 10th September 2012 of the High Court of the Southern Province.

1. Anita George Carey
   Hunts House, West Lavington, NR,
   Devizes, Wiltshire, England.

   By her Attorney A.L.B. Britto
   Muthunayagam, No.50,
   Rosmead Place, Colombo 07.

2. William George Carey
3. Rhiannon George Carey
4. Angharad George Carey
5. Catrin George Carey
6. David George Carey

S.C. Appeal No 147/2014
SC/HCCA/LA 442/2012
SP/HCCA/GA/LA/2/2010
DC Galle Case No 294/M

All of Hunt House, West Lavington, NR, Devizes, Wiltshire, England appearing by their next friend A.L.B. Britto Muthunayagam

Plaintiffs

Vs.

1. G.H.G.Elizabeth,
   No.100, Peddler Street,
   Galle.

2. Mirissa Gallappathige Eric
   Piyadarshana Udaya Kumara,
   'Somagiri', Goviyapana,
   Ahangama.

3. S.U. Dungi,
   No.26F, Dodanwela Passage, Kandy.

4. Mohamed Ali Mubarak,
   No. 65D, Akuressa Road,
   Katugoda, Galle.

Defendants

And

S.U. Dungi,
No.26F, Dodanwela Passage, Kandy.

<u>3rd Defendant-Petitioner</u>

Vs.

1. Anita George Carey,
   Hunts House, West Lavington, NR,
   Devizes, Wiltshire, England.

   By her Attorney A.L.B. Britto
   Muthunayagam, No.50,
   Rosmead Place, Colombo 07.

2. William George Carey
3. Rhiannon George Carey
4. Angharad George Carey
5. Catrin George Carey
6. David George Carey

   All of Hunt House, West Lavington, NR,
   Devizes, Wiltshire, England
   appearing by their next friend
   A.L.B. Britto, Muthunayagam.

<u>Plaintiff-Respondents</u>

1. G.H.G.Elizabeth,
   No.100, Peddler Street,
   Galle.

2. Mirissa Gallappathige Eric
   Piyadarshana Udaya Kumara,
   'Somagiri', Goviyapana,
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4. Mohamed Ali Mubarak,
   No. 65D, Akuressa Road,
   Katugoda, Galle.

<u>Defendant – Respondents</u>

And

S.U. Dungi,
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3rd Defendant-Petitioner-Petitioner

Vs.

1. Anita George Carey
   Hunts House,
   West Lavington, NR,
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   By her Attorney A.L.B. Britto
   Muthunayagam, No.50,
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   All of Hunt House, West Lavington, NR,
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   A.L.B. Britto, Muthunayagam.

Plaintiff-Respondent-Respondents

1. G.H.G.Elizabeth,
   No.100, Peddler Street,
   Galle.

2. Mirissa Gallappathige Eric
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   Ahangama.

4. Mohamed Ali Mubarak,
   No. 65D, Akuressa Road,
   Katugoda, Galle.

Defendant-Respondent-Respondents

AND NOW BETWEEN

S.U. Dungi,
No.26F, Dodanwela Passage, Kandy.

3rd Defendant – Petitioner – Petitioner – Petitioner / Appellant

Vs.

1. Anita George Carey,
   Hunts House,
   West Lavington, NR,
   Devizes, Wiltshire, England.

   By her Attorney A.L.B. Britto
   Muthunayagam, No.50,
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   All of Hunt House, West Lavington, NR,
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   their next friend A.L.B. Britto
   Muthunayagam.

Plaintiff-Respondent-Respondent-Respondents

1. G.H.G.Elizabeth,
   No.100, Peddler Street,
   Galle.

2. Mirissa Gallappathige Eric
   Piyadarshana Udaya Kumara,
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4. Mohamed Ali Mubarak,
No. 65D, Akuressa Road,
Katugoda, Galle.

Defendant-Respondent-Respondent-Respondents

Before: Murdu N.B.Fernando, PC. J.,
P.P.Surasena J. and
Yasantha Kodagoda, PC. J.

Counsel: Nihal Fernando PC with Ms. Rhadeena de Alwis instructed by Nimal Kuruwitabandara for the 3rd Defendant-Petitioner-Petitioner-Appellant.

Romesh de Silva PC with Aruna Samarajeewa and Shanaka Cooray instructed by Malin Rajapakse for the Plaintiff-Respondent-Respondent-Respondents.

Argued on: 03.03.2021

Decided on: 27.02.2024

Murdu N.B. Fernando, PC. J.,

The 3rd defendant-petitioner-petitioner-petitioner/appellant ("the 3rd defendant/ appellant") preferred this appeal against the Order of the High Court of the Southern Province ("the High Court") dated 10th September, 2012 and obtained leave from this Court on three questions of law.

The High Court by the said impugned Order, affirmed the Order of the learned District Judge of Galle dated 12th January, 2010 and rejected with costs, the application of the appellant, *to lead evidence and to further cross-examine the 1st plaintiff-respondent-respondent-respondent* ("the 1st plaintiff"), which application was made after the trial was concluded and the case was fixed for written submissions and to tender marked documents.

The factual matrix of this appeal is unique. It amply demonstrates the abysmal speed at which the wheels move in the administration of justice in this country.

The narrative

01. This appeal stems from an action instituted in the District Court of Galle way back on 22nd December, 2000 by the 1st plaintiff and her children (all minors) claiming damages from the defendants, consequent to the death of the 1st plaintiff's husband Peter Carey, who succumbed to his death, following a road accident that occurred on 27th December, 1998 in Habaraduwa, Galle.

02. The deceased and the plaintiffs are all British nationals. The 1st plaintiff is the wife of the deceased and the 2nd to the 6th plaintiff-respondent-respondent-respondents are the children of the deceased and the 1st plaintiff. The plaintiffs filed this action claiming damages in a sum of 2,176,710 Sterling Pounds or its equivalent in Sri Lankan Rupees as compensation from the defendants.

03. The plaintiffs together with the deceased, arrived in Sri Lanka for a holiday and were on their way to their destination when the accident occurred. The van in which they travelled [bearing registration no. 57-5280] collided with a bus [bearing registration no. 62-9444] which resulted with the untimely death of Peter Carey, a Solicitor by profession, based in Hong Kong.

04. The 1st and the 4th defendants-respondents-respondents-respondents ("1st and 4th defendants") were respectively, the owner and the driver of the van in which the deceased and the plaintiffs travelled. The **appellant before this Court (the 3rd defendant) was the owner of the bus, that collided with the van and the 2nd defendant-respondent-respondent-respondent ("the 2nd defendant") was the driver of the bus, that met with the fateful accident.**

05. All four defendants were represented before court and filed answer. The record bears out that the defence of the 2nd and 3rd defendants were undertaken by the Sri Lanka Insurance Corporation Ltd., at which the bus was insured and they were represented by counsel throughout the trial. The said counsel also filed proxy on behalf of the 2nd and 3rd defendants.

06. The trial pertaining to this matter began in the District Court of Galle on 23rd March, 2004. Admissions were recorded and issues raised by all counsel including the counsel for the 3rd defendant *i.e.,* the appellant before this Court.

07. At the commencement, the learned trial judge made order dated 25th August, 2004 and directed trial to begin in respect of all issues, rejecting the preliminary objection raised on behalf of the 4th defendant, that legal issues should be answered first.

08. On 24th June, 2005 the counsel for the plaintiff led the evidence of two police witnesses. Thereafter, in March, 2006 the evidence of two other witnesses were led and a number of documents produced. The said two witnesses were the 1st plaintiff (deceased's wife, a British national) and another foreign witness, named Mable Lui (the business partner of the deceased) from the firm, 'Lui and Carey', a British Law firm functioning in Hong Kong.

09. The record clearly bears out that the said four witnesses of the plaintiffs, were cross-examined by counsel of the defendants respectively, including the 3rd defendant, the appellant before this Court.

10. On 6th November, 2006 the counsel for the 1st defendant presented its defence, led evidence and marked documents. The counsel who appeared for the 2nd defendant [driver of the bus who had passed away by then] and the 3rd defendant [the owner of the bus - the appellant before this Court] thereafter moved for further time to lead evidence and the court granted such request.

11. On 9th July, 2007 the said **counsel for the 2nd and 3rd defendants informed court that no evidence would be led on behalf of the 2nd and 3rd defendants**. The record bears out, that the said counsel also submitted to court that the plaintiffs should make representations to the Insurer, but the counsel for the plaintiffs indicated that prior to the commencement of the trial, a dialogue was initiated but there was no positive response from the Insurer.

12. On 23rd October, 2007 court was informed that no evidence would be led on behalf of the 4th defendant. Thus, the trial was concluded and the learned judge directed the parties to file marked documents and written submissions by 12th December, 2007.

13. On 12th December 2007, further time was moved for written submissions and the court granted time till 6th February, 2008. On the said date too, time was once again moved for written submissions (the 3rd date for written submissions) and court granted time till 4th June, 2008. [vide journal entries bearing numbers 43 to 46]

14. Subsequent to same, the 3rd defendant, the **appellant before this Court, by way of a motion dated 29th May, 2008** moved to revoke proxy and file fresh proxy and further prayed to call this case in open court on 30th May, 2008, three days prior to 4th June, 2008 - the 3rd date granted by court to file written submissions.

15. The case was thus called on the said date and **an application was made under Sections 134, 165 and 166 of the Civil Procedure Code**, on behalf of the 3rd defendant to '*lead further evidence and to further cross-examine the plaintiff-respondent*' and the court made order to notice all parties. The basis upon which such application dated 28th May, 2008 was made, *inter-alia* was that the bus owned by the 3rd defendant was insured with Sri Lanka Insurance Corporation Ltd., and that the plaintiffs have not given notice of action to Sri Lanka Insurance Corporation, in terms of the Motor Traffic Act.

16. Consequent to notices being issued on all parties, the application of the 3rd defendant was fixed for inquiry. On 19th May, 2009 inquiry was taken up and the plaintiffs objected to such application and moved to file written submissions. Court granted time till 9th July, 2009 to file written submissions pertaining to the 3rd defendant's application, to lead further evidence on her behalf and to cross-examine the 1st plaintiff.

17. On 9th July, 2009 the date given for filing of written submissions pertaining to the aforesaid application of the 3rd defendant, revocation papers and fresh proxy was filed on behalf of the 3rd defendant and the case was once again re-scheduled for 26th August, 2009.

18. Thereafter, all parties filed their written submissions and the matter was set down for Order on 30th September, 2009.

19. On 12th January, 2010 **the Order of the learned District Judge was delivered rejecting the application of the 3rd defendant to lead evidence and further cross-examine the 1st plaintiff,** the wife of the deceased who was initially examined and cross-examined in March 2006.

20. The 3rd defendant appealed against the said Order to the High Court. Based on written submissions, the High Court upheld the Order of the District Court and dismissed the 3rd defendant's appeal with costs.

Being aggrieved by the Order of the High Court, the 3rd defendant thereafter came before this Court and obtained leave on the following three questions of law.

01. Did the learned judges of High Court of the Southern Province err in law and misdirect themselves by totally failing to take into account the factors that must necessarily be considered in exercising the discretion vested in court by Section 166 of the Code?
02. Did the learned judges of High Court of the Southern Province err in law and misdirect themselves by totally failing to consider that an admission of fact which is untrue and/or made by mistake or error can be withdrawn in the District Court?
03. Did the learned judges of High Court of the Southern Province err in law and misdirect themselves by making Order not permitting the Petitioner's evidence to be led?

The High Court, in a very short analysis upheld the findings of the learned trial judge upon the ground that the application of the 3rd defendant is not justiciable.

The learned judges of the High Court observed that the application of the 3rd defendant is not just and fair, as the papers filed before the trial court do not give reasons as to why further cross-examination of the 1st plaintiff [who is a foreign national] is necessary as the 1st plaintiff was cross-examined extensively by the counsel for the 3rd defendant at the trial.

The High Court also observed that the petition of appeal did not aver or indicate that the counsel who appeared for the 3rd defendant at the trial, acted contrary to instructions or that the intimation made to court that *no evidence would be led on behalf of the 3rd defendant or that no defence would be taken on behalf of the 3rd defendant at the trial* was erroneous or made with a mistaken understanding.

Having made the aforesaid observations, the learned judges of the High Court fully concurred with the findings of the learned District Judge.

Hence, let me examine the Order of the District Court first.

In the said Order, the learned District Judge considered the application made by the 3rd defendant in terms of Sections 134, 165 and 166 of the Civil Procedure Code, and rejected the contention of the 3rd defendant pertaining to Sections 134 and 165 of the Civil Procedure Code, on the ground that the said provisions have no bearing on the matter in issue.

The said provisions read as follows;

> **Section 134 -**
>
> "Subject to the rules of this Ordinance as to attendance and appearance, if the court at any time thinks it **necessary to examine any person other than a party to the action**, and not named as a witness by a party to the action, **the court may, of its own motion, cause such person to be summoned as a witness to give evidence,** or to produce any document in his possession, on a day to be appointed; and may examine him as a witness, or require him to produce such document." (emphasis added)
>
> **Section 165 -**
>
> "The **court may also in its discretion** recall any witness, whose testimony has been taken, for further examination or cross-examination, whenever in **the course of the trial it thinks it necessary** for the ends of justice to do so." (emphasis added)

The learned trial judge in his Order, observed that **Section 134** of the Civil Procedure Code, speaks of a 'court, on its own motion, causing a person [other than a party to the action and or not named as a witness] to be summoned as a witness'. In the instant matter, since the trial court did not deem it necessary to summon any person, the learned judge held, that the provisions of Sections 134 cannot be made use of by the 3rd defendant, to lead further evidence to substantiate its case.

With regard to **Section 165** of the Civil Procedure Code, the finding of the trial judge was twofold;

First, it is the discretion of court to recall any witness, whose testimony has been taken. In this instance, the court has not deemed it necessary to recall a witness and therefore, on the said ground, the application of the 3rd defendant cannot be permitted.

Secondly, recalling of a witness for further examination or cross-examination may be resorted to in the instance such witness has given a testimony. The 3rd defendant did not give

evidence at the trial and hence 'recalling' a person who has not given evidence, does not come within the provisions of Section 165, the learned judge held.

As discussed earlier, the 3rd defendant's application *'to lead further evidence and to further cross-examine the 1st plaintiff'* was made under three provisions of the Civil Procedure Code namely, Sections 134, 165 and 166.

Having rejected the 3rd defendant's contention relating to Sections 134 and 165 *in-limine*, the trial judge went onto examine the provisions in Section 166 of the Civil Procedure Code.

The said Section reads as follows;

Section 166

"The court may for grave cause, to be recorded by it at the time, permit a departure from the course of trial prescribed in the foregoing rules."

The learned trial judge, whilst noting that in accordance with the provisions of Section 166, a court could depart from prescribed course of trial for reasons which in the opinion of court is grave, referred to the discretion placed in court in such instances. Further it was emphasized, that such discretion is not only a part of our law, but is accepted even in South Africa as referred to by **E R S R Coomaraswamy** in his book 'The Law of Evidence' [Volume Two, Book 2 at page 849].

Further, the trial judge considered the judicial dicta pertaining to the discretion referred to in Section 166 and the pronouncements in the Court of Appeal case of **Murin Perera v. Gajaweera [2005] 1 SLR 103** and the following observations of this Court in **Samarakone v. The Public Trustee 65 NLR 100** *viz;* '*An obvious instance for the application of Section 166 would be where a party having closed his case, is faced with evidence of a decisive nature arising ex-improviso which he could not reasonably have forseen' (page 106),* to hold that if a party could not have reasonably forseen of any important evidence at the material time, the court could exercise its discretion and permit a party to lead such evidence.

Thereafter, the learned judge delved into the question of factors, **a party could not reasonably have forseen** [as referred to in the aforesaid case of **Samarakone v. The Public Trustee]** *vis-à-vis*, the instant case, and in view of paucity of material submitted by the 3rd defendant to justify calling for fresh evidence, declined the discretion of court to depart from the prescribed course of trial. Thus, the learned judge rejected the application of the 3rd defendant and held that the 3rd defendant cannot have recourse to Section 166 of the Civil Procedure Code in the given circumstances.

The learned District Judge, while emphasizing that the 3rd defendant failed to spell out the new evidence that had later emerged went onto state that the 3rd defendant also failed to

establish that such material was not available or could not have been forseen by the 3rd defendant at the time the evidence was led, and therefore, the court cannot be satisfied whether such material was actually available or not, in order to use its discretion, to permit the 3rd defendant to lead such evidence.

Moreover, the learned trial judge referred to another factor, which in the opinion of the judge was crucial, when the court decided to reject the application of the 3rd defendant. It was the relationship between the 2nd and 3rd defendants, a contention that was put forward by the counsel for the 3rd defendant in the written submissions, though not referred to in the petition filed before court.

The learned judge emphatically stated that the 3rd defendant ought to have known the relationship between the 3rd defendant and the 2nd defendant, *viz,* whether the 2nd defendant was in the employment of the 3rd defendant and or whether the 2nd defendant acted as an agent of the 3rd defendant. If the 2nd defendant was not in employment or did not act in the capacity of an agent, the judge observed, then the 3rd defendant at the relevant time and when the defence was called, could have led evidence of such fact.

The 3rd defendant failed to avail of such opportunity and did not lead evidence of such fact at the given moment. Furthermore, the 3rd defendant failed to indicate to court, why she failed to give evidence since the relationship of the 2nd and 3rd defendant is a matter, which is within the personal knowledge of the 3rd defendant, and a fact that the 3rd defendant should have known from the inception of the case. Hence, the learned judge, in his Order categorically emphasized, the relationship between the 2nd and 3rd defendants is not fresh or new evidence, that can be led under Section 166 of the Civil Procedure Code '*as evidence of a decisive nature, not reasonably foreseen'*, as stated in **Samarakone's case** referred to above.

In the Order at page 13, the learned trial judge goes on to explore another factor to justify its findings *i.e.,* **a party does not have a right to lead evidence, contrary to an admission of fact recorded at the trial.**

In the instant matter, the 2nd and 3rd defendants have admitted the contents of paragraph four of the amended plaint and recorded it as 'an admission' at the commencement of the trial. Paragraph four of the amended plaint, reads *'that at the material time, i.e., 27th December, 1998 the 3rd defendant was the owner of the bus bearing number 62-9444, and the 2nd defendant was the driver of the bus and drove the bus as an employee or as an agent of the 3rd defendant'.*

Furthermore, the 3rd defendant, in the joint answer filed before the District Court [on behalf of the 2nd and 3rd defendants] has categorically accepted such fact, namely, that the 2nd defendant was in the employment of the 3rd defendant and drove the bus at the material time. Thus, the learned judge went onto hold, having accepted the fact that the 2nd defendant was in the employment of the 3rd defendant in the answer, and recording it as an admission, the 3rd defendant cannot resile from such fact.

Further, the learned judge opined that with regard to an admission on a point of law, parties may not be bound, but on 'an admission of fact', a party is bound and cannot go back from such position or from the admission recorded.

Thus, based on the judicial dicta in **Mariammai et al v. Pethrupilli et al 21 NLR 200; Perera v. Samarakoon 23 NLR 502; Solomon Ranaweera v. Solomon Singho 79 (2) NLR 136;** and **Uvais v. Punyawathie [1993] 2 SLR 46** the learned Judge held that the court cannot permit the 3rd defendant to withdraw the impugned admission or to lead evidence contrary to such admission.

Finally, the learned judge referred to explanation two of **Section 150** of the Civil Procedure Code, which reads as follows;

> *"**The case enunciated must reasonably accord with the party's pleading, i.e., plaint or answer, as the case may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet**. And the facts proposed to be established must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings."* (emphasis added)

The above provision categorically states that the trial should take place in accordance with the pleadings; the character of a case cannot be changed; a party is not permitted from making at the trial a case materially different from that which he has placed on record and which his opponent is prepared to meet. Thus based upon the above provisions of explanation two in Section 150 of the Civil Procedure Code also, the trial judge came to the finding that the application of the 3rd defendant should not be permitted and dismissed the application.

The aforesaid Order of the trial court was upheld by the learned judges of the High Court and the appeal filed by the 3rd defendant was dismissed with costs, on the ground that the application of the 3rd defendant made to the trial court, after the case was closed to lead fresh evidence, was not justiciable.

The principle contention of the appellant before this Court was that 'the admission of fact' upon which the instant case revolves, is untrue and or made by mistake or error and therefore, the 3rd defendant should be permitted to withdraw such admission and or lead fresh evidence to negate such fact.

Mr. Nihal Fernando, President's Counsel for the appellant went onto contend that the police inquiry notes produced before the trial court by the plaintiff, clearly indicate that the 3rd defendant did not have any vicarious liability towards the 2nd defendant. Therefore, it was vehemently contended that the 3rd defendant ought to have been permitted to lead evidence to establish such fact and by not permitting such evidence to be led, the learned District Judge

failed to take into account the necessary factors in order to exercise the discretion vested on him under Section 166 of the Civil Procedure Code, and thereby erred in law.

Moreover, the learned President's Counsel argued that by upholding the said Order and endorsing the actions of the District Judge in not permitting the 3rd defendant to lead fresh evidence, the High Court misdirected themselves and erred in law and hence, the Order of the High Court should be set aside.

Countering the said position, Mr. Romesh de Silva, President's Counsel for the respondents submitted, that the petition filed by the 3rd defendant before the trial court, the subject matter of this appeal, did not indicate any ground or reason whatsoever, as to why leading of fresh evidence is necessary or should be permitted. Thus, it was forcefully contended, that the learned trial judge correctly used the discretion vested in him, in rejecting the application filed by the 3rd defendant.

Furthermore, the learned President's Counsel argued, the defence of mistake, [on the part of the counsel appearing for the 3rd defendant at the trial by recording an erroneous admission] as contended by the 3rd defendant was taken up by the 3rd defendant belatedly and was an afterthought, as the petition filed by the petitioner in the trial court did not mention such fact. Hence, it was argued that the contention of 'mistake' should also be rejected *in limine*.

We have considered the submissions made by the learned President's Counsel, the Order of the learned District Judge and the Order made by the High Court and we see no reason to interfere with the Order of the High Court which upheld the District Court Order.

Undisputedly, a collision has taken place, a life has been lost and the plaintiffs, being the legal successors of the deceased, have filed this action claiming damages from the alleged wrongdoers.

The record amply bears out that **the defence of the driver and the owner of the bus**, (*i.e.,* 2nd and 3rd defendants) which collided with the van, in which the deceased and the plaintiffs were travelling, **was undertaken by the insurer of the bus** from the inception of the case.

The cause of action of this matter arose in the year 1998 and the application of the 3rd defendant to lead fresh evidence was made only in 2008, *i.e.,* a decade after the collision. During the long gestation period of this case, it is a well-known fact and a matter in public domain, that the ownership of the insurer changed multiple times, from state-owned to privately owned. Throughout the said period, the defence of the 2nd and 3rd defendants [the driver and the owner of the bus] had been undertaken, by the 'insurer of the bus', whether it be state-owned or otherwise.

A joint answer, for the driver and the owner was filed in court, in which the fact of the accident, the ownership of the bus and the status of the driver at the material time, *i.e.,* the 2nd defendant was acting in the capacity of an employee, agent and representative of the 3rd defendant when the accident occurred, was categorically admitted by the 2nd and 3rd defendants. Moreover, such fact was recorded as an admission at the trial.

Further it is observed, the issues raised on behalf of the 2nd and 3rd defendants take up the same stand and also shed light to the relationship of the 2nd and 3rd defendants. By issues bearing numbers 15 and 16, the 2nd and 3rd defendants categorically put forward the point of contention that the accident occurred not due to the fault or negligence of the 2nd and 3rd defendants, but due to the negligence of the driver of the van in which the deceased and the plaintiffs travelled.

Having presented such a defence before the District Court in response to the case of the plaintiffs, it is beyond comprehension as to why the 2nd and 3rd defendants, who were throughout represented by the insurer, (although by different counsel) thought it fit to change its stance and take up the position, that the 3rd defendant is not vicariously liable for the actions of the 2nd defendant.

Furthermore, this Court is intrigued by the fact that the 3rd defendant deemed it necessary to put forward an argument, that the admissions recorded based on the pleadings filed had been entered by mistake and or error, after conceding to court, days before that evidence will not be led on behalf of the 2nd and 3rd defendants. In the submissions filed before this Court, the 3rd defendant relied on **Sarkar's** two books, 'Code of Civil Procedure' and 'Law of Evidence' to substantiate, that a gratuitous or an erroneous admission can be withdrawn.

In any event, the questions of law that this Court is called upon to answer are, whether the learned judges of the High Court misdirected themselves by failing to take into account the factors that must necessarily be considered in exercising the discretion vested in a trial court in terms of Section 166 of the Civil Procedure Code; secondly, whether a party should be permitted to withdraw an admission of fact, already recorded, merely because a party thereafter takes up the position that the admission of fact, was an error and was recorded by mistake; and thirdly, whether in not permitting the 3rd defendant to lead evidence afresh, the High Court erred in law.

I would begin my analysis of the aforesaid questions of law by referring to pages 849 and 850 of the book 'The Law of Evidence' by **E R S R Coomaraswamy**. It reads as follows;

> "Late Evidence Generally
>
> Civil cases
>
> A trial court has a general discretion to allow a party who has closed his case to lead fresh evidence at any time up to the judgement. This discretion is well-recognized in South Africa. Such leave will be more readily granted after only one party has closed his case than after both

have done so. It would be even more difficult for a party to obtain leave after the weaknesses in his case have exposed in argument or judgement has been reserved.

In exercising this discretion, the court must seek to preserve a balance between abstract justice and the need for finality in litigation. The following factors would be considered.

(a) The reasons why the evidence was not led before: Leave will not generally be granted, unless the evidence could not by the exercise of due diligence have been led at the proper time. If the evidence is at the disposal of a party, who does not lead it, because he considers it unnecessary, he cannot reinforce his case by leading it later. More recent decisions in South Africa have taken a more liberal view and permitted evidence omitted earlier through mere inadvertence, or by considering it unnecessary on a *bona fide* mistake of law.

(b) The materiality of the evidence and whether it is likely to have any effect on the result of the case.

(c) The possible prejudice to the opposing party, as where he may no longer have available the witnesses who could have given evidence in rebuttal. If the opposing party is unlikely to suffer any prejudice, which cannot be compensated by an award of costs, leave may be granted. This would also be the case where the plaintiff seeks to lead further evidence when only he has closed his case.

In Sri Lanka, the same general discretion is recognised by section 166 of the Civil Procedure Code, which provides that the court may, for grave cause, to be recorded by it at the time, permit a departure from the course of trial prescribed in the rules contained in the earlier sections. The Supreme Court will not, as a rule, interfere with the exercise of the discretion of the trial judge under this section…"

Hence it is observed, the discretion to allow a party to lead fresh evidence is more readily granted after only one party has closed his case, than after both parties have done so; and it would be difficult for a party to obtain such discretion, when the weaknesses in a case have been exposed.

In exercising the discretion, the court must preserve the balance between abstract justice and the need for finality in litigation and should consider the reason why the evidence was not led before; the materiality of the evidence; and the possible prejudice to the opposing party.

The writer further states, quoting **Jaganadan Pillai v. Perera 5 NLR 95** and **Samarakone v. The Public Trustee** (supra) *"that the Supreme Court will not as a rule, interfere with the exercise of the discretion of the trial judge."*

There is no doubt, that Section 166 of the Civil Procedure Code, permits a trial court, to depart from the prescribed course of trial, if in the opinion of court there is a 'grave concern'. In the event such a departure is permitted, the reasons for such departure should be recorded by the trial judge. Thus, first and foremost the court should be satisfied, that there was a 'grave concern,' *i.e.,* factors unforeseen for a party not to lead such evidence at the material time. Thereafter only the court could use its discretion and permit or disallow an application to depart from the laid down course of trial.

This Court observes, that the learned trial judge, in the instant matter relying on the pronouncements of Weerasooriya, J., in the case of **Samarakone v. The Public Trustee** (supra), emphasised that application of Section 166 should be when a party having closed his case, is faced with evidence of a decisive nature arising *ex-improviso*, which he could not have reasonably foreseen earlier.

Having considered the application of the 3rd defendant to lead evidence on her behalf and to further cross-examine the 1st plaintiff, the learned judge, being satisfied that there was no 'grave concern', declined the discretion vested in court, to permit a departure from the prescribed course of trial. In my view, the said reasoning of the learned trial judge cannot be faulted.

The appellant in the written submissions, took up the position, that the Order of the High Court is erroneous, since the High Court failed to consider, that the aforesaid case of **Samarakone v. The Public Trustee** as well as the case of **Murin Perera v. Gajaweera** (supra) [cited by the trial judge] can be distinguished. The contention of the appellant was, that in the said two cases, no application was made to have recourse to Section 166 before the trial court and hence, the pronouncements made in the said two cases have no bearing and cannot be relied upon in the instant appeal.

In my view, the aforesaid contention of the appellant has no merit since the material factor is the effect of such provision and not the point at which recourse to Section 166 was made, be it at the trial or in appeal. The crucial issue is, what is the evidence to be led afresh or anew; was it foreseeable? was such evidence available to such party; and whether such material was within the knowledge of the party, who is belatedly making an application to lead such evidence.

The appellant in his written submissions also contended that the discretion of the court should extend to permit evidence not led and even inadvertently omitted to be led by a party at the relevant time, since it is 'mere inadvertence'. The appellant went onto submit relying on Law of Evidence by **E R S R Coomaraswamy**, that evidence inadvertently omitted is permitted to be led afresh in South Africa. The said argument of the appellant too, in my view

has no relevance to the matter in issue since the appellant has failed to demonstrate 'mere inadvertence' or for that matter any reason or ground whatsoever to justify leading of fresh evidence.

In the instant matter, if the necessity to lead new evidence, was to substantiate that no vicarious liability lies with the 3rd defendant *vis-à-vis* the 2nd defendant, that material was clearly within the knowledge of the 3rd defendant from the time of the collision, *i.e.,* the time the cause of action arose. Having taken up the position that the 2nd defendant driver, was acting in the capacity of an employee, agent or representative and filing a joint answer and moreover recording an admission to such fact, the 3rd defendant in my view cannot now resile from the said position, especially after the demise of the 2nd defendant, to put forward an argument that the 3rd defendant is vicariously not liable for the actions of the 2nd defendant.

The Civil Procedure Code, is a codification of procedural rules to be followed, when conducting a civil trial. It has clearly and precisely laid down a step-by-step procedure to be followed. Having failed to lead a piece of evidence at the opportune moment, intentionally or otherwise, a party cannot be permitted to have recourse to a special provision, which is incorporated in the Code, to be utilized only in a situation when the court deems it necessary and to be of importance and of 'grave concern'.

In the said circumstances, I see no reason for the trial court to rely on Section 166 and to depart from the prescribed procedure and permit the appellant to lead fresh evidence. The evidence to be led anew was demonstrably always within the knowledge of the 3rd defendant/appellant. In such circumstances I am of the view, that the appellant has failed to convince this Court that the judges of the High Court have erred in law or misdirected themselves in coming to their findings. Thus, I answer the 1st question of law raised before this Court in the negative.

The 2nd question of law raised before this Court pertains to whether an admission of fact recorded before a trial court can be withdrawn, if such admission is untrue or made by mistake or error.

It is trite law that an admission recorded by a party cannot be withdrawn or contradicted. This proposition was succinctly laid down in the case of **Mariammai v. Pethrupillai** (supra) where Bertram, CJ., observed *"If a party in a case makes an admission for whatever reason, he must stand by it; and it is impossible for him to argue a point on appeal which he formally gave up in the court below."*

However, in the case of **Perera v. Samarakoon** (supra) Bertram, CJ., whilst not referring nor distinguishing the above case, but relying on two Indian cases observed "*an erroneous admission of counsel on a point of law has no effect, and does not preclude the party from claiming his legal rights in the appellate court"*. This was a case pertaining to servitudes and easements, where there was no recorded admission and only the submission of the counsel

and the understanding of the judge relating to a dominant tenement losing his servitude over a servient tenement.

Having propounded the above statement Bertram CJ., went onto opine that in the said case, *"no formal note of the suggested admission was made in the learned judge's notes and it is by no means clear [...] that the trial judge correctly appreciated the position of the plaintiffs' counsel and therefore, the principal point is open for argument."* Thus, in the said case, although an erroneous admission on a point of law was permitted to be withdrawn, the learned judge left the issue of withdrawal of an admission, whether it be a question of law or fact, open for further discussion.

Another land mark case, where withdrawal of admissions was discussed is, the case of **Solomon Ranaweera v. Solomon Singho** (supra), wherein Sharvananda, J., observed, in a partition action *"an admission made by counsel for one of the parties that such a decree was null and void for failure to make proper substitution, is a mistaken admission in law and is not binding on such party."*

The aforesaid case relates to an interlocutory appeal stemming from a partition action which had been remitted to the trial court for re-trial. It is interesting to note that the learned counsel for the plaintiff-respondent, Mr. Thiagalingam Q.C. admitted that he over looked Section 651 (1) of the Administration of Justice (Amendment) Law No 25 of 1975, when drafting amended plaint in a partition action and moved to withdraw the admission in the Supreme Court [pertaining to a final decree being null and void in view of failure to make a proper substitution] which was made on a mistaken view of the law. He was allowed to retract such admission.

In my view, the facts relating to the aforesaid case, are unique in nature and the observations of Sharvananda, J., cannot be applied in general to all cases. In any event, the learned Queen's Counsel was allowed to re-tract an admission based on a mistaken view of the law and not an admission based on a question of fact, as is the issue in the impugned case.

The case of **Uvais v. Punyawathie** (supra) a rent and ejectment matter, is another case relied upon by parties before this Court. It relates to withdrawal of admissions. In this case, Mark Fernando, J. considers a number of provisions in the Civil Procedure Code, pertaining to conducting of a civil trial, and elucidates the legal position in respect of 'withdrawal of admissions' in the following manner:

> *"While it is sometimes permissible to withdraw admissions on question of law, the admissions now under consideration are primarily questions of fact; what the parties intended and understood by their letters, and their conduct in relation thereto, hardly involve questions of law. In any event,* ***in the absence of evidence as to the circumstances in which those admissions were made, it would be speculative to regard them as resulting from the misconstruction of documents by the defendant's lawyers: they***

> ***may equally well have been the result of express instructions given by the client.*** *An additional circumstance is that, had these admissions not been made, the plaintiff would have had an opportunity of reconsidering this position, and may then have decided to withdraw his action and to institute another action on a different basis; the denial of that opportunity was a potential source of prejudice, and the Court of Appeal was in error in assuming that the plaintiff had suffered no prejudice, or had not acted to his detriment, where he had no chance of explaining how he would have acted. Quite apart from any question of estoppel or prejudice, to* ***permit admissions to be withdrawn in these circumstances would subvert some of the most fundamental principles of the Civil Procedure Code in regard to pleadings and issues.*** *Section 75 not only requires a defendant to admit or deny the several averments of the plaint, but also to set out in detail, plainly and concisely, the matters of fact and law, and the circumstances of the case upon which he means to rely for his defence; sections 146(2) and 148 oblige the Court upon the pleadings, or upon the contents of documents produced, and after examination of the parties if necessary, to* ***ascertain the material propositions of fact or of law upon which the parties are at variance****, and thereupon to record issues on which the right decision of the case depends; section 150, explanation (2), prohibits a party from making at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet;* ***the facts proposed to be established by a party must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings****".* (emphasis added)

Having propounded the aforesaid, Mark Fernando, J., went onto hold that the Court of Appeal was in error in holding that the defendant could withdraw admissions recorded at a trial.

Thus, it is crystal clear that a court will not permit a party to withdraw an 'admission of fact', whereas in certain circumstances an 'admission of a question of law' may be permitted.

Similarly, in the absence of evidence as to the circumstances upon which admissions were made, it would be speculative to permit withdrawal of an admission, without knowing the full picture pertaining to recording of admissions, since it could well have been the express instructions of the party concerned.

In **Uvais case**, discussed above, Mark Fernando, J., went onto observe, if not for the admission by the defendant pertaining to increase of rent creating a new tenancy agreement, the plaintiff may have changed its strategy. Further, His Lordship succinctly opined, in any event withdrawal of an admission will go against the gravamen of the fundamental principles of the Civil Procedure Code in regard to pleadings and issues and the whole concept of a civil trial encapsulated by Sections 75, 146(2), 148 and explanation (2) of Section 150 would become superfluous.

The appellant in written submissions filed before this Court, put forward another argument, based on Section 58 of the Evidence Ordinance as well as upon the cases of **Perera v. Samarakoon** and **Solomon Ranaweera v. Solomon Singho** (supra), that an admission of fact which is untrue or made by mistake or error can be withdrawn. The appellant further distinguished the **Mariammi's case** and **Uvais's case** as not relevant to the facts of the instant case, upon the ground that in the said two cases the withdrawal of the admission of fact was moved for the first time in appeal, and not before the trial court.

The said submission of the appellant, in my view, has no merit and should be rejected. As clearly outlined in **Uvais's case** decided in 1991, permitting an admission of fact to be withdrawn, would subvert the guiding principles laid down in the Civil Procedure Code. Moreover, it would transform the case to a different position not pleaded, nor suggested to in cross-examination and not supported by the evidence of the witnesses.

Furthermore, the aforesaid principles laid down in **Uvais case**, have been referred to and followed in many judgements of the appellate courts. In **Jayalath v. Karunatilake [2013] 1 SLR 337** the Court of Appeal re-echoed that, while it is sometimes permissible to withdraw admissions on questions of law, admissions on questions of fact cannot be withdrawn. See also **Soysa v. Fernando** and **others [2012] 1 SLR 182**.

The recent judgement of this Court in **Chaminda v. Janashakthi General Insurance Ltd., - S.C.Appeal 134/2018- decided on 09-10-2019** re-iterated the principles laid down in **Mariammai's case** and **Uvais's case**.

The facts of the aforesaid **Chaminda v. Janashakthi case** is similar to the instant matter. It refers to a comprehensive insurance policy issued to a party pertaining to a vehicle. The vehicle met with an accident and extensive damage was caused to it. A claim was made and the insurer repudiated the claim. When the matter went into trial, an admission was recorded regarding the jurisdiction of the court. Thereafter the defendant insurance company, moved to withdraw the said admission relating to jurisdiction.

Amarasekara, J., in his judgement referred to **Uvais's case** and other authorities, and held that the admission of jurisdiction by the defendant, was an admission of fact and not a question of law and as such the defendant cannot withdraw an admission of fact at a belated stage.

I am in agreement with the judicial dicta of the aforesaid **Uvais's case** and **Chaminda's case.** I re-iterate that the time tested principles laid down in the Civil Procedure Code, and more so, in Sections 75, 146(2), 148 and explanation (2) of Section 150, should be strictly followed and rigidly enforced. A party cannot be permitted to withdraw an admission belatedly and at its whim and fancy. An admission once recorded by all parties with consent, cannot be permitted to be withdrawn, arbitrarily by a party, many years after it was recorded, whether it is true or untrue and or made by mistake or error or not.

In the instant appeal, the 3rd defendant moved to withdraw the admission after the trial was concluded, and the case was called for the third occasion to tender written submissions. The admission to be withdrawn related to the relationship between the 2nd and 3rd defendants. In my view, it is an admission of fact and not a question of law. In any event, the 3rd defendant cannot propound a theory that it was untrue or made by mistake or error after categorically accepting the relationship in its pleadings, admissions and issues.

The District Court rightly rejected such request and the High Court upheld the Order of the District Court.

In the said circumstances, I am of the view that the High Court acted correctly and in accordance with the law. Thus, the appellant has failed to convince this Court, that the learned judges of the High Court have erred or misdirected themselves in coming to such conclusion. Therefore, I answer the 2nd question of law raised before this Court in the negative.

The final matter that the Court is called upon to answer, is whether the appellant should be permitted to lead evidence.

Undisputedly, the 3rd defendant /appellant opted not to lead evidence nor put forward a defence at the trial. Generally, in a trial, it would have been vital to have had the evidence of the 3rd defendant led, since the 3rd defendant was the principal defendant before court and also to negate the case of the plaintiff filed against the 3rd defendant and others. Nevertheless, the 3rd defendant thought otherwise.

As discussed in this judgement in detail, the appellant having failed to put forward a defence and or lead evidence at the material time made an application to lead the evidence of the 3rd defendant and further cross-examine the 1st plaintiff. The trial court rejected such application. Being aggrieved by the Order of the District Court, the appellant went before the High Court. In the High Court, the appellant abandoned the relief to further cross-examine the 1st plaintiff and only sought to lead her evidence. The said application was rejected by the High Court with costs.

Now, once again before this Court, the appellant is moving for the very same relief by way of the 3rd question of law. In my view, the 1st and 2nd questions of law have a direct bearing on this matter. The 3rd question is a follow up question. Thus, stemming from the answers given to the 1st and 2nd questions, this question too should be answered in the negative.

Nevertheless, the appellant fashions her submissions on the basis of Section 839 of the Civil Procedure Code and contends that the court is vested with inherent power to make order 'in the interests of justice'.

To substantiate the said argument, the appellant relies on **Seneviratne v. Fonseka Abeykoon (1986)1 CALR 434** also reported in **[1986] 2 SLR 1** and submits that in the said

case, it was stated that Section 839 of the Civil Procedure Code is intended not only to repair errors committed by the court itself but also extends to 'repair injuries' done to a party by the parties' own act, and contends that the court should permit the 3rd defendant to correct the injury done, in not leading evidence at the material time. It is ironic that the 'injury' complained of by the 3rd defendant, was an injury brought upon on the 3rd defendant, by 3rd defendant herself and not by any other.

Upon perusal of the submissions of the appellant, it is apparent that the 'injury' the appellant and/or the insurer is perturbed by, is the payment of damages. In my view, the belated application to establish that the 3rd defendant is not vicariously liable for the actions of the 2nd defendant driver, especially in a situation where the 2nd defendant driver is no longer in the land of the living to refute such fact, is for a collateral purpose. Further, the eagerness of the appellant to rely on the inquiry notes of the police [which were produced by the plaintiff, and were available at the time the 3rd defendant indicated to court that evidence will not be led on her behalf] to justify the application to lead the evidence of the 3rd defendant, amply demonstrate the real reason for the belated application, *viz;* to avoid payment of damages and that too, by the insurer of the bus at a subsequent point of time.

My considered view is that this line of argument, *viz.,* to repair injury, will not help the appellant since the appellant by its pleadings, admissions and issues accepted the relationship between the 2nd and 3rd defendants. This Court has already come to the finding, that the trial judge was not in error and acted in terms of the law, when he rejected the application of the 3rd defendant.

In any event, the question of vicarious liability is yet to be decided by the trial court and the inquiry notes are before the trial court. Such decision has been hampered and delayed, by the actions of the appellant herself, by making this application to lead evidence, after the case was closed, and more so after indicating to court, that no evidence will be led on behalf of the 3rd defendant.

My attention is also drawn to the final point in the appellant's further written submissions. It is as follows; *"Appellant is not seeking the withdrawal of the admission already recorded, but is merely seeking to lead her evidence under Section 166 of the CPC"*

Thus, in my view, the appellant is blowing hot and cold. On one hand, expressly by the 2nd question of law the appellant is moving to withdraw the admission and in the written submissions, takes up the position that the appellant is not seeking withdrawal of the admission.

Similarly, in the 'conclusion' of the appellant's initial written submissions, it is submitted *"that no prejudice will be caused to the plaintiff, except a delay of one more trial day which can be compensated with an award of costs"*. It is clearly seen that the 3rd defendant's application and the appellate procedure resorted to by the appellant pertaining to the said application, has already taken a decade. In such a situation, can the appellant maintain that no prejudice had been caused to the plaintiffs?

Having put forward the contention relating to 'no prejudice', the appellant goes on to state that 'in the interests of justice', the appellant's application should be permitted. The appellant drew our attention to two cases, namely, **De Fonseka v. Dharmawardena [1994] 3 SLR 49** to emphasise that Section 839 recognizes the inherent power of court to make an order, as may be necessary, for ends of justice; and **Velupillai v. The Chairman, Urban District Council 39 NLR 464** to emphasise that this is a court of justice and not an academy of law.

We have considered the above submissions of the appellant, and we see no reason to rely on Section 839 of the Civil Procedure Code, *viz* the inherent power of court, in the instant matter, to permit the appellant to lead evidence, 'in the interests of justice'.

There is no doubt that the 'injury' the appellant is complaining of, was the appellant's own doing. The appellant would have we assume, opted not to give evidence nor to lead evidence on her behalf and not to put up a defence to negate or challenge the action filed, after a careful consideration of all relevant facts and circumstances.

Having taken such a stand, a reasonable person should stand by its decision. He cannot resile from such position. In a court of law, a party cannot approbate and reprobate. Moreover, a party cannot be permitted to materially change the composition of its defence. A party should not take the other party by surprise nor take undue advantage of a situation. Rule of Law demands that justice and fair play should prevail.

Similarly, a party cannot be allowed to prolong a case and hamper the administration of justice. Already a decade and a half had passed and the trial court has still not delivered judgement of its findings, although the trial had been concluded.

The Civil Procedure Code, provide the manner in which a case has to be presented, defended and adjudicated. Section 166 categorically provides, that a court may, for 'grave cause', permit a departure from the course of trial, prescribed in the rules of the Code.

When a trial court has decided that a departure cannot be permitted under Section 166, I see no reason as to why a party should move court under Section 839 of the Code, to make an order, 'in the interests of justice.'

In the instant appeal the learned trial judge, having considered all relevant matters decided that a departure from the course of trial is not required and should not be permitted. Thus, the application of the 3rd defendant to lead evidence was refused and rejected. The learned judges of the High Court upheld such decision for reasons stated.

In such circumstances, I see no reason to interfere with such decision. The appellant has failed to convince this Court, that the learned judges of the High Court have erred in law or misdirected themselves in coming to such a finding. Hence, I answer the 3rd question of law in the negative.

This Court granted leave to the appellant on three question of law and all three questions of law have been answered in favour of the respondents for reasons morefully stated in this judgement.

Having Considered the submissions of the parties and the law relating to the matter in issue, this Court rejects the application of the Appellant.

Thus, for reasons, adumbrated in this Judgement, the Order of the High Court of the Southern Province dated 10th September, 2012 is upheld. The Order of the District Court of Galle dated 12th January 2010 rejecting the application of the 3rd defendant dated 28th May, 2008 is also upheld.

The appeal of the 3rd defendant-petitioner-petitioner-appellant made to this Court is thus, dismissed with costs fixed at Rs. 150,000.00 payable by the appellant.

The District Court of Galle is further directed to determine the instant case expeditiously and forthwith, on the evidence and material available in the record.

The Appeal of the 3rd defendant-petitioner-petitioner-appellant is dismissed with costs fixed at Rs. 150,000.00.

Judge of the Supreme Court

P.P. Surasena, 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

Warnakulasuriya Ludgar Leo
Kamal Thamel,
'Rebeka', Play Ground Road,
Wennappuwa.
Plaintiff

SC APPEAL NO: SC/APPEAL/153/2019
SC HCCA LA NO: SC/HCCA/LA/47/2018
HCCA NO: NWP/HCCA/KURUNEGALA/18/2017/LA
DC MARAWILA NO: 3173/D

Vs.

Nawarathna Tirani Deepika
Damayanthi Nawarathne,
'Rebeka', Play Ground Road,
Wennapuwa.
Defendant

AND BETWEEN

Nawarathna Tirani Deepika
Damayanthi Nawarathne,
'Rebeka', Play Ground Road,
Wennapuwa.
Defendant-Petitioner

Vs.

Warnakulasuriya Ludgar Leo
Kamal Thamel,
'Rebeka', Play Ground Road,
Wennappuwa.
Plaintiff-Respondent

AND BETWEEN

Warnakulasuriya Ludgar Leo
Kamal Thamel,
'Rebeka', Play Ground Road,
Wennappuwa.
Plaintiff-Respondent-Petitioner

Vs.

Nawarathna Tirani Deepika
Damayanthi Nawarathne,
'Rebeka', Play Ground Road,
Wennapuwa.
Defendant-Petitioner-Respondent

AND NOW BETWEEN

Warnakulasuriya Ludgar Leo
Kamal Thamel,
'Rebeka', Play Ground Road,
Wennappuwa.

Plaintiff-Respondent-Petitioner-Appellant

Vs.

Nawarathna Tirani Deepika Damayanthi Nawarathne,
'Rebeka', Play Ground Road,
Wennapuwa.
Defendant-Petitioner-Respondent-Respondent

Before: Hon. Justice Murdu N.B. Fernando, P.C.
Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Mahinda Samayawardhena

Counsel: Harsha Soza, P.C. with Ajith Moonesinghe for the Plaintiff-Respondent-Petitioner-Appellant.
Sudarshani Coorey for the Defendant-Petitioner-Respondent-Respondent.

Argued on: 31.05.2023

Written Submissions:

By the Appellant on 22.07.2019 and 14.07.2023
By the Respondent on 27.09.2019 and 13.07.2023

Decided on: 28.02.2024

Samayawardhena, J.

Background

The plaintiff filed action against the defendant in the District Court of Marawila seeking a decree of divorce on the ground of constructive malicious desertion and custody of their four children. The defendant-wife filed an application under section 614 of the Civil Procedure Code dated 26.01.2006 seeking alimony *pendente lite* until the determination of the divorce action and costs of litigation. After a lengthy inquiry, the District Court by order delivered on 04.05.2017 directed the plaintiff to pay Rs. 60,000 *per mensem* as alimony *pendente lite*. The District Court did not order costs of litigation, possibly due to oversight. On appeal by the plaintiff, the High Court of Civil Appeal of Kurunegala, by judgment dated 11.01.2018, affirmed the order of the District Court. This appeal by the plaintiff is against the judgment of the High Court.

On 12.06.2019, this Court granted leave to appeal against the said judgment on the question whether the amount ordered as alimony is excessive in terms of section 614(1) of the Civil Procedure Code. At the argument on 31.05.2023, learned President's Counsel for the plaintiff refined this question stating that the order of the District Court is not in compliance with the proviso to section 614(1) of the Civil Procedure Code. However, this was raised as an additional question of law.

Section 614 of the Civil Procedure Code reads as follows:

> *614(1) In any action under this Chapter, whether it be instituted by a husband or a wife, the wife may present a petition for alimony pending the action. Such petition shall be preferred and dealt with as of summary procedure, and the husband shall be made respondent therein; and the court, on being satisfied of the truth of the statements therein contained, may make such order on the*

> *husband for payment to the wife of alimony pending the action as it may deem just:*
>
> *Provided that alimony pending the action shall in no case be less than one-fifth of the husband's average net income for the three years next preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be.*
>
> *(2) A husband may present a petition for alimony pending the action. The provisions of the preceding subsection shall apply, mutatis mutandis, to such application.*
>
> *(3) Where one of the spouses is not possessed of sufficient income or means to defray the cost of litigation, the court may at any stage of the action order the spouse who is possessed of sufficient income or means to pay to the other spouse such sum on account of costs as it considers reasonable.*

It may be noted that subsections (2) and (3) above were introduced by the Civil Procedure (Amendment) Law, No. 20 of 1977.

Based on section 614(1), the argument of learned President's Counsel for the plaintiff (as morefully described in the post-argument written submissions) is two-fold:

(a) The defendant did not follow the summary procedure; and
(b) The order is not based on the net income of the plaintiff for the three years immediately preceding the date of the order.

Hence, it is argued that the order of the District Court and the judgment of the High Court are bad in law and should be set aside.

I must state that leave was not granted on (a) above although learned President's Counsel for the plaintiff has dedicated significant portion of his post-argument written submissions on that matter.

Let me now consider both the said arguments in turn.

Failure to follow summary procedure

In terms of section 614(1), the "petition shall be preferred and dealt with as of summary procedure". The summary procedure is set out in sections 373-391 of Chapter XXIV of the Civil Procedure Code.

In the instant case, admittedly, summary procedure was not followed although the application was filed by petition and affidavit before the District Court. After the plaintiff filed objections, the matter was fixed for inquiry. However, halfway through the inquiry, on 22.01.2009, the Court brought the matter of failure to adopt the summary procedure to the attention of the parties. Both parties consented to the procedure adopted and agreed to continue with the inquiry.

Learned President's Counsel for the plaintiff now argues that the parties cannot by consent follow a different procedure and the failure to follow the summary procedure renders the whole proceedings void *ab initio*. I have no hesitation in rejecting this argument.

If the Court has plenary jurisdiction to hear a case, a party who has acquiesced in the wrong procedure being adopted cannot later raise objections to the procedure once he realises that the order is against him. All objections to the procedure should be raised at the earliest opportunity before the trial Court and not in the appellate Court. Otherwise, such objections are deemed to have been waived.

In *Dabare v. Appuhamy* [1980] 2 Sri LR 54 the defendant sought dismissal of the plaintiff's action on *res judicata*. This was rejected by the

trial Court. On appeal, the contention of the plaintiff was 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. The Court of Appeal rejected this argument and allowed 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.

In the instant case, the parties have consented to the wrong procedure being adopted by signing the case record when they were represented by their lawyers. Therefore, the plaintiff is estopped from taking up that objection before this Court.

The relevancy of the income of the plaintiff for the three years immediately preceding the date of the order

Learned President's Counsel for the plaintiff argues that the impugned order delivered over eleven years after the application was filed, without any evidence being produced "*pertaining to the plaintiff's net income for the three years preceding the date of the impugned order*", is "*fatally bad and defective for non-compliance with the proviso to section 614*". His argument is that the documents marked by the defendant at the inquiry were all beyond three years from the date of the order and therefore could not have been taken into consideration in deciding the quantum of alimony. I find myself unable to agree with this argument.

The argument of learned President's Counsel presupposes that the proviso to section 614(1) imposes conditions upon a wife seeking alimony in a divorce action. It is not so. Prior to the Civil Procedure (Amendment) Law, No. 20 of 1977, in terms of section 614, only the wife, whether she

was the plaintiff or the defendant, could ask for alimony from the husband; *vice versa* was not possible. This proviso has been in effect since the beginning.

The proviso to section 614(1) is not against the wife but in favour of her. It does not impose any condition on her but rather facilitates her in obtaining a sufficient amount as alimony from her husband. What does this proviso say? It says alimony "*shall in no case be less than one-fifth of the husband's average net income for the three years next preceding the date of the order*". This means, the alimony order **must exceed** one-fifth of the husband's **average** net income for the three years preceding the date of the order. This does not imply that the evidence related to income must be limited to the earnings for the three years immediately preceding the date of the order. If sufficient evidence has not been presented regarding the average net income of the husband for the three years next preceding the date of the order, the Court does not lack jurisdiction to make an order for alimony, but the applicant is not guaranteed a minimum amount.

In reference to the proviso to section 614(1), Dr. Shirani Ponnambalam in her book titled *Law and the Marriage Relationship in Sri Lanka*, 2nd Edition (1987), page 401 states:

> *When quantifying alimony pendente lite the Sri Lankan law, following early English law practice, ensures that the alimony awarded is in no case "less than one-fifth of the husband's average net income for the three years next preceding the date of the order". This rule has been abolished in the English law. See P.M. Bromley, Family Law (5th ed. London 1976) p.529, note 1.*

In the instant case, for instance, the plaintiff has stated in evidence that his monthly average net income was Rs. 75,000. If it was accepted by

Court, the Court should have ordered him to pay more than Rs. 15,000 as alimony to the wife, if the order was delivered within three years. Assuming the defendant claims that his income later decreased to Rs. 25,000, then he would still be required to pay more than Rs. 5,000 as alimony. Notably, the Rs. 15,000 and Rs. 5,000 mentioned above represent the minimum payment, not the maximum. The precise amount to be paid shall be determined by assessing the evidence led at the inquiry in its overall context.

The argument of learned President's Counsel for the plaintiff that the documents marked by the defendant are beyond three years from the date of the order and therefore could not have been taken into account in calculating the quantum of alimony is unacceptable. Those documents are not obnoxious to the proviso to section 614(1).

Although, at first glance, section 614 does not explicitly require the consideration of the financial status of the applicant-wife in ordering alimony, our Courts have consistently taken into account the financial status of the wife when determining the quantum of alimony. However, this does not mean that if the wife has some income, she must use it for litigation, and that in such circumstances, the Court lacks the power to order alimony against the husband. It is hard to lay down fixed criteria in the determination of the quantum of alimony pending action. The decision shall depend on the unique facts and circumstances of each case.

In *Jeffery v. Jeffery* [1949] HCA 28 at 581, the High Court of Australia stated:

> *It would be wrong to lay down a rule that as long as a wife had any means whatever she could not obtain an order for alimony pendente lite. She is not bound to exhaust the whole of a small capital in order*

> *to maintain herself during the pendency of a suit. Each case must be considered in all its circumstances and particularly with regard to the station in life and the financial position of each of the parties.*

In an alimony inquiry, the Court is not required to go into the merits of the main case. As S.N. Silva J. (as His Lordship then was) stated in *Edirippuli v. Wickramasinghe* [1995] 2 Sri LR 22 at 24:

> *The merits of the action and the question of matrimonial fault are not gone into at an inquiry into an application for alimony and costs made under Section 614. If the merits are gone into at this stage it would result in the question of matrimonial fault being determined prior to even the pleadings are completed. The only matters at issue in an application for alimony pendente lite are the need for financial support on the part of the applicant spouse, that stems from the lack of his or her income and income of the respondent spouse.*

In any event, the defendant could not lead evidence on the husband's income for the three years next preceding the date of the order, due to reasons beyond her control. The plaintiff prolonged the inquiry by filing various applications and appeals. The evidence at the inquiry had been led before several judges. When an inquiry spans a decade, this is not uncommon. Following the conclusion of the inquiry, there was a delay in appointing a judge to deliver the order. Ultimately, the order was delivered by a judge before whom no evidence was led. Can the defendant be found fault with for those matters? The answer should be in the negative. In such circumstances, the Court can invoke legal maxims such as *lex non cogit ad impossibilia* (the law does not compel the performance of what is impossible) and *actus curiae neminem gravabit* (the act of the Court shall prejudice no man) to prevent injustice to a party to the action.

In the case of *The Young Men's Buddhist Association v. Azeez and Another* [1995] 1 Sri LR 237, the leave to appeal application was filed before the Court of Appeal out of time. When this was raised before the Supreme Court, Kulatunga, J. (with the agreement of G.P.S. de Silva C.J. and Ramanathan J.) held at 241:

> *I am of the view that taking into consideration all the facts, including conditions of civil unrest which prevailed in the country and the fact that the judgment was delivered on a date other than the date which the Court had fixed for delivery of judgment, no lapse, fault or delay can be attributed to the plaintiff-appellant in filling the application for leave to appeal on 25.10.95; hence the principle "lex non cogit ad impossibilia" would apply, in addition to the principle "actus curiae neminem gravabit".*

The Supreme Court has reiterated this in several cases including *Gamaethige v. Siriwardena and Others* [1988] 1 Sri LR 384 at 402.

The plaintiff is a successful businessman. A large number of documents have been marked by the defendant through several witnesses to show the plaintiff's income. Unlike a person who draws a monthly fixed salary, it is not easy to prove someone else's business income.

It may be in that context, the Maintenance Act, No. 37 of 1999, shifts the burden to the respondent to show cause why the application for maintenance should not be allowed. Section 11(1) of the Maintenance Act reads as follows:

> *Every application for an order of maintenance or to enforce an order of maintenance shall be supported by an affidavit stating the facts in support of the application, and the Magistrate shall, if satisfied that the facts set out in the affidavit are sufficient, issue a summons together with a copy of such affidavit, on the person against whom*

> *the application is made to appear and to show cause why the application should not be granted:*

In the Supreme Court case of *Pushpa Rajani v. Sirisena* (SC/APPEAL/117/2010, SC Minutes of 08.05.2013) Wanasundera J. observed:

> *When an application for maintenance is made before the Magistrate with an affidavit by the Applicant, from there onwards, the Magistrate is bound to act on the evidence before Court sworn in the affidavit. If what is said on oath in the affidavit by the Applicant is satisfactory and sufficient to create a prima-facie case to be tried by the Magistrate, it is only then that the Magistrate sends the summons. The summons tells the Respondent "to show cause why the application should not be granted". In any civil case the summons issued directs the receiver only to file in Court the answer to the plaint therewith and not to show cause.*

Her Ladyship then concluded:

> *Therefore as it is mentioned in Section 11 of the Act, in the Magistrate's Court the Respondent has to show cause why the application should not be granted. The burden of proof of his income is cast on the Respondent and not the Applicant in such an instance.*

Section 614(1) is also to a similar effect. The procedure to be adopted is summary procedure where, upon issuance of order *nisi*, the husband is required to show cause against making it absolute.

It should be borne in mind that the order for alimony is a temporary order made until the dissolution of the marriage, and such order can also be varied based on a change of circumstances. Hence there is absolutely no necessity to have a long drawn out inquiry for alimony. It is unfortunate

that this inquiry has taken more than a decade due to various reasons, including intervening appeals preferred by the plaintiff, which, according to the defendant, were done to delay the finality of the alimony inquiry. As a general rule, alimony inquiries must be concluded as early as possible. If the Court thinks that the opposite party is adopting dilatory strategies to frustrate the early conclusion of the inquiry, the Court may, by invoking the inherent powers of the Court referred to in section 839 of the Civil Procedure Code, issue an interim order for alimony, inducing the parties to conclude the inquiry speedily. (cf. *Aslin Nona v. Peter Perera* (1945) 46 NLR 109)

Although no evidence had been led before the judge who wrote the alimony order, the order of the learned District Judge is a well-considered one. The learned District Judge has analysed all the documentary and oral evidence led at the inquiry. There is no necessity to repeat them in this judgment. In the course of the judgment, he has *inter alia* stated that notwithstanding the plaintiff is admittedly the owner of three business establishments, he has not given correct details of his income. The learned Judge has decided that, given the facts and circumstances of this case, he cannot accept the plaintiff's version that he earns only Rs. 75,000 as profits *per mensem*. Eventually, he has come to the following conclusion.

> 2003.09.19 සිට 2004.12.18 දක්වා මාස 51ක කාලයක් ඇතුලත පැමිණිලිකාර වගඋත්තරකරු විසින් ආනයනය කරන ලද භාණ්ඩවල වටිනාකම රු.126,396,394,842/-ක අගයක් ගන්නා අතර, ඒ සඳහා ගෙවන ලද බදු මුදල රු.108,651,570/- කි. ඒ අනුව ඒ සඳහා දැරූ සම්පූර්ණ පිරිවැය රු.235,046,412/- කි. ඒ අනුව මසක කාලයක් තුළ පැමිණිලිකාර වගඋත්තරකරු මෙරටට ආනයනය කරන ලද භාණ්ඩවල අගය රු.4,608,753.17/-ක අගයක් ගනී. වාර්ෂිකව පැමිණිලිකාර වගඋත්තරකරුගේ අලෙවි භාණ්ඩවල වටිනාකම රු.55,305,038/- කි. එකී මෙම වාර්ෂික ආදායමෙන් 10%ක ප්‍රමාණයක් ලාභ වශයෙන් උපයා ගත්තේ නම් පැමිණිලිකාර වග උත්තරකරුගේ වාර්ෂික ආදායම රු.55,30503/- කි. එම මුදලින් 50%ක මුදලක් ව්‍යාපාර නඩත්තු, සේවක වැටුප්

> ආදිය වෙනුවෙන් වැයකළ ද, රු.27,65251/-ක මුදලක් ලාභ වශයෙන් පවතී. මෙම ගණනය කිරීම මෙරට සැපයුම්කරුවන්ගෙන් මිලට ගෙන විකිණීමෙන් උපයන ආදායම නොමැතිව වේ. ඒ අනුව මෙරට සැපයුම්කරුවන්ගේ භාණ්ඩ ලබාගෙන විකුණා ලාභ ලබාගැනීම ද සැලකිල්ලට ගතහොත් මසකට රුපියල් දෙලක්ෂ පනස්දහසකට වඩා වැඩි ආදායමක් පැමිණිලිකාර වගඋත්තරකරු උපයා ගන්නා බව පැහැදිලි වේ. 614 වගන්තිය අනුව මුදල තීරණය කිරීමේදී එකී වගඋත්තරකාර කාලත්‍රයාගේ පසුගිය වර්ෂ තුනේ සාමාන්‍ය ආදායමේ 1/5 කට අඩු නොවිය යුතු වේ. ඒ අනුව මාසිකව විත්තිකාර පෙත්සම්කාරියට රු.60,000/-ක නඩු තීන්දුව තෙක් දික්කසාද දීමනාවක් ලබාදිය යුතු බවට නියම කරමි.

His conclusion is that the plaintiff earns more than Rs. 250,000 per month, and therefore, the plaintiff should pay Rs. 60,000 per month as alimony to the defendant. Despite the defendant seeking alimony and costs of litigation separately, the learned District Judge has not ordered costs of litigation. It is assumed that the costs of litigation are included in this, although alimony *pendente lite* (governed by section 614(1) of the Civil Procedure Code) and costs of litigation (governed by section 614(3) of the Civil Procedure Code) are regulated by two separate provisions.

It is the submission of learned President's Counsel for the plaintiff that the District Judge's order is based on assumptions. I cannot agree. The Court needs to arrive at findings on the evidence led at the inquiry. Such findings are not based on assumptions. Given the facts and circumstances of this case, I am of the view that the amount ordered is not excessive.

Conclusion

I answer the two questions of law in favour of the defendant.

The order of the District Court pronounced on 04.05.2017 and the judgment of the High Court of Civil Appeal dated 11.01.2018 are affirmed.

The order of the District Court should take effect from the date of the alimony application.

The appeal is dismissed with costs.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., J.

I agree.

Judge of the Supreme Court

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

I agree.

Judge of the Supreme Court

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

In the matter of Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka from the Judgement of the Civil Appellate High Court of Kalutara in WP/HCCA/KAL/80/2003 [F] dated 12th of July, 2011.

SC Appeal No. 156/2012
SC/HCCA/LA Appl No. 320/2011
WP/HCCA/KAL/80/2003 [F]
D.C. Matugama Case No: 1978/L

Kodithuwakku Arachchilage Don Mithrasena
Temple Junction, Welipanna

Plaintiff

VS.

1. Withanage Don Ariyarathne
2. Opatha Kankanamge Don Neetha Ranjani
   Both of No. 05, Kannangara Mawatha, Matugama

Defendants

AND BETWEEN

Kodithuwakku Arachchilage Don Mithrasena
Temple Junction, Welipanna

Plaintiff – Appellant

VS.

1. Withanage Don Ariyarathne
2. Opatha Kankanamge Don Neetha Ranjani

Both of No. 05, Kannangara Mawatha, Matugama

1st and 2nd Defendants – Respondents

AND NOW BETWEEN

1. Withanage Don Ariyarathne (Deceased)

1A. Vithanage Don Charith Jithendra
1B. Vithanage Dona Nethmi
1C. Vithanage Dona Sanduni

All of No. 39/22A, Hospital Road, Waththawa, Matugama.

2. Opatha Kankanamge Don Neetha Ranjani (Deceased)

2A. Vithanage Don Charith Jithendra
2B. Vithanage Dona Nethmi
2C. Vithanage Dona Sanduni

All of No. 39/22A, Hospital Road, Waththawa, Matugama.

1A To 1C and 2A to 2C Substituted Defendants – Respondents - Appellants

VS.

Kodithuwakku Arachchilage Don Mithrasena (Deceased)
Temple Junction, Welipanna

Plaintiff – Appellant – Respondent

1A. Tharindu Madushan Kodithuwakku
1B. Kodithuwakku Arachchige Don Sajith Madhusanka
1C. Randika Madushashi Kodithuwakku

All of Temple Junction, Welipanna

1A to 1C Substituted Plaintiffs – Appellants – Respondents

Before : Priyantha Jayawardena PC, J

: Kumudini Wickremasinghe, J

: A. L. Shiran Gooneratne, J

Counsel : Upendra Walgampaya Wijeratne Hewage for the 1A-1C and 2A-2C Substituted Defendants – Respondents – Appellants.

: Navin Marapana, PC, with Uchitha Wickremasinghe for the Substituted Plaintiffs – Appellants – Respondents.

Argued on : 30th of October, 2023

Decided on : 29th of February, 2024

Priyantha Jayawardena PC, J

This is an Appeal to set aside the judgment of the Civil Appellate High Court of Western Province holden in Colombo (hereinafter referred to as the "High Court"), dated 12th July 2011 where it was held that the learned District Judge has erred in holding that the defendants–respondents–appellants (hereinafter referred to as the "appellants") were entitled to the land in suit.

The plaintiff–appellant–respondent (hereinafter referred to as the "respondent") instituted an action in the District Court of Matugama against the 1st defendant-respondent-appellant (hereinafter referred to as the "1st appellant") praying, *inter alia* for a declaration of title to the land

described in the first schedule to the Plaint, and he is the owner of the articles listed in the second schedule to the Plaint.

Further, the respondent prayed for the ejectment of the appellants from the said land and claimed a sum of Rs. 2,500/- per month from 1st of June, 1994 as damages until the respondent is placed in possession of the said land.

The respondent further averred that he became the owner of the said land and premises on the 15th of January, 1988 and placed the appellants in possession thereof as licensees on or about the 1st of June, 1988. Further, he permitted the appellants to use and enjoy the movables listed in the second schedule.

On the 18th of April, 1994 the respondent had sent a notice to the 1st appellant terminating the said license granted to him to occupy the said premises, and requested him to hand over possession of the land, premises and movables on or before the 31st of May, 1994. The 1st appellant, through his Attorney-at-Law had sent the letter dated 9th of May, refusing to vacate the premises and refused to accept the title of the respondent. Further, in the said letter, the 1st appellant had taken up the position that the said land and premises were purchased by the appellants in the name of the respondent as a trust.

Later, the 2nd defendant-respondent-appellant (hereinafter referred to as the "2nd appellant"), who is the wife of the 1st appellant, was added as a party to the District Court action as the 2nd defendant, consequent to an application made by her to court.

In their joint amended Answer dated 26th of August, 1997, the appellants took up the positions, *inter alia*, that the consideration on the said Deed No. 3749 was provided for by both the appellants as the respondent promised to transfer the said property to the appellants whenever they made a request for the transfer of the property.

Evidence led at the Trial

The vendor of the said deed, Yasawathie Perera, gave evidence at the trial on behalf of the respondent, and stated that with regard to the said sale of the property, she only dealt with the respondent and that the consideration of Rs. 125,000/- had been paid by the respondent to the

Notary. Later, the Notary handed over the said money to her. She further stated that the appellants were not known to her and that they never took part in the said transaction. Further, the broker who found the said property for the respondent gave evidence at the trial and stated that at the time the said deed was executed by the Notary, the appellants were not present.

The Grama Niladhari for the area in which the appellants resided, Don Lionel, and a clerk from the Divisional Secretariat gave evidence at the trial and stated that the appellants and their child were in receipt of food stamps under the Janasaviya Programme in 1989 and 1992. He further stated that only persons who were in receipt of an income less that Rs. 300/- per month were entitled to such food stamps. Further, the Grama Niladhari for the area in which the property in suit was situated, A. K. Piyadasa, gave evidence and stated that the 1st and 2nd appellants are given as occupants of the house in suit in the Village List and also that they came into occupation on the 31st of March, 1988. It was further stated that the name of the owner of the house is given as that of the respondent.

The respondent, in giving evidence stated that he knew the 1st appellant as he was supplying latex rubber to his rubber store. Further, the 1st appellant requested the said premises for a short period of time as he was asked to vacate the house that he was occupying by the landlord. He further stated that it was he who paid the full consideration for the house in suit and that it was bought by him for his own use. The respondent also stated that he made certain improvements to the house and denied the allegation that he held the property in trust for the respondents.

The 2nd appellant also gave evidence and stated that a few days after the said deed was written, she wanted the respondent to re-transfer the property in her name as she wanted the deed for the purpose of admitting her son to school. Moreover, she obtained the letter 'P12' from the respondent, where he admitted that the money for the purchase of the land was given by her, and that the respondent was holding the land in her favour. The respondent, however, stated that the letter, 'P12' was given to the 2nd appellant upon her request to facilitate the admission of her child to the school and thus, it was not an admission that the said money was paid by the 2nd appellant to purchase the property.

She further stated that she gave the money to the respondent on the 25th of December, 1987 prior to the execution of the deed as the respondent was the one who found the house. She further stated

that she got to know the respondent in 1987 and that she had an illicit affair with him from March, 1987.

The 2nd appellant went on to state that as at January 1988 she had Rs. 30,000/- to 40,000/- in her Savings book. Further, she stated that she sold her business to a cousin brother, Leslie, for Rs. 71,000/- to raise funds to purchase the house.

The 2nd appellant in her evidence stated that she visited the house/land and went to the Notaries office prior to the purchasing the house. In giving evidence at the trial, it was stated as follows,

> *"ප්‍ර: ඒක තමන්ලා බලන්න ගියාද?*
>
> *උ: ඔව්.*
>
> *ප්‍ර: බලන්න ගියේ කව්රු කව්රුද?*
>
> *උ: මගේ මහත්තයාව සහ මාව පැමිණිලිකරුගේ කාර් එකෙන් එක්ක ගෙන ආවා..."*

> *"පස්සේ ලියන්න කියා දවස් 2ක් එක්ක ගෙන ආවා . වාද්දුවේ නොතාරිස් මහත්තයෙක් ළඟට යන්න ඕ නෑ කිව්වා. අද බැහැ පස්සේ එමු කිව්වා. ඊට පස්සේ 88.1.15 වෙනදින ඉඩම ලියා තිබුනා. සල්ලි මම දීලා තිබුනේ. අප බෙන්තර සිටි ගේ අයිතිකරුට කඩේ පවරුවා. අවුරුදු 2 කට ගේ අරගෙන තිබුනේ..."*

> *"ප්‍ර: නොතාරිස් ගාස්තු දුන්නේ කව්ද?*
>
> *උ: මම රුපියල් 8000/- ක් දුන්නා*
>
> *ප්‍ර: පැමිණිලිකරු එක්ක තමයි තමන්ලා මුදල් දුන්නේ?*
>
> *උ: ඔව්. නමුත් දවස් 2ක් විතර නොතාරිස් මහත්තයා ළඟ ට ගියාට ඔප්පු ලියන්න බැරි වුනා..."*

Judgment of the District Court

Upon the conclusion of the trial, the learned District Judge of Matugama delivered Judgment dated 28th of March, 2003, answering all the issues in favour of the appellants and granted all the reliefs prayed for in the amended Answer. Further, it was held, *inter alia,* that the letter dated 15th of July,

1988 which is admittedly written by the respondent, contains an admission that the subject property had been purchased by the 2nd appellant in the name of the respondent. Further, it was held that the respondent had failed to prove his case on a balance of probabilities.

Judgment of the Civil Appellate High Court

Being aggrieved by the said Judgement of the District Court, the respondent appealed to the High Court of Civil Appeals of the Western Province holden in Kalutara. After hearing the submissions of the parties, the Civil Appellate High Court allowed the Appeal of the respondent and set aside the judgment of the District Court. In the said judgment, it was held that the District Court judgment was based on unfounded and uncorroborated evidence. Moreover, it was held that the appellants were not entitled to the subject property described in the first schedule to the Plaint.

Appeal to the Supreme Court

When the application was supported for granting of leave, this Court granted leave to appeal on the following question of law:

> *"Did the learned Civil Appellate High Court Judges err in holding that the Petitioner has failed to discharge the burden placed on him by law as regards prayer of adequate circumstances with respect to the alleged constructive trust?"*

Did the learned Civil Appellate High Court Judges err in holding that the Petitioner has failed to discharge the burden placed on him by law as regards prayer of adequate circumstances with respect to the illegal constructive trust?

The learned judges of the Civil Appellate High Court, *inter-alia,* stated in the said judgment;

> *"… The burden of proof shifted to the Defendant after the Plaintiff had proved by calling the Notary Public who had attested the said deed, that it*

was an outright transfer but not a constructive trust created by the Plaintiff for the 2nd Defendant…"

However as aforementioned, the said Notary, who was a vital witness to this case did not testify at the trial. Further, his evidence is vital as the parties are at variance with regard to the person who paid consideration to purchase the property.

Moreover, the learned judges of the Civil Appellate High Court held,

> *"… As is said earlier, nothing was proved by the Defendant that the said P1 was a forgery and not an act and deed of the said Ratnasekara…"*

A careful consideration of the evidence reveals that a person named 'Ratnasekara' had not given evidence at the trial before the District Court.

The powers of the appellate courts in hearing civil appeals and the requirements of the judges are set out in section 774 of the Civil Procedure Code, which states as follows;

> *"(1) On the termination of the hearing of the appeal, the Court of Appeal shall either at once or on some future day, which shall either then be appointed for the purpose, or of which notice shall subsequently be given to the parties or their Counsel, pronounce judgment in open court; and if the bench hearing the appeal is composed of more than one Judge, each Judge may, if he desires it, pronounce a separate judgment.*
>
> *(2) The judgment which shall be given or taken down in writing, shall be signed dated by the Judge or Judges, as the case may be, and shall state-*
>
> *(a) the points for determination;*
> *(b) the decision of the Judge or Judges thereon;*
> *(c) the reasons which have led to the decision;*
> *(d) the relief, if any, to which the appellant is entitled on the appeal in consequence of the decision."*

However, as stated above, the reasons which led to the decision to set aside the judgment of the District Court are based on facts that were not transpired at the trial before the District Court.

Hence, the impugned judgment of the Civil Appellate High Court is contrary to section 774(2)(c) of the Civil Procedure Code as amended.

Further, an appellate court should not interfere with the findings of facts of a learned judge who has had the advantage of seeing the demeanour of witnesses at the trial. A similar view was expressed in the case of ***De Silva and others vs. Seneviratne and another*** **(1981) 2 SLR page 7**, where it was held;

> *"*
>
> *(1) Where an Appellate Court is invited to review the findings of a trial judge on questions of fact, the principles that should guide it are as follows:*
>
> *a. Where the findings on questions of fact are based upon the credibility of witnesses on the footing of a trial judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration and will be reversed only if it appears to the Appellate Court that the trial judge has failed to make full use of his advantage of seeing and listening to the witnesses and the Appellate Court is convinced by the plainest considerations that it would be justified in doing so;*
>
> *b. That however where the findings of fact are based upon the trial judge's evaluation of facts, the Appellate Court is then in as good a position as the trial judge to evaluate such facts and no sanctity attaches to such findings of fact of a trial judge;*
>
> *c. Where it appears to an Appellate Court that on either of these grounds the findings of fact by a trial judge should be reversed then the Appellate Court "ought not to shrink from that task"*

In view of the aforementioned erroneous findings in the said judgment of the Civil Appellate High Court on vital facts, I answer the following question as follows;

"Did the learned Civil Appellate High Court Judges err in holding that the Petitioner has failed to discharge the burden placed on him by law as regards prayer of adequate circumstances with respect to the alleged constructive trust?"

Yes

In the circumstances, the judgment of the Civil Appellate High Court dated 12th July, 2011 is set aside. In view of the above, the other questions of law were not considered in this judgment. Hence, the instant appeal is sent back to the Civil Appellate High Court to re-hear the appeal on merits. At the rehearing, the parties are entitled to make fresh submission before the said court.

Accordingly, the appeal is allowed.
No costs.

Judge of the Supreme Court

Kumudini Wickremasinghe, 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, against an order of the Court of Appeal.

(1) Chitra Weerakkoon

No. 10, Swarnadisi Pedesa

Koswatte, Nawala.

(2) D.M.W. Kannangara

No.12, Waragodawatte

Waragoda, Kelaniya.

SC APPEAL NO. 166/2012

SC (SPECIAL LA) APPLICATION No. 232/2011

PETITIONERS

VS

(1) Hon. Jeewan Kumaratunga'

Minister of Lands

Ministry of Lands,

'Govijana Mandiraya'

No. 80/05, Rajamalwatte Road,

Battaramulla.

(2) Divisional Secretary,

Bandaragama Divisional Secretariat,

Bandaragama.

(3) Secretary,

Ministry of Lands,

'Govijana Mandiraya',

No. 80/05, Rajamalwatte Road,

Battaramulla.

RESPONDENTS

AND THEN BETWEEN

Bandaragama Pradeshiya Sabhawa,

Bandaragama

INTERVENIENT PETITIONER

VS

(1) Chitra Weerakkoon

No. 10, Swarnadisi Pedesa,

Koswatta, Nawala.

(2) D.M.W. Kannangara

No.12, Waragodawatte,

Waragoda, Kelaniya.

PETITIONER-RESPONDENTS

(1) Hon. Jeewan Kumaratunga

Minister of Lands

Ministry of Lands,

'Govijana Mandiraya',

No. 80/05, Rajamalwatte Road,

Battaramulla.

(2) Divisional Secretary,

Bandaragama Divisional Secretariat,

Bandaragama.

(3) Secretary,

Ministry of Lands,

'Govijana Mandiraya',

No. 80/05, Rajamalwatte Road,

Battaramulla..

RESPONDENT-RESPONDENTS

AND NOW BETWEEN

Bandaragama Pradeshiya Sabhawa,

Bandaragama

INTERVENIENT PETITIONER-APPELLANT.

VS

(1) Chitra Weerakkoon

No. 10, Swarnadisi Pedesa,

Koswatte, Nawala.

(2) D.M.W. Kannangara

No.12, Waragodawatte,

Waragoda, Kelaniya.

PETITIONER-RESPONDENT-RESPONDENTS.

(1) Hon. Jeewan Kumaratunga

Minister of Lands, Ministry of Lands

'Govijana Mandiraya',

No. 80/05, Rajamalwatte Road,
Battaramulla.

(1A) Hon. M.K.A.D.S. Gunawardene,

Minister of Lands

"Mihikatha Medura" , Land Secretariat

No. 1200/6, Rajamalwatta Avenue

Battaramulla.

(1B) Hon. T.B. Ekanayake

Minister of Lands and Land Development,

"Mihikatha Medura", Land Secretariat,

No. 1200/6, Rajamalwatta Avenue

Battaramulla.

(1C) Hon. John Amarathunga

Minister of Lands and Land Development,

"Mihikatha Medura", Land Secretariat,

No. 1200/6, Rajamalwatta Avenue,

Battaramulla.

(2) Divisional Secretary

Bandaragama Divisional Secretariat,

Bandaragama.

(3) Secretary

Ministry of Lands,

"Mihikatha Medura" , Land Secretariat,

No. 1200/6, Rajamalwatta Avenue,

Battaramulla.

RESPONDENT-RESPONDENT-RESPONDENTS

BEFORE : **P. PADMAN SURASENA J.**

JANAK DE SILVA J.

ACHALA WENGAPPULI J.

COUNSEL : Mr. Kamran Aziz with Ms. F. Latheef instructed by

Sivanathan Associates for the Intervenient Petitioner-Appellant.

K.V.S. Ganesharajan with M. Mangaleswary Shanker for the Petitioner-Respondent-Respondents.

Vikum De Abrew, PC, ASG for the 1st -3rd Respondent-Respondent.

ARGUED &

DECIDED ON : 17-01-2024.

P. PADMAN SURASENA J.

Court heard the submissions of the learned Counsel for the Intervenient Petitioner-Appellant, submissions of the learned Counsel for the Petitioner-Respondent-Respondents, and the submission of the learned Additional Solicitor General appearing for the 1st -3rd Respondent- Respondent-Respondents.

The Petitioner- Respondent- Respondents have filed the Writ Application relevant to this case in the Court of Appeal against the Respondent- Respondent-Respondents.

During the pendency of the said Application before the Court of Appeal, the Intervenient Petitioner-Appellant had sought to intervene as a party to the said Writ Application.

The Petitioner-Respondent-Respondents had objected to the said application for intervention made by the intervened Petitioner-Appellant in the Court of Appeal.

Thereafter, a divisional bench of the Court of Appeal, having considered the submissions made by the learned Counsel who appeared for the Petitioner-Respondent-Respondents as well as the submissions made by the learned Counsel who appeared for the Intervenient Petitioner-Appellant, by its order dated 22-11-2011, had refused the application of the Intervenient Petitioner-Appellant to intervene as a party to the said Writ Application.

Being aggrieved by the said decision dated 22-11-2011 pronounced by the Court of Appeal, the intervenient Petitioner- Appellant has filed this appeal.

When the case was taken up for argument in this Court today, the learned Counsel who appeared for the Petitioner-Respondent-Respondents informed this Court that the Petitioner- Respondent- Respondents would no longer maintain the objection raised against the intervention sought by the intervenient Petitioner- Appellant.

The learned Counsel for the Petitioner- Respondent- Respondents then proceeded to inform us that the intervention sought by the Intervenient Petitioner- Appellant- can be allowed and the order dated 22-11-2021 pronounced by the Court to Appeal refusing permission for the Intervenient Petitioner- Appellant to intervene as a party can be pro-forma set-aside.

Mr. Ganesharajan appearing for the Petitioner-Respondent-Respondents also consented to take the proposed course of action in this appeal by this Court.

Mr. Vikum De Abrew, PC, ASG brings to the notice of this Court that the 1st - 3rd Respondent- Respondent-Respondents have not filed written submissions to resist the application for intervention made by the Intervenient Petitioner- Appellant.

The Order dated 22-11-2021 pronounced by the Court of Appeal does not show that the 1st - 3rd Respondent-Respondent-Respondents have resisted the application made by the Intervenient Petitioner- Appellant for intervention as a party in the Court of Appeal.

The order dated 22-11-2021 pronounced by the Court of Appeal which is the order impugned in this appeal, is just an order refusing permission for the Intervenient Petitioner-Appellant for Intervention. We have also taken into consideration that this order has been made by the Court of Appeal on 22-11-2021.

This Court was told by the learned Counsel that the argument of the Writ Application is yet to be taken up before the Court of Appeal.

Indeed, that is the primary reason as to why Mr. Ganesharajan had decided to consent for the application for the intervention made by the Intervenient Petitioner-Appellant. This was done with a view to facilitate the speedy disposal of the relevant Writ Application pending for a long time in the Court of Appeal.

We note that when this case came up before this Court on 07-07-2023, the learned counsel for the Intervenient Petitioner-Appellant as well as the learned counsel for the Petitioner-Respondent-Respondents had informed this Court that they would inform this position to the Court of Appeal and have the matter relating to the application for intervention settled in the Court of Appeal.

However, today Mr. Ganesharajan brought to our notice, the journal entry dated 21-07-2020 made by the Court of Appeal in the relevant Writ Application. The said journal entry also shows that the learned counsel appearing for the parties had undertaken in the Court of Appeal to inform this settlement to this Court.

In view of the above, we are also of the view that this is the best course of action to be taken in this case at this stage.

Thus, with the concurrence of the learned Counsel for the Intervenient Petitioner-Appellant and the learned Counsel for the Petitioner-Respondent-Respondents, we pro forma set aside the order dated 22-11-2021 pronounced by the Court of Appeal. The Intervenient Petitioner-Appellant is allowed to intervene as a Respondent to the relevant Writ Application.

Mr. Ganesharajan informs this Court that he has no objection for the Intervenient Petitioner-Appellant filing a statement of objections in the Court of Appeal in the relevant Writ Application.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA J.

I agree

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI J.

I agree

JUDGE OF THE SUPREME COURT

AG/-

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

1. Don Alfred Weerasekera
1A. Don Dharmadasa Weerasekera, Yakdehiwatte, Labungederawatte, Nivitigala.

Plaintiff

SC/APPEAL NO: 172/2017
SP/HCCA/RAT/01/2014 (LA)
DC RATNAPURA NO: 2203/P

Vs.

1. Gonakoladeniya Gamage Pantis Appuhamy
1A. Gonakoladeniya Gamage Gamini Premadasa
2. Kubunkelawatte Dingiri Ethana
2A. Madara Maliyanage Bandulahamy
2B. Gonakoladeniya Gamage Gamini Premadasa
3. Kubunkelawatte Punchi Ethana
3A. Godage Pathalage Yasohamy
4. Metaramba Koralalage Sirisena
5. Metaramba Koralalage Charlis Appuhamy
5A. Metaramba Koralalage Piyasekera
6. Malawana Gamlalage Abraham Appuhamy
7. Malewana Gamlalage Rathenis Appuhamy
8. Malewana Gamlalage Publis Singho

9. Metaramba Koralalage Piyasena
10. Wijekoon alias Mudiyanselage
Willie Bandara Wijeratne
10A. Wijekoon alias Mudiyanselage
Mahai Bandara Wijeratne,
All of,
Yakdehiwatte,
Nivitigala.
11. Ekanayake Mudiyanselage
Sumanawathie Ekanayake
12. Godage Liyanage Yasohamy
13. Hon. Attorney-General,
Attorney-General's Department,
Colombo 12.
14. M. M. Lamahamy
Defendants

AND

Madara Mahaliyanage Bandusena,
C/O Mr. A.W. Weeraratne,
Devale Road,
Yakdehiwatte,
Nivitigala.
Petitioner

Vs.

1. Don Alfred Weerasekera
1A. Don Dharmadasa Weerasekera,
Yakdehiwatte,

Labungederawatte,
Nivitigala.
Plaintiff-Respondent

AND

1. Gonakoladeniya Gamage Pantis Appuhamy
1A. Gonakoladeniya Gamage Gamini Premadasa
2. Kubunkelawatte Dingiri Ethana
2A. Madara Maliyanage Bandulahamy
2B. Gonakoladeniya Gamage Gamini Premadasa
3. Kubunkelawatte Punchi Ethana
3A. Godage Pathalage Yasohamy
4. Metaramba Koralalage Sirisena
5. Metaramba Koralalage Charlis Appuhamy
5A. Metaramba Koralalage Piyasekera
6. Malewana Gamlalage Abraham Appuhamy
7. Malewana Gamlalage Rathenis Appuhamy
8. Malewana Gamlalage Publis Singho,
9. Metaramba Koralalage Piyasena
10. Wijekoon alias Mudiyanselage Willie Bandara Wijeratne
10A. Wijekoon alias Mudiyanselage Mahai Bandara Wijeratne,
All of,

Yakdehiwatte,
Nivitigala.

11. Ekanayake Mudiyanselage Sumanawathie Ekanayake
12. Godage Liyanage Yasohamy
13. Hon. Attorney-General,
Attorney-General's Department,
Colombo.
14. M.M. Lamahamy

Defendant-Respondents

AND BETWEEN

Madara Mahaliyanage Bandusena,
C/O Mr. A.W. Weeraratne,
Devale Road,
Yakdehiwatte,
Nivitigala.

Petitioner-Petitioner

Vs.

1. Don Alfred Weerasekera

1A. Don Dharmadasa Weerasekera,
Yakdehiwatte, Labungederawatte,
Nivitigala.

Plaintiff-Respondent-Respondent

AND

1. Gonakoladeniya Gamage Pantis Appuhamy
1A. Gonakoladeniya Gamage Gamini Premadasa
2. Kubunkelawatte Dingiri Ethana
2A. Madara Maliyanage Bandulahamy
2B. Gonakoladeniya Gamage Gamini Premadasa
3. Kubunkelawatte Punchi Ethana
3A. Godage Pathalage Yasohamy
4. Metaramba Koralalage Sirisena
5. Metaramba Koralalage Charlis Appuhamy
5A. Metaramba Koralalage Piyasekera
6. Malawana Gamlalage Abraham Appuhamy
7. Malewana Gamlalage Rathenis Appuhamy
8. Malewana Gamlalage Publis Singho
9. Metaramba Koralalage Piyasena
10. Wijekoon alias Mudiyanselage Willie Bandara Wijeratne
10A. Wijekoon alias Mudiyanselage Mahai Bandara Wijeratne,
All of, Yakdehiwatte,
Nivitigala.
11. Ekanayake Mudiyanselage Sumanawathie Ekanayake
12. Godage Liyanage Yasohamy
13. Hon. Attorney-General,

Attorney-General's Department,
Colombo.

14. M.M. Lamahamy
Defendant-Respondent-Respondents

AND NOW BETWEEN

Madara Mahaliyanage Bandusena,
C/O Mr. M.K. Swarnapala
Yakdehiwatte, Nivitigala.
Petitioner-Petitioner-Appellant

Vs.

1. Don Alfred Weerasekera (Deceased)

1A. Don Dharmadasa Weerasekera,
Yakdehiwatte,
Labungederawatte, Nivitigala.
Plaintiff-Respondent-Respondent-Respondent

AND

1. Gonakoladeniya Gamage Pantis Appuhamy (Deceased)

1A. Gonakoladeniya Gamage Gamini Premadasa (Deceased)

1B. Gonakoladeniya Gamage, Udayajeewa Premadasa,
Kala Bhumi, Pathakada Road,
Yakdehiwatte,

Nivitigala.

2. Kubunkelawatte Dingiri Ethana (Deceased)

2A. Madara Maliyanage Bandulahamy (Deceased)

2B. Gonakoladeniya Gamage Gamini Premadasa (Deceased)

2C. Gonakoladeniya Gamage Udayajeewa Premadasa, Kala Bhumi, Pathakada Road, Yakdehiwatte, Nivitigala.

3. Kubunkelawatte Punchi Ethana (Deceased)

3A. Godage Pathalage Yasohamy

3B. Madare Kankanamalage Wjesinghe

4. Metaramba Koralalage Sirisena (Deceased)

4A. Manamperi Mudiyanselage Seelawathie

4B. Sirimewan Metarambakoralalage

4C. Swarnapala Metarambakoralalage

4D. Sudharma Metarambakoralalage

4E. Pathmini Chandra

4F. Susila Rupawathie

4A to 4F Respondents are of C/O Mrs. M.M. Seelawathie, Yakdehiwatte, Nivitigala.

5. Metaramba Koralalage Charlis Appuhamy (Deceased)

5A. Metaramba Koralalage Piyasekera

(Deceased)

5B. Metaramba Koralalage Sirisena

6. Malawana Gamlalage Abraham Appuhamy (Deceased)

7. Malewana Gamlalage Rathenis Appuhamy (Deceased)

7A. Malewana Gamalakshege Wanshapala (Deceased)

7B. Raigala Desilige Suneetha

7C. Malewana Gamlakshege Chaminda

7D. Malewana Gamlakshege Chandrika Gamlakshe

7E. Malewana Gamlakshege Nisansala Manori Gamlakshe

7F. Malewana Gamlakshege Dilan Chanaka Gamlakshe

8. Malewana Gamlalage Publis Singho (Deceased)

9. Metaramba Koralalage Piyasena (Deceased)

9A. Metaramba Koralalage Sirisena (Deceased)

10. Wijekoon alias Mudiyanselage Willie Bandara Wijeratne (Deceased)

10A. Wijekoon alias Mudiyanselage Mahinda Bandara Wijeratne,
All of,
Yakdehiwatte,
Nivitigala.

11. Ekanayake Mudiyanselage
Sumanawathie Ekanayake (Deceased)

11A. Sarath Wijeratne Mahinda Bandara,
Yakdehiwatte, Nivitigala.

12. Godage Liyanage Yasohamy,
(Deceased)

12A. Parassage Heenmenike,
Yakdehiwatte, Nivitigala.

13. Hon. Attorney-General,
Attorney-General's Department,
Colombo.

14. M. M. Lamahamy (Deceased)

14A. Madare Mahaliyanage Athula
Pemachandra, Niralgama,
Alupothagama, Ratnapura.

14B. Madare Mahaliyanage Susantha
Sena Kumara,
Devale Road,
Yakdehiwatte, Nivitigala.
Defendant-Respondent-
Respondent-Respondents

Before: S. Thurairaja, P.C., J.
Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Shyamal A. Collure with Prabath S. Amarasinghe for the
Petitioner-Petitioner-Appellant.
S.N. Vijithsingh for the 9A, 14A and 14B Defendant-Respondent-
Respondent-Respondents.

Hussain Ahamed with Ayendri De Silva for the 1B and 2C Defendant-Respondent-Respondent-Respondents.

Written Submissions:

By the Petitioner-Petitioner-Appellant on 13.10.2017
By the 2B Defendant-Respondent-Respondent-Respondents on 24.11.2017

Argued on: 22.11.2023

Decided on: 30.01.2024

Samayawardhena, J.

Introduction

The plaintiff filed this action in the District Court of Ratnapura against eight defendants to partition the land known as *Labungederawatta* described in the schedule to the plaint according to the partition law. The 9th to 14th defendants were later added. After trial, the judgment was delivered partitioning the land among the plaintiff, the 2nd to 5th defendants, and the 7th and 9th defendants. No party appealed against the judgment. The final partition plan was confirmed by Court without any contest. In the final decree, the 2nd defendant was allotted lots 2, 3 and 7 of the final partition plan No. 1456 dated 16.08.2010. The instant appeal relates to the delivery of possession of the said three lots.

According to journal entry No. 44 dated 02.04.1987, the District Judge was informed about the death of the 2nd defendant, namely Kumbukkolawatte Dingiri Ethana and the Court directed the plaintiff to take steps. According to journal entry No. 46 dated 10.12.1987, steps were taken to serve order nisi on M.M. Lamahamy and M.M. Bandulahamy who were said to be the daughter and son of the deceased 2nd defendant, Dingiri Ethana. It is not clear from the journal entry whether they were present in Court on that date. However, the Court

substituted Bandulahamy as the 2(a) defendant. Lamahamy has later been added as the 14th defendant.

The judgment was delivered on 11.03.2009. In the meantime, 2(a) defendant, Bandulahamy, has died. According to journal entry No. 145 dated 01.09.2011, steps were tendered in open Court. The petition and affidavit dated 01.09.2011 filed by one Gamini Premadasa through an Attorney-at-Law are in the brief. No documents were tendered with the petition and affidavit. Bandulahamy's death certificate was not tendered. Not even the date of death was disclosed. In the affidavit, Gamini Premadasa stated that Bandulahamy was appointed as the sole heir of the original 2nd defendant Dingiri Ethana, and that Bandulahamy transferred his rights to Gamini Premadasa by Deed No. 679 dated 01.11.1991. These assertions, as I will explain later, are not correct.

In the judgment delivered after trial, the District Judge clearly states at page 11 that Bandulahamy is not the only child of Dingiri Ethana, and that there is no necessity in this case to investigate how Dingiri Ethana's rights devolve on others. It is on that basis, in the final decree of partition, lots 2, 3 and 7 were allotted in the 2nd defendant's name.

The succeeding District Judge had not considered any of these things but had made a perfunctory order substituting Gamini Premadasa as the 2(b) defendant in place of the deceased 2(a) defendant Bandulahamy.

What did Bandulahamy transfer by Deed No. 679 pending partition?

> ඉහත කී දීමනාකාර මට, මව් උරුමයට හා දීර්ගකාලීන භුක්තිය මත හිමිව, භුක්ති විඳගෙන එනු ලබන, සබරගමු පළාතේ රත්නපුර දිස්ත්‍රික්කයේ නවදුන් කෝරලේ මැද පත්තුවේ නිවිතිගල පිහිටා තිබෙන, ලැබුන්ගෙදර වත්ත නොහොත් පහල ලැබුන්ගෙවත්ත නැමැති උතුරට:- උඩහ ලැබුන්ගෙවත්ත සහ අගලවත්ත ද, නැගෙනහිරට:- පිටකනත්තේ වත්ත සහ අගල ද, දකුණට: හන්දුරුගෙ කනත්ත සහ බස්නාහිරට:- කහටගහ කොරටුව සහ වේල්ල යන මායිම්තුල පිහිටි අක්කර දෙකක් (අක්:02 රූ:00 පර්:00) විශාල ඉඩමෙන් මට ඇති සියලුම අයිතිවාසිකම් හෙවත්, රත්නපුර දිසා අධිකරණයේ අංක 2203 දරන බෙදුම් නඩුවේ අවසන් තීන්දුවෙන් මට ලැබෙන යම් අයිතිවාසිකමක් හිමිකමක් වේද, එකී අයිතිවාසිකම් සියල්ල වේ.

By that Deed, Bandulahamy transferred what he might be allotted in the final decree of partition. He did not get anything from the final decree but his deceased mother, the 2nd defendant, was allotted lots 2, 3 and 7 of the final partition plan. Bandulahamy did not and could not transfer the entirety of lots 2, 3 and 7 unless he was the only heir of the 2nd defendant. It must be remembered that Deed No. 679 is not a Deed executed by the 2nd defendant Dingiri Ethana during the pendency of the partition action but by one of her children, Bandulahamy.

After the final decree was registered, the 2(b) defendant Gamini Premadasa tendered steps by way of a motion dated 21.03.2013 to eject the current occupants of lots 2, 3, and 7 and deliver possession of those lots to him. This was minuted in journal entry No. 156 dated 28.03.2013. The District Judge allowed that application in chambers. The possession has not been delivered yet. The heirs of the original 2nd defendant seem to be in possession of those lots.

In view of this development, Bandulahamy's son, M.M. Bandusena, made an application by way of petition and affidavit dated 07.06.2013 seeking to quash the order appointing Gamini Premadasa as the 1(b) defendant and to suspend the execution of the writ. This is minuted in journal entry No. 157 dated 10.06.2013.

The District Judge, by a two-page order dated 09.01.2014 dismissed this application with costs on the following basis:

> ඇත්තවශයෙන්ම එකී පැවරීම එනම් බන්දුලහාමි විසින් ගාමිනී ප්‍රේමදාස වෙත කරන ලද පැවරීම පෙත්සම්කාර බන්දුසේන විසින් ප්‍රතික්ෂේප කිරීම කරයි නම් කළ යුතුව තිබුනේ මෙම නඩුවේ අවසාන තීන්දුව ඇතුලත් කිරීමට පෙර වේ. නමුත් ඔහු එම ඉල්ලීම අවසාන තීන්දුව ඇතුලත් කිරීමෙන් අනතුරුව කර ඇති අතර දැනට මෙම නඩුවේ කටයුතු අවසන් වී ඇති බැවින් ඔහුට මෙවැනි ඉල්ලීමක් මෙම නඩුව පවත්වා ගෙන යාමට කළ නොහැක. ඒ සදහා වඩාත් සුදුසු වනුයේ වෙනත් නඩුවක් මගින් අදාල ඔප්පුව විවාදයට ලක් කිරීමයි. එවැන්නක්ද මෙම පෙත්සම්කරු කර ඇති බවක් තහවුරු නොවේ. හුදෙක් මෙම නඩුවේ කටයුතු ප්‍රමාද කිරීමේ අදහසින්ම මෙම නිරර්ථක ඉල්ලීම මෙම නඩුවට කර ඇති බව පෙනේ. ඒ අනුව රුපියල් 5000/- ක ගාස්තුවකට යටත්ව ඉල්ලීම ප්‍රතික්ෂේප කරමි.

The order of the learned District Judge is contradictory. Firstly, the learned Judge says that the application cannot be maintained because proceedings stand terminated with the entering of the final decree. He states the application to cancel the appointment of the 2(b) defendant should have been made prior to the entering of the final decree. According to journal entry No. 145, this appointment was made and the final decree was entered on the same date. After stating that there are no live proceedings, the learned Judge then states that this frivolous application was made to delay the conclusion of the case. The learned Judge further states that if the transfer effected by Deed No. 679 is to be challenged, it should be done in separate proceedings. Had the learned Judge read the application carefully, he would have realised that the petitioner Bandusena does not challenge the Deed. Bandusena has not even mentioned that Deed. He is challenging the appointment of Gamini Premadasa in place of Bandulahamy because Gamini Premadasa was taking steps to eject Bandusena and others from lots 2, 3 and 7. Bandusena's main application was not to hand over possession of those lots to Gamini Premadasa. In the order, the learned Judge has not mentioned a word about delivery of possession.

Being dissatisfied with this order, the petitioner Bandusena preferred an appeal to the High Court of Civil Appeal of Ratnapura. The High Court affirmed the said order of the District Court and dismissed the appeal with costs on the basis that the 2(a) defendant Bandulahamy was the sole heir of the deceased 2nd defendant and that the 2(a) defendant transferred his share to the 2(b) defendant by Deed No. 679. The High Court further stated that the 2(b) defendant is entitled to obtain possession of lots 2, 3 and 7 of the final partition plan in terms of section 52A(1)(c) of the Partition Law. As I will explain below, all these findings are not sustainable in fact and in law.

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

(a) Has the Civil Appeallate High Court erred in law in failing to conclude that the 2(b) defendant-respondent is not entitled to obtain possession of or to obtain a writ of execution in respect of all the lots allotted to the original 2nd defendant, and does the said error vitiate the judgment dated 11.09.2014?

(b) In any event, has the Civil Appellate High Court erred in law by failing to hold that the 2(b) defendant-respondent does not become entitled to the entirety of the original 2nd defendant's interest in the corpus on Deed No. 679 dated 01.11.1991?

Alienation of rights pending partition

Deed No. 679 was executed after the *lis pendens* was registered. In terms of section 66 of the Partition Law, No. 21 of 1977, voluntary alienations made after a partition action is duly registered as a *lis pendens* are void.

> *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.*

The main reason for this prohibition is the potential disruption that may be caused by alienating parts of the land at frequent intervals, making it a challenging task to reach a finality in a partition action. (*Baban v. Amarasinghe* (1878) 1 SCC 24, *Annamalai Pillai v. Perera* (1902) 6 NLR 108, *Subaseris v. Prolis* (1913) 16 NLR 393, *Hewawasan v. Gunasekere* (1926) 28 NLR 33, *Srinatha v. Sirisena* [1998] 3 Sri LR 19 at 23)

However, it is now well-settled law that this prohibition for alienation does not apply to contingent interests in the land (those that might ultimately be allotted to him in the final decree) being alienated pending partition. Section 66 only prohibits the alienation of undivided interests presently vested in the owners. (*Louis Appuhamy v. Punchi Baba* (1904) 10 NLR 196, *Sillie Fernando v. Silman Fernando* (1962) 64 NLR 404, *Karunaratne v. Perera* (1965) 67 NLR 529, *Sirinatha v. Sirisena* [1998] 3 Sri LR 19)

In the case of *Kahan Bhai v. Perera* (1923) 26 NLR 204 at 208, a Full Bench of the Supreme Court presided over by Bertram C.J. with the agreement of Ennis, Schneider, Garvin JJ., and Jayawardene A.J. held that "*Persons desiring to charge or dispose of their interests in a property subject to a partition suit can only do so by expressly charging or disposing of the interest to be ultimately allotted to them in the action.*"

In *Sirisoma v. Sarnelis Appuhamy* (1950) 51 NLR 337 at 341, a Divisional Bench of the Supreme Court presided over by Gratiaen J. with the agreement of Dias S.P.J. and Pulle J., having considered almost all the previous decisions including *Kahan Bhai v. Perera*, took the view that the prohibition against alienation pending partition need not be interpreted overly broadly.

> *Section 17 of the Partition Ordinance prohibits the alienation or hypothecation of undivided interests presently vested in the owners of a land which is the subject of pending partition proceedings. There is no statutory prohibition against a person's common law right to alienate or*

> *hypothecate, by anticipation, interests which he can only acquire upon the conclusion of the proceedings. That right is in no way affected by the pendency of an action for partition under the provisions of the Ordinance. "Section 17 imposes a fetter on the free alienation of property, and the Court ought to see that that fetter is not made more comprehensive than the language and the intention of the section require". Subaseris v. Prolis (1913) 16 NLR 393*

Nevertheless, the grantee of such contingent interest need not be made a party to the case as he has no absolute interest other than contingent interest vested in him pending partition. Interest would only vest in him upon the entering of the final decree provided the grantor is allotted a lot in severalty. (*Nazeer v. Hassim* (1947) 48 NLR 282, *Karunaratne v. Perera* (1965) 67 NLR 529, *Abeyratne v. Rosalin* [2001] 3 Sri LR 308)

If such contingent interests are alienated pending partition without any conditions, immediately on the final decree being entered, the lot in severalty allotted to the grantor will automatically pass and vest in the grantee without execution of another Deed, although, in practice, another Deed is also executed for better manifestation of the intention of the grantor.

In *Sirisoma v. Sarnelis Appuhamy* (1950) 51 NLR 337 Gratiaen J. stated at 343:

> *[W]hen an instrument has been executed whereby a present right is conveyed in respect of a contingent interest which the parties to the transaction expect to be realised at some future date, the instrument already executed operates so as to vest that interest in the purchaser as soon as it has been acquired by the vendor. No further conveyance is needed to secure the intended result – although it may well be desirable, as is often stipulated by prudent conveyancers, that the result already achieved should be "confirmed" in a further notarial instrument which will place the purchaser's rights beyond the possibility of controversy.*

In *Sillie Fernando v. Silman Fernando* (1962) 64 NLR 404, the 2nd defendant claimed certain soil rights, plantations and a thatched house in the land to be partitioned. Prior to the entering of the interlocutory decree, he, by a deed of gift, donated to his natural children born to his mistress, the 41st defendant-appellant, the soil, plantations and the thatched house which would be allotted to him ultimately by the final decree. The 2nd defendant died before the entering of the final decree and his wife and legitimate child, namely, 39th and 40th defendants, were respectively substituted in place of him. In the final decree the soil shares of the 2nd defendant, the plantations and the thatched house as a lot in severalty, were allotted to the substituted defendants, and they moved for a writ of possession against the 41st defendant and her children who were in possession. This was allowed by the District Judge. On appeal, the Supreme Court set aside that order and stated at 404-405:

> *It has been held by this Court in Sirisoma v. Sarnelis Appuhamy (1950) 51 NLR 337 and by a fuller Bench at a later stage, that, when a deed purports to sell or donate an undivided interest in a land, whatever will be allotted to the vendor or donor by a final decree in a partition action, the lot in severalty allotted to the vendor or donor or those representing him will automatically pass and vest in the vendee or donee under the deed in question, without any further conveyance, either by the vendor or donor or by his representatives.*
>
> *In view of this position, the moment a final decree was entered in this case allocating the thatched house, plantations and the lot in severalty to the representatives of the 2nd defendant in consequence of the terms of the deed Z1, title to that lot in severalty vested under the donees in Z1, namely, a life interest or usufruct in favour of the 41st defendant-appellant and title or donarium in her children.*

Substitution in partition actions

Substitution in partition actions is different from that in other civil actions. In partition actions involving multiple parties and prolonged proceedings, the death of a party might go unnoticed. A classic example might be the instant case, filed in the District Court more than 46 years ago, on 11.11.1977. In a partition action, all parties are not active; most of them remain dormant. Nevertheless, the District Judge in a partition action cannot afford to remain dormant. He must play an active role throughout the proceedings. Although the system of justice we adopt is adversarial as opposed to inquisitorial, the Judge in a partition action assumes an inquisitorial role. This distinction arises from partition actions being actions *in rem*, where the resulting decree binds the entire world.

It was the position in early cases that the death of a party without being substituted would render the entire proceedings a nullity from the point of the death of such party, despite the decree having been entered after a contested trial. (*Somapala v. Sirimanne* (1954) 51 CLW 31 per Gratiaen J., *Suraweera v. Jayasena* (1971) 76 NLR 413 per H.N.G. Fernando C.J.)

It was held by Sansoni C.J. with the agreement of T.S. Fernando, Sri Skanda Rajah and G.P.A. Silva JJ. in *Mariam Beebee v. Seyed Mohamed* (1965) 68 NLR 36 at 38-39:

> *[I]t is clear that a partition decree which allotted a share to a party, but which was entered after the death of that party, is a nullity. It is open to another party to the action to ask this Court in revision to set aside that decree (even though it may have been affirmed in appeal) and to remit the case to the lower Court in order that proper steps may be taken in the action-see Chelliah v. Tamber (1904) 5 Tamb. Rep. 52; Menchinahamy v. Muniweera (1950) 52 NLR 409; Somapala v. Sirimanne (1954) 51 CLW 31.*

Having realised the serious injustice caused to the parties thereby, when the present Partition Law, No. 21 of 1977, was enacted, the following section was introduced.

> *48(6). 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.*

Thereafter, the legislature introduced special provisions to simplify the substitution procedure in partition actions by repealing and replacing section 81 of the Partition Law by the Partition (Amendment) Act, No. 17 of 1997.

Section 81(1) necessitates every party to a partition action or any other person required to file a memorandum under the Partition Law, to file such memorandum, substantially in the form set out in the second schedule to the Partition 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.

According to section 81(5), such party or person may file a fresh memorandum at any time before the final determination of the action.

Section 81(2)(c) enacts that the person or persons so nominated shall subscribe his or their signatures to the memorandum signifying consent to be so appointed as a legal representative. The signatures of the nominator and those of the nominee or nominees so consenting to be appointed shall be witnessed by an Attorney-at-Law or a Justice of the Peace or a Commissioner of Oaths.

Section 4(2) of the Partition Law mandates every plaintiff to file a memorandum nominating legal representatives.

> *4(2). There shall be appended to every plaint presented to a court for the purpose of instituting a partition action, a memorandum substantially in the*

form set out in the Second Schedule to this Law, nominating in accordance with section 81, a person to be the legal representative of the plaintiff for the purposes of the action, in the event of his death pending the final determination of the action.

Section 19(d) mandates every defendant to do so.

19(d). Every defendant in the action 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 in accordance with section 81, a person to be his legal representative for the purposes of the action, in the event of his death pending the final determination of the action.

According to section 69(1), any person who applies to be added as a party, any purchaser who is substituted under section 69(2), and any intervenient as described under section 69(3), shall also file such memorandum.

However, it should be borne in mind that the failure to file a memorandum shall not affect the substantive rights of the party or person. The proviso to section 81(2)(c) reads as follows:

Provided however, that failure to file such memorandum shall not by such failure alone render the plaint, statement of claim, or application to be added as a party defective or, notwithstanding anything in section 7, be a cause or ground for rejecting such plaint, statement of claim or any application to be added as a party.

This is emphasised in section 81(9) as well. It states that the failure to file a memorandum shall not invalidate the proceedings in the action.

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.

Under section 81(3), the Court may, at any time before the final determination of the action, direct a party or any person required to file a memorandum to do so by a specified date.

A nominee may, in terms of section 81(4), at any time prior to the death of the nominator, apply to Court by way of motion with notice to the nominator to withdraw his consent as the nominee.

After the death of the nominator, section 81(8) permits the nominee to apply for permission from Court to be released from the office of legal representative of such nominator. If such nominee is the only nominee, the Court can appoint a consenting heir of such deceased nominator to that position.

Section 81(10)(a) empowers any party or person to apply to Court for the appointment of a legal representative in the event of a death of a party or person who had failed to file a memorandum as required by section 81. Gamini Premadasa seems to have made the application dated 01.09.2011 under this section.

81(10)(a). On the death of a party or person who had failed to file a memorandum as required by this section, any party or person may apply to court by an ex parte application, requesting that a person be appointed as the legal representative of such deceased party or person and the court may, on being satisfied after inquiry that such appointment is necessary, appoint a suitable person to be the legal representative of such deceased party or person for the purposes of the action. Such legal representative shall be bound by the proceedings had up to the time of such appointment.

According to section 81(10)(a) the Court may make such appointment on being satisfied after inquiry that such appointment is necessary. However, in the instant case, no such inquiry has been held.

Section 81(11) permits an heir of the deceased nominator to apply to Court for the removal of the nominator and the appointment of another individual as the legal representative of the deceased.

> *81(11)(a). An heir of a deceased nominator may, at any time after the death of such nominator, apply to court to have the legal representative of such deceased nominator removed and to have another person named in such application or the person next named in order of preference in the memorandum filed by the deceased nominator, appointed as such legal representative. The person who for the time being is the legal representative of the deceased nominator shall be made a respondent to such application.*
>
> *(b) The court may, upon being satisfied that it is in the interests of the heirs of the deceased nominator to do so, remove such legal representative and appoint the person next named in order of preference in the memorandum filed by the deceased nominator or if there are sufficient grounds for doing so, appoint the person named in the application, as the legal representative of the deceased nominator.*
>
> *(c) An application under this section shall be by way of petition and affidavit and the court may in its discretion, issue notice of the application to the other heirs, if any, of the deceased nominator.*

The appellant seems to have made the application in terms of section 81(11).

It may be noted that such nominees who are designated as legal representatives of the nominator need not necessarily be the heirs of the nominator. They can be anybody who can take steps for the purpose of the action as the deceased nominator would have been entitled to take had he been alive.

The appointment of a legal representative does not affect the rights of the heirs of the deceased. He only represents the estate of the deceased for the purpose of the action. With the death of the deceased, the legal representative does not become the owner of all the properties of the deceased.

The devolution of title needs to be decided separately. What section 81(1) requires is for the party or any other person to file a memorandum nominating persons "to be his legal representative for the purpose of the action". The term "for the purpose of the action" is stressed throughout section 81.

Section 81(14) reads as follows:

> *For the purposes of this section "legal representative" means, a person who represents the estate of a deceased party or person, for the purposes of the action, by virtue of a nomination, or of an appointment by court under this section.*

With reference to section 81(14) of the Partition Act, Amarasekara J. in *Premawathie v. Thilakaratne* [2021] 3 Sri LR 382 at 392 states:

> *As per section 81(14) of the Partition Act, a legal representative means a person who represents the estate of the deceased person. Generally, in a partition action shares are given or rights are granted to the original party and if the party is dead, the legal representative gets it not for him/her but on behalf of all the heirs of the deceased or for the person/s entitled under the original deceased party.*

There is no requirement for the legal representative to file a memorandum nominating his legal representatives in the event of his death. Upon the death of the legal representative, the next in order of preference in the memorandum of the original party will assume the role. If the sole legal representative dies, a legal representative needs to be appointed, not for the deceased legal representative, but for the original party deceased.

Applicability of section 81 to the issue in the instant appeal

The learned District Judge misunderstood the issue. He neither referred to section 81 nor to the delivery of possession of lots.

The High Court referred to section 81(10) and stated that "*These sections are applicable only in the instances where the case is pending and before the final determination for the purpose of the action*". The High Court concluded that the appellant does not meet these qualifications. I am unable to agree.

The application of Gamini Premadasa dated 01.09.2011 fell under section 81(10)(a), while the application of the appellant dated 07.06.2013 fell under section 81(11).

The High Court took the view that the action had been finally determined and that there is nothing to be done "for the purpose of the action".

Section 81(10)(a) requires the Court to appoint a person to be the legal representative "for the purpose of the action". Gamini Premadasa made the application to appoint him as the legal representative not of the original 2nd defendant but of the legal representative of the 2nd defendant, Bandulahamy, on the same date the final decree was confirmed. This application was made seeking an order from Court to deliver possession of lots 2, 3 and 7 of the final plan to him on the basis that he is the owner of those lots by Deed No. 679. This was allowed by Court. I have already commented on Deed No. 679. Even if it is a valid Deed, Gamini Premadasa does not become entitled to the entirety of lots 2, 3 and 7 by virtue of that Deed as Bandulahamy is not the only heir but one of the heirs of the original 2nd defendant, Dingiri Ethana. The delivery of possession of lots 2, 3 and 7 will result in ejecting the 2nd defendant's heirs and Bandulahamy's heirs from possession of the said lots. Is not the application of the appellant "for the purpose of the action"? The High Court states that "*It appears that the appellant, very well knowingly that he has no locus standi as his mother, the 2A defendant, has already transferred the share to be allocated, subject to the*

pending partition, has made this vague application in order to delay the application made by the respondent [Gamini Premadasa] for the writ of possession." The High Court has misdirected itself on the facts. It was not the mother (the 2nd defendant) who transferred contingent interests, but her legal representative Bandulahamy who transferred his (Bandulahamy's) contingent interests. The High Court ought to have considered the application of the appellant on the merits and made an appropriate order.

The High Court also misdirected itself on the facts when it stated "*It was revealed in the evidence that the 2A defendant [Bandulahamy] was the only heir of the deceased 2nd defendant, and therefore he shall have all the rights to alienate entitlement of the land, subject to the partition action as there were no other heirs to be substituted.*" As I stated previously, the District Judge in his judgment clearly came to the finding that Bandulahamy is not the only heir of the 2nd defendant and that the question of devolution of the 2nd defendant's rights need not be decided in this case. The District Judge allocated lots 2, 3 and 7 in the name of the original 2nd defendant, Dingiri Ethana, not in the name of Bandulahamy. Bandulahamy did not appeal against these findings of the District Judge.

Delivery of possession in partition actions

The High Court states that "*the respondent [Gamini Premadasa] as a person who derived title of the 2nd defendant in accordance with section 52A(1)(c), has made an application to obtain possession in the same case*", and therefore that application should be allowed.

The delivery of possession in partition actions is different from the delivery of possession in any other civil action. Sections 52, 52A, 77 and 79 of the Partition Law are the sections relevant to the delivery of possession. Section 52A was introduced by the same Amendment Act, No. 17 of 1997, which introduced section 81, discussed earlier.

Section 52(1)

According to section 52(1), a successful party or a purchaser, for whom a certificate of sale has been issued by Court, is entitled to make an application in the same action, by motion, for an order for the delivery of possession of the land or a portion thereof as per the final decree of partition. The proviso to this section stipulates that this entitlement is contingent upon payment of any owelty or compensation for improvements, if applicable.

> *52(1). Every party to a partition action who has been declared to be entitled to any land by any final decree entered under this Law and every person who has purchased any land at any sale held under this Law and in whose favour a certificate of sale in respect of the land so purchased has been entered by the court, shall be entitled to obtain from the court, in the same action, on application made by motion in that behalf, an order for the delivery to him of possession of the land:*
>
> *Provided that where such party is liable to pay any amount as owelty or as compensation for improvements, he shall not be entitled to obtain such order until that amount is paid.*

In view of section 81(7), every party and every person referred to in section 52 includes his legal representatives in the event of the death of such party or person.

> *81(7). A nominee deemed to be the legal representative of a deceased nominator shall be entitled to take all such steps for the purposes of the action as the deceased nominator would have been entitled to take had he been alive.*

Section 52(1) does not expressly state the time period within which an application for delivery of possession can be made to Court. This is an omission

on the part of the legislature. However, this omission can be addressed through sections 77 and 79.

Section 77 enacts that the provisions of the Civil Procedure Code relating to the execution or service of writs, warrants and other processes of Court shall apply in relation to the execution or service of writs, warrants and other processes of Court in a partition action.

Section 79 enacts that in any matter or question of procedure not provided for in the Partition Law, the procedure laid down in the Civil Procedure Code in a like matter or question shall be followed by the Court, if such procedure is not inconsistent with the provisions of the Partition Law.

In cases such as *Samarakoon v. Punchi Banda* (1975) 78 NLR 525, *Abeyratne v. Manchanayake* [1992] 1 Sri LR 361, *Munidasa v. Nandasena* [2001] 2 Sri LR 224, it was held that section 337 of the Civil Procedure Code, which states that (subject to some exceptions) an application to execute a decree shall be made within 10 years from the date of the decree or on appeal affirming the same, is inapplicable to partition decrees.

In *Abeyratne v. Manchanayake* the Court held that if the 10-year period stipulated in section 337 of the Civil Procedure Code is applicable, such period shall commence from the date the owelty or compensation was paid.

If section 337 of the Civil Procedure Code is inapplicable or applicable only from the date the owelty or compensation is paid, an allottee in a partition action could delay execution of the writ for an indefinite period. This delay might allow him to seek ejectment of those in possession, possibly even several decades after the final decree was entered. This cannot be the intention of the legislature. By the time the allotee makes the application for delivery of possession, those lots may have been prescribed by others.

Although *Samarakoon v. Punchi Banda* is cited to argue against the applicability of the 10-year period stipulated in section 337 to partition actions, a closer scrutiny of the judgment reveals that the Supreme Court appreciates the necessity of filing the application for writ within 10 years. The Court states at pages 527-528 that if the fiscal is resisted during execution, he will report it to the Court, triggering the procedure outlined in section 53 (regarding contempt of Court). In these proceedings under section 53, the resisting party can demonstrate to the Court that his resistance did not constitute contempt by presenting a defence, such as having acquired prescriptive title to the land after the final decree was entered. Let me quote what the Supreme Court stated at pages 527-528 of the judgment:

> *The correct procedure that should be adopted in giving possession of a divided lot to a party who had been declared entitled to it under a final partition decree is set out in Section 52 of the Partition Act.*
>
> *A party requiring possession must apply by way of a motion in the same action for an order for the delivery of possession of the lot. The Court thereafter on being satisfied that the person applying is entitled to the order will issue an order to the Fiscal to put the party in possession of the lot. The Fiscal on receiving the order, will repair to the land and deliver possession of the lot to the party.*
>
> *If the Fiscal is resisted, he will report the resistance to Court and the procedure set out in Section 53 of the Partition Act will apply.*
>
> *In the proceedings under Section 53, it will be open to the party resisting, to satisfy the Court, that his resistance did not constitute a Contempt of the Court. This he could do, for example by showing that he had prescribed to the said lot after the final decree had been entered, and the party applying for an order of possession under Section 52, had no right to be given possession of the land.*

This illustrates that if the application under section 52 is to succeed, a party to the action or a purchaser at sale must make the application to Court within the 10-year period.

This is further understood by a closer reading of section 52A, which was introduced by Partition (Amendment) Act, No. 17 of 1997. In short, in terms of section 52A, a party who has been dispossessed or whose possession has been interfered with can make an application for restoration of possession in the same action within 10 years of the date of the final decree of partition. If the application for restoration of possession must be made within 10 years of the date of the final decree of partition, it is illogical to assume that an application for delivery of possession can be made beyond the period of 10 years. If delivery of possession has not taken place, restoration of possession does not arise.

I hold that in terms of section 52 of the Partition Law read with section 337 of the Civil Procedure Code, an application for delivery of possession in a partition action shall be made within ten years of the date of the final decree of partition or the issuance of the certificate of sale or on appeal affirming the same.

Eviction of a tenant

The law relating to eviction of a tenant under the partition law suffers from a lack of clarity and is therefore complicated.

According to section 48(1) of the Partition Law, the right, share or interest awarded in the interlocutory and final decree of partition is free from all encumbrances whatsoever other than those specified in the decree.

> *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.*

The term "encumbrance" is defined in section 48(1).

> *In this subsection and in the next subsection "encumbrance" means any mortgage, lease, usufruct, servitude, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month.*

Although section 48(1) states that this definition is applicable to both subsection (1) and (2) of section 48, section 48(2) makes a difference.

Section 48(2) reads as follows:

> *Where in pursuance of the interlocutory decree a land or any lot thereof is sold, the certificate of sale entered in favour of the purchaser shall be conclusive evidence of the purchaser's title to the land or lot as at the date of the confirmation of sale, free from all encumbrances whatsoever except any servitude which is expressly specified in such interlocutory decree and a lease at will or for a period not exceeding one month.*

After the trial, the District Court may order partition of the land or sale of the land in whole or in lots. While section 48(1) relates to partition of land, section 48(2) relates to sale of the land.

When it comes to “encumbrances”, Partition Act, No. 16 of 1951, did not have a provision similar to section 48(2) in the present Partition Law. Hence there was a difference of opinion as to whether a purchaser at sale upon receipt of the certificate of sale acquires the full title without any encumbrances unlike a party who has been declared entitled to a lot or lots in the final partition plan. *Vide Heenatigala v. Bird* (1954) 55 NLR 277, *Britto v. Heenatigala* (1956) 57 NLR 327, *Ranasinghe v. Marikar* (1970) 73 NLR 361.

Section 52(2) of the Partition Law now in force addresses the issue of eviction of a tenant in the execution of the final decree of partition or a purchaser at a sale held under the Partition Law.

In terms of section 52(2)(a), an allottee of a final decree of partition or a purchaser at a sale held under the Partition Law, can make an application by petition to which such person in occupation shall be made respondent for delivery of possession seeking eviction of anyone in the land or a house in the land.

> *Where the applicant for delivery of possession seeks to evict any person in occupation of a land or a house standing on the land as tenant for a period not exceeding one month who is liable to be evicted by the applicant, such application shall be made by petition to which such person in occupation shall be made respondent, setting out the material facts entitling the applicant to such order.*

The nature of the inquiry and the order to be made are stated in section 52(2)(b):

> *After hearing the respondent, if the court shall determine that the respondent having entered into occupation prior to the date of such final decree or certificate of sale, is entitled to continue in occupation of the said house as tenant under the applicant as landlord, the court shall dismiss the application; otherwise it shall grant the application and direct that an order for delivery of possession of the said house and land to the applicant do issue.*

At the inquiry, two conditions must be satisfied by the respondent who claims tenancy:

(a) that he came into occupation prior to the date of the final decree or certificate of sale, and
(b) that he is entitled to continue in occupation of the said house as tenant under the applicant as the landlord.

Under (b) above, the person claiming tenancy shall prove that the allottee of the lot on which the premises stand in terms of the final decree is his landlord. If the lot on which the premises stand is allotted to another, the tenant cannot claim tenancy under the new owner.

In *Martin Singho v. Nanda Peiris* [1995] 2 Sri LR 221, the District Court allowed the 1st respondent's application for delivery of possession of lot 1 by ejecting the petitioners who claimed tenancy rights. On appeal, the Court of Appeal held at 223:

> *Section 52(2) read with section 48(1) of the Partition Law and section 14(1) of the Rent Act, required court to determine (1) whether the petitioners had entered into occupation of the premises as tenants prior to the date of the final decree and (2) whether they were entitled to continue in occupation of the premises as tenants under the original 1st respondent Rosalin Fonseka, who was allotted the lot in which the relevant houses stood. If the petitioners succeeded in satisfying court of the two matters aforesaid, the application of the 1st respondent had to be dismissed, as section 14(1) of the Rent Act makes provision for the tenants of residential premises to continue as such, under any co-owner who has been allotted the relevant premises in the final decree.*

The petitioners failed to prove what was required from them by law. Hence the Court of Appeal dismissed the application of the petitioners remarking at page 224:

As observed by the District Judge, the petitioners have failed to produce any documentary evidence in proof of their tenancy. The best test of establishing tenancy is proof of payment of rent, and the best evidence of payment of rent is rent receipts. (see Jayawardene v. Wanigasekera [1985] 1 Sri LR 125) We see no reason to interfere with the order of the District Judge.

In *Ramasinghe v. Hettihewa* [1998] BLR 34 at 35, the Court of Appeal held:

It is to be noted that a co-owner is entitled to let his undivided shares of the common property. Similarly a co-owner has a right to compel a division of the common property. Where property could not be divided without injury or if partition was impossible or inexpedient the law permits a sale of it among the co-owners for preference. As tenant's rights are derived from and dependent on the title of the person from whom he gets his tenancy, the rights of a tenant under one co-owner are subject to the prior rights of the other co-owners to compel a division of the property by partition or sale. Where there is a partition, his rights will be restricted to the divided portion obtained by the co-owner who gave him tenancy.

In the instant case the learned trial Judge after due inquiry found that the petitioner was not a tenant of the 1st respondent who was allotted lot 4 in the final decree. I reject the proposition that the new owner of the lot in which there is a house with a tenant is the landlord, by operation of law.

Ranasinghe v. Marikar (*supra*) was a five judge bench decision made under the repealed Rent Restriction Act on the question of delivery of possession after a sale of the premises under the repealed Partition Act, No. 16 of 1951. It was held in that case:

Where there is a valid letting of the entirety of premises to which the Rent Restriction Act applies, a sale of the premises under the Partition Act does not extinguish the rights of the tenant as against the purchaser, even if the tenant's interest is not expressly specified in the interlocutory decree

entered in the partition action. Section 13 of the Rent Restriction Act protects any tenant of rent-controlled premises "notwithstanding anything in any other law" except upon grounds permitted by the Section.

But if rent-controlled promises are owned by co-owners and one of them lets the entirety of the premises without the consent or acquiescence of the other co-owners, the protection of the Rent Restriction Act is not available to the tenant as against a purchaser who buys the premises subsequently in terms of an interlocutory decree for sale entered under the Partition Act. In such a case, the tenant cannot resist an application by the purchaser to be placed in possession of the premises.

In the case of *Thambirajah v. Abdul Kudoos Dorai* [1990] 2 Sri LR 319, the premises were situated within the municipal limits of Colombo and hence were governed by the Rent Act, No. 7 of 1972. Both the District Court and the Court of Appeal held that the plaintiff was entitled to an order for delivery of possession in terms of section 52(2)(b) of the Partition Law as the evidence was insufficient to establish a valid tenancy.

If a valid tenancy is established in respect of premises governed by the Rent Act, section 14(1) of the Rent Act becomes applicable. It states "notwithstanding anything in any other law", the tenant of any residential premises which is purchased by any person under the Partition Law or which is allocated to a co-owner under a decree for partition shall be deemed to be the tenant of such purchaser or of such co-owner.

Section 14(1) of the Rent Act reads as follows:

Notwithstanding anything in any other law, the tenant of any residential premises which is purchased by any person under the Partition Law or which is allocated to a co-owner under a decree for partition shall be deemed to be the tenant of such purchaser or of such co-owner, as the case may be, and the provisions of this Act shall apply accordingly, and where such

tenant is deprived of any amenities as a result of such partition, the owner of the premises where such amenities are located shall permit such tenant to utilize such amenities without making any payment therefor until such amenities are provided by such purchaser or co-owner or by the tenant under subsection (3).

Although this section is in conflict with section 52(2)(b) of the Partition Law which specifies that the person claiming tenancy shall prove that he "is entitled to continue in occupation of the said house as tenant under the applicant as landlord", section 14(1) of the Rent Act overrides section 52(2)(b) due to the term "notwithstanding anything in any other law" used in that section. Accordingly, the protection given to tenants by the Rent Act is not extinguished by a partition or sale of land under the Partition Law whether or not the allottee or purchaser at sale is the landlord of the tenant.

In *Esabella Perera Hamine v. Emalia Perera Hamine* [1990] 1 Sri LR 8, the Court of Appeal affirmed the order of restoration of such a tenant to possession by the District Court when it was found that the tenant had been evicted without following the procedure stipulated in section 52(2). The Court of Appeal held that such restoration can be done by invocation of the inherent powers of the Court.

In *Virasinghe v. Virasinghe* [2002] 1 Sri LR 264, the Supreme Court held that it is not permissible to enter a finding in a judgment, interlocutory decree or final decree in a partition action with regard to any claim of a monthly tenant in respect of the land sought to be partitioned. Such questions should, if at all, be considered at the stage of execution in terms of section 52 of the Law.

Restoration of possession

Section 52A deals with restoration of possession.

52A(1). Any person –

(a) who has been declared entitled to any land by any final decree entered under this Law; or

(b) who has purchased any land at any sale held under this Law and in whose favour a certificate of sale in respect of the land so purchased has been entered by Court; or

(c) who has derived title from a person referred to in paragraph (a), or paragraph (b),

and whose possession has been, or is interfered with or who has been dispossessed, shall, if such interference or dispossession occurs within ten years of the date of the final decree of partition or the entering of the certificate of sale, as the case may be, be entitled to make application, in the same action, by way of petition for restoration of possession, within twelve months of the date of such interference or dispossession, as the case may be.

(2) The person against whom the application for restoration of possession is made, shall be made the respondent to the application.

(3) The Court shall, after due inquiry into the matter, make order for delivery of possession or otherwise as the justice of the case may require:

Provided that, no order for delivery of possession of the land shall be made where the respondent is a person who derives his title to the land in dispute or part thereof directly from the final decree of partition or sale, or is a person who has acquired title to such land from a person who has derived title to such land under the final decree of partition or sale, or from the privies or heirs of such second mentioned person.

In the instant appeal, the High Court took the view that the 2(b) defendant Gamini Premadasa has made the application to obtain possession in accordance with section 52A(1)(c).

In terms of section 52A, if the possession of a party or a purchaser or a person who has derived title from such party or purchaser has been or is interfered with or has been dispossessed, if such interference or dispossession occurs within 10 years of the date of the final decree of partition or entering of the certificate of sale, such person shall be entitled to make an application in the same action by way of petition naming as the respondent the person against whom the application is made, within 12 months of the date of such interference or dispossession for restoration of possession. The Court shall, after inquiry, make an order restoring the petitioner to possession or refusing it.

It may be noted that section 52A deals with restoration of possession, not delivery of possession. The 2(b) defendant cannot be restored to possession unless he was previously in possession. Section 52A cannot be invoked to deliver possession for the first time. The delivery of possession for the first time is done in terms of section 52.

The High Court was not correct to have concluded that the 2(a) defendant had successfully made an application to recover possession in terms of section 52A(1)(c).

Conclusion

The two questions of law on which leave to appeal was granted are answered in the affirmative.

The order of the District Court dated 09.01.2014 and the judgment of the High Court dated 11.09.2014 are set aside.

According to the final decree of partition, lots 2, 3 and 7 of the final partition plan No. 1456 dated 16.08.2010 have been allotted to the original 2nd defendant, Kumbukkolawatte Dingiri Ethana. How Dingiri Ethana's rights in respect of the said lots should devolve shall be resolved in a separate action.

The 2(a) defendant, Gamini Premadasa, cannot seek delivery of possession in respect of these three lots in the instant action.

The appeal is accordingly allowed.

Parties will bear their own costs.

Judge of the Supreme Court

S. Thurairaja, P.C., 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 under and in terms of Section 5[2] of the High Court of the Provinces [Special Provisions] Act No. 10 of 1996 read with the provisions prescribed in terms of Chapter LVIII of the Civil Procedure Code.

SC Appeal 173/2018

SC[HC] leave to Appeal 114/2017

HC [ARB] 177/2015, 218/2015

Z. O. A

[Formerly Z.O.A Refugee Care Netherlands]

No. 34, Gower Street

Colombo 05.

Claimant

Vs.

Ceylinco Insurance PLC

4th Floor Ceylinco House

No. 69, Janadhipathi Mawatha

Colombo 1

Respondent

And Then Between

Ceylinco Insurance PLC

4th Floor Ceylinco House

No. 69, Janadhipathi Mawatha

Colombo 01.

Respondent - Petitioner

Vs.

Z. O. A

[Formerly Z.O.A Refugee Care

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No. 34, Gower Street

Colombo 05.

Claimant - Petitioner

And now between

Ceylinco Insurance PLC

4th Floor Ceylinco House

No. 69, Janadhipathi Mawatha

Colombo 1

Respondent - Petitioner - Petitioner

Vs.

Z. O. A

[Formerly Z.O.A Refugee Care

Netherlands]

No. 34, Gower Street

Colombo 05.

Claimant - Respondent - Respondent

Before : Priyantha Jayawardena, PC, J.

P. Padman Surasena, J.

E. A. G. R. Amarasekara, J

Counsel : Nihal Fernando, PC, with Rhadeena de Alwis instructed by Chandana Madawila for the Respondent -Petitioner Appellant.

Ms. Vijula Arulanantham instructed by Sinnadurai Sundaralingam &

Balendra for the Claimant- Respondent- Respondent.

Argued on : 13.03.2020

Decided On ; 28.02.2024

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

As per the statement of claim filed before the Arbitrators by the Claimant-Respondent-Respondent, ZOA (hereinafter referred to as the Claimant or the Respondent), the background facts relating to this matter can be summarized as follows;

- In or about 1998, the Claimant, ZOA obtained insurance covers for its fleet of motor vehicles, tractors, trailers, motor cycles etc. under policy numbers BR00071A002012, BR00071C001704 and BR00071H000056 from the Ceylinco Insurance PLC, the Respondent-Petitioner-Petitioner (hereinafter referred to as the Petitioner).
- The Claimant being a registered Non-Governmental Organization had entered into a Memorandum of Understanding with the Ministry of Social Services and in 2002, a project by the name of Vanni Project was established in the Killanochchi and Mulativu Districts to facilitate the humanitarian work of the Claimant. A total of 41 vehicles were used in the Vanni Project in the Killanochchi and Mullativu Districts and were insured with the Petitioner as aforesaid.
- With the upsurge of the war in the Vanni area and with the advancement of the Government Forces in or about February 2009, the staff members of the Claimant organization were compelled to move out of the area, leaving behind the assets in order to safeguard their lives.
- The Claimant immediately informed the Petitioner of this matter, and the Petitioner advised to ensure the safety of the staff and that it would proceed with the claim once normalcy returns.
- After the conclusion of the war, on or about 19.05.2009, the Claimant was informed by the Government officials that the said assets were not traceable and probably destroyed. The Claimant made attempts to trace their assets including the vehicles left behind in the Vanni area. In term of the letter dated 1st of November 2009, the Respondent informed the Petitioner of the said lost and/or destroyed vehicles. In September 2010, the Petitioner informed the Claimant of the decision of the National Insurance Trust Fund (hereinafter sometimes referred to as NITF) that the claim had been rejected for the reason that the vehicles had not been in the care, custody and control of the Claimant. The said rejection had been reiterated once again in March 2011.

As per the Statement of Defense dated 30.01.2013, among other things, the Petitioner has averred as follows.

- No cause of action had accrued to the Claimant to proceed to Arbitration against the Petitioner and no dispute and/or difference has arisen between the Claimant and the Petitioner, that would attract the provisions of the Arbitration agreement.
- The purported claim is based on the loss of vehicles used by the Claimant in the North during the terrorist conflict and as per the Claimant's stance, the loss allegedly caused was due to terrorism or violence.

- The insurance policies issued to the Claimant were subject to the Terrorism Endorsement, which expressly provided inter alia that; " *It is further declared and agreed that this extension is granted for and on behalf of the Government Terrorism Fund and any liabilities whatsoever under this specific extension shall devolve solely upon the said Fund in any action, suit or proceeding, where the Fund alleges that by reason of the provisions of this extension any loss or damage is not covered by this insurance, the burden of proving that such loss or damage is covered shall be upon the insured."*
- The NITF rejected the claim of the Claimant on the ground that the said vehicles had not been in the care, custody or control of the Claimant and the said rejection was repeatedly communicated to the Claimant.
- The insurance policies were subject to the Terrorism Endorsement, whereby the Claimant obtained the insurance cover from the NITF against '*physical loss or damage to the vehicles insured' as a result of terrorism or violence,* and in that regard the Petitioner was merely the collector of the insurance premium who forwarded the relevant component of the premium to the NITF.
- The Claimant cannot in fact and in law, claim to be indemnified by the Petitioner, and in any event, the Claimant has not suffered any loss/damage as alleged or over estimated its alleged loss/damage and sought to unjustly enrich itself.

The matter had been taken up before an Arbitral Tribunal consisting of three arbitrators. After recording admissions and issues, the Claimant had led its evidence along with the documentary evidence. However, the Petitioner had closed its case without leading any evidence. Parties tendered their written submissions, and the Arbitral Tribunal delivered a divided decision where the Majority awarded the Claimant a sum of Rupees 10,958,685/- together with legal interest on the aggregate sum as from 20.12.2012 and further sum of Rupees 500,000/- as cost, while the Minority dismissed the statement of claim of the Claimant.

After the award was made by the Arbitral Tribunal, before the High Court, the Claimant and the Petitioner had agreed to consolidate the two applications, namely the application for the enforcement of the Arbitral award and the application to set aside the majority decision of the Panel of Arbitrators, and to have a single judgment. After the filing of objections, both parties had agreed to conclude the inquiry by way of written submissions and the High Court had fixed the matter for judgment on the written submissions as agreed by the parties. The Learned High Court Judge delivered his judgment dated 16.10.2017 allowing the enforcement of the Majority decision of the Arbitral Tribunal.

Being aggrieved by the said Judgment, the Petitioner had filed a leave to appeal application before this Court and, when that application was supported, this Court had granted leave on the three questions of law mentioned in paragraph 30 (c), (d), and (g) of the Petition dated 27.11. 2017- vide journal entry dated 29.10.2018. In addition to that, when this matter was taken up for argument, this Court allowed another question of law – vide Journal entry dated 13.03.2020. The questions of law so allowed are quoted below for easy reference;

1. Whether the learned High Court Judge had failed to consider that there could not have been any dispute with the Petitioner in as much as it was known to the Respondent that the settlement or determination as to the settlement in respect of any claim arising out of the terrorism cover was with the NITF and not with the Petitioner?

2. Whether the learned High Court Judge had failed to appreciate and /or realize that the said award deals with alleged disputes not contemplated by and/or arising out of the Contract [Insurance Policy marked "C4"] and thus contains decisions on matters beyond and/or not falling within the terms of submissions to Arbitration and thus, violates Section 32(1) (a)(iii) of the Arbitration Act No.11 of 1995?

3. Whether the learned High Court Judge had misdirected himself by failing to appreciate that the National Insurance Trust Fund in terms of Section 3 of the National Insurance Trust Fund Act No.28 of 2006 was solely responsible for the purported claim, if any, of the Claimant-Respondent-Respondent, and not the Petitioner?

4. Whether the award deals with a dispute not contemplated or not falling within the terms of the submission to arbitration?

The Claimant and the Petitioner have filed their written submissions dated 17.05.2019 and 19.12.2018 respectively prior to the hearing. After the argument that took place on 13.03.2020, as directed by the Court, additional written submissions, dated 15.07.2020 and 03.06.2020 have been filed respectively by the Claimant and the Petitioner.

The Petitioner attempts to indicate that there is a jurisdictional error made by the Arbitral Tribunal as there cannot be any dispute between the Petitioner and the Claimant when there is no liability on the Petitioner as the liability for any claim arising out of the terrorism cover is determined and borne by the NITF. The Petitioner further argues that the Arbitration award deals with disputes not contemplated by and /or arising out of Contracts of Insurance, and thus, falls beyond the scope of the submission to Arbitration or the alleged dispute is not covered by the Arbitration agreement.

In this regard, the Petitioner brings this Court's attention to certain parts of the Terrorism Endorsement and of the Strike, Riot Civil Commotion Endorsement contained in the insurance policies which reads as follows;

" ... It is further declared and agreed that this extension is granted for and on behalf of the Government Terrorism Fund and any liabilities whatsoever under this specific extension shall devolve solely upon the said Fund in any action, suit or proceeding where the Fund alleges that by reason of the provisions of this extension any loss or damage is not covered by this insurance, the burden or(sic) proving such loss or damage is covered shall be upon the insured....
It is hereby declare(sic) and agreed that the Riot & Strike Extension if granted for and on behalf of the government fund for Strike, Riot and Civil Commotion and Terrorism and any liability whatsoever under this specific extension shall devolve solely upon the said fund."

Highlighting that the said terrorism extension has been granted on behalf of the Government Terrorism Fund and that any liability whatsoever under the specific extension is solely upon the said Fund, the Petitioner takes up the position that the NITF is solely liable for disputes arising out of the said endorsement. However, it is observed that the terminology used in the above Terrorism Endorsement is that "*Liabilities/Liability whatsoever shall devolve solely upon the said Fund"*. For a liability to devolve on one entity, first it must be accrued to another entity. In the given context it appears to be from the insurer to the said Fund.

In relation to the stance taken up by the Petitioner in its written submissions dated 19.12.2018, it has brought this Court's attention to section 28 of the National Insurance Trust Fund Act No.28 of 2006 which established the said NITF, and the said section further states that benefits from the Fund shall be paid to persons to whom the said Act applies, and such monies as are specified in section 18 of the Act shall be paid to the Fund. It must be noted here that the said Act was passed in 2006 while the relevant Insurance Policies were obtained in 1998. However, as per the aforementioned section 18(c), all monies lying to the credit of the Strike, Riot and Civil Commotion and Terrorism Fund established in terms of the Cabinet Decision of November 18th, 1987 in Accounts in Peoples Bank, Union Place and Bank of Ceylon, Corporate Branch should be paid into the NITF. This provision apparently indicates that the NITF has absorbed the Government Terrorism Fund referred to in the Terrorism Endorsement in the Insurance Policies.

The Petitioner has further referred to certain regulations made by the Minister in charge of the subject in terms of section 28 (2)(c) of the said Act published in the Gazette Number 1542/11 dated 25th March 2008.

However, those provisions that came into existence after the Petitioner and the Respondent entered into the contract of insurance as found in the relevant insurance policies cannot establish a contractual nexus between the Respondent and the Government Terrorism Fund or NITF.

However, while referring to the aforesaid provisions of the law, the Petitioner takes up the position that, it issued the relevant Strike, Riot and Civil Commotion Endorsement and Terrorism Endorsement in compliance with the law on behalf of the said NITF and the Respondent's attempt to hold the Petitioner liable for a claim under the said endorsement is contrary to the contract and law. Thus, the Petitioner submits that no dispute can ever arise and/or has arisen between the Petitioner and the Respondent which is subject to the arbitration agreement contained in the contract of insurance. In this regard, the Petitioner brought this Court's attention to the evidence of the Respondent where during cross examination the Respondent admitted the liability of the NITF to pay what is covered under the said endorsement. The Petitioner has also referred to some communications between the Petitioner and the Respondent where it is either mentioned that the Petitioner would be presenting the claim to the NITF or that the claim was rejected by the NITF. Hence, the Petitioner states that the Respondent was aware of the involvement of the NITF and has conceded that the dispute is with the NITF. The Petitioner, therefore, argues that there is no dispute between the Petitioner and the Respondent that would fall within the terms of submission to arbitration as required by section 32(1)(a)(iii) of the Arbitration Act. If there was a direct contractual relationship

between the Respondent and the NITF or the Government Terrorism Fund as alleged by the Petitioner, it is questionable the necessity for the Petitioner to be involved in claims or communications in that regard.

As per the notices of Arbitration, each reference for Arbitration has been done in term of Clause 8 of the General Exceptions in the relevant policies. Such reference was based on disclaiming of liability in respect of insurance claims made under the relevant policies. Said Clause 8 provides for the parties to the relevant policy to refer all differences arising out of the relevant policy for arbitration as a dispute resolution mechanism. When it refers to all differences, it encompasses any dispute that is arisen out of the contract of insurance. Thus, there is an arbitration agreement between the parties to the relevant insurance policy as far as each policy is concerned.

It should be noted that neither any person from any authority which was responsible for the Government Terrorism Fund or later the NITF (once it came into existence in terms of the Act No. 28 of 2006) had taken part in signing the policies for them to become a party to the policy. It is also common ground that the Petitioner collected the relevant premiums from the Respondent including the premiums for the protection under the Terrorism Endorsement which endorsement became part of each relevant policy. If one looks at the relevant Terrorism Endorsement quoted above, it is clear that the said *extension is granted by the Petitioner for and on behalf of the Government Terrorism Fund. This could have happened due to situations such as;*

A) There was an administrative or contractual or statutorily established or supported arrangement or agreement between the Petitioner and the relevant Authority that was responsible for the said Fund at the time of entering into the Policies without any involvement of the Respondent to grant such cover through the Petitioner. (However, it is clear that NITF Act was passed only in 2006. No statute or regulation relevant to the time of entering into the policies prior to 2006 has been brought to the notice of the Court other than stating that the Government Terrorism Fund was established by a Cabinet Decision).

B) The Petitioner was acting as the Agent of the relevant Fund or the Authority responsible for the said Government Terrorism Fund.

Whatever it is, it appears that an arrangement has been made in a manner to devolve any liability that may accrue to the Petitioner to the said Fund. If it is a separate arrangement or an agreement between the Petitioner and the Fund or the relevant authority, as the Fund or the relevant authority responsible is not a party to the relevant policy, the Respondent has to claim and go after the Petitioner for any liability in terms of the insurance policy and claim it from the Petitioner. If Petitioner is liable or proved liable it is up to the Petitioner to cause the settlement of claims through the Fund as per the agreement or arrangement between it and the Fund or the Authority that is responsible for the Fund. The Respondent or the Claimant cannot go after the Fund or the relevant Authority since there is no contractual nexus between the Claimant and the Fund or the relevant authority. Even if it is an undisclosed agency between the Petitioner and the Government Terrorism Fund, the Respondent or the Claimant still has to go after the Petitioner to enforce any obligation. It is only when a disclosed agency exists between the Petitioner and the said Fund, the Respondent can go after the disclosed principal

for the enforcement of obligation. As per the submissions made, originally, the Government Terrorism Fund was established through a decision of a Cabinet meeting. Thus, such a Fund cannot be considered as a legal person. The Terrorism Endorsement in the policy quoted above does not refer to any authority or legal person who is responsible for the Fund. The NITF Act which came into existence in 2006 has established a Board which is a corporate body for administration of the NITF. However, there is no such Board referred to in the said Government Terrorism Fund Endorsement found in the Policies. Hence, if it is an agency, there is no disclosure of any principal who should be liable relating to Terrorism Endorsement in the policy. Thus, as per the material placed, there is nothing to show that there was a contractual nexus creating obligations between the Respondent and the said Government Terrorism Fund or NITF or any authority responsible for such Fund. Each relevant insurance policy was between the Petitioner and the Respondent, and it is the Petitioner who granted the terrorism cover on behalf of the said Fund. Further, in my view it is the Petitioner's responsibility and obligations that devolve on the Fund. The Respondent is not a party to any contract, agreement or arrangement between the Fund or any authority responsible for the Fund. Thus, in my view, it is the responsibility of the Petitioner to fulfill its obligations through the Fund as per any arrangements it has with the Fund. However, there is no contractual nexus between the Fund and the Respondent. As per each Policy of Insurance, the contract is between the Petitioner and the Respondent. Thus, the Arbitration agreement contained therein is between the Petitioner and the Respondent.

As stated in the Majority decision of the Arbitration award, there is no provision found in the policies that allows the then Government Terrorism Fund to refuse payment on the basis that the relevant vehicles were not in the care, custody and the control of the Respondent. As a party to the contract of insurance, when the insurer refuses the claim on the basis that the NITF refused payment, there is a clear dispute with regard to the payment of claim arising out of the relevant policy of insurance, especially in terms of the Terrorism Endorsement. As explained above, parties to each relevant policy are the Petitioner and the Respondent and there is no contractual nexus proved between the Petitioner and the NITF. It is not in dispute that the premiums relevant to each policy including the amount relevant to the Terrorism Endorsement were collected by the Petitioner and as per some arrangement between the Petitioner and the Government Terrorism Fund, the Petitioner would have transmitted the relevant amounts to the said Fund or the NITF. Due to this arrangement, parties would have stated in the Terrorism Endorsement that the liability arising out of terrorism related damages or loss covered by the insurance policy devolves on the said Fund. However, to claim it from the Fund, there is no contractual relationship between the Respondent and the Terrorism Fund or the NITF.

The contract of insurance that contained an arbitration agreement was between the Petitioner and the Respondent and, the dispute with the refusal of the claim has arisen from that agreement. Further, there is an arbitration agreement to refer all differences arising out of the policy for arbitration. The words "All differences" is a very wide term that include any dispute arising out of the relevant insurance policy.

For the reasons given above, I am unable to agree with the submissions of the Petitioner that there could be no dispute between the Petitioner and the Respondent, on the basis that the liability for any claim arising out of the terrorism cover is determined and borne by the NITF

and not by the Petitioner or that the award deals with disputes not contemplated by and/or arising out of contract of insurance or that the alleged disputes are not covered by the arbitration agreement. If there is any liability to devolve on the NITF as per any arrangement between the Petitioner and the NITF or the then Government Terrorism Fund, it is the Petitioner's liability arising out of the contract of insurance between the Petitioner as the insured and the Respondent as the insurer and nothing else.

As per the Terrorism Endorsement quoted above, when the Fund alleges that by reason of the provisions of this extension any loss or damage is not covered by this insurance, the burden of proving such loss or damage is covered, is upon the insured. The reason that appeared to have been given by the NITF was that the vehicles were not in the care, custody and control of the Respondent. No such ground is found in the relevant policies to absolve the insurer or the Fund from liability. As such, there is nothing to be proven by the Respondent against such refusal after proving that the harm, damage or loss caused was due to the terrorist activities that existed at the relevant time. On the other hand, when there is a war, terrorist activities or natural disasters it is natural to expect that the insured may leave behind the insured property. Moreover, the decision on facts is solely with the Arbitrators and the learned High Court Judge is not expected to sit in appeal against the findings of facts by the Arbitrators.

As explained above, the contract of insurance was between the Petitioner and the Respondent. There was no contractual nexus between the Respondent and the Government Terrorism Fund or the NITF and or any authority that was responsible for such Fund. The dispute has arisen from the contract of insurance due to the refusal to pay the claim after collecting the premium for Terrorism Endorsement. Whether the Petitioner is liable or not as per the contract of insurance itself is a part of the dispute. There was an arbitration agreement as explained above to refer all differences arising out of the contract of insurance found in the policy to refer for arbitration. Thus, the Arbitrators had the jurisdiction to hear and decide the dispute. In my view, the Majority award dealt with a dispute contemplated by or falling within the terms of submission for arbitration and contains decisions on matters within the scope of the submission to arbitration. As this was to enforce an award made in Sri Lanka, to set aside, it must fall within the ambit of section 32 (1) (a)(i) or(ii) or (iii) or(iv) or (b)(i) or (ii) of the Arbitration Act No. 11 of 1995. Other than that, the High Court is not empowered to sit in appeal over the decision of the Arbitrators. No such ground as contemplated by the said section has been established before the High Court. In this regard, it is relevant to refer to the following decision made by our superior courts.

Light Weight Body Armour Ltd. Vs. Sri Lanka Army (2007) 1 Sri L R 411

"*In exercising jurisdiction under section 32 Court cannot sit in appeal over the conclusions of the Arbitral Tribunal by scrutinizing and reappreciating the evidence considered by the Arbitral Tribunal. The Court cannot re-examine the mental process of the Arbitration Tribunal contemplated in its findings nor can it revisit the reasonableness of the deductions given by the Arbitrator- since the arbitral tribunal is the sole judge of the quantity and the quality of the mass of evidence led before it by the parties…"*
"… Section 32 contains the sole grounds upon which an award may be challenged or set aside, courts have no jurisdiction to correct patent and glaring errors of law in an Award unless the

error can be established to be a jurisdictional error or can be shown to be of such nature as to render the Award contrary to public policy."

For the reasons elaborated above, the questions of law allowed by this Court which are mentioned above are answered as follows;

Q. 1. Whether the learned High Court Judge had failed to consider that there could not have been any dispute with the Petitioner in as much as it was known to the Respondent that the settlement or determination as to the settlement in respect of any claim arising out of the terrorism cover was with the NITF and not with the Petitioner?

A. Answered in the negative as the Contractual nexus is only with the Petitioner.

Q 2. Whether the learned High Court Judge had failed to appreciate and /or realize that the said award deals with alleged dispute not contemplated by and/or arising out of the Contract [Insurance Policy marked "C4"] and thus contains decisions on matters beyond and/or not falling within the terms of submissions to Arbitration and, thus, violates Section 32(1) (a)(iii) of Arbitration Act No.11 of 1995?

A. Answered in the Negative. The terms of contract of insurance contained in the relevant policy including Terrorism Endorsement are parts of the insurance policy and it is a contract between the Petitioner and the Respondent and not with any other Fund. Who is liable for payment for the claims made under the said endorsement is a dispute arising out of the contract, and parties have agreed to refer "all differences" arising out of the contract for arbitration.

Q 3. Whether the learned High Court Judge had misdirected himself by failing to appreciate that the National Insurance Trust Fund in terms of Section 3 of the National Insurance Trust Fund Act No.28 of 2006 was solely responsible for the purported claim, if any, of the Claimant-Respondent-Respondent and not the Petitioner?

A. Answered in the Negative. Section 3 establishes the National Insurance Trust Fund from which the benefits shall be paid to the persons to whom the Act applies. As per the insurance policy liability, devolves on the Terrorism Fund which appears to have been absorbed by the NITF. However, to devolve on the Terrorism Fund, liability must first accrue to the Insurer, the Petitioner. The Respondent's (Claimant's) Contractual nexus is only with the Petitioner

Q4. Whether the award deals with a dispute not contemplated or not falling within the terms of submissions to arbitration?

A. Answered in the Negative. As explained above, it is a dispute arising out of the insurance contract between the Petitioner and the Respondent, and both parties have agreed to refer all differences arising out of that contract for arbitration.

Hence, this Court affirms the decision of the Learned High Court Judge dated 16.10.2017 and decides to dismiss this appeal.

Appeal dismissed with costs.

…………………………………………………

Judge of the Supreme Court

Hon. Priyantha Jayawardena, PC, J.

I agree.

…………………………………………………...

Judge of the Supreme Court

Hon. P. Padman Surasena, J.

I agree.

………………………………………………..

Judge of the Supreme Court

<u>IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA</u>

Warnakula Arachchiralalge Dona Annie Rita Fonseka *alias* Annie Seeta Fonseka,
"Swarna", Kuda Payagala,
Payagala.
<u>Plaintiff</u>

SC APPEAL NO: SC/APPEAL/175/2014
SC LA NO: SC/SPL/LA/53/2014
COURT OF APPEAL NO: CA/379/97(F)
DC KALUTARA NO: 5921/P

<u>Vs.</u>

1. Hewafonsekage Prasad Annesley Fonseka
2. Hewafonsekage Sunil Stanley Remand Fonseka
   Both of Kuda Payagale, Payagala.
3. Hewafonsekage Chandra Kumari Hyscinth Fonseka,
   No. 213/4, Kuda Payagala,
   Payagala.
4. Don Nichulas Clament Derrick Weerasooriya,
   No. 213/4, Galle Road,
   Kuda Payagala, Payagala.

5. Kurukula Karunatilleke
   Dissanayake Don Nichulas
   Clament Derrick Weerasooriya,
   Kuda Payagala, Payagala.
6. Lekam Mudiyanselage Nimal
   Patricia Magdaline Alexander,
   2, 1/13, Galle Road,
   Kuda Payagala, Payagala.
   Defendants

AND

4. Don Nichulas Clament Derrick
   Weerasooriya,
   No. 213/4, Galle Road,
   Kuda Payagala, Payagala.
6. Lekam Mudiyanselage Nimal
   Patricia Magdaline Alexander,
   2, 1/13, Galle Road,
   Kuda Payagala, Payagala.
   4th and 6th Defendant-Appellants

Vs.

Warnakula Arachchiralalge Dona
Annie Rita Fonseka *alias* Annie
Seeta Fonseka,
"Swarna",
Kuda Payagala, Payagala.
Plaintiff-Respondent

1. Hewafonsekage Prasad Annesley Fonseka
2. Hewafonsekage Sunil Stanley Remand Fonseka
   Both of Kuda Payagale, Payagala.
3. Hewafonsekage Chandra Kumari Hyscinth Fonseka,
   No. 213/4, Kuda Payagala,
   Payagala.
5. Kurukula Karunatilleke Dissanayake Don Nichulas Clament Derrick Weerasooriya,
   Kuda Payagala, Payagala.
   Defendant-Respondents

AND NOW BETWEEN

4. Don Nichulas Clament Derrick Weerasooriya,
   No. 213/4, Galle Road,
   Kuda Payagala, Payagala.
   (Deceased)
6. Lekam Mudiyanselage Nimal Patricia Magdaline Alexander,
   2, 1/13, Galle Road,
   Kuda Payagala, Payagala.
   4th and 6th Defendant-Appellant-Appellants

4A. Kurukula Karunatilaka
Dissanayake Don Denisha

Prashani Weerasuriya

4B. Kurukula Karunatilaka
Dissanayake Don Antanoch
Prashanthi Dilani Weerasuriya
Substituted 4th Defendant-Appellant-Appellants

Vs.

Warnakula Arachchiralalge Dona Annie Rita Fonseka *alias* Annie Seeta Fonseka,
"Swarna", Kuda Payagala,
Payagala.
(Deceased)
Plaintiff-Respondent-Respondent

1A. Hewadonsekage Prasad Annesley Fonseka,
Kuda Payagala, Payagala.

1B. Hewafonsekage Sunil Stanley Remand Fonseka,
Kuda Payagala, Payagala.

1C. Hewafonsekage Chandra Kumari Hyscinth Fonseka,
No. 213/4, Kuda Payagala,
Payagala.

Substituted Plaintiff-Respondent-Respondents

1. Hewafonsekage Prasad Annesley Fonseka
2. Hewafonsekage Sunil Stanley Remand Fonseka

   Both of Kuda Payagale, Payagala.
3. Hewafonsekage Chandra Kumari Hyscinth Fonseka,

   No. 213/4, Kuda Payagala, Payagala.

5. Kurukula Karunatilleke Dissanayake Don Nichulas Clament Derrick Weerasooriya,

   Kuda Payagala, Payagala.

   Defendant-Respondent-Respondents

Before: Hon. Justice P. Padman Surasena
Hon. Justice Mahinda Samayawardhena
Hon. Justice K. Priyantha Fernando

Counsel: Sugath Caldera for the 4th and 6th Defendant-Appellant-Appellants.
Ranjan Gooneratne for the Plaintiff-Respondent-Respondent and 1st-3rd Defendant-Respondent-Respondents.

Argued on: 10.08.2023

Written Submissions:

By the 4th and 6th Defendant-Appellant-Appellants on 12.12.2014

By the Plaintiff-Respondent-Respondent and 1st-3rd Defendant-Respondent-Respondent on 05.10.2022 and 15.09.2023

Decided on: 22.02.2024

Samayawardhena, J.

The plaintiff filed this action by plaint dated 06.05.1991 in the District Court of Kalutara naming 4 defendants, seeking to partition 1/3 of the land described in the schedule to the plaint in extent of about 1 rood, among the plaintiff and the 1st-3rd defendants. The 1st-3rd defendants are the children of the plaintiff. The plaintiff sought the balance 2/3 portion to be left unallotted. The plaintiff further stated that the 4th defendant was made a party to the case since he is living on the land. The 5th and 6th defendants later intervened.

Preliminary Plan No. 120 depicts a land in extent of 1 rood and 00.56 perches. Plan No. 120 was superimposed on Plan No. 6799 marked 6D2, which was also prepared on a court commission on the application of the 4th and 6th defendants. Both Plans depict the same land but Plan No. 6799 has separated the land into two Lots – Lot 1A (northern portion) and Lot 1B (southern portion).

The 4th and 6th defendants sought exclusion of Lot 1B on the basis that it is a different land. They showed a different pedigree to Lot 1B and did not claim any rights from Lot 1A.

The crux of the matter before the District Court was the identification of the corpus. There was no contest on the pedigrees unfolded by the two contesting parties – the plaintiff on the one hand and the 4th and 6th defendants on the other.

After trial, the District Court decided that Lot 1A and Lot 1B constitute the same land. The District Court ordered partition of the entire land as pleaded by the plaintiff. The Court left 2/3 of the land unallotted stating that the deeds tendered by the 4th and 6th defendants are not relevant to the land to be partitioned.

On appeal, the Court of Appeal affirmed the judgment of the District Court.

Hence this appeal by the 4th and 6th defendants to this Court.

What did the plaintiff seek to partition? The plaintiff sought to partition a land known as "the northern half share portion of Gadambagahawatta" situated at Payagala and bounded on the north by a portion of the same land in the name of W. Don Juwan, east by a portion of the same land in the name of Don Audris Prisinthirala, south by the remaining half share portion of this land and west by high road and containing in extent about 1 rood.

The plaintiff produced an incomplete pedigree. Her pedigree is simple. She states Girigoris was entitled to 1/3 of the land, which he transferred to Mary and Thomas by deed marked P1 executed in 1940. They transferred it to the plaintiff by deed marked P2 executed in 1949 and the plaintiff transferred 1/2 of it to her husband by deed marked P3 executed in 1950. After the death of her husband, the plaintiff and the 1st-3rd defendants, who are their children, became entitled to 1/3 of the land. In those three deeds the land is described in the same way as described above without reference to a Plan.

It is significant to note that in the plaintiff's deeds, the southern boundary of the land is "the remaining half share portion of this land".

The land on the eastern boundary has been partitioned in partition case No. 4688/P.

Now let us consider the land the 4th and 6th defendants seek to exclude from the corpus.

The 4th and 6th defendants tendered 6D1-6D16. Those deeds are also old deeds. In the oldest deed marked 6D6 executed in 1936, the land is described as Gadambagahawatta situated at Payagala and bounded <u>on the north by the one sixth part of the same land in the name of W.B. Girigoris</u>, east by a portion of the same land, <u>south by Kongahawatta</u> and west by high road and containing in extent 34 perches as depicted in Plan No. 2007 dated 04.07.1929 made by J.F. Collette, Licensed Surveyor. In all the subsequent deeds of the said defendants the land is described in the same way.

The 4th and 6th defendants state that this is the land depicted as Lot 1B in the superimposed Plan No. 6799 marked 6D1.

Now let us consider the land depicted in the Preliminary Plan No. 120, marked X. It depicts a land known as "the northern half share portion of Gadambagahawatta" situated at Payagala and bounded <u>on the north by a portion of this land in the name of W. Don Juwan</u>, east by a portion of this land in the name of Don Audris Prisinthirala (the land partitioned in case No. 4688), <u>south by the remaining half share portion of this land alias Kongahawatta</u> and west by high road and containing in extent 1 rood and 00.56 perches.

According to the 4th and 6th defendants' old deeds, the northern boundary of their land is one sixth part of the same land in the name of Girigoris, not a portion of this land in the name of Juwan as described in the schedule to the plaint and the plaintiff's deeds. Girigoris is the original

owner in the plaintiff's pedigree. This shows that the northern boundary of the 4th and 6th defendants' land is the plaintiff's land.

An argument that the names of the adjoining owners could have changed due to passage of time cannot be presented in this case because the old deeds of the plaintiff and the contesting defendants have been executed during the same period.

According to the plaint, the southern boundary of the plaintiff's land is the remaining half share portion of the same land, not Kongahawatta. It is so stated in the plaintiff's deeds as well. According to the 4th and 6th defendants' old deeds and Plan 6D1, the southern boundary of those defendants' land is Kongahawatta.

The surveyor who prepared the Preliminary Plan has stated in the Plan that the southern boundary is the remaining half share portion of this land alias Kongahawatta. The phrase "alias Kongahawatta" is to reconcile the southern boundary of the 4th and 6th defendants' land with the plaintiff's land. This reconciliation is not supported by evidence.

The District Judge mainly, if not solely, relied on the extract of the Land Registry marked by the 4th and 6th defendants as 6D3/6D5, to reject the 4th and 6th defendants' claim. This has no basis. Let me explain.

As I stated previously, the oldest deed marked by the 4th and 6th defendants is 6D6 executed in 1936. I have already quoted the land and extent described in that deed. However, the 4th and 6th defendants refer to deed No. 21058 executed in 1929 in their pedigree. This deed is referred to in the extract marked 6D3/6D5. That deed also gives the same boundaries and the same extent (34 perches) as in the deed marked 6D6. The District Judge states that in the extract 6D3/6D5, at the beginning, the extent of the land is given as 20 square perches but when deed No. 21058 was executed in 1929 with a new Plan prepared to identify the

land, the land has been identified as a land of 34 perches. I cannot understand how the discrepancy between 20 perches and 34 perches fortifies the plaintiff's case.

The plaintiff's deeds do not refer to any Plan. Those deeds refer to a land in extent of "about 1 rood". It is on that basis the plaintiff thinks that the land which she claims undivided rights from, has 1 rood (40 perches).

In the absence of surveyor Plans, the extent given in these old deeds is speculative. During that era, it was a commonplace for a deed to purport to convey either much more or much less than what a person was entitled to. The uncertain extent mentioned in those old deeds is unreliable and needs to be reconciled with other evidence in the case.

Although that old Plan of surveyor Collette was not produced, it is clear that the 4th and 6th defendants' land lies to the south of the land sought to be partitioned by the plaintiff, especially in considering the southern boundary of the plaintiff's land sought to be partitioned (the remaining half share portion of this land) and the northern boundary of the land claimed by the 4th and 6th defendants (the one sixth part of the same land in the name of W.B. Girigoris) and the southern boundary of the land claimed by the 4th and 6th defendants (Kongahawatta).

As Basnayake J. (later C.J.) with the agreement of Gratiaen J. held in *Gabriel Perera v. Agnes Perera* 43 CWR 82 at 83 "*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*".

Taking all the facts and circumstances into account, it can be concluded that Lot 1B in the superimposed Plan marked 6D1 represents the land

claimed by the 4th and 6th defendants although there is no clear boundary between Lot 1A and 1B. However, the surveyor has identified a boundary and marked it in dotted lines.

The fact that Lot 1A has only 7 perches is not a ground to reject the 4th and 6th defendants' version.

The plaintiff and the 1st-3rd defendants do not possess Lot 1B. They possess Lot 1A.

Lot 1B in Plan marked 6D1 shall be excluded from the corpus.

Once Lot 1B is excluded, the corpus is limited to Lot 1A, which is only 7 perches. The plaintiff and 1st-3rd defendants claim 1/3 of the corpus and pray that the balance 2/3 portion to be left unallotted. Partition is not practically possible given the extent of Lot 1A.

The plaintiff has not properly identified the corpus. The plaintiff has not disclosed a complete pedigree. The plaintiff's action in the District Court shall stand dismissed.

The parties can demarcate the boundary between the two Lots in accordance with Plan marked 6D1 without embarking upon a new lawsuit, if so advised.

At the argument, the parties agreed to confine the argument to the following two questions:

> 16(a). Did the Court of Appeal fail to appreciate that the land identified by the plaintiff is a portion of a larger land?
>
> 16(d). Did the Court of Appeal fail to consider that the District Judge has failed to properly examine title to the corpus?

I answer both questions in the affirmative.

The judgments of the District Court and the Court of Appeal are set aside and the appeal is allowed. The 4th and 6th defendants are entitled to recover taxed costs of all three courts from the substituted plaintiffs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.
I agree.

Judge of the Supreme Court

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

Sooriya Pahtirennehelage Piyalka
Weerakanthi,
Ingaradaula,
Narangoda.
Petitioner

SC APPEAL NO: SC/APPEAL/179/2019
SC LA NO: SC/HCCA/LA/310/2017
HC NO: NWP/HCCA/KUR/102/2011/F
DC KULIYAPITIYA NO: 605/T

Vs.

1. Sembukutti Arachchige Shanthi
Siriwardena,
Ingaradaula, Narangoda.
(Deceased)

1A. Sembukutti Arachchige Radhika
Siriwardena,
Ingaradaula, Narangoda.

2. Sembukutti Arachchige Premaratne,
Dambagahagedera, Yakwila.
3. Sembukutti Arachchige Piyathilaka,
Ingaradaula, Narangoda.
4. Sembukutti Arachchige Dharmasena,
Ambalangoda.
(Deceased)

4A. Gange Lalitha De Silva
4B. Sembukutti Arachchige Sisira Priyankara
4C. Sembukutti Arachchige Sisira Sanoja Dilhani
All of No. 5, Polwatta Municipal Houses, Ambalangoda.
5. Sembukutti Arachchige Leelawati Manike,
Ingaradaula, Narangoda.
6. Sembukutti Arachchige Paulu Appuhamy,
Munamaldeniya, Akarawatta.
Respondents

AND BETWEEN

Sooriya Pahtirennehelage Piyalka Weerakanthi,
Ingaradaula, Narangoda.
Petitioner–Appellant

Vs.

1. Sembukutti Arachchige Shanthi Siriwardena,
Ingaradaula, Narangoda.
(Deceased)
1A. Sembukutti Arachchige Radhika Siriwardena,
Ingaradaula, Narangoda.
2. Sembukutti Arachchige Premaratne,
Dambagahagedera, Yakwila.

3. Sembukutti Arachchige Piyathilaka,
   Ingaradaula, Narangoda.
4. Sembukutti Arachchige Dharmasena,
   Ambalangoda.
   (Deceased)

4A. Gange Lalitha De Silva

4B. Sembukutti Arachchige Sisira Priyankara

4C. Sembukutti Arachchige Sisira Sanoja Dilhani
All of No. 5, Polwatta Municipal Houses,
Ambalangoda.

5. Sembukutti Arachchige Leelawati Manike,
   Ingaradaula, Narangoda.
6. Sembukutti Arachchige Paulu Appuhamy,
   Munamaldeniya, Akarawatta.

Respondent-Respondents

AND NOW BETWEEN

1. Sembukutti Arachchige Shanthi Siriwardena,
   Ingaradaula, Narangoda.
   (Deceased)

1A. Sembukutti Arachchige Radhika Siriwardena,
Ingaradaula, Narangoda.

2. Sembukutti Arachchige Premaratne,
   Dambagahagedera, Yakwila.
3. Sembukutti Arachchige Piyathilaka,

Ingaradaula, Narangoda.

4. Sembukutti Arachchige Dharmasena,
Ambalangoda.
(Deceased)

4A. Gange Lalitha De Silva (Deceased)

4B. Sembukutti Arachchige Sisira Priyankara

4C. Sembukutti Arachchige Sisira Sanoja Dilhani
All of No. 5, Polwatta Municipal Houses,
Ambalangoda.

5. Sembukutti Arachchige Leelawati Manike,
Ingaradaula, Narangoda.

6. Sembukutti Arachchige Paulu Appuhamy,
Munamaldeniya, Akarawatta.

1A, 2nd, 3rd, 4B, 4C, 4D, 5th and 6th
Respondent-Respondent-Appellants

Vs.

Sooriya Pahtirennehelage Piyalka Weerakanthi,
Ingaradaula, Narangoda.
Petitioner–Appellant–Respondent

Before: Hon. Justice Priyantha Jayawardena, P.C.
Hon. Justice A.L. Shiran Gooneratne
Hon. Justice Mahinda Samayawardhena

Counsel: M.C. Jayaratna, P.C., with H.A. Nishani and H. Hettiarachchi for the 1A, 2nd, 3rd, 4B, 4C, 4D, 5th and 6th Respondent-Respondent-Appellants.

Jacob Joseph for the Petitioner-Appellant-Respondent.

Argued on : 26.10.2021

Written submissions:

by the Respondent-Respondent-Appellants on 05.10.2020.

Decided on: 28.02.2024

Samayawardhena, J.

The original petitioner instituted these proceedings in the District Court of Kuliyapitiya in terms of section 528 of the Civil Procedure Code seeking letters of administration to administer the intestate estate of the deceased on the basis that she is the widow of the deceased. She tendered the marriage certificate marked P1 with the petition. The original 2nd respondent who is the brother of the deceased (with the support of the other siblings) countersued for letters of administration on the basis that the marriage between the petitioner and the deceased is a nullity in terms of section 18 of the Marriage Registration Ordinance, No. 19 of 1907, as amended, since the petitioner married the 2nd respondent's deceased brother without having her former marriage dissolved by a competent Court.

Section 18 of the Marriage Registration Ordinance enacts:

> *No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void.*

Section 19 of the Marriage Registration Ordinance enacts:

> *19(1) No marriage shall be dissolved during the lifetime of the parties except by judgment of divorce a vinculo matrimonii pronounced in some competent court.*

(2) Such judgment shall be founded either on the ground of adultery subsequent to marriage, or of malicious desertion, or of incurable impotence at the time of such marriage.

Section 607 of the Civil Procedure Code provides for a spouse to institute an action in the District Court seeking a declaration that the marriage is a nullity on any ground that results in the marriage between the parties being deemed void under the laws of Sri Lanka. It was held in *Peiris v. Peiris* [1978-79] 2 Sri LR 55 that this includes the application of Roman Dutch law which recognises *inter alia* duress, mistake, fraud and immaturity as grounds on which nullity of marriage can be sought. In *Seneviratne v. Premalatha* (SC/APPEAL/211/2012, SC Minutes of 02.05.2016) it was observed that a party can invoke section 607 against his or her spouse whose has entered into the marriage with that party without having his or her former marriage dissolved by an order of Court.

607(1) Any husband or wife may present a plaint to the Family Court within the local limits of the jurisdiction of which he or she (as the case may be) resides, praying that his or her marriage may be declared null and void.

(2) Such decree may be made on any ground which renders the marriage contract between the parties void by the law applicable to Sri Lanka.

Section 608 of the Civil Procedure Code provides for a dissolution of marriage on separation a *mensa et thoro* for a specified period identified in the section. However, it was held in *Tennakoon v. Tennakoon* [1986] 1 Sri LR 90 that the words "either spouse" in section 608(2) of the Civil Procedure Code must be understood as referring only to the innocent spouse for the purpose of the relief of divorce under section 608(2)(a) or

section 608(2)(b) of the Civil Procedure Code. The necessity to prove a matrimonial fault has not been done away with.

> *608(1) application for a separation a mensa et thoro on any ground on which by the law applicable to Sri Lanka such separation may be granted, may be made by either husband or wife by plaint to the Family Court, within the local limits of the jurisdiction of which he or she, as the case may be, resides, and the court, on being satisfied on due trial of the truth of the statements made in such plaint, and that there is no legal ground why the application should not be granted, may decree separation accordingly.*
>
> *(2) Either spouse may-*
>
> > *(a) after the expiry of a period of two years from the entering of a decree of separation under subsection (1) by a Family Court, whether entered before or after the 15th day of December,1977, or*
> >
> > *(b) notwithstanding that no application has been made under subsection (1) but where there has been a separation a mensa et thoro for a period of seven years,*
>
> *apply to the Family Court by way of summary procedure for a decree of dissolution of marriage, and the court may, upon being satisfied that the spouses have not resumed cohabitation in any case referred to in paragraph (a), or upon the proof of the matters stated in an application made under the circumstances referred to in paragraph (b), enter judgment accordingly:*
>
> *Provided that no application under this subsection shall be entertained by the court pending the determination of any appeal*

> *taken from such decree of separation. The provisions of sections 604 and 605 shall apply to such a judgment.*

As seen from the marriage certificate P1, the position of the petitioner seems to be that since she did not hear from her former husband for more than seven years, she contracted the second marriage.

The former husband was alive at the time of the second marriage and at the inquiry before the District Court into the issuance of letters of administration, the former husband gave evidence for the 2nd respondent.

The District Court refused to issue letters of administration to the petitioner (sought on the basis that she is the widow of the deceased as crystallised in the issues), and instead issued the same to the 2nd respondent (as one of the heirs of the deceased).

On appeal, the High Court set aside the order of the District Court and ordered trial *de novo* on the basis that the District Judge failed to consider "*as to whether or not the marriage contracted between the petitioner and the deceased was valid and lawful under and in terms of section 108 of the Evidence Ordinance to be read with section 18 of the Marriage Registration Ordinance.*"

Being dissatisfied with the judgment of the High Court the respondents have appealed to this Court.

Section 107 of the Evidence Ordinance reads as follows:

> *When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.*

Section 108 (as it stood prior to the amendment introduced by Act No.10 of 1988 whereby seven years was reduced to one year) runs as follows:

Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

Sections 107 and 108 are complementary to each other in that the latter is the proviso to the former. Both these sections fall under the chapter "Burden of Proof" in the Evidence Ordinance.

In *Davoodbhoy v. Farook* (1959) 63 NLR 97 it was held that these two sections do not enact a presumption of law or fact but only a rule of evidence as to the burden of proof. Basnayake J. (as he then was) with the agreement of Pulle J. at page 99 states:

It is essential to bear in mind that these two sections do not enact a presumption of law or fact, but enact rules governing the burden of proof like any one of the other rules that precede them. Section 107 enacts the rule and section 108 enacts the proviso to it. In one case it is sufficient to "show" that the person about whom the question has arisen was alive within thirty years, in the other it must be "proved" that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive. These sections regulate the burden of proof in a case in which one party affirms that a person is dead and the other party that the same person is alive, and the question for decision is whether the person is dead or alive.

This was further explained at pages 100-101 in the following manner:

In a case where one party affirms that a person is dead and another that he is alive, if a party produces evidence to the effect that he was alive within thirty years then the person who affirms that he is dead

> *must prove that he is dead; but if the person who affirms that he is dead instead of proving that he is dead leads evidence which proves that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive then the person who affirms that he is alive must prove that he is alive. So that in a case where the question is whether a person is alive or dead and one party affirms that he is dead and the other that he is alive and it is in evidence that he was alive within thirty years the burden that lies on the party that affirms that he is dead by virtue of section 107 to prove that he is dead shifts by operation of section 108 to the party that affirms that he is alive if it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive.*

But E.R.S.R. Coomaraswamy, The Law of Evidence, Vol II, Book I, pages 428-429, is not in favour of this dichotomy between presumption of fact and law on the one hand and burden of proof on the other. He takes the view that such difference is artificial:

> *The fact is that rules as to burden of proof and presumptions are so involved together that it is artificial to separate a given situation and to state that it is a pure rule of the burden of proof and not of a presumption. Every rebuttable presumption in favour of one party necessarily involves a rule as to burden of proof in the other and vice versa.*

Explaining the affinity between sections 107 and 108 of the Evidence Ordinance, the learned author on page 430 states that section 107 creates a presumption of the continuance of life, and section 108 functions as a clause that supplements section 107.

> *Sections 107 and 108 must be read together, because the latter section is a proviso to the earlier. Section 107 creates a legal presumption of continuance of life, if nothing is shown to the contrary. Section 108 is a proviso to section 107, so that if a man has not been heard of for one year [after the amendment in 1988] by those who would naturally have heard of him, had he been alive, the presumption of continuance of life under section 107 ceases, and the burden of proving him to be alive lies on the person asserting it by denying the death.*

It is seen that whereas section 107 is based on the presumption of continuity of life, section 108 is based on the presumption of death.

In *Hamy Vel Muladeniya v. Siyatu* (1945) 46 NLR 95 Jayetileke J. states:

> *Under section 108 of the Evidence Ordinance when a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive the presumption of life ceases, and the burden is shifted to the person who denies the death.*

The High Court concedes that it is common ground that the second marriage was contracted whilst the first marriage was still subsisting, thereby rendering the second marriage null and void under section 18 of the Marriage Registration Ordinance. Nevertheless, the High Court thereafter takes the view that the second marriage can be given validity by proper invocation of section 108 of the Evidence Ordinance, and that the District Court had failed to consider it. This is a misdirection in law.

It is undisputed that under the Marriage Registration Ordinance, during the subsistence of a marriage, a spouse cannot lawfully enter into another marriage, and such subsequent marriage during the subsistence of the former marriage is void. It must also be born in mind that dissolution of marriage by a judgment of a competent Court under section

19(1) of the Marriage Registration Ordinance is necessary only "during the lifetime of the parties". If one party is dead, there is no need for dissolution of marriage by an order of Court. Section 108 of the Evidence Ordinance creates only a presumption of death.

As much as there is a strong affinity between section 107 and 108 of the Evidence Ordinance, there is a strong affinity between section 108 of the Evidence Ordinance and the exception to section 362B of the Penal Code.

Section 362B of the Penal Code provides:

> *Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

The exception to this section states:

> *This section does not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the lime of the subsequent marriage, shall have been continually absent from such person for the space of seven years and shall not have been heard of by such person as being alive within that time:*
>
> *Provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts, as far as the same are within his or her knowledge.*

Pattison v. Kalutara Special Criminal Investigation Bureau (1970) 73 NLR 399 is one case where the exception to section 362B of the Penal Code

was successfully invoked to defeat a criminal charge of bigamy. It was held in this case:

> *Where, in a prosecution for bigamy, the defence of the accused is based on the Exception to section 362B of the Penal Code, namely that the accused who contracted a second marriage did not know that his first wife had been alive at any time during the preceding seven years, the burden is on the prosecution to prove knowledge on the part of the accused that his first wife had been alive when he contracted his second marriage.*

Although there is a close correlation between section 108 of the Evidence Ordinance and the exception to section 362B of the Penal Code, it shall be born in mind that successful invocation of either section 108 of the Evidence Ordinance or the exception to section 362B of the Penal Code does not transform an invalid second marriage into a valid one.

In *Fenton v. Reed* (1809) 4 Johns 52 (N.Y. Sup. Ct.) it was observed:

> *The statute concerning bigamy does not render the second marriage legal, notwithstanding the former husband or wife may have been absent above five years, and not heard of. It only declares that the party who marries again, in consequence of such absence of the former partner, shall be exempted from the operation of the statute, and leaves the question on the validity of the second marriage just where it found it.*

In the case of *Re Josephine Ratnayake* (1921) 23 NLR 191, the wife filed an action seeking a declaration that her husband is dead on the basis that she did not hear from her husband for more than seven years. The District Court dismissed the action. On appeal, De Sampayo J. affirmed the judgment of the District Court and held:

> *This application is entirely misconceived. It is supposed to have been in pursuance of section 108 of the Evidence Ordinance, which is merely laying down a rule of evidence that, if a husband is absent for a certain period without any information as to his whereabouts, for certain purposes his death may be presumed. But nowhere is there any provision laying down the procedure for obtaining a declaration of Court. The only way that the section of the Evidence Ordinance can be availed of is by repelling any charge of bigamy that may be made against her if she marries again. But beyond that that section does not help the appellant.*

In *Hamy Vel Muladeniya v. Siyatu (supra)* it was held that "*Where a person is presumed to be dead in accordance with the provisions of section 108 of the Evidence Ordinance, his property may be divided among his heirs.*"

As was held in *Davoodbhoy v. Farook (supra)* that "*These sections [sections 107 and 108] regulate the burden of proof in a case in which one party affirms that a person is dead and the other party that the same person is alive, and the question for decision is whether the person is dead or alive.*" However, in the instant case there is no issue as to whether the former husband of the petitioner was alive or dead at the time the petitioner contracted the second marriage to the deceased: he was alive.

In the case of *Parkash Chander v. Parmeshwari* (AIR 1987 PH 37) it was observed:

> *The presumption under S. 108 of the Evidence Act arises only when the question is raised in Court as to whether a man is alive or dead and such question is in issue. There is no presumption in this regard unless such a proceeding comes in the Court and an issue in this regard is raised. S.108 is only a rule of evidence and presumption is*

drawn for purposes of reaching at a conclusion on the concerned issue.

In certain jurisdictions, remarriage is legally recognised when one spouse is believed to be deceased or has been absent and unheard of for a period of years, typically ranging from three to seven. In such circumstances, the second marriage is considered to be valid until held void by a Court of competent jurisdiction.

In India, section 13(1)(vii) of the Hindu Marriage Act of 1955 provides that a Hindu marriage can be dissolved by a decree of divorce on the ground that the other party has not been heard of as being alive for a period of seven years or more by those who would naturally have heard of that party had they been alive. Similar provisions are found in section 27(h) of the Special Marriage Act of 1954 in India.

Article 41 of the Family Code of the Philippines declares that a marriage entered into by any individual while a previous marriage is still in effect is considered null and void, unless, before the subsequent marriage, the prior spouse has been absent for four consecutive years, and there exists a well-founded belief that the absent spouse is deceased. However, for the purpose of contracting the subsequent marriage, the present spouse must initiate a summary proceeding, as provided in the Code, to declare the presumptive death of the absentee, without prejudice to the consequences of the absent spouse's reappearance.

In the UK, in terms of sections 1 and 2 of the Presumption of Death Act 2013, where a person is thought to have died, or has not been known to be alive for a period of at least seven years, any person may apply to the High Court for a declaration that the missing person is presumed to be dead. According to section 3(2), a declaration under this Act is effective against all persons and for all purposes, including for the purposes of the

acquisition of an interest in any property, and the ending of a marriage or civil partnership to which the missing person is a party.

There are no similar express provisions found in the Marriage Registration Ordinance or any other statute in Sri Lanka that link the presumption of death to remarriage.

The Tsunami (Special Provisions) Act, No. 16 of 2005 made provisions to issue death certificates where persons resident in identified areas as at 26.12.2004 were found missing for six months from that date. Section 2 of the Act reads as follows:

> *Notwithstanding the provisions of section 108 of the Evidence Ordinance, where any person, who had been resident in an area referred to in the First Schedule to this Act as at December 26, 2004 or was known to have been in or travelling through such area on that date, cannot be found and has not been heard of for six months since that date by those who would normally have heard of such person has such person been alive, and the disappearance is attributable to the Tsunami that occurred on that date, the burden of proving that such person is alive is on the person who affirms it.*

Under our law, the presumption of death is not a ground for dissolution of marriage.

Hence in terms of section 18 of the Marriage Registration Ordinance, the second marriage contracted with the deceased without the former marriage having been dissolved by a decree of divorce from a competent court is void. On the facts and circumstances of this case, section 108 of the Evidence Ordinance has no application, and the High Court was in error when it set aside the District Judge's order on that ground and ordered a retrial in order to consider the application of the original petitioner in light of section 108 of the Evidence Ordinance.

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

1. *Did the High Court err in law when it held that the question of the second marriage could have been decided along with the provisions of section 108 of the Evidence Ordinance despite section 18 of the General Marriages Ordinance is clear on that issue?*
2. *Did the High Court err in law in ignoring section 19(1) of the General Marriages Ordinance?*
3. *Did the High Court err in law by ordering a re-trial?*

I answer the questions of law in the affirmative. I set aside the judgment of the High Court and restore the order of the District Court dated 20.07.2011 and allow the appeal but without costs.

However, the judgment of the District Court is restored subject to the condition that issue No. 11 raised by the respondents need not be decided at this stage of the case. Issue No. 11 is: *"Should the property described in paragraphs 6 and 7 of the statement of objections of the respondents be included in the inventory in this case?"*

In terms of section 539(1) of the Civil Procedure Code, the inventory shall be filed by the person to whom the Court decides to issue the probate or letters of administration within a period of one month from the date of taking the oath as the executor or administrator. When the Court is called upon to decide to whom the probate or letters of administration shall be issued, no time shall be wasted on inquiring into the correctness of the details of the deceased's property included in the original petition. Although it is a requirement under section 528(1)(d) of the Civil Procedure Code that the petitioner shall set out the details of the deceased's property in the petition, this is different from filing the inventory under

section 539(1) of the Civil Procedure Code. Section 539(1) reads as follows:

> *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.*

At this stage, the question to be decided is to whom letters of administration shall be issued and nothing else.

Judge of the Supreme Court

Priyantha Jayawardena, P.C., J.

I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Supreme Court

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

In the matter of an application for Special Leave to Appeal and in terms of Section 31D of the Industrial Dispute Act No 43 of 1950 read with the section 99 (a) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990

SC/APPEAL/183/2017
Labour Tribunal Case No. 01/AD/80/2011
H.C.A.L.T. No. 45/2014
SC (SPL) LA 211/2016

Laththuwahandi Priyani De Silva
Vijitha,
Balapitiya.

NOW AT

No. 420/1, Lansiyawatta Road,
Pathegama,
Balapitiya.

Applicant

Vs.

1. W. T. Ellawala
   Chairman,
   Sinhalese Sports Club
   35, Maitland Place,
   Colombo 07.

2. A. D. H. Samaranayake,

Secretary,
Sinhalese Sports Club,
35, Maitland Place,
Colombo 07.

3. S. Gunawardena,
Treasurer,
Sinhalese Sports Club,
35, Maitland Place,
Colombo 07.

Respondents

AND NOW

1. W.T. Ellawala
Chairman,
Sinhalese Sports Club
35, Maitland Place,
Colombo 07.

2. A. D. H. Samaranayake,
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35, Maitland Place,
Colombo 07.

3. S. Gunawardena,
Treasurer,
Sinhalese Sports Club
35, Maitland Place,
Colombo 07.

Respondents – Appellants

Vs.

Laththuwahandi Priyani De Silva
Vijitha,
Balapitiya.

Applicant – Respondent

AND NOW BETWEEN

Laththuwahandi Priyani De Silva
Vijitha,
Balapitiya.

NOW AT

No. 420/1 Lansiyawatta Road,
Pathegama,
Balapitiya.

Applicant – Respondent –
Appellant

Vs.

4. W. T. Ellawala
   Chairman,
   Sinhalese Sports Club
   35, Maitland Place,
   Colombo 07

5. A. D. H. Samaranayake,
   Secretary,
   Sinhalåese Sports Club,

35, Maitland Place,
Colombo 07.

6. S. Gunawardena,
Treasurer,
Sinhalese Sports Club,
35, Maitland Place,
Colombo 07

Respondents – Appellants – Respondents

Before : Priyantha Jayawardena PC, J
: Yasantha Kodagoda PC, J
: Achala Wengappuli, J

Counsel : Vasantha Gunasekara for the Applicant-Respondent-Appellant

: Shanaka Cooray with Prasan Gunathilake the Respondents-Appellants-Respondents

Argued on : 14th March, 2022.

Decided on : 29th February, 2024

Priyantha Jayawardena PC, J

Facts of the case

The applicant-respondent-appellant (hereinafter referred to as the "appellant"), an employee of the Sinhalese Sports Club, alleged the unlawful termination of her employment. The appellant further stated, *inter alia,* that she joined as a Trainee Clerk on the 12th of July, 1993, and at the time of termination of her service, she was working as a Stores Account Clerk of the canteen.

Moreover, as the employer created a difficult environment to work, she tendered her resignation by letter dated 7th of July, 2011, but later she sent another letter on the 11th of July, 2011, withdrawing her resignation. However, at the request of the employer, the appellant changed the date of the said letter as the 12th of July, 2011. The appellant further stated that her employment was terminated by the letter dated 2nd of August, 2011, and her last drawn salary was Rs. 24,290.

The respondents-appellants-respondents (hereinafter referred to as the "respondents") filed their answer and admitted the date of employment and the salary of the appellant. The respondents further stated that the appellant voluntarily resigned on the 11th of July, 2011 and thereby, she voluntary terminated her services.

Since the termination of services was denied by the respondents, the inquiry commenced with the appellant giving evidence before the Labour Tribunal. At the inquiry before the Labour Tribunal, the appellant stated that after the withdrawal of the letter of resignation, she was called for a domestic inquiry by the letter dated 18th of July, 2011. After the said domestic inquiry, by the letter dated 2nd August, 2011, resignation given by the appellant was accepted. The letter further stated that the appellant's complaint against a member of the Executive Committee of the Club was proved to be a false allegation at the inquiry.

Thereafter, she has filed an application the Labour Tribunal. After the inquiry, the learned President of the Labour Tribunal delivered his Order dated 24th of April, 2014. It was held that the appellant's resignation was not voluntary, and that acceptance of the resignation notice was necessary prior to its withdrawal to render the resignation valid. Thus, it was held that the termination of the services of the appellant by the respondent is unjust and unlawful.

Thus, the Labour Tribunal ordered the employer to pay a three months' salary for each year of service, but in calculation, the service period was taken as eight years. However, the learned President of the Labour Tribunal after noticing the error in the order, corrected it under Regulation 29 of the Industrial Disputes Act 1958 and ordered the respondent to pay a sum of Rs. 1,311,660.

The respondents being aggrieved by the aforesaid order of the Labour Tribunal, referred an appeal to the provincial High Court of the Western Province Holden in Colombo (hereinafter referred to as the "High Court"). After the hearing, the learned judge of the High Court delivered her Order on the 23rd of September, 2016, and held;

"Respondent employee has terminated her employment by voluntary resignation from the services of the Appellants' Club and that was not a termination by the employer"

Accordingly, the Order of the Labour Tribunal was set aside, and an Order was made to give Rs. 100,000 as ex-gratia payment.

Being aggrieved by the said Order of the High Court, the appellant sought Special Leave to Appeal from the Supreme Court and this court granted Leave on the following questions of law;

> *"(b). Did the Honourable High Court Judge err in law when she decided that Regulation 29 of the Industrial Dispute Regulations 1958 is not applicable to Labour tribunal*
>
> *(c). Did the Honourable Judge of the High Court err in law when she deciding that the Appellant terminated her service by tendering voluntary resignation?*
>
> *(e). Did the Honourable High Court Judge misinterpreted and misapply the established legal principles applicable for the resignation of the employment and thereby commit error of law."*

In addition to the above questions of law, the court framed the following question of law;

> *"Whether the compensation awarded by the Labour Tribunal is excessive?"*

Written Submissions on behalf of the appellant

The learned counsel for the appellant submitted that the appellant tendered her resignation due to ill treatment by the superior officers of the respondent club. It was also submitted that she handed over a letter to the Chairman/Secretary of the respondent club stating the injustice that was caused to the appellant by the General Manager. Furthermore, in the said letter, she stated that her salary increment was not granted by the General Manager despite her superior's recommendation of her work as being excellent in the evaluation of her work.

Moreover, it was submitted that by the letter dated 5th of May, 2011, the appellant and another employee of the accounts branch wrote a letter to the Chairman regarding their grievances. It was further submitted that as the appellant did not receive any redress from the management for her grievances, she tendered the resignation letter of 7th July, 2011, stating the reasons for tendering resignation as unfair treatment by the management. However, the appellant withdrew the letter five days prior to the acceptance of the resignation.

Thereafter, the appellant informed the respondent that she tendered her resignation because of the pressure exerted by the restaurant manager who was the head of the division where she was working. It was submitted that the learned President of the Labour Tribunal held that the appellant's club failed to rebut the appellant's evidence by calling the restaurant manager. Further, the respondents did not challenge the appellant's position by cross-examining her on the aforementioned points. Moreover, it was held that the resignation given by the appellant is not voluntary but instead due to pressure exerted on her by the management.

In the circumstances, the learned President of the Labour Tribunal held that the termination was unlawful and unjust and granted compensation to the appellant by the Order dated 24th April, 2014. However, it was submitted that in calculating the amount of compensation, mistakenly 8 years was taken into account instead of the period of service for 18 years. Nevertheless, without delay, the learned President corrected it under Regulation 29 of the Industrial Dispute.

Written Submissions on behalf of the respondent

The learned counsel for the respondent submitted that the appellant tendered her resignation dated 7th July, 2011, giving one month's notice and stated that she will be resigning from service with effect from the 7th of August, 2011. The Labour Tribunal held that as the contract of employment did not have a clause regarding the period of giving a resignation, the acceptance of the resignation tendered by the appellant was necessary.

The counsel further submitted that for the respondent, the appellant having given a valid notice of resignation, was not entitled in law to withdraw the said notice of resignation and it is not necessary to accept her resignation. Furthermore, it was submitted that the learned President of the Labour Tribunal has failed to consider whether acceptance of resignation was required

in law for the resignation to take place. In the circumstances, it was submitted that the learned judge of the Provincial High Court correctly arrived at the finding that the Order of the learned President of the Labour Tribunal had error on the face of the record.

Moreover, the Labour Tribunal proceeded to change the Order purportedly in terms of Regulation 29 of the Industrial Disputes Act. It was submitted that Regulation 29 has no application to a Labour Tribunal exercising jurisdiction under and in terms of section 31 (b) (1) (a) of the Industrial Disputes Act.

Further, it was submitted that the reference to the award or decision to be published in the Gazette makes it abundantly clear that this Regulation does not apply to a Labour Tribunal exercising jurisdiction in terms of section 31 (b) (1) (a) of the Industrial Disputes Act because there is no provision in law for a normal Labour Tribunal order to be published in the Gazette. It is only awards and orders made in arbitrations are published in the Gazette in terms of the Industrial Disputes Act, 1958.

Therefore, it was submitted that the Order of the Labour Tribunal to change its prior Order was made without jurisdiction and was an error of law on the face of the record. It was further submitted that the learned High Court judge of the Provincial High Court Holden in Colombo correctly arrived at the finding that the Labour Tribunal has no jurisdiction to change its own Order after it was delivered. Accordingly, it was submitted to dismiss this appeal.

Did the Honourable High Court Judge err in law when she decided that Regulation 29 of the Industrial Dispute Regulations 1958 is not applicable to Labour Tribunal?

Regulation 29 of Industrial Dispute Regulations, 1958 states;

> *"An **Industrial Court** or an **arbitrator** or a **Labour Tribunal** may, in any awards or decision or order made by such Court, arbitrator or **Tribunal correct any clerical error or mistake due to any oversight.** Where any such correction is made after the date by which the award or decision is published in the Gazette, such correction shall also be published in the Gazette in like manner as the original award or decision."*

[emphasis added]

A careful consideration of the said Regulation shows that it is applicable to the Industrial Courts, arbitrators and Labour Tribunals. The phrase "*where any such correction is made after the date by which the award or decision is published in the Gazette, such correction shall also be published in the Gazette in like manner as the original award or decision"* applies to situations where Industrial Courts, arbitrators or Labour Tribunals exercise jurisdiction with regard to industrial disputes. However, the said Regulation also applies when the Labour Tribunal exercise jurisdiction under section 31 B (1) of the Industrial Dispute Act. Therefore, the said Regulation confers power on the Industrial Court, arbitrator and Labour Tribunal to make corrections to their awards, decisions and Orders.

In any event, any court or Tribunal has inherent jurisdiction to correct any clerical error or mistake done to any oversight. Therefore, the Labour tribunal did not err in correcting the clerical errors in the Order under reference.

Did the Honourable Judge of the High Court err in law when she decided that the appellant terminated her service by tendering voluntary resignation?

The resignation letter of the appellant stated that she tendered her resignation due to unfair treatment in the workplace by the manager, the lack of redress to her complaints, and not being given the due salary increment. The resignation of an employee must be voluntary, and it cannot be tainted by any element of influence by the employer or by a superior officer. The evidence led at the Labour Tribunal shows that her resignation was a result of the ill-treatment she received by her superiors. Hence, the resignation was not given voluntarily. Furthermore, a resignation tendered by an employer is a unilateral termination of contract by the employee. Hence, if tendered under duress, it amounts to constructive termination. Thus, the High Court erred in holding that the appellant terminated her services voluntarily.

Did the Honourable High Court Judge misinterpret and misapply the established legal principles applicable for the resignation of the employment and thereby commit an error of law?

It is pertinent to note that the appellant withdrew the letter of resignation before it was accepted by the respondent club. Thereafter, the respondent club conducted the domestic inquiry and informed the appellant that the respondent club accepted the resignation which was withdrawn by the employee. However, once the resignation is withdrawn, there is no valid resignation that can be accepted.

A similar view was expressed in ***Virendera Chand v. The Thar Anchalic Gramin Bank and Anr (*****1991) LLR 564 (Raj.HC)** which held;

> *"If an employee tenders his resignation during pendency of inquiry which is not accepted by the management but terminated the services of the employee after enquiry on the basis of resignation, such termination will be illegal."*

In the circumstance, the High Court erred in law by allowing the appeal filed by the respondents.

In view of the above, the other question of law is not answered.

Accordingly, appeal is allowed.

The judgment of the High Court dated 23rd of September, 2016 is set aside. The Order of the Labour Tribunal dated 24th of April, 2014 is affirmed.

Judge of the Supreme Court

Yasantha Kodagoda PC, J

I agree

Judge of the Supreme Court

Achala Wengappuli, J

I agree

Judge of the Supreme Court

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

Karunawathi Palith Liyanage,
No. 283, Pasyala,
Meerigama.
Petitioner-Petitioner-Appellant

SC APPEAL NO: SC/APPEAL/190/2011
SC LA NO: SC/LA/188/2010
HCCA NO: WP/HCCA/GAMP/REV/14/2008
DC GAMPAHA NO: 28140/L

Vs.

Ratna Lakshmi Jayakodi (*nee* Yatawara),
"Rajagaha" Balagalla,
Divulapitiya.
Plaintiff-Respondent-Respondent

1. Handunweerage Babynona,
No. 283, Pasyala, Meerigama.
(Deceased)

1A. Palith Liyanage Ariyadasa
(Deceased)

2. Palith Liyanage Ariyadasa,
No. 283, Pasyala, Meerigama.
(Deceased)

2A. Yaspali Liyanage,

2B. Chalinda Palitha Liyanage,
Both of No. 45, Sri Sugathawansa Mawatha, 2nd Division, Maradana, Colombo 10.
Defendant-Respondent-Respondents

Before: Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Kumudini Wickremasinghe
Hon. Justice Mahinda Samayawardhena

Counsel: Manohara De Silva, P.C. with Hirosha Munasinghe for the Petitioner-Petitioner-Appellant.
C.E. De Silva with Thilini Wickremasinghe for the Plaintiff-Respondent-Respondent.

Written Submissions:
By the Petitioner-Petitioner-Appellant on 04.01.2012
By the Plaintiff-Respondent-Respondent on 05.03.2012

Argued on: 30.06.2023

Decided on: 07.03.2024

Samayawardhena, J.

The petitioner-petitioner-appellant (appellant) filed this appeal against the judgment of the High Court of Civil Appeal of Gampaha dated 19.06.2009, whereby the revision application filed by the appellant against the order of the District Court dated 13.09.2007 was dismissed. By that order made after an inquiry, the District Court refused to substitute the appellant in place of the deceased 1st defendant.

The appellant stated in the revision application filed before the High Court that she had duly filed an appeal against the order of the District Court, and that appeal was pending in the same High Court. The appellant filed the revision application primarily to stay the proceedings of the District Court and no other reason was given.

The appellant repeated the said facts even before this Court. Let me reproduce paragraphs 18-20 of the petition dated 17.06.2010 filed by the appellant seeking leave to appeal from this Court.

> *18. At the inquiry, the petitioner's evidence was led and subsequently the parties tendered their written submissions as directed by Court. Thereafter the learned District Judge of Gampaha delivered order dated 13.09.2007 refusing the application of the petitioner to substitute in place of the original 1st defendant and also to vacate the ex parte judgment already entered.*
>
> *19. Being aggrieved by the order dated 13.09.2007, the petitioner duly filed an appeal against the same and the said appeal is still pending before the Provincial High Court of the Western Province holden in Gampaha.*
>
> *20. The petitioner states that as she would suffer grave and irreparable damage if writ is executed and she and her family are evicted from the premises in suit, she filed the above-styled application for revision dated 27.08.2008 in the Provincial High Court of the Western Province holden in Gampaha.*

The revision application was filed nearly one year after the impugned order of the District Court. The reason given in the petition for the delay, namely that the appellant was seriously ill, was not accepted by the High Court. It was noted that despite the alleged serious illness, the appellant

had managed to file the appeal within time. The appellant was guilty of laches when she filed the revision application in the High Court.

Even if the appellant filed the revision application without delay, it is not a good practice to entertain revision applications to stay the proceedings in the District Court while the appeal is admittedly pending in the same court. The law provides for execution of writ pending appeal. If the appellant thinks that she is not bound by the decree, she will have to advise herself on what lawful action she should take.

There is no necessity to go into the merits of the matter in this appeal filed against the dismissal of the revision application.

This court had granted leave to appeal mainly on the question whether the High Court failed to consider that there was no proper substitution in the room of the deceased 1st defendant when the case was taken up for *ex parte* trial against the 1st defendant.

I answer that question in the negative because there was no necessity for the High Court to deal with that matter when the appeal was pending.

I affirm the judgment of the High Court on the basis that there was no justification for entertaining the belated revision application filed against the order of the District Court, especially when the appeal, according to the appellant herself, was pending in the same court.

The appeal is accordingly dismissed but without costs.

Judge of the Supreme Court

E.A.G.R. Amarasekara, 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

Jalathge Rathnawathy
of Alugolla, Hewadeewala.
Plaintiff

SC APPEAL NO: SC/APPEAL/202/2016
SC LA NO: SC/HCCA/LA/345/15
HCCA NO: SP/HCCA/KAG/976/2012(F)
DC KEGALLE NO: 27164/P

Vs.

1. Jayathge Leelawathy
2. Jayathge Somawathy
3. Jayathge Dharmasena

All of Alugolla, Hewadeewala.
Defendants

AND

Jalathge Rathnawathy
of Alugolla, Hewadeewala.
Plaintiff-Appellant

Vs.

1. Jayathge Leelawathy
2. Jayathge Somawathy

3. Jayathge Dharmasena
   All of Alugolla, Hewadeewala.
   Defendant-Respondents

NOW BETWEEN

2. Jayathge Somawathy
3. Jayathge Dharmasena
   Both of Alugolla, Hewadeewala
   2nd and 3rd Defendant-Respondent-Appellants

Vs.

1. Jalathge Rathnawathy
   of Alugolla, Hewadeewala.
   Plaintiff-Appellant-Respondent

2. Jayathge Leelawathy
   of Alugolla, Hewadeewala.
   1st Defendant-Respondent-Respondent

Before: Hon. Justice Vijith K. Malalgoda, P.C.
Hon. Justice Mahinda Samayawardhena
Hon. Justice Arjuna Obeyesekere

Counsel: 2nd and 3rd Defendant-Respondent-Appellants are absent and unrepresented.
Sanjaya Kodituwakku for the Plaintiff-Appellant-Respondent.

Written Submissions:

By the 2nd and 3rd Defendant-Respondent-Appellants on 01.12.2016

By the 1st Defedant-Respondent-Respondents on 06.09.2018

By the Plaintiff-Appellant-Respondent on 06.09.2018

Argued on: 16.06.2023

Decided on: 01.02.2024

Samayawardhena, J.

The plaintiff filed this action in the District Court of Kegalle to partition the land now depicted in the preliminary plan among the plaintiff (7/10 share) and the 1st defendant (3/10 share). According to the plaintiff's pedigree, the 2nd and 3rd defendants have no rights in the corpus. The 2nd defendant is a sister of the plaintiff and the 1st defendant. The 3rd defendant is the husband of the 2nd defendant. The 2nd defendant claimed 1/3 share by inheritance, and the 3rd defendant claimed 2/15 share by deed No. 5395 dated 31.10.1998 marked 2D3.

After trial, the District Court dismissed the plaintiff's action on the basis that the plaintiff has not unfolded a full pedigree. On appeal, the High Court of Civil Appeal of Kegalle set aside the judgment of the District Court and directed the District Judge to enter the Interlocutory Decree in terms of the pedigree of the plaintiff.

The parties are governed by the Kandyan law. The High Court concluded that the 2nd defendant does not get rights from her father since she contracted a *diga* marriage. The High Court further concluded that the 3rd defendant does not get rights from deed No. 5395 because the

transferor of that deed, namely Premaratne, did not have remaining rights to alienate at that time.

Being dissatisfied with that judgment, the 2nd and 3rd defendants preferred this appeal with leave obtained from this Court on the following three questions of law:

(a) Did Premaratne not transfer 1/5 share inherited from his father Jamis to the 1st defendant by deed No. 3167 dated 13.06.1997 (1D1)?
(b) Did Premaratne transfer 1/5 share inherited from his father Jamis to the 3rd defendant by deed No. 5395 dated 31.10.1998 (2D3)?
(c) Is the 3rd defendant entitled to 1/5 of the corpus by deed marked 2D3?

The original owner of the land was Jamis. According to the plaintiff's pedigree, upon the death of Jamis on 05.11.1970, his rights devolved 1/2 on the plaintiff and 1/2 on Premaratne. There is currently no dispute over this, and the 2nd defendant does not assert 1/3 share by inheritance.

Premaratne executed the following deeds after the death of his father, Jamis. Consequently, whatever he transferred has to be from his ½ share of the corpus, not from the entire corpus. He cannot transfer what he does not have.

By deed No. 5928 dated 16.06.1994 marked P5, Premaratne transferred 1/5 of his 1/2 share to the plaintiff. Accordingly, the plaintiff became entitled to 1/2 + 1/10 = 6/10 share of the corpus.

By deed No. 3167 dated 13.06.1997 marked 1D1, Premaratne transferred 1/5 of his 1/2 share to the 1st defendant. Thereafter, by deed No. 3869 dated 06.06.1998 marked 1D2, Premaratne transferred another 1/5 of

his 1/2 share to the 1st defendant. Accordingly, the 1st defendant became entitled to 2/10 share.

By deed No. 5395 dated 31.10.1998 marked 2D3, Premaratne transferred all his remaining shares to the 3rd defendant. Accordingly, the 3rd defendant became entitled to 2/10 share of the corpus.

The share allocation calculated by the High Court is not correct. The mistake made by the learned High Court Judge was that, although he first stated that Premaratne had to transfer rights from his 1/2 share, he later calculated shares on the basis that Premaratne transferred those rights from the entire corpus.

The judgments of the District Court and the High Court are set aside and the appeal of the 3rd defendant is allowed.

The District Judge will amend the Interlocutory Decree accordingly and take follow up steps in accordance with the partition law.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., 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

1. Aqua World Private Limited,
   Suduwella New Road,
   Wennappuwa.

2. Kuranage Marian Stella Rose
   Perera,
   Suduwella New Road,
   Wennappuwa.
   Plaintiffs

SC APPEAL NO: SC/APPEAL/219/2016
CHC CASE NO: HC/CIVIL/120/2014/MR

Vs.

1. DFCC Bank,
   No. 73/5, Galle Road, Colombo 03.

2. Navinda Samarawickrama
3. Anuja Samarawickrama
   (Partners of Shockman and
   Samarawickrama Auctioneer)
   290, Havelock Road, Colombo 05.
   Defendants

AND BETWEEN

DFCC Bank PLC,
No. 73/5, Galle Road, Colombo 03.
1st Defendant-Appellant

Vs.

1. Aqua World Private Limited,
   Suduwella New Road,
   Wennappuwa.

2. Kuranage Marian Stella Rose Perera,
   Suduwella New Road,
   Wennappuwa.
   Plaintiff-Respondents

3. Navinda Samarawickrama
4. Anuja Samarawickrama
   (Partners of Shockman and Samarawickrama Auctioneer) of
   290, Havelock Road, Colombo 05.
   Defendant-Respondents

Before: Hon. Justice P. Padman Surasena
Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Mahinda Samayawardhena

Counsel: Chandaka Jayasundara, P.C. with Milinda Jayatilaka for the 1st Defendant-Appellant.
Widura Ranawaka for the Plaintiff-Respondents.

Argued on: 19.10.2023

Written Submissions:

By the Plaintiff-Respondents on 02.05.2017 and 10.11.2023

By the 1st Defendant-Appellant on 07.04.2017 and 08.12.2023

Decided on: 07.03.2024

Samayawardhena, J.

The plaintiff filed this action in the Commercial High Court seeking a declaration that the resolution passed by the board of directors of the 1st defendant Bank dated 29.05.2013 to sell the mortgaged property by *parate* execution in terms of section 4 of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, as amended, is unlawful and therefore a nullity. Pending determination of the action, the court issued an interim injunction preventing the Bank from proceeding with the auction. The Bank is before this court against the said order.

Although the resolution had been passed to recover a sum of Rs. 5,443,787/47 together with the interest, the plaintiff by reference to documents issued by the Bank marked P3 and P4 has pointed out that, at the time the resolution was passed, the balance of the principal amount borrowed was less than Rs. five million–to be exact Rs. 4,024,582/37. The Bank does not dispute this fact before this court.

The contention of learned counsel for the plaintiff is, at the time of default, if the balance of the principal amount borrowed was less than Rs. five million, the Bank cannot resort to *parate* execution.

Admittedly, the principal amount borrowed was Rs. nine million. It is the contention of learned President's Counsel for the Bank that the Bank can

resort to *parate* execution, if the principal amount borrowed is more than Rs. five million.

The short matter to be decided by this court is which argument should prevail.

This court in *Nanayakkara v. Hatton National Bank PLC* [2017] BLR 95 held that the argument of learned counsel for the plaintiff should prevail. However, learned President's Counsel for the Bank submits that it does not represent the correct position of the law. I regret my inability to agree with learned President's Counsel for the Bank.

Section 5A was introduced to the principal Act, No. 4 of 1990, by Act No. 1 of 2011. Section 5A was further amended by Act No. 19 of 2011. Section 5A(1), as presently constituted, reads as follows:

> *5A(1) No action shall be initiated in terms of section 3 of the principal enactment for the recovery of any loan in respect of which default is made, nor shall any steps be taken in terms of section 4 or section 5 of the aforesaid Act, where the principal amount borrowed of such loan is less than rupees five million:*
>
> *Provided however, at the time of default when calculating the principal amount borrowed due and owing to the Bank on the loan granted to such defaulter, the interest accrued on such loan and any penalty imposed thereon, shall not be taken into consideration.*

Learned President's Counsel for the Bank relies on section 5A(1) to contend that, when the principal amount borrowed is more than Rs. five million, as in this case, the Bank can resort to *parate* execution. He argues, in such circumstances, the proviso to section 5A(1) has no applicability. He further argues that the proviso is applicable in calculating the principal amount borrowed when a borrower has obtained

multiple facilities secured by a mortgage. This convoluted argument is against the plain meaning of the proviso to section 5A(1).

For the purpose of section 5A, a Bank is not permitted to aggregate multiple loan facilities, all secured by the same mortgage, in order to surpass the threshold of Rs. five million. The principal amount of each loan facility should exceed Rs. five million.

The proviso to section 5A(1) needs no interpretation; it is self-explanatory. It states (a) at the time of default (b) when calculating the principal amount borrowed due and owing to the Bank (c) on the loan granted to such defaulter, (d) the interest accrued on such loan and any penalty imposed thereon, shall not be taken into consideration.

The calculation has to be done at the point of default, and at that point, the principal amount borrowed due and owing to the Bank on the loan granted, should exceed Rs. five million.

Learned counsel for both parties restricted the argument to the following question of law:

> *When the capital to be recovered is less than Rs. five million as at the date of resolution, can the Bank resort to parate execution?*

I answer this question in the negative.

The order of the Commercial High Court dated 19.11.2014 is affirmed and the appeal is dismissed with costs.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

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

I agree.

Judge of the Supreme Court

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

SC/APPEAL/225/2014
SC/HCCA/LA/169/2013
HCCA/Kandy/24/2011(F)
DC MATALE 5632/L

Mohamadu Abu Sali
Son of Adapelegedara Mohamed
Hasim Lebbe,
25/2, Medillethanna, Ankumbura
Plaintiff

Vs.

1. Ummu Kaldun daughter of
Mohomed Illas,
139, Kurunagala Road, Galewala
2. M.I.M. Falulla
13, Kalawewa Road, Galewela

Defendants

AND BETWEEN

M.I.M. Falulla
13, Kalawewa Road, Galewela
2nd Defendant-Appellant

Vs.

Mohamadu Abu Sali
Son of Adapelegedara Mohamed
Hasim Lebbe

25/2, Medillethanna, Ankumbura
Plaintiff-Respondent

Ummu Kaldun
Daughter of Mohomed Illas,
139, Kurunagala Road, Galewala
1st Defendant-Respondent

AND NOW BETWEEN

Mohamadu Abu Sali
Son of Adapelegedara Mohamed
Hasim Lebbe,
25/2, Medillethanna, Ankumbura
Plaintiff-Respondent-Appellant

Vs.

1. Ummu Kaldun
Daughter of Mohomed Illas,
139, Kurunagala Road, Galewala
And now
M.F.M. Younis Stores,
64/A, 6/2, Waththagama Road,
Madawala
1st Defendant-Respondent-Respondent

M.I.M. Falulla
13, Kalawewa Road, Galewala
2nd Defendant-Appellant-Respondent

Before: Hon. P. Padman Surasena, J.
Hon. Mahinda Samayawardhena, J.
Hon. K. Priyantha Fernando, J.

Counsel: Nuwan Bopage with R.D. Shariff for the Plaintiff-Respondent-Appellant.
Hejaaz Hizbullah with Piyumi Seneviratne for the 2nd Defendant-Appellant-Respondent.

Written Submissions:

By the Appellant on 04.08.2014 and 02.06.2023
By the Respondent on 03.12.2014 and 26.09.2023

Argued on: 04.05.2023

Decided on: 30.01.2024

Samayawardhena, J.

Background

The plaintiff filed this action in the District Court of Matale on 22.05.2002 on the basis that he leased out premises No. 13, Kalawewa Road, Galewela, morefully described in the schedule to the plaint, to the 1st defendant by lease agreement marked P2 dated 05.09.1988 for a period of four years from 01.09.1988 to 01.09.1992 subject to the terms and conditions stated therein but the 1st defendant together with her brother, the 2nd defendant, continues to be in possession without yielding up possession of the premises to the plaintiff. The plaintiff sought a declaration of title to the said premises, ejectment of the two defendants therefrom and damages.

The 1st defendant in the answer admitted that she was the lessee of the premises by P2 but stated that she was never given possession of the premises. She prayed for an order directing the plaintiff to release the refundable deposit of Rs. 100,000 deposited with the plaintiff at the time of the execution of the said lease agreement. The 1st defendant did not in my view contest the plaintiff's case in all three Courts. The 1st defendant did not give evidence, nor did she call any witnesses despite the plaintiff giving affirmative evidence that possession of the premises was handed over to the 1st defendant in the presence of the 2nd defendant and the defendants' father, Illiyas, at the time of the execution of P2. Illiyas is also a witness to the lease agreement. As the learned District Judge *inter alia* has stated in the judgment, in the year 1988, a sum of Rs. 100,000 is a substantial amount and if possession was not handed over to the 1st defendant, she would not have waited until 2003 to recover that money. There is not even a police complaint alleging that possession was not handed over to her upon the execution of the lease agreement. Conversely, the plaintiff made a police complaint dated 18.09.1992 marked P14 (17 days after the effluxion of the lease agreement) stating that the defendants are not vacating the premises.

The 1st defendant is the elder sister of the 2nd defendant. The 2nd defendant is also in possession of the premises. It is the complaint of the plaintiff that the 1st defendant sublet or allowed the 2nd defendant also to conduct the business in the premises in violation of clause 5 of the lease agreement. It is the 2nd defendant who contested the plaintiff's case. The 2nd defendant took up the position in the answer that he became a co-owner of the land by purchasing 1/45 share of the land including premises No. 13 from another person by deed marked 2V1 dated 16.08.1990 and therefore without first filing a partition action to end the co-ownership, the plaintiff cannot maintain this action.

After trial, the learned District Judge entered judgment for the plaintiff except the relief for declaration of title.

On appeal, the High Court of Civil Appeal set aside the judgment of the District Court and dismissed the plaintiff's action on the basis that the plaintiff filed the action as the sole owner of the property but the 2nd defendant is a co-owner of the property and therefore the 2nd defendant cannot be ejected from the property. In addition, the High Court concluded that the plaintiff's cause of action is prescribed since the plaintiff filed the action 6 years after the termination of the lease agreement.

This Court granted leave to appeal against the judgment of the High Court of Civil Appeal mainly on three questions of law:

(a) Is the judgment of the High Court of Civil Appeal contrary to law, more specifically, section 116 of the Evidence Ordinance?
(b) Did the High Court of Civil Appeal misdirect itself in law by failing to understand the real nature of the dispute presented for adjudication?
(c) Did the High Court of Civil Appeal err in law in holding that the cause of action of the plaintiff is prescribed in law?

Can the plaintiff's action be dismissed on the basis that the 2nd defendant is a co-owner of the land?

The learned District Judge accepted the evidence of the plaintiff that at the time of the execution of the lease agreement, the possession of the premises was handed over to the 1st defendant in the presence of the 2nd defendant who is the brother of the 1st defendant and their father. The High Court does not dispute this finding of fact by the trial Judge.

The 2nd defendant came into possession of the premises under the 1st defendant lessee, his elder sister. The 2nd defendant does not have independent survival in the premises. He will have to shelter behind the protection of her sister. Every subordinate interest must perish with the superior interest on which it is dependent.

What does section 116 of the Evidence Ordinance enact?

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

The lessee cannot question the lessor's right, title or interest in the premises for the latter to lease it out to him. The reason being that a person need not necessarily be the owner of the premises to enter into such an agreement with another. Even in the absence of ownership, these agreements establish valid legal relationships such as landlord and tenant, lessor and lessee, licensor and licensee between the parties, although they may not be binding on the actual owner. (Professor George Wille, *Landlord and Tenant in South Africa*, 4th Edition, page 20; Dr. H.W. Tambiah, Landlord and Tenant in Ceylon, page 48; *Imbuldeniya v. De Silva* [1987] 1 Sri LR 367 at 372, 380, *Gunasekera v. Jinadasa* [1996] 2 Sri LR 115 at 120; *Pinona v. Dewanarayana* [2004] 2 Sri LR 11)

In *Ruberu v. Wijesooriya* [1998] 1 Sri LR 58 at 60, Gunawardana J. held:

> *Whether it is a licensee or a lessee, the question of title is foreign to a suit in ejectment against either. The licensee (the defendant-respondent) obtaining possession is deemed to obtain it upon the*

> *terms that he will not dispute the title of him, i.e. the plaintiff-appellant without whose permission, he (the defendant-respondent) would not have got it. The effect of the operation of section 116 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must, first, quit the land. The fact that the licensee or the lessee obtained possession from the plaintiff-appellant is perforce an admission of the fact that the title resides in the plaintiff. No question of title can possibly arise on the pleadings in this case, because, as the defendant-respondent has stated in his answer that he is a lessee under the plaintiff-appellant, he is estopped from denying the title of the plaintiff-appellant. It is an inflexible rule of law that no lessee or licensee will ever be permitted either to question the title of the person who gave him the lease or the licence or the permission to occupy or possess the land or to set up want of title in that person, i.e. of the person who gave the licence or the lease. That being so, it is superfluous, in this action, framed as it is on the basis that the defendant-respondent is a licensee, to seek a declaration of title.*

In the case of *Reginald Fernando v. Pubilinahamy* [2005] 1 Sri LR 31 the Supreme Court declared:

> *Where the plaintiff (licensor) established that the defendant was a licensee, the plaintiff is entitled to take steps for ejectment of the defendant whether or not the plaintiff was the owner of the land.*

Gunasinghe v. Samarasundara [2004] 3 Sri LR 28 and *Dharmasiri v. Wickrematunga* [2002] 2 Sri LR 218 are also cases that share the same view.

The 2nd defendant cannot defeat the plaintiff's action on the basis that the plaintiff does not have absolute title to the premises No. 13. The

plaintiff need not prove title to the land for the ejectment of the defendant. The title is presumed to be with the plaintiff. Once the Court decides that the defendant is a lessee or licensee of the plaintiff, whether the plaintiff is the owner of the entire premises or part of it or has no title at all to the premises is irrelevant.

The High Court misdirected itself about the whole case. The High Court did not refer to any of these legal principles. The High Court did not understand the case presented by the plaintiff before the District Court. It decided the appeal on the basis that the 2nd defendant is a co-owner of the land and therefore he cannot be ejected from the premises in suit by the plaintiff who is also a co-owner. The High Court concluded:

> *On the other hand it is significant to note that the Plaintiff has come before court alleging that the 2nd Defendant is in unlawful possession and it seems that no contractual relationship whatsoever between the Plaintiff and the 2nd Defendant. The learned counsel for the Plaintiff contended that the 2nd Defendant should have surrendered the possession of the premises in suit and litigated before a competent court thereafter. However, as discussed earlier the 2nd Defendant cannot be treated as a lessee of the Plaintiff in eyes of law and he claimed to be another co-owner of the property. It is to be born in mind that the Plaintiff is evidently a co-owner of the property and he is not entitled to have a declaration of title as prayed for due to the reasons already discussed. Therefore it is my opinion that the learned District Judge erred in concluding that the Plaintiff is entitled to eject the 2nd Defendant who claimed to be another co-owner of the property in suit.*

As I have explained below, the plaintiff did not file the action as the owner or a co-owner of the premises. In any event, the 2nd defendant did not prove that he is a co-owner of the land. He tendered a deed marked 2V1

alleged to have been executed on 16.08.1990, which is during the operation of the lease agreement. It is not even a photocopy of the original deed. It is not a registered deed at the Land Registry. By way of issues, the position taken up by the 2nd defendant was not that he is a co-owner of the land but that he is the owner of premises No. 13 by deed 2V1 (vide issue No. 26).

The plaintiff's action is neither a *rei vindicatio* nor a declaration of title, but rather, an action for ejectment

The plaintiff's action is not a *rei vindicatio* action. Although the plaintiff sought a declaration of title to the premises in suit in addition to the ejectment of the defendants, what the plaintiff filed was an action for ejectment based on the violation of the lease agreement. In an ejectment action, the plaintiff must show a present right to possession of the property withheld by the defendant. In cases where a plaintiff files an action for ejectment on a breach of agreement, as in this instance, there is no legal requirement to seek a declaration of title to the premises in suit, although it is done as a matter of practice. If a declaration of title is sought in such action, the Court can grant that relief against the defendant not because the plaintiff has proved title to the premises but because the defendant is debarred from disputing the plaintiff's title by operation of law. This was lucidly explained by Gratiaen J. in *Pathirana v. Jayasundara* (1955) 58 NLR 169 at 172-173:

> *In a rei vindicatio action proper the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation. "The plaintiff's ownership of the thing is of the very essence of the action". Maasdorp's Institutes (7th Ed.) Vol. 2, 96.*

The scope of an action by a lessor against an overholding lessee for restoration and ejectment, however, is different. Privity of contract (whether it be by original agreement or by attornment) is the foundation of the right to relief and issues as to title are irrelevant to the proceedings. Indeed, a lessee who has entered into occupation is precluded from disputing his lessor's title until he has first restored the property in fulfilment of his contractual obligation. "The lessee (conductor) cannot plead the exceptio dominii, although he may be able easily to prove his own ownership, but he must by all means first surrender his possession and then litigate as to proprietorship…" Voet 19.2.32.

Both these forms of action referred to are no doubt designed to secure the same primary relief, namely, the recovery of property. But the cause of action in one case is the violation of the plaintiff's rights of ownership, in the other it is the breach of the lessee's contractual obligation.

A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner.

Hence the High Court was wrong to have looked at the appeal on the basis that "*the plaintiff has filed this action based on his title and no more.*" The nature of the plaintiff's action is clear by the following observation made by the learned High Court Judge himself in the impugned judgement: "*A perusal of the plaint it is clear that albeit the present action is in the nature of a declaration of title no chain of title was set out in the*

plaint other than simply referring to a single title deed upon which he said to have derived title to the premises in suit."

Can a defendant who enters into a land in a subordinate character claim title to the land in the same action?

According to Roman Dutch Law principles, a defendant who enters into a land in a subordinate character such as a lessee, licensee, tenant, mortgagee etc. cannot claim ownership to the land in the same action. To assert ownership, he must first quit the land and then fight for his rights.

Voet 19.2.32 as translated in Selective Voet's commentary on the Pandects Vol 3, Percival Gane tr, Butterworth & Co. (Africa) Ltd (1956) 447 states:

> *Lessee cannot dispute lessor's title, tho' third party can. Nor can the setting up of an exception of ownership by the lessee stay this restoration of the property leased, even though perhaps the proof of ownership would be easy for the lessee. He ought in every event to give back the possession first, and then litigate about the proprietorship.*

In *Pathirana v. Jayasundara* (1955) 58 NLR 169 at 173, Gratiaen J. endorsed this view.

Maasdorp's Institutes of South African Law, Vol III (C.G. Hall ed, 8th edn, Juta and Co. 1970) 185 states:

> *A lessee, as already stated, is not entitled to dispute his landlord's title, and consequently he cannot refuse to give up possession of the property at the termination of his lease on the ground that he is himself the rightful owner of it. His duty in such a case is first to restore the property to the lessor and then to bring an action for a declaration of rights.*

In *Alvar Pillai v. Karuppan* (1899) 4 NLR 321, the plaintiff sued the defendant to recover possession of the entire land on the basis that the term of lease had expired. The defendant refused to give up possession of the whole land on the basis that he was the tenant under the plaintiff only for a half of the said land. He set up a title under another person to the other half. Although the defendant was initially placed in possession by the plaintiff on the whole land, the District Judge entered judgment for the plaintiff only for his half share. On appeal, Bonser C.J. stated at 322:

> *Now, it appears that the plaintiff can only prove title to a half of the land. It is not necessary for the purposes of this case to state the devolution of the title, for even though the ownership of one-half of this land were in the defendant himself, it would seem that by our law, having been let into possession of the whole by the plaintiff, it is not open to him to refuse to give up possession to his lessor at the expiration of his lease. He must first give up possession, and then it will be open to him to litigate about the ownership (see Voet XIX. 2. 32).*

In *Mary Beatrice v. Seneviratne* [1997] 1 Sri LR 197 the Court espoused a similar viewpoint.

In the Supreme Court case of *Wimala Perera v. Kalyani Sriyalatha* [2011] 1 Sri LR 182 it was held:

> *A lessee is not entitled to dispute his landlord's title by refusing to give up possession of the property at the termination of his lease on the ground that he acquired certain rights to the property subsequent to him becoming the lessee and during the period of tenancy. He must first give up possession and then litigate about the ownership he alleges.*

In *Bandara v. Piyasena* (1974) 77 NLR 102 where facts were similar to the facts of the instant appeal, the Supreme Court held as follows:

> *Learned Counsel for the appellant submits that the learned District Judge has clearly held that the house in the premises in suit was the house taken by the defendant on the lease bond P4 of 5.12.1960. The question does arise as to whether the plaintiff can maintain this action for ejectment of the defendant. The defendant has sought to resist the claim of the plaintiff on the footing of certain interests in this land which he has acquired on a deed of 10.5.1962 during the period of the lease. The District Judge observes that as the defendant is a co-owner of this land, the plaintiff is not entitled to maintain this action against the defendant for a declaration of title to a building put up by him in the common property.*
>
> *Dr. Wickremesinghe has drawn our attention to Maasdorp Book III page 216, where he observes that a lessee is not entitled to dispute his landlord's title and consequently he cannot refuse to give up possession of the property at the termination of his lease on the ground that he is himself the rightful owner of the said property. His duty in such a case is first to restore the property to the lessor and then litigate with him as to the ownership. (See also Voet 19 Tit. 2 Section 32) where it has been set out that the setting up of any defence of ownership of the lessee cannot stay the restoration of the property leased, even though, perhaps, the proof of ownership cannot be easy for the lessee. He ought in every event to give back possession first and then litigate about the proprietorship.*
>
> *In the light of these principles which are not questioned by Mr. Amerasinghe, learned Counsel for the respondent, we are of the view that there is a merit in the submissions made by Dr. Wickremesinghe that the District Judge was in error in holding that*

> *the plaintiff cannot maintain this action against the defendant, since the defendant had acquired certain rights on 10.5.1962 subsequent to his becoming a lessee and during the period of the lease.*
>
> *We would accordingly enter judgment for the plaintiff as prayed for. The plaintiff shall be entitled to the costs of action and of this appeal.*

The High Court states "*the 2nd defendant cannot be treated as a lessee of the plaintiff in the eyes of the law and he claimed to be another co-owner of the property.*" I accept that the 2nd defendant cannot be treated as a lessee of the plaintiff. But as I stated previously the 2nd defendant comes under the original lessee, the 1st defendant. With the eviction of the 1st defendant, her subordinates, agents, servants etc. should all leave. The normal rule is that the branch falls with the tree; ending of the 1st defendant's standing in the premises would also have the effect of ending that of her subordinates. The 2nd defendant cannot create a purported ownership or co-ownership during the subsistence of the lease agreement and thwart the action of the plaintiff.

For the sake of completeness, it is worth noting that if an action is filed for ejectment against such defendant who originally entered into possession in a subordinate character, and such defendant claims prescriptive title to the property (which is an arduous task) by stating that he changed the character of possession from subordinate to adverse by an overt act (as the starting point of adverse possession) and continued such adverse possession for over 10 years as required by section 3 of the Prescription Ordinance, the rigidity of the said principle can be relaxed. In such circumstances, the defendant is not compelled to surrender possession as a prerequisite for establishing his prescriptive title.

Professor G.L. Peiris in his book *Law of Property in Sri Lanka*, Vol I, (2nd edn, 1983) 112, citing *inter alia Angohamy v. Appoo* (Morgan's Digest 281), *Government Agent, Western Province v. Perera* (1908) 11 NLR 337, and *Alwis v. Perera* (1919) 21 NLR 321 states:

> *The principle that an occupation which began in a dependent or subordinate capacity can be converted into "adverse possession" by an overt act or a series of acts indicative of a challenge to the owner's title, is clearly deducible from the decided cases.*

The presumption is that a person who commences his possession in a subordinate character continues such possession in that character. To demonstrate a shift from one character to another, cogent and affirmative evidence is required.

In *Ran Naide v. Punchi Banda* (1930) 31 NLR 478, Jayawardene A.J. observed:

> *Where a person who has obtained possession of a land of another in a subordinate character, as for example as a tenant or mortgagee, seeks to utilize that possession as the foundation of a title by prescription, he must show that by some overt act known to the person under whom he possesses he has got rid of that subordinate possession and commenced to use and occupy the property ut dominus (Government Agent v. Ismail Lebbe (1908) 2 Weer. 29). It is for him to show that his quasi-fiduciary position was changed by some overt act of possession. This view was adopted by the Privy Council in Naguda Marikar v. Mohamadu (1903) 7 N.L.R. 91) and also by the Supreme Court in Orloff v. Grebe (1907) 10 N.L.R. 183).*

In *Seeman v. David* [2000] 3 Sri LR 23 at 26, Weerasuriya J. stated:

> *It is well settled law that a person who entered property in a subordinate character cannot claim prescriptive rights till he changes his character by an overt act. He is not entitled to do so by forming a secret intention unaccompanied by an act of ouster. The proof of adverse possession is a condition precedent to the claim for prescriptive rights.*

The same conclusion was reached in *Thillekeratne v. Bastian* (1918) 21 NLR 12 at 19 and *Mitrapala v. Tikonis Singho* [2005] 1 Sri LR 206 at 211-212.

In the case of *De Soysa v. Fonseka* (1957) 58 NLR 501 at 502, Basnayake C.J. held:

> *There is no evidence that the user which commenced with the leave and licence of the owner of No. 18 was at any time converted to an adverse user. When a user commences with leave and licence the presumption is that its continuance rests on the permission originally granted. Clear and unmistakable evidence of the commencement of an adverse user thereafter for the prescribed period is necessary to entitle the claimant to a decree in his favour. There is no such evidence in the instant case.*

In the Privy Council case of *Siyaneris v. Udenis de Silva* (1951) 52 NLR 289, it was held that "*If a person goes into possession of land as an agent for another, prescription does not begin to run until he has made it manifest that he is holding adversely to his principal.*"

In *Naguda Marikar v. Mohammadu* (1898) 7 NLR 91, the Privy Council held that in the absence of any evidence to show that the plaintiff had got rid of his character of agent, he was not entitled to the benefit of section 3 of the Prescription Ordinance.

In the case of *Navaratne v. Jayatunge* (1943) 44 NLR 517, Howard C.J. remarked:

> *The defendant entered into possession of the lands in dispute with the consent and the permission of the owner. Being a licensee, she cannot get rid of this character unless she does some overt act showing an intention to possess adversely.*

In the more recent case of *Ameen and Another v. Ammavasi Ramu* (SC/APPEAL/232/2017, SC Minutes of 22.01.2019), one of the questions to be decided was whether the defendant, who was a licensee, was entitled to put forward a plea of prescription. De Abrew A.C.J. stated:

> *When a person starts possessing an immovable property with leave and licence of the owner, the presumption is that he continues to possess the immovable property on the permission originally granted and such a person or his agents or heirs cannot claim prescriptive title against the owner or his heirs on the basis of the period he possessed the property.*

Can a plea of prescription be raised for the first time on appeal?

The defendants in the answers did not take up the position that they have acquired prescriptive title to the premises or that the cause of action of the plaintiff is prescribed. Nor did they raise an issue to that effect. However, on appeal before the High Court, counsel for the 2nd defendant appears to have taken up the position that the plaintiff's cause of action is prescribed. Although the judgment of the High Court in this regard is not clear, it is clear that the High Court has accepted the argument on prescription as another ground to allow the appeal. The High Court holds:

> *A simple reading of the plaint makes it clear that the Plaintiff has filed this action based on his title and no more. In fact it is alleged*

> *that the 1st Defendant is liable to be ejected as the lease agreement has expired already but it seems as pointed out by the learned counsel for the 2nd Defendant that if there was such cause of action arose on such agreement it is prescribed as the present action was filed in 2002 namely after 06 years. I am of the view that in the absence of declaration of title in favour of the Plaintiff is not entitled act upon such cause of action already prescribed.*

Prescription can take the form of acquisitive prescription, serving as a mode of acquiring title, or extinctive prescription, acting as a defence or bar to prosecution. The plea of prescription to be sustained in law must be taken up in the pleadings. It cannot be raised as an issue at the trial without expressly pleaded in the answer, unless the plaintiff consents to it. It cannot be raised as an issue while the trial is in progress. Needless to say, it cannot be taken up for the first time in appeal.

The Prescription Ordinance only limits the time within which an action may be instituted but it does not prohibit an action being instituted outside the stipulated time limit. If the objection is not raised by the opposite party in the pleadings, the opposite party is deemed to have waived it and acquiesced in the action being tried on the merits.

The judge cannot take up the plea of prescription *ex mero motu* because a party can waive such objection. *Chitty on Contract*, Vol I, 33rd edn, para 28-108 states "*A party is not bound to rely on limitation as a defence if he does not wish to do so. In general, the court will not raise the point suo officio even if it appears from the face of the pleading that the relevant period of limitation has expired.*" *Chitty* at para 28-127 states "*Limitation is a procedural matter, and not one of substance".*

In *Juanis Appuhamy v. Juan Silva* (1908) 11 NLR 157, Hutchnson C.J. and Wood Renton J. (later C.J.) state that "*it is competent for a party to waive a claim by prescription.*"

It is not obnoxious to law or public policy for parties to agree not to plead prescription (*Hatton National Bank Ltd v. Helenluc Garments Ltd* [1999] 2 Sri LR 365). *Chitty* (*ibid*) dealing with the English Law states at para 28-109 "*An express or implied agreement not to plead the statute, whether made before or after the limitation period has expired, is valid if supported by consideration (or made by deed) and will be given effect to by the Court.*" Prof. C.G. Weeramantry, *The Law of Contracts*, Vol II, para 844, states: "*It is not contrary to public policy for parties to enter into an agreement not to plead limitation. Such an agreement is valid and enforceable in English Law if supported by consideration, whether it be made before or after the limitation period has expired. The same observation holds good for our law, except that such an agreement need not be supported by consideration.*"

In *Brampy Appuhamy v. Gunasekere* (1948) 50 NLR 253 at 255 Basnayake J. (later C.J.) held:

> *An attempt was made to argue that the defendant's claim was barred by the Prescription Ordinance (Cap. 55). The plea is not taken in the plaintiff's replication. There is no issue on the point, nor is there any evidence touching it. The plaintiff was represented by counsel throughout the trial. In these circumstances the plaintiff is not entitled to raise the question at this stage. It is settled law that when, as in the case of sections 5, 6, 7, 8, 9, 10 and 11 of the Prescription Ordinance, the effect of the statute is merely to limit the time in which an action may be brought and not to extinguish the right, the court will not take the statute into account unless it is specially pleaded by way of defence.*

In *Gnananathan v. Premawardena* [1999] 3 Sri LR 301, the defence taken in issue Nos. 7-9 was based on section 10 of the Prescription Ordinance. These issues on prescription were raised after the commencement of the trial. On appeal, the Court of Appeal took the view that the District Judge should not have accepted those issues as the defendant did not plead such defence in the answer. Justice Weerasekera at 309-310 states:

> *Presumably, the defence taken in the issue is based on section 10 of the Prescription Ordinance. The acts of nuisance complained of are thus sought to be shown to have taken place long prior to the 3-year period. To that the plaintiff-appellant's answer is that the application of the defendant-respondent to the National Housing Department for the premises to purchase was finally concluded only 2 months before the institution of the action.*
>
> *Be that as it may the position in law is quite clear and settled. In the case of Brampy Appuhamy v. Gunasekera 50 NLR 253 Basnayake J. held: "Where the effect of the Prescription Ordinance is merely to limit the time within which an action may be brought, the Court will not take the statute into account unless it is expressly pleaded by way of defence."*
>
> *It is, therefore, settled law and that for salutary reasons lest all the basic rules of law particularly that of the rule of audi alteram partem that if a party to an action intends to raise the plea of prescription it is obligatory on his part to plead that in his pleadings. I say salutary because reason, justice and fair play demands that the opposing party be given an opportunity of making such a plea and that party or no party should not be taken unawares of a defence taken that the action is barred by lapse of time.*

> *In this action the answer did not state that the cause of action was prescribed in law. For the first time this defence was permitted after the commencement of the evidence. A practice which in my view is both repugnant to law, reasonableness and fair play and from which judges should desist. In any event the defendant-respondent has denied all the acts of nuisance acts pleaded, but also for some inexplicable reason pleaded non-deterioration. Therefore, a plea of prescription cannot arise without the act or acts of nuisance being admitted whereas the defendant-respondent has in his answer specifically denied them. The plea is, therefore, not only in law, but also at the stage it was so done, both bad in law, but also contradictory in itself.*
>
> *The acceptation of these issues is also repugnant to the law inasmuch as the date of commencement of prescription is vague in that the absence of a plea as to whether it was the acts of nuisance or the date of the notice to quit. It is, therefore, additionally for the same reason of reasonableness that as is required by section 44 of the Civil Procedure Code that a plea of the reasons for the non-operation or application of prescription is mandatory that it is equally reasonable and fair that the law requires that the defence of prescription be specifically pleaded in the answer.*
>
> *I am, therefore, of the view that issues 7, 8 and 9 should not have been accepted as issues for adjudication and that the order accepting them is bad, insupportable and made per incuriam. I, therefore, reject them.*

In the Supreme Court case of *Tilakaratne v. Chandrasiri and Another* (SC/APPEAL/172/2013, SC Minutes of 27.01.2017), prescription was not pleaded as a defence in the answer, no issue regarding prescription was framed at the trial and there was no suggestion made at the trial that

the plaintiff's action was prescribed. However, at the hearing of the appeal before the High Court, counsel for the defendants submitted that the plaintiff's action was one for "Goods Sold and Delivered" which, by operation of section 8 of the Prescription Ordinance, was prescribed after the expiry of one year from the date of the last sale which took place on 30th March 2005 as per the entries in a notebook marked P2. The High Court accepted this argument and dismissed the plaintiff's action. Prasanna Jayawardena J. held that the defendant could not have taken up the defence of prescription for the first time in appeal.

> *[I]t is settled Law that, a party is prohibited from raising an issue regarding prescription for the first time in appeal. As Bonser C.J. described in the early case of TERUNNANSE vs. MENIKE [1 NLR 200 at p.202], a defence of prescription is a "shield" and not a "weapon of offence". Adopting the phraseology used by the learned Chief Justice over a century ago, it may be said that, if a Defendant chooses not to pick up the shield of prescription when he goes into battle at the trial, the 'rules of combat' are that he forfeits the use of that shield in appeal.*

In the instant case, the High Court erred when it decided on appeal that the plaintiff's action is prescribed.

Conclusion

I answer the three questions of law on which leave to appeal was granted 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.

The subject matter of this action is business premises. The defendants refused to hand over possession of the premises after the expiry of the lease agreement for more than 20 years. Apart from other reliefs the

plaintiff is entitled to have with the appeal being allowed, the 1st and 2nd defendants each shall pay Rs. 250,000 to the plaintiff (in total Rs. 500,000) as costs of this Court in addition to the payment of incurred costs in the trial Court and the High Court.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.

I agree.

Judge of the Supreme Court

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

In the matter of an Application for Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Officer in Charge,
Police Station.
Ganemalwila (Thanamalwila).

SC Appeal No. 249/2017
SC SPL LA No. 231/2017

Complainant

Court of Appeal Case No:
CA (PHC) APN 04/2017

V.

High Court Monaragala Case No:
HC 79/2014

W.M. Sampath Preethi Viraj.

Accused

AND NOW

W.M. Piyal Senadheera,
Kanthoruwatta,
Thalawa South,
Kariyamadiththa.

Registered Owner Claimant
Petitioner

V.

Hon. Attorney General,

Attorney General's Department,
Colombo 12.

Respondent

AND NOW BETWEEN

W.M Piyal Senadheera,
Kanthoruwatta,
Thalawa South,
Kariyamadiththa.

Registered Owner Claimant Petitioner Petitioner

V.

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

Respondent-Respondent

Before : **E. A. G. R. Amarasekara, J**
A.L. Shiran Gooneratne, J
K. Priyantha Fernando, J

Counsel : Anil Silva, PC with Amaan Bandara for the Owner Claimant Petitioner – Appellant.

Sajith Bandara, SC for the Hon. Attorney General.

Argued on : 12.12.2023

Decided on : 20.02.2024

K. PRIYANTHA FERNANDO, J

1. The Claimant-Appellant-Appellant in the instant case (hereinafter referred to as the appellant) preferred an appeal from the Order of the Court of Appeal dated 14.09.2017 which dismissed the appellant's application for revision. The application for revision has been made in respect of the Order of the High Court, which refused to release the vehicle bearing No. SP PE 1214 to the appellant which was confiscated under the Poisons Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

2. This Court granted leave to proceed on the questions of law in sub paragraphs (c) and (e) of the petition dated 19.10.2017. However, at the argument of this application, both Counsel confined their submissions to the question of law referred to in paragraph 19(c) of the petition dated 19.10.2017 and submitted that they would be satisfied if the question of law set out in paragraph 19(c) would be decided by this Court.

Question of law

19(c) – Did the Judges of the Court of Appeal misdirect themselves when they failed to consider that there is no necessity for the owner of the vehicle to show that he has taken all precautions to prevent the use of the vehicle for the commission of an offence when an inquiry is held under Poisons Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

Facts in brief.

3. The appellant in the instant case is a businessman by profession. The appellant has been the registered owner of the vehicle bearing No. SP PE 1214, which is a black-coloured Toyota double cab. On 28.03.2013 the elder brother of the appellant *W.M. Sampath Preethi Viraj* (hereinafter referred to as the accused) has asked the appellant if he could borrow the appellant's vehicle for the purpose of bringing a paddy harvesting machine. Admittedly, the appellant has permitted the accused to borrow the vehicle. The accused has been an ex-police officer who has been interdicted from his services.

4. At about 5:30 p.m. on the same day, the appellant became aware that the accused has been arrested by the *Thanamalwila* Police. Thereafter, the appellant along with the wife of the accused has gone to the said police station. On arriving at the police station, they have come to know that the accused has been arrested by the Special Task Force (STF) on the allegation of transporting Cannabis Sativa (*Ganja*).

5. Thereafter, the accused has been produced before the Magistrate's Court of *Wellawaya* along with the productions which included the vehicle in question. Upon an application by the appellant, the learned Magistrate has released the vehicle in question to the appellant after entering into a bond.

6. The accused has been indicted in the High Court of *Monaragala* for the charges of trafficking and possession of 106 kg and 105 grams of Cannabis Sativa. Upon pleading guilty to the charges that were levelled against him, the High Court has convicted him for the said charges and imposed a sentence of imprisonment and suspended it for a period of 10 years along with a fine.

7. Subsequent to the conviction of the accused, the learned Judge of the High Court has afforded an opportunity for the appellant to show cause as to why the vehicle in question which was used for the commission of the offence should not be confiscated. Both the appellant and the accused has given evidence at the inquiry. The learned Judge of the High Court, by his Order dated 06.12.2016 [P-1(e)] has refused to release the said vehicle to the appellant and has ordered that the vehicle be confiscated.

8. Being aggrieved by the Order of the learned Judge of the High Court, the appellant has preferred a revision application against the said Order to the Court of Appeal which was listed under No. CA (PHC) APN 04/2017 [P-1(f)]. The learned Judges of the Court of Appeal, by Order dated 14.09.2017 [P-1(i)], dismissed the appellant's application for revision. Being aggrieved by the Order of the learned Judges of the Court of Appeal, the appellant preferred the instant appeal to this Court.

<u>Written Submissions in respect of the appellant.</u>

9. At the argument of this appeal, the main submission which was made by the learned President's Counsel for the appellant was that, as the law stands under section 79 of the Poisons Opium and Dangerous Drugs (Amendment) Act No. 13 of 1984, there exists no

requirement for the owner of a vehicle to prove that he took all necessary precautions to prevent the use of such vehicle for the commission of the offence. It was his submission that the learned Judge of the High Court has erred in including an additional requirement on the appellant which is not stipulated in the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 13 of 1984. It has been imported from section 40 of the Forest Ordinance and section 3A of the Animals Act. The High Court has applied additional legal burden on the appellant by importing provisions from other statutes. The learned President's Counsel stated further, that it is the duty of the Parliament to legislate, and Courts should not include provisions that the legislature has not included. Therefore, it was his position that a literal interpretation of the words of the statute should have been used.

10. The learned President's Counsel for the appellant submitted further that, in the case of ***Manawadu v. The Attorney General [1987] 2 SLR 30*** considered the vehicle confiscation provision under the Forest Act which demonstrates that there is no automatic confiscation or forfeiture of a vehicle where the registered owner of the vehicle is not the person convicted for the offence (where the registered owner of the vehicle is a third party). It was his position that the said interpretation should be given by the Court which was *"in pari materia"*.

11. It was also submitted that, where the owner of the vehicle had no role to play in the commission of the offence and is innocent, then the forfeiture of his vehicle would amount to an arbitrary expropriation since he was not a party to the commission of any offence. Therefore, it was his submission that, in a similar light, under the provisions of the Poisons Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984, an Order of confiscation can only be made where, either the owner himself is convicted of the offence, or if the owner permitted the vehicle to be used by the convict with the knowledge that it was going to be used in the commission of such offence. It was his submission that the opportunity should be provided for the owner of the vehicle to prove this on a balance of probabilities. It is imperative for the owner of the vehicle to be heard before an Order of confiscation is made.

12. The learned President's Counsel submitted further that the learned Judges of the Court of Appeal by their Order dated 14.09.2017, has erred in concluding that the owner of the vehicle has the burden to prove that he had no knowledge of the Commission of the offence

and that he took all necessary steps to prevent the offence being committed and this amounts to a misapplication of the law.

Written Submissions in respect of the respondent.

13. The learned State Counsel for the respondent while conceding that the law relating to confiscation of a vehicle under the Poisons Opium and Dangerous Drugs Ordinance has not been amended, also pointed out that, when compared to present times, dangerous drugs were not so much of a menace at the time. The learned State Counsel also submitted that, there is nothing wrong in imposing an additional criteria to the statute. He further submitted that, giving a literal interpretation to the words of section 79 of the Poisons Opium and Dangerous Drugs (Amendment) Act No. 13 of 1984 would be too restrictive.

14. It was his submission that even *"Manawadu"* did not use a literal interpretation of the words of the statute. Further, the Court is not bound to follow *"Manawadu"* merely because the Forest (Amendment) Act No. 65 of 2009 was not in place during the time *"Manawadu"* was decided.

15. The learned State Counsel submitted that, the honorable Judges of the High Court and Court of Appeal were correct in taking the position that the appellant has not shown on a balance of probabilities that he has taken all precautions to prevent the use of such vehicle for the commission of the offence or that he had no knowledge. When considering the quantity of dangerous drugs that the accused was in possession of, which amounted to 106 kg and 105 grams of Cannabis Sativa which is not a small quantity, it ought to be preplanned and the owner of the vehicle (appellant) ought to have known about this. Further, the evidence of the appellant portrays that he was aware that the accused had a criminal record, and therefore the appellant ought to have taken all necessary precautions.

Analysis

16. Section 79 of the Poisons, Opium and Dangerous Drugs Ordinance is the relevant provision that deals with vehicle confiscation. The latest amendment that was made to the Poisons Opium and Dangerous Drugs Ordinance was by way of Act No.41 of 2022. However, the last amendment that was made to section 79 of the said Ordinance has been by way of Act No. 13 of 1984. Accordingly,

section 79 of the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 13 of 1984 sets out that,

Section 79

"(1). Where any person is convicted of an offence against this Ordinance or any regulation made thereunder the court shall order that all or any articles in respect of which the offence was committed and any boat, vessel, vehicle, aircraft or air-borne craft or equipment which has been used for the conveyance of such article shall, by reason of such conviction, be forfeited to the State.

(2). Any property forfeited to the State under subsection (1) shall -

(a) if no appeal has been preferred to the Court of Appeal against the relevant conviction, vest absolutely in the State with effect from the date on which the period prescribed for preferring an appeal against such conviction expires ;

(b) if an appeal has been preferred to the Court of Appeal against the relevant conviction, vest absolutely in the State with effect from the date on which such conviction is affirmed on appeal.

In this subsection " relevant conviction" means the conviction in consequence of which any property is forfeited to the State under subsection (1)."

17. It is clear that the above section does not include a special provision with regard to a situation where the owner of the vehicle which was used for the commission of the offence is a third party. Both the learned President's Counsel and the learned Counsel for the State have conceded to the fact that section 79 of the Poisons, Opium and Dangerous Drugs Act has not been amended since 1984.

18. The learned President's Counsel for the appellant brought the case of ***Manawadu(supra)*** to the attention of this Court and submitted that, according to *"Manawadu"* there can be no automatic confiscation of a vehicle where the owner of the vehicle is a third party. He elaborated that in such a situation, on the lines of *"Manawadu"* the third-party owner must be heard before an Order of confiscation is made.

19. The case of *Manawadu(supra)* has been decided on 11.02.1987 and is in reference to section 40 of the Forest Ordinance as amended by Act No. 13 of 1982. A further amendment has been brought to the Forest Ordinance by way of Act No. 65 of 2009.

20. Section 40 of the Forest Ordinance as amended by Act No. 13 of 1982 (the position under which *"Manawadu"* was decided) sets out that,

Section 40

"(1) Upon the conviction of any person for a forest offence -

(a) all timber or forest produce which is not the property of the State in respect of which such offence has been committed; and

(b) all tools, boats, carts, cattle and motor vehicles used in committing such offence (whether such tools, boats, carts, cattle and motor vehicles are owned by such person or not,

shall, by reason of such conviction, be forfeited to the State."

21. In *"Manawadu"*, the evolution of section 40 of the Forest Ordinance was discussed from its inception. Accordingly, section 40 of the Forest Ordinance as amended by Act No. 13 of 1966 has in fact initially provided that, where the owner of such a vehicle is a third party, no order of confiscation shall be made if such owner proved to the satisfaction of the court that he had used all precautions to prevent the use of such vehicle as the case may be for the commission of such offence.

22. However, section 40 of the Forest Act No. 13 of 1966 was amended by the repeal of the proviso to that section by Act No. 56 of 1979. Consequently, at the time *"Manawadu"* was decided, section 40 of the Forest Act was yet again repealed by way of Act No. 13 of 1982 which still did not include a provision dealing with a situation, in which special protection would be accorded where the owner of a vehicle is a third party.

23. Forest Act No. 13 of 1982 as set out above, contains no proviso with regard to a situation where owner of the vehicle is a third party. The main contention in *"Manawadu"* was whether the legislature intended to dispense with the rules of natural justice or as to whether it is inbuilt within section 40 of the Forest Act No. 13 of 1982.

24. *Sharvananda CJ* in *"Manawadu"*, after an extensive analysis of the various case law surrounding the principles of natural justice held that,

> *"In the light of the above principles, I am unable to accept the submission of State Counsel that the legislature by Section 7 of Act No. 13 of 1982 intended to deprive an owner of his vehicle that had been used by the offender in committing a forest offence without the owner's knowledge and without his participation. Having regard to the inequitable consequences that flow from treating the words 'shall by reason of such conviction be forfeited to the State' as mandatory. I am inclined to hold, as the House of Lords did in A. G. v. Parsons (supra) (14) that "forfeited" meant "liable to be forfeited. " and thus avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on the conviction of the accused. Having regard to the above rules of construction, I am unable to hold that the amended subsection 40 excludes by necessary implication the rule of 'audi alteram partem'. On this construction the petitioner, as owner of lorry bearing No. 26 Sri 2518* ***is entitled to be heard on the question of forfeiture and if he satisfies the court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture****."*

[Emphasis mine]

25. *Sharvananda CJ* with *Atukorale J* agreeing and *Seneviratne J* dissenting allowed the appeal and directed the Magistrate to hear the petitioner who was the owner of the vehicle in *"Manawadu"* on the question of showing cause as to why the petitioner's vehicle is not liable to be forfeited.

26. It is observed that the case facts of *"Manawadu"* are quite similar to the case at hand. In both cases the petitioner who is owner of the vehicle has been a third party, and has not been a party to the relevant offence. The main issue in *"Manawadu"* was that the petitioner has not been provided an opportunity to show cause against the Order of confiscation. However, in the instant case the petitioner (appellant) has in fact been provided the opportunity to show cause as to why his vehicle should not be confiscated. This has been set out in the Order of the High Court dated 06.12.2016. This is also admitted by way of paragraphs 11 and 12 of the petition dated 19.10.2017. Therefore, the appellant in the instant case has not been deprived of a hearing as he has been provided an opportunity to show cause as to why his vehicle should not be confiscated.

27. Be that as it may, after the case of *Manawadu(supra)* was decided, the law has been subject to amendment. Amendments were made to the Forests Act No. 13 of 1982, by way of Act No. 84 of 1988, Act No. 23 of 1995 and finally as the law stands today, by way of Act No. 65 of 2009.

28. Section 40 of the Forest Ordinance as amended by Act No. 65 of 2009 sets out that,

Section 40

"(1) Where any person is convicted of a forest offence -

(a) all timber or forest produce which is not the property of the State in respect of which such offence has been committed; and

(b) all tools, vehicles, implements, cattle and machines used in committing such offence,

shall in addition to any other punishment specified for such offence, be confiscated by Order of the convicting Magistrate:

Provided that in any case where the owner of such tools, vehicles, implements and machines used in the commission of such offence, is a third party, no Order of Confiscation shall be made if such owner proves to the satisfaction of the Court that he had taken all precautions to prevent the use of such tools, vehicles, implements, cattle and machines, as the case may be, for the commission of the offence."

[Emphasis mine]

29. A proviso to section 40 was added by way of Act No. 65 of 2009 as emphasised above. Thus, the section explicitly provides the position of a third-party owner of a vehicle which has been used in the commission of an offence under this Act. Accordingly, there would be no automatic confiscation of the vehicle in question where the owner of the vehicle is a third party so long as the third-party owner is able to satisfy Court that he had taken all precautions to prevent the use of such vehicle for the commission of the offence. The burden of proving such position is clearly on the third-party owner.

30. While the Forest Act No. 65 of 2009 clearly sets out this position, as observed earlier, section 79 of the Poisons Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984

has not been amended to this effect. Hence, it was the position of the learned President's Counsel for the appellant that the additional burden of proving that "…he had taken all precautions to prevent the use… for the commission of the offence… " should not be imposed on the appellant. It is his position that a literal interpretation is appropriate.

31. Section 79(1) of the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 13 of 1984 sets out that,

> *"79 (1). Where any person is convicted of an offence against this Ordinance or any regulation made there under the court shall order that all or any articles in respect of which the offence was committed and any boat, vessel, vehicle, aircraft or air-borne craft or equipment which has been used for the conveyance of such article shall, by reason of such conviction, be forfeited to the State.*

32. A literal interpretation of section 79(1) of the Poisons, Opium and Dangerous Drugs Act would mean that, regardless of who the owner of a vehicle may be, the vehicle that has been used for the conveyance of the article which amounts to an offence, shall upon conviction be forfeited to the state. It does not contain a proviso with regard to the position of a third-party owner of a vehicle. Therefore, providing a literal interpretation to section 79(1) of the Poisons, Opium and Dangerous Drugs Act under the facts and circumstances of the instant case would still mean that the vehicle bearing No. SP PE 1214 would be confiscated to the state as in plain meaning, the section lays down that "***all or any*** *articles in respect of which the offence was committed and any boat, vessel,* ***vehicle****, aircraft or airborne craft or equipment which has been used for the conveyance of such article* ***shall, by reason of such conviction, be forfeited to the State***".

33. Had their Lordships deciding *"Manawadu"* used a literal interpretation of the words of the statute, that is giving a plain meaning to the words of the statute, the third-party owners right to be heard before an order of confiscation is made would never have been recognized and provided for. If this Court is to accept the argument of the learned President's Counsel, not even a hearing can be afforded to the appellant in the instant case.

34. Let us also look at other legislation which provides for similar confiscation provisions. The confiscation provision under the

Animals Act was also brought to the attention of Court. Section 3A of the Animals Act No. 10 of 1968 as amended by Act No. 10 of 2009 sets out that,

Section 3A

"*Where any person is convicted of an offence under this Part or any regulations made thereunder, any vehicle used in the commission of such offence shall, in addition to any other punishment prescribed for such offence, be liable, by order of the convicting Magistrate, to confiscation:*

Provided, however, that in any case where the owner of the vehicle is a third party, no order of confiscation shall be made, if the owner proves to the satisfaction of the Court that he has taken all precautions to prevent the use of such vehicle or that the vehicle has been used without his knowledge for the commission of the offence."

[Emphasis mine]

35. When considering the development in the law with regard to confiscation of a vehicle under other laws such as the Forest Ordinance and the Animals Act, it is clear that the law has been amended so as to include a proviso which provided special attention where the owner of the vehicle that is subject to confiscation is a third party.

36. This Court cannot in good conscience ignore the development of the law surrounding the position of a third-party owner of a vehicle, whose vehicle has been subject to confiscation. Neither can this Court ignore the fact that dangerous drugs have evolved to be a menace in society in the recent past. The law evolves with time and it is the duty of the Court to interpret the law in a manner so as to suit changing times. Further, as the intention of the legislature is understood, there would be no usurpation of its power by the judiciary.

37. When considering the doctrine of *'in pari materia'* in reference to the rules of interpretation, it was stated in the case of ***The Commercial Tax Officer and....V. Mohan Brewaries and... Civil Appeal No. 715 of 2013 (2020) 78 GSTR 133 (SC) (Supreme Court of India)*** that, on the doctrine of *"pari materia"*, reference to other statues dealing with the same subject or forming part of the same system is a permissible aid to the construction of provisions in a statute. It has already been seen that a statute must be read as a whole as words are to be understood in their context.

Extension of this rule of context permits reference to other statutes *in pari materia* i.e. statutes dealing with the same subject-matter or forming part of the same system. It is to be a right and duty to construe every word of a statute in its context. The word context in its widest sense include 'other statutes in pari materia'.
[*'Legal Maxims & Phrases' by Nanda Senanayake Attorney-at-law* at page 319]

38. Therefore, it is my position that, it is appropriate to interpret the Poisons, Opium and Dangerous Drugs Act in a similar light so as to include the proviso set out in section 40 of the Forest Act and section 3A of the Animals Act.

39. Further, where one relies on the position that a third-party owner of a vehicle must be treated differently and that there should be no automatic confiscation and that a hearing should be accorded to such a person, as set out under the Forest Ordinance and the Animals Act, the proviso in its entirety should be considered. One cannot simply request that the proviso should be applied to the extent where it is beneficial to them. The proviso is conditional on the word "if". The benefit of the proviso could only be attained if the owner of the vehicle proves to the satisfaction of the Court that he has taken all precautions to prevent the use of the vehicle in question or that the vehicle has been used without his knowledge.

40. The knowledge on the commission of the offence and taking necessary precautions to prevent the commission of the offence are to an extent interwoven. In this regard, it is pertinent to consider what was stated by His Lordship *S.N. Silva* as he was then, in the case of ***Faris v. The Officer-In-Charge, Police Station, Galenbindunuwewa and Another [1992] 1 SLR 167.***

> *"… .Furthermore, there is the evidence of the Petitioner that he had warned the driver not to transport anything that requires a permit without such permit. In the light of these contradicted items of evidence it would be not possible to infer that the petitioner has knowledge of the commission of this particular offence. The presence of some special facility in the lorry for the transporting of animals does not per se establish that the owner had knowledge of the commission of the particular offence. … "*

41. The knowledge of a person is locked up in his mind, and it is inferred from the circumstances of each case. Knowledge includes instances where one willfully shuts one's eyes to the truth. In

Westminster City Council v Croyalgrange Limited And Another [1986] 83 Cr.App.R. 155 at 164, *Lord Bridge* in his dictum said that,

> *"… It is always open to the tribunal of fact… to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not wish to have his suspicion confirmed."*

(Archbold Criminal Pleading evidence and practice 2019 at page 2153)

42. This applies to criminal cases in which knowledge being the *mens rea* requirement, is imperative to prove the offence. In the instant case, the appellant was well aware that the accused who was his brother was a police officer who had been interdicted from his services for various alleged offences and malpractices. Therefore, it was for the appellant to be vigilant when permitting the accused whose character was in question to borrow the vehicle.

43. The appellant in this case cannot simply say that he had no knowledge that the vehicle was being used for the commission of the offence after shutting his eyes to the obvious. If this position with regard to knowledge is ignored, every owner of a vehicle who is a third party could circumvent every situation which would enable a vehicle being confiscated by simply taking the position that he had no knowledge of the same. This would frustrate the intention of the legislature. However, it must be noted that the existence of such knowledge would have to be decided on the circumstances of each case.

44. In the instant case, there is clear evidence that the appellant has failed to take any precautions to prevent the use of the vehicle for the commission of the offence, while being well aware that the accused had a history of being involved in the commission of various alleged offences. Therefore, as failure to take necessary precautions seems to be interwoven with the existence of knowledge, in the circumstances of this case, where it is established that the appellant has not taken any precautions to prevent the use of the vehicle for the commission of the offence, the appellant has failed to establish on a balance of probabilities that the vehicle has been used without his knowledge for the commission of the offence.

45. Thus, in answering the question of law that has been raised by the appellant, the Honorable Judges of the Court of Appeal have not misdirected themselves. For the reasons that I have provided above, I affirm the Order of the learned High Court Judge and the Order of the Court of Appeal.

The appeal is dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE E. A. G. R. AMARASEKARA.

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 appeal in terms of Section 5 (1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read with Section 6 of the Act No. 10 of 1996 and provisions contained in Chapter LVIII of the Civil Procedure Code.

Kanthi Fernando,
No. 10, Wijesekara Place,
Kalutara South.

S.C. Appeal (CHC) No. 84/2014
H.C. (Civil) No. 57/2012/CO

Petitioner

Vs.

W. Leo Fernando (Maddagedara) Estates Company Limited,
No. 01, Castle Terrace,
Colombo 08.

Respondents

AND NOW BETWEEN

Kanthi Fernando,
No. 10, Wijesekara Place,
Kalutara South.

Petitioner-Appellant

Vs.

W. Leo Fernando (Maddagedara) Estates Company Limited,
No. 01, Castle Terrace,
Colombo 08.

Respondent-Respondent

Before: Hon. Vijith K. Malalgoda, PC, J.

Hon. Janak De Silva, J.

Hon. K. Priyantha Fernando, J.

Counsel:

Dr. Romesh De Silva, PC with Ranil Samarasooriya and Shanaka Cooray for Petitioner-Appellant

Chrishmal Warnasooriya with Prabuddha Hettiarachchi and M.I.M. Iynullah for Respondent-Respondent

Written Submissions:

Petitioner-Petitioner on 27.10.2023

Respondent-Respondent on 07.07.2017

Argued on: 18.10.2023

Decided on: 24.01.2024

Janak De Silva, J.

The Petitioner-Appellant ("Appellant") instituted this action in the Provincial High Court of the Western Province (Exercising Civil Jurisdiction) Holden in Colombo ("Commercial High Court") seeking an order to wind up the Respondent-Respondent ("Respondent").

The learned Judge of the Commercial High Court dismissed the application with costs. Aggrieved by the dismissal, the Appellant has preferred this appeal.

The Appellant has also filed a leave to appeal application bearing No. SC/HC/LA/46/2014. Parties agreed that they will abide by one judgment given in S.C. Appeal (CHC) No. 84/2014 which is the statutory appeal.

The learned Judge of the Commercial High Court dismissed the application to wind up on the following grounds:

1. The Appellant has failed to submit any documents to corroborate the matters pleaded in the petition seeking the winding up of the Respondent.
2. The Appellant has failed to exhaust alternative remedies prior to the institution of this application.
3. It is not just and equitable to wind up the Respondent Company since the Appellant has not exhausted alternative remedies.

Ground for Winding Up

The winding up application was made pursuant to Section 270 (f) of the Companies Act No. 07 of 2007 ("Act") which reads:

> *"270. A company may be wound up by the court, if-*
>
> > *(f) the Court is of the opinion that it is just and equitable that the Company should be wound up"*

The Appellant sought a winding up order on the basis that there is a deadlock in the Respondent Company and/or in the management of the said Company and/or the ownership of the said Company.

In ***Ceylon Textiles Ltd. v. Chittampalam Gardiner*** **(54 N.L.R. 313)** it was held that the words *"a company may be wound up by the court if the court is of the opinion that it is just and equitable that the company should be wound up"* in Section 162 (6) of the Companies Ordinance No. 51 of 1938 is extremely wide and includes a situation where there is a deadlock. However, L. M. D. De Silva J. added a word of caution in stating (at page 316):

> *"In the decided cases the deadlock has been complete. In fact no deadlock can truly be called a deadlock unless it is complete but the word "complete" serves to direct attention to the true nature of the deadlock that must be shown to exist*

before a liquidation can be ordered. It must be complete not only at any given moment but it must appear reasonably that no remedy can be hoped for by recourse to the courts or otherwise."

It is an established rule of interpretation that where there are statutes made *in pari materia*, whatever has been determined in the construction of one of them is a sound rule of construction for the other [*Craies on Statute Law*, 7th Ed., page 139]. In ***Crosley v. Arkwright*** **[(1788) 2 T.R. 603, 608, (1788) 100 E.R. 325, 328]** Buller J. held that all Acts relating to one subject must be construed *in pari materia*.

The Companies Ordinance No. 51 of 1938 and the Act are *in pari materia*. The interpretation given to just and equitable in the former is applicable to the Act as well. Hence, the ground relied on by the Appellant is one which falls within Section 270 (f) of the Act.

Burden of Proof

The learned Judge of the Commercial High Court took the view that the Appellant has failed to submit any documents to corroborate the matters pleaded in the petition seeking the winding up of the Respondent Company. Court refers to the denial by Mrs. Anula Fernando of the matters pleaded in the winding up petition and states that it is word and against word and hence no reason to accept one version over the other. Accordingly, the learned Judge of the Commercial High Court holds that the Appellant has failed to prove the allegations made in the winding up application.

One important matter pleaded by the Appellant is that she holds 50% of the shares of the Respondent Company and is also a Director. It is true that the Appellant has not tendered any documentation to establish that she is a shareholder and a Director. Nevertheless, this pales into insignificance upon a consideration of the affidavit filed by Mrs. Anula Fernando opposing the winding up application. She has, at paragraph 32 of her affidavit, admitted that the Appellant and she are the only shareholders and Directors of the Respondent Company. In this context the requirement of any documentation to corroborate these two matters does not arise.

The learned Judge of the Commercial High Court erred in overlooking the admissions made in the affidavit filed in opposition to the winding up application while taking cognizance only of the denials made therein.

Another important matter pleaded by the Appellant is that Mrs. Anula Fernando has constantly failed and neglected to have any board meetings, divulge any accounts, have any shareholders meetings, furnish audited accounts, have a general meeting or furnish information in respect of the running of the company. Admittedly, the Appellant has not tendered any documentation in support of these allegations. However, she has affirmed to such matters in her affidavit.

Nevertheless, as the learned Judge of the Commercial High Court himself states, requiring such evidence from the Appellant amounts to asking her to prove the negative. In ***Laxmibai (Dead) Thru Lr'S. & Anr vs Bhagwanthbuva (Dead) Thru Lr'S. & Ors.*** **[Civil Appeal No. 2058 of 2003, Decided on 29.01.2013]** the Indian Supreme held (at para. 15) that a negative fact cannot be proved by adducing positive evidence.

Nanda Senanayake in *Legal Maxims & Phrases*, First Ed. (2023), page 435 states that a negative is usually incapable of proof. The decision in ***New Indian Assurance Company Ltd. v. Nusli Neville Wadiya and Another*** **[Case No. Appeal (Civil) 5879 of 2007, Decided on 13.12.2007]** is cited in support. There, the Supreme Court of India referred (at para. 54) to the legal maxim, *ei incumbit probation qui dicit, non qui negat* (The burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for a negative is usually incapable of proof).

In ***New Indian Assurance Company Ltd. v. Nusli Neville Wadiya and Another*** (ibid.) it was held that it is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons, and reference was made to the statement by Lord Maugham in ***Constantine (Joseph) Steamship Line Ltd. vs. Imperial Smelting Corpn.*** **[(1941) 2 All ER 165, 179]**. This rule is derived from Roman law and is

supportable not only upon the ground of fairness, but also upon that of the greater practical difficulty which is involved in proving a negative than in proving an affirmative.

This Court has affirmed this legal maxim in ***Indrajith Rodrigo v. Central Engineering Consultancy Bureau*** **[(2009) 1 Sri.L.R. 248]**.

This legal maxim has been affirmed by the Supreme Court of India in ***Shambhu Nath Goyal vs. Bank of Baroda and others*** **(1983) 4 SCC 491**, ***Garden Silk Mills Ltd. and another vs. Union of India and others*** **(1999) 8 SCC 744** and ***J. K. Synthetics Ltd. vs. K. P. Agrawal and another*** **(2007) 2 SCC 433 (para 18)**.

The learned Counsel for the Respondent relied on the decision in ***In Re Langham Skating Rink Company*** **[(1877) 5 Ch.D. 669]** where it was held that it is very important that Court should not, unless a very strong case is made, take upon itself to interfere with the domestic forum which has been established for the management of a company.

The decisions in ***McInerney Homes Ltd. v. Cos Acts 1990*** **[(2011) IESC 31]** and ***Re Connemara Mining Company PLC (No. 2)*** **[(2013) IEHC 225]** were also cited where the High Court of Ireland refused to wind up a company on the grounds that the Petitioner had failed to discharge the onus of proving, that it would be just and equitable to wind up the company.

I am mindful of the provisions in Section 101 of the Evidence Ordinance which reads:

> *"101. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist."*

It is the Appellant who is seeking to wind up the Respondent Company. This is sought to be done due to the alleged failure and neglect to have any board meetings, divulge any accounts, have any shareholders meetings, furnish audited accounts, have a general meeting or furnish information in respect of the running of the Respondent Company. These matters have been affirmed to by the Appellant in her affidavit. That

is evidence for the purposes of the winding up application and should have been considered by the Commercial High Court.

Moreover, Mrs. Anula Fernando has, at paragraphs 8 and 19 of her affidavit, denied the allegation on the failure to hold board meetings and the failure to divulge any accounts. She has reserved her right to tender the relevant documents to Court.

In this context, it is apposite to consider the practice of English Courts in winding up applications. In ***Re Travel and Holiday Clubs Ltd*****. [(1967) 2 All.E.R. 606]**, on the question of whether the evidence filed (by way of affidavit) was not sufficient to support the charges contained in the petition, it was held (at pages 608-609) that:

> *"The court would not in the exercise of its discretionary jurisdiction, be satisfied with prima facie evidence but would require the petitioner to substantiate his case more fully; that in such cases it would require, where practicable, the evidence of witnesses with direct knowledge of the matters to which they were testifying, and on which they could be cross-examined, and which conformed to the ordinary rules of the admissibility of evidence".*

In ***Colombo Engineering Enterprises (Pvt) Ltd. and Others v. Hatton National Bank Ltd.*** **[(1999) 1 Sri.L.R. 72 at 75]** the Court of Appeal after an examination of the English practice held:

> *"Whilst no doubt the verifying affidavit is always a necessary document, in all cases it may not always be sufficient to verify the petition. In such cases the Judge clearly has a discretion to allow the testimony of witnesses and their cross-examination. It may appear to be contradictory to the statutory provisions which provide that affidavits should in ordinary circumstances be sufficient prima facie evidence of the statements of the petition, but where the verifying affidavit is not sufficient, then and only then must opportunity be afforded for the adducing of evidence and/or cross-examination of the deponent witnesses."*

I am in respectful agreement with the position articulated upon a consideration of the form of pleadings required to be filed where a company is sought to be wound up on just and equitable grounds.

It has been held that a company may be wound up for a number of reasons on just and equitable grounds. Hence, it will suffice for the petition and supporting affidavit in such a winding up application to set out the heads of complaint with sufficient details to enable the Respondent to respond to the complaints made. Where a prima facie case has been made in the winding up petition, the Court must exercise its wide discretion judiciously and in conformity with procedural fairness.

This appears to be the English practice as well. In ***Fildes Bros. Ltd., Re*** **[(1970) 1 All ER 923**, it was held that in deciding a petition for winding up on just and equitable grounds, facts existing at the time of hearing have to be taken in to account, but *heads of complaint will be as set forth in the petition*.

In the present application, the winding up petition has sufficiently set out the heads of complaint and provided evidence in the form of averments in the affidavit in support. The Appellant cannot be asked to prove by documentary evidence the negative, such as failure and neglect to have any board meetings, shareholders meetings and general meetings.

The best evidence of holding such meetings are the minutes of such meetings. If the Appellant did not take part in such meetings although informed, the best evidence is the notification sent to the Appellant.

In the circumstances of the case, the learned Judge of the Commercial High Court should have exercised his discretion and called for evidence from the Appellant and the Respondent Company prior to making an order on the winding up application. In fact, the Respondent Company had in its written submissions filed in the Commercial High Court, paragraph 8, indicated to Court that it may be prudent to call for oral evidence.

Accordingly, I am in agreement with the contention of Mr. Cooray, learned counsel for the Appellant that the learned Judge of the Commercial High Court erred in not calling for oral evidence and thereby failed to duly and properly exercise his discretion judiciously.

Alternative Remedies

I will examine grounds 2 and 3 relied on by the learned Commercial High Court judge together as they are interconnected.

In this context, I observe that the judgment does not specify the alternative reliefs the learned Judge of the Commercial High Court had in mind.

It appears that the learned Judge may have taken into consideration the alternative grounds set out at paragraph 46 of the written submissions filed by the Respondent Company in the Commercial High Court.

They are:

(i) An action for oppression and mismanagement under sections 224 and 225 of the Act;

(ii) Seeking to appoint an inspector to investigate the affairs of the Company under section 172 (1) of the Act;

(iii) Raising any issue of alleged oppression or mismanagement at the Board Meeting and/or Shareholder Meeting of the Company.

The alternative remedy at (iii) does not arise as the Appellant contends that no such meetings took place.

In so far as sections 224 and 225 of the Act are concerned, the learned counsel for the Appellant drew our attention to section 227 of the Act which reads:

> *"Notwithstanding the provisions of Part XII, at any stage of the winding up proceedings in respect of a company, where a court is of the opinion that to wind up the company would be prejudicial to the interests of a shareholder of the*

company, it shall be lawful for the court to act under the provisions of section 224 or section 225 in like manner, as if an application had been made to the court under the provisions of either of those two sections."

Accordingly, the Court has the discretion to act under sections 224 or 225 of the Act at any stage of the winding up proceedings. Where the Court is not inclined to exercise this discretion, reasons will have to be given. In the present matter, the Commercial High Court has failed to do so if this was indeed an alternative remedy it had in contemplation.

For all the foregoing reasons, I set aside the judgment of the learned Judge of the Commercial High Court dated 11.07.2014.

I direct the Commercial High Court to conduct an inquiry into the winding up application by granting parties the opportunity to lead oral and documentary evidence on the matters pleaded. After such inquiry, the Commercial High Court shall make an order according to law.

The appeal is partly allowed with costs.

Judge of the Supreme Court

Vijith K. Malalgoda PC, J.

I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.

I agree.

Judge of the Supreme Court

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

Hatton National Bank Ltd.,
No. 481, T.B. Jayah Mawatha,
Colombo 10.
Plaintiff

SC/CHC/APPEAL/03/2012
HC (CIVIL) 117/2006(1)

Vs.

1. Nadarajah Ganarajah
   No. 110, Bankshall Street,
   Colombo 11.
2. Chelliah Ramachandran and
3. Manohari Ramachandran
   Both of 49, Collingwood Place,
   Colombo 06.
   1st to 3rd Defendants

4. Llyod Rajaratna Devarajah
   49, 6/2 Collingwood Place,
   Colombo 06.
5. Vadivelu Anandasiva (Deceased)
   49, 1/2 Collingwood Place,
   Colombo 06.
6. Mrs. Karthiga Senthuran and
7. Shanmugavadivel Senthuran
   both of 49, 1/4 Collingwood Place,
   Colombo 06

and presently of P.O. Box 52, PC, 111
CPO FEEB, Oman.

8. Thuraippa Viswalingam
49, 2/1 Collingwood Place,
Colombo 06.
9. Yogeswary Raveendiran
49, 2/3 Collingwood Place,
Colombo 06.
10. Sabapathy Arunasalam Arumugan
49, 3/1 Collingwood Place,
Colombo 06.
11. Anthonypillai Mary Joseph
49, 3/2 Collingwood Place,
Colombo 06.
12. Nagalingam Santhasoruban
49, 3/3 Collingwood Place,
Colombo 06.
13. Velupillai Arulanantham
49, 3/4 Collingwood Place,
Colombo 06.
14. Thanabalasingham Krishnamohan
49, 4/4 Collingwood Place,
Colombo 06.
15. Jacob Amaranathan
49, 4/1 Collingwood Place,
Colombo 06.
16. Sivagurunathan Punithanathan
49, 4/2 Collingwood Place, Colombo 06
and presently of Le Royal Meridian
Beach Resort, P.O. Box 24970,
Dubai UAE.

17. Ramanathan Sivagurunathan
    49, 5/1 Collingwood Place,
    Colombo 06.
18. Tharshini Sivagurunathan
    of 13331 Seattle Hill Road,
    Snohimish, Washington USA.
19. Kathiravelu Sarveswaram
    49, 5/2 Collingwood Place,
    Colombo 06.
20. Dr. Selvaratnam Selvaranjan
    49, 5/3 Collingwood Place,
    Colombo 06.
21. Subramaniam Suthershan
    49, 6/3 Collingwood Place,
    Colombo 06.
22. Sornambikai Mahasivam
    of Arthisoody Veethi,
    Thirunelveli, Jaffna.
23. Thambiah Mahasivam
    49, 6/4 Collingwood Place,
    Colombo 06.
    4th to 23rd Added Defendants

AND NOW

1. Chelliah Ramachandran and
2. Manohari Ramachandran
   Both of 49, Collingwood Place,
   Colombo 06.
   2nd to 3rd Defendant-Appellants

3. Llyod Rajaratnam Devarajah
   49, 6/2 Collingwood Place,
   Colombo 06.
4. Vadivelu Anandasiva (Deceased)
   49, 1/2 Collingwood Place,
   Colombo 06.
5. Mrs. Karthiga Senthuran and
6. Shanmugavadivel Senthuran
   both of 49, 1/4 Collingwood Place,
   Colombo 06
   and presently of P.O. Box 52, PC, 111
   CPO FEEB, Oman.
7. Thuraippa Viswalingam
   49, 2/1 Collingwood Place,
   Colombo 06.
8. Yogeswary Raveendiran
   49, 2/3 Collingwood Place,
   Colombo 06.
9. Sabapathy Arunasalam Arumugan
   49, 3/1 Collingwood Place,
   Colombo 06.
10. Anthonypillai Mary Joseph
    49, 3/2 Collingwood Place,
    Colombo 06.
11. Nagalingam Santhasoruban
    49, 3/3 Collingwood Place,
    Colombo 06.
12. Velupillai Arulanantham
    49, 3/4 Collingwood Place,
    Colombo 06.
13. Thanabalasingham Krishnamohan

49, 4/4 Collingwood Place,
Colombo 06.

14. Jacob Amaranathan
    49, 4/1 Collingwood Place,
    Colombo 06.
15. Sivagurunathan Punithanathan
    49, 4/2 Collingwood Place,
    Colombo 06
    and presently of Le Royal Meridian
    Beach Resort, P.O. Box 24970,
    Dubai UAE.
16. Ramanathan Sivagurunathan
    49, 5/1 Collingwood Place,
    Colombo 06.
17. Tharshini Sivagurunathan
    of 13331, Seattle Hill Road,
    Snohimish,
    Washington USA.
18. Kathiravelu Sarveswaram
    49, 5/2 Collingwood Place,
    Colombo 06.
19. Dr. Selvaratnam Selvaranjan
    49, 5/3 Collingwood Place,
    Colombo 06.
20. Subramaniam Suthershan
    49, 6/3 Collingwood Place,
    Colombo 06.
21. Sornambikai Mahasivam
    of Arthisoody Veethi,
    Thirunelveli, Jaffna.
22. Thambiah Mahasivam

49, 6/4 Collingwood Place,
Colombo 06.
4th to 23rd Added Defendant-Appellants

Vs.

1. Hatton National Bank Ltd.,
   No. 481, T.B. Jayah Mawatha,
   Colombo 10.
   Plaintiff-Respondent
2. Nadarajah Ganarajah 110,
   Bankshall Street,
   Colombo 11.
   1st Defendant-Respondent

Before: Hon. Justice S. Thurairaja, P.C.
Hon. Justice Yasantha Kodagoda, P.C.
Hon. Justice Mahinda Samayawardhena

Counsel: J.A.J. Udawatta with Suresh Philips, Chaminda Dheerasinghe, P. Damayanthi and H.N. Hettige for the 2nd and 3rd Defendant-Appellants.

Ikram Mohamed, P.C. with Anuradha Abeysekera and C.R. Mitrakrishnan for the 4th to 20th Added Defendant-Appellants.

Dr. Romesh De Silva, P.C. with Palitha Kumarasinghe, P.C., and V.K. Niles for the Plaintiff-Respondent.

M.A. Sumanthiran, P.C. with Vijula Arulanantham for the 1st Defendant-Respondent.

Written Submissions:

By the 2nd and 3rd Defendant-Appellants on 25.11.2022 and 17.03.2023

By the 4th to 23rd Added Defendant-Appellants on 02.12.2022 and 16.03.2023

By the Plaintiff-Respondent on 12.12.2022, 06.04.2023 and 10.04.2023

By the 1st Defendant-Respondent on 08.12.2022 and 17.03.2023

Argued on: 08.02.2023

Decided on: 12.02.2024

Samayawardhena, J.

Background

The plaintiff bank filed this action on 22.06.2006 in the Commercial High Court of Colombo against the three defendants jointly and/or severally (a) for the recovery of a sum of Rs. 46,829,186/72 together with interest thereon at the rate of 23% per annum from 01.08.2005 till payment is made in full, (b) an order that the land and buildings described in the schedule to the plaint be bound and executable for the payment of the said sum and interests with BTT, VAT and costs on the footing of the Mortgage Bond marked P4, and (c) an order to pay the said sum within two months of the date of the decree and in default of such payment that the said mortgaged property be sold by public auction to recover the dues to the plaintiff.

The 1st defendant is the principal debtor and the 2nd and 3rd defendants, husband and wife respectively, are the mortgagors who mortgaged their property described in the schedule to the plaint as a primary mortgage

to secure the loan disbursed to the 1st defendant. The mortgaged property is an apartment complex located at No. 49, Collingwood Place, Colombo 6.

It is the position of the 1st defendant that the 2nd and 3rd defendants had previously obtained a loan from the plaintiff bank to construct an apartment complex on the same property, mortgaging it as collateral. They had defaulted in repayment, and subsequently, the mortgage was redeemed with the assistance of the 1st defendant. He further states that on behalf of the 2nd and 3rd defendants, he agreed to be the nominal borrower to obtain the loan facility relevant to this case from the plaintiff bank.

According to the 1st defendant the beneficiaries of the loan were the 2nd and 3rd defendant mortgagors and the plaintiff bank was fully aware of it. This position seems to have been accepted by the 2nd and 3rd defendants in paragraph 23 of their answer. By reiterating the averments in the answer, the 2nd and 3rd defendants in their written submissions state "*the 2nd and 3rd defendants deposited (in several installments in the year 2001) a total sum of Rs. 7,500,000 with the plaintiff and the plaintiff set off Rs. 175,000 (out of this amount paid by the 2nd defendant) against the capital of the said loan; the plaintiff allowed the 1st defendant to take Rs. 4,000,000 (out of this amount paid by the 2nd defendant) and that the plaintiff has set off the balance (out of this amount paid by the 2nd defendant) against the interest and tax and stamp duty said to be due on the said loan*". Unless the 2nd and 3rd defendants were the beneficiaries of the loan disbursed to the 1st defendant, payment of loan instalments to the bank is not expected from an innocent mortgagor. No other explanation has been provided by the 2nd and 3rd defendants for such conduct in the answer or by way of

evidence. The learned High Court Judge in the judgment has accepted this position of the 1st defendant.

In the answer, the 2nd and 3rd defendants took up the position that (a) the effect of renouncing the benefit of the *senatus consultum velleianum* and *authentica si qua mulier* was never explained to the 3rd defendant by an Attorney-at-Law as stated in the Mortgage Bond and (b) the 2nd and 3rd defendants did not intentionally renounce the privilege of *excussionis*, which they were entitled to as guarantors.

The 4th to 23rd defendants intervened in the action, claiming to be the occupants of the units within the apartment complex constructed on the mortgaged property. They allege that prior to the execution of the Mortgage Bond, the 2nd and 3rd defendants collected full consideration of the purchase price of all these units. Furthermore, they contend that, having received these funds, the 2nd and 3rd defendants secretly mortgaged the premises along with the building without their knowledge, thus placing them in grave jeopardy. This, they argue, amounts to a fraud committed on them.

In the answer, the 4th to 23rd defendants state that since the 1st defendant is the principal debtor, the plaintiff bank should recover the money from him, emphasising that the 1st defendant holds sufficient deposits in the plaintiff bank for this purpose. They pray that the Mortgage Bond be declared null and void and the plaintiff's action be dismissed.

At the trial, the Chief Manager of the Colombo region of the plaintiff bank gave evidence on behalf of the plaintiff and tendered documents marked P1 to P10. Except for the Mortgage Bond marked P4, which was recorded as a formal admission, all other documents have been marked subject to proof. The learned High Court Judge correctly noted in the

judgment that there was no necessity for further proof of these documents.

I must pause for a while to state that merely because the opposing counsel routinely says “subject to proof” whenever a document is marked in evidence, it does not mean that all those documents must be proved by calling witnesses. It is up to the Court to decide whether or not a document marked “subject to proof” needs further proof. When a counsel says a document shall be marked “subject to proof”, it is necessary for him to state the basis of it, firstly, for the Court and the party producing the document to seriously consider whether it is necessary to call witnesses to prove the document and secondly, to decide which aspect of the document (such as genuineness, contents, date of receipt) requires further proof. Routine objections in general terms for “subject to proof” as a matter of practice, which is one of the main causes for the delay in concluding a trial, should be strongly discouraged. With the pre-trial conference introduced by the Civil Procedure (Amendment) Act, No. 29 of 2023 properly implemented, this undesirable practice will hopefully cease to exist.

On behalf of the 2nd and 3rd defendants, no witnesses were called. The 2nd and 3rd defendants have marked D1 and D2 through the plaintiff’s witness.

Although several intervenient defendants have given evidence and marked documents, as I will discuss later, they are irrelevant in deciding the case.

The learned High Court Judge has entered judgment as prayed for in the prayer to the plaint.

Appeals have been preferred by the 2nd and 3rd defendants, and the 4th-23rd defendants.

Main argument of the 2nd and 3rd defendant mortgagors

Let me now consider the appeal of the 2nd and 3rd defendants.

At the argument, the main, if not the sole, submission of learned counsel for the 2nd and 3rd defendants was based on "novation". Learned counsel admits that the 2nd and 3rd defendants gave security for the original loan agreement P3 dated 28.02.2001 entered into between the plaintiff bank and the 1st defendant. He submits that, according to the loan ledger marked P8, the original loan of Rs. 30,000,000 disbursed to the 1st defendant on 28.02.2001 was rescheduled on 30.12.2002, and on the same day, a new loan of Rs. 34,099,341/12 was granted to the 1st defendant. It is his submission that this is a novation of the original loan agreement and the 2nd and 3rd defendants did not agree to guarantee this new loan and therefore the bank is not entitled to recover any dues arising out of the new loan using the security given for the original loan.

Was there a novation of the original loan agreement?

In order to decide whether there is a "novation" of the old agreement, the use of terms such as "rescheduling", "restructuring", "renewing" are not decisive. The transaction is determined by the unique facts and circumstances of each individual case, not by the labels assigned to it by the parties involved.

Loan rescheduling typically involves modifying payment terms without altering the fundamental conditions of the existing agreement. This adjustment may involve changes to the principal sum alone or both the principal and interest, along with other payments. The primary aim of rescheduling is to afford the borrower additional time for repayment. The rescheduling of an existing loan, for instance, for the convenience of the borrower or as part of an internal bookkeeping arrangement to

ensure conformity with standard accounting practices, does not *ipso facto* give rise to a new loan agreement.

Conversely, "novation" replaces the old contract with an entirely new one, fundamentally altering the terms and conditions and also perhaps the parties involved.

The *Black's Law dictionary* (11th edition) page 1281 defines "novation" in the following manner:

> *1. The act of substituting for an old obligation a new one that either replaces an existing obligation with a new obligation or replaces an original party with a new party. A novation may substitute (1) a new obligation between the same parties, (2) a new debtor, or (3) a new creditor.*
>
> *2. A contract that (1) immediately discharges either a previous contractual duty or a duty to make compensation, (2) creates a new contractual duty, and (3) includes as a party one who neither owed the previous duty nor was entitled to its performance. A novation rests on a contract, which must be clearly shown. It cannot be made binding by later acquiescence or ratification without a new consideration or the existence of facts that constitute an estoppel. If the novation involves the original debtor's discharge, it must be contemporaneous with and must result from the consummation of an arrangement with the new debtor.*

As Prof. C.G. Weeramantry in his book, *The Law of Contracts*, Vol II, page 718 states "*Where there is a novation of a contract, there comes into existence in the eye of the law a new and independent contract*". To effectuate this, the intention of the parties to substitute the old contract with the new contract must be unequivocally evident, avoiding

speculative interpretation, as such a transition entails serious legal ramifications. Prof. Weeramantry at page 719 states:

> *A novation discharges not only the original obligation but all obligations accessory to it. Interest, penal charges, suretyships and pledges, accessory to the original contract, are thus all discharged. In the words of Lord Moulton, in explaining the similar English concept of 'accord and satisfaction by a substituted agreement', "No matter what were the respective rights of the parties inter se, they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place, the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it." [Palaniappa v. Saminathan (1913) 17 NLR 56 at 58]*

It is because of these serious repercussions, Prof. Weeramantry at page 720 states:

> *Novation is never presumed, for the law considers that a contract once established retains its binding force, and that a creditor does not intend to surrender the rights he has acquired under the earlier contract. It follows that the law will incline to the view that a later contract co-exists with, rather than supersedes, a former contract, unless the court is satisfied of an intention on the part of the parties to supersede and extinguish the earlier contract. [Voet 46.2.3; Wessels, s. 2396,2398; Karthikesu v. Ponnachchy (1911)14 NLR 486]*

This does not however mean that there must be an express agreement entered into between the parties for novation to take effect. A novation

can be inferred provided there is strong evidence that the parties intended to replace the original contract with a new one. In *Karthikesu v. Ponnachchy* (1911) 14 NLR 486 at 487, Chief Justice Lascelles stated:

> *Maasdorp (vol. IV., p. 165) states the law on this point as follows: By our law differing in that respect from the Roman law, novatio may take place, not only by express agreement, but also tacitly or by implication, the consent of the parties to the novatio being implied from the circumstances and the conduct of the parties. In the latter event, however, the inference must be so probable and conclusive as to make it quite clear that the parties intended to recede from the original obligation and to replace it by another – in fact, it must be a necessary inference, the new obligation being inconsistent and incompatible with the continued existence of the original obligation.*

The substitution of the original contract with a new contract as an indispensable element of novation has been emphasised by the Courts of other commonwealth jurisdictions as well.

In *Kabab-Ji SAL v. Kout Food Group* [2021] UKSC 48, the appellant entered into a franchise development agreement with a Kuwait company. Later, the Kuwait company became a subsidiary of the respondent. A dispute arose under the franchise development agreement, which the appellant referred to arbitration. The arbitration was commenced against the respondent only, not against the Kuwait company, on the basis that the respondent became a party to the agreements by the novation of original agreements. The Supreme Court of the United Kingdom was not inclined to accept this argument. Making a distinction between novation and assignment it was held at paras 60 and 61:

60. Under English law contractual rights may be transferred by an assignment of those rights. An assignment cannot, however, transfer contractual obligations. Both contractual rights and obligations may be assumed by a third party where there is a novation. A novation involves the substitution of one contracting party by another with the consent of all parties. It does not involve a transfer of rights and liabilities but rather the discharge of the original contract and its replacement with a new contract, typically on the same terms but with a different counterparty: see generally Chitty on Contracts, 33rd ed (2019), Vol 1, paras 19-087 - 19-090.

61. The main differences between assignment and novation were summarised by Aikens J. in Argo Fund Ltd v. Essar Steel Ltd [2005] EWHC 600 (Comm); [2006] 1 All ER (Comm) 56, at para 61 as follows:

"…there are four main differences. First, a novation requires the consent of all three parties involved…But (in the absence of restrictions) an assignor can assign without the consent of either assignee or the debtor. Secondly, a novation involves the termination of one contract and the creation of a new one in its place. In the case of an assignment the assignor's existing contractual rights are transferred to the assignee, but the contract remains the same and the assignor remains a party to it so far as obligations are concerned. Thirdly, a novation involves the transfer of both rights and obligations to the new party, whereas an assignment concerns only the transfer of rights, although the transferred rights are always 'subject to equities'. Lastly, a novation, involving the termination of a contract and the creation of a new one, requires consideration in relation to both those acts; but

> *a legal assignment (at least), can be completed without the need for consideration."*

In a more recent case of *Musst Holdings Ltd. v. Astra Asset Management UK Ltd. & Another* [2023] EWCA Civ 128 at para 82, Justice Falk states that a variation of terms is not a novation.

> *A novation is not a variation. A varied contract remains in place. In contrast, a novation is the replacement of a contract by a new contract between different parties.*

Section 62 of the Indian Contract Act, 1872 reads as follows:

> *62. Effect of novation, rescission, and alteration of contract.—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract, need not be performed.*
>
> *Illustrations*
>
> *(a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.*
>
> *(b) A owes B 10,000 rupees. A enters into an arrangement with B and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.*
>
> *(c) A owes B 1,000 rupees under a contract. B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement. B still owes C 1,000 rupees, and no new contract has been entered into.*

This section underscores the necessity of having a complete substitution of a new contract in place of the old with the assent of all the parties as an essential prerequisite for the novation of a contract.

In *Lata Construction v. Rameshchandra Ramniklal Shah* [2000] 1 SCC 596, the Supreme Court of India held:

> *One of the essential requirements of 'Novation'; as contemplated by Section 62, is that there should be complete substitution of a new contract in place of the old. It is in that situation that the original contract need not be performed. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract, has to be by agreement between the parties. A substituted contract should rescind or alter or extinguish the previous contract.*

In *Ramdayal v. Maji Devdiji* (AIR 1956 Raj 12) Justice Modi held at para 7:

> *"62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."*
>
> *A plain reading of this section shows that in order to have a novation, the parties to a contract must agree to the extinguishment or discharge of the old debt or obligation. There can be no novation until this has been accomplished. A novation may take place by the introduction of new parties or new terms into the contract. The test; therefore, is what was the intention of the parties, or, in other words, whether they intended to bring about a new or altered contract between themselves.*

In *ALH Group Property Holdings Pty Ltd. v. Chief Commissioner of State Revenue* [2012] HCA 6, Chief Justice French, Justices Crennan, Kiefel and Bell in the High Court of Australia held at para 12:

> *A novation, in its simplest sense, refers to a circumstance where a new contract takes the place of the old [Olsson v. Dyson (1969) 120 CLR 365 at 389; [1969] HCA 3]. It is not correct to describe novation as involving the succession of a third party to the rights of the purchaser under the original contract. Under the common law such a description comes closer to the effect of a transfer of rights by way of assignment. Nor is it correct to describe a third party undertaking the obligations of the purchaser under the original contract as a novation. The effect of a novation is upon the obligations of both parties to the original, executory, contract. The enquiry in determining whether there has been a novation is whether it has been agreed that a new contract is to be substituted for the old and the obligations of the parties under the old agreement are to be discharged.*

In *Ran Banda and Others v. People's Bank* [2004] 2 Sri LR 31, the loan was rescheduled by the bank with the agreement of the 1st defendant debtor. When the bank took steps to recover the loan upon failure to pay as agreed, the 1st defendant debtor and the 2nd and 3rd defendant guarantors resisted it on the basis that novation of the old loan agreement took place with the reschedulement of the old loan and the bank cannot enforce the terms of the old loan agreement to recover the dues of the new loan. This argument was rejected by the Court of Appeal. Justice Amaratunga stated at pages 33-34:

> *The defendant-petitioners in their joint application and in their affidavits took up the position that the Bank had no right to seek to recover any sum of money upon the agreement P2 and that the 2nd*

and 3rd defendants were not liable to pay anything to the Bank as the said document P2 had become invalid. The basis upon which the defendants claimed that the original written contract P2 had become invalid was that when the Bank re-scheduled the loan the former debt was extinguished and a new debt created by the rescheduled agreement V2A has come into existence and that this new contract made the former written contract unenforceable. In short, the contention of the defendants was that the new arrangement brought into existence by the re-scheduled arrangement amounted to what is known to the law of contract as 'novation'. This concept of novation, which is a part of the modern law of contract, both English and the Roman Dutch, had its origins in the Roman Law. To put it in the simplest possible way, in the modern law, 'novation occurs whenever an existing obligation is discharged in such a manner that another obligation is substituted in its place.' Wessels-Law of Contract Vol 2, 2nd Ed., 1951, page 658 para. 2369. Novation proper takes place if a new contract to take the place of the old is established between the same parties without the intervention of a third party. When this happens, the later obligation extinguishes the former.

The law presumes that once a contract is established, it retains its binding force and that a creditor does not intend to renounce rights which he has acquired. Hence where two parties to a contract make a later agreement, the law will presume rather, that they intended both agreements to have equal force than that the latter should supersede the former. A mere change in the method of payment does not affect the substance of the contract, though it may affect the manner of its execution. Mere extension of time to the debtor does not affect the substance of the obligation and will therefore not be construed to be a novation having the effect of

> *releasing the sureties. Wessels – paragraphs 2396, 2411 and 2415.*
>
> *Document V2A clearly indicates that the re-scheduled arrangement was made at the request of the debtor, the 1st defendant. It merely gave him extended time for payment and a concessionary rate of interest in respect of the balance of the loan remaining unpaid as at the date of the re-schedule agreement. It did not bring into existence anything unfavourable to the guarantors. In fact, the concessions granted to the debtor were beneficial to the guarantors as well. Condition No 4 in the re-scheduled agreement preserves the Bank's rights to have recourse to the conditions of the original agreement in the event of the failure of the debtor to act in accordance with the conditions of the re-scheduled arrangement, and this in my opinion completely negatives any intention on the part of the Bank to make the re-scheduled arrangement to take the place of a new contract – a new obligation extinguishing the existing contract. Further the absence of the participation of the guarantors for the re-scheduled agreement is significant. It is clear evidence that the Bank considered that the re-scheduled arrangement was an arrangement within the framework of the existing contract and not in substitution therefor.*

In *Luxman Perera v. Union Bank of Colombo Ltd* [2019] 2 Sri LR 395, the 1st respondent bank filed action in the Commercial High Court to recover a sum of Rs. 5,162,341/53 and interest alleged to be due to it from the 2nd respondent Company upon certain credit facilities which it had granted to the 2nd respondent at the request of the appellant and the 3rd respondent, who were the directors of the 2nd respondent. The appellant and the 3rd respondent were also made defendants to the action under a "Joint and Several Personal Guarantee" dated

16.03.1998, which they had signed at the time of granting the facility. In the year 2000 the 2nd respondent went into arrears in making its repayments, and at the request of another director, the 1st respondent bank "restructured" the outstanding amount subject to the terms and conditions of an offer letter, which was signed and accepted by the appellant on 16.07.2001. The 2nd respondent continued to default on its repayments, and in 2002 the bank sent several reminders followed by a letter of demand. On 06.02.2007 the bank instituted legal action for the recovery of the total amount outstanding and interest.

At the trial, the appellant's defence was that in 2001 the 2nd respondent Company did not reschedule the existing loan repayments but obtained a new credit facility. The appellant argued that he only became a surety for the 1998 loan, and not for the loan obtained in 2001, and the Guarantee Bond having been executed in 1998, the claim for recovery of money in respect of the same in 2007 was prescribed. It was also argued that the 1998 guarantee bond was executed for a specific loan, and could not be extended to cover future uncertain monies. The Commercial High Court entered judgment in favour of the 1st respondent bank and the appellant appealed to the Supreme Court.

The Supreme Court dismissed this argument, despite the presence of evidence that could suggest a novation of the prior loan agreement. Justice Aluwihare reasoned out the said conclusion in the following terms at pages 401-402:

> *There is no dispute that it was the abovementioned request letter marked "P6" that prompted the Plaintiff-Bank to send a new offer letter in June 2001 marked "P7." In the said letter the Plaintiff-Bank has clearly indicated that "We, the Union Bank of Colombo, are pleased to restructure the outstanding pertaining to Emm Chem (Pvt) Ltd on terms and conditions stipulated below." According to the*

said letter, the outstanding amount was restructured as "Term Loan 1" and "Term Loan 2". Even at the end of the letter "P7", the Plaintiff-Bank has stated "Please note that this is the second re-schedulement of the outstandings and therefore request you to strictly adhere to the rescheduled payments".

It is also important to note that under the heading "Security", the Plaintiff-Bank has specifically referred to "personal guarantee for Rs. 7,000,000/= of Mr. Lakshman Perera and Mr. Surenthiran together with net worth investments". The 2nd Defendant-Appellant argued based on this reference that "P7" was a new and distinct loan which required a new personal guarantee. In contrast, the Plaintiff-Bank claimed that it was not a request for 'fresh guarantee' but a cross-reference to the already existing guarantee bond executed in 1998. I am inclined to believe that it was a cross-reference, as it specifically refers to the 2nd and 3rd Defendants who were the sureties in the 1998 Guarantee Bond. If the Plaintiff-Bank was requesting fresh guarantee, there would not have been any necessity to specifically refer to the 2nd and 3rd Defendants' names. The Plaintiff-Bank could have easily followed the requirements in the Board Resolution marked "P4" which only requires the signature of "any two directors of the Company."

Apart from these contentions, the 2nd Defendant-Appellant also sought to argue that the 2001 facility was a new loan based on the ledger accounts marked "P12." In the said ledger account, there is an entry to the effect 'full recovery of the loan granted'. According to the 2nd Defendant-Appellant, this entry proves that the 1998 loan had been fully repaid and nothing was remaining. If the 1998 loan was 'fully recovered", the 2nd Defendant-Appellant argued that there could be no continuation of the same. Thus, the 2001 loan could only be construed as a 'new loan'.

However, immediately underneath the said entry are two further entries to the effect: "Term Loan 1" and "Term Loan 2". When asked to explain the three entries, Mr. Ned Gomez–Head of Operations of the Plaintiff-Bank, in his evidence stated that the said entry "full recovery of the loan granted" was not made pursuant to any physical money being deposited by the 1st Defendant Company. Instead, it has been made for accounting purposes and to cross-reflect that it was the same outstanding amount of the aforesaid loan, that had been rescheduled as "Term Loan 1" and "Term Loan II". He also gave evidence that no cash was released with regard to "Term Loan I" and "Term Loan II". All these clearly indicate that, contrary to what is claimed by the 2nd Defendant, the 2001 arrangement was not a new loan. What the 2nd Defendant-Appellant attempts to characterize as a 'new loan' is the amount which the 1st Defendant-Company was anyway duty bound to repay.

Throughout trial, the two witnesses on behalf of the Plaintiff-Bank have consistently maintained that no new loan was granted to the 1st Defendant-Company and that the action was instituted to recover the outstanding amount with interests of the same continuing loan.

The 2nd Defendant-Appellant's position is that "Term Loan I" and "Term Loan II" were two new loans granted to the 1st Defendant-Company and one for which the Plaintiff-Bank never obtained fresh security. It would be difficult to believe that, in the circumstances where there had been default and delay in paying the monies that were due, the Plaintiff-Bank would have even considered making the restructured banking facilities available without security of the existing bank guarantee.

> *All these factors cumulatively indicate that there was only one continuing loan—i.e. the loan obtained in 1998. It was the same loan for which the 2nd Defendant-Appellant along with the 3rd Defendant had signed a guarantee bond.*

As previously noted, there shall be *consensus ad idem* (meeting of minds) among contracting parties for novation to come into effect.

Chitty on Contracts, 33rd ed (2018), Vol 1, para 19-087 states:

> *Novation takes place where the two contracting parties agree that a third, who also agrees, shall stand in the relation of either of them to the other. There is a new contract and it is therefore essential that the consent of all parties shall be obtained: in this necessity for consent lies the most important difference between novation and assignment.*

In *Musst Holdings Ltd v. Astra Asset Management UK Ltd (supra)*, the Court of Appeal of the United Kingdom stated at para 56:

> *The consent of all parties is required for a novation. Consent can either be provided expressly or can be inferred from conduct. Whether consent has been provided is a question of fact. For example, in Re Head [1894] 2 Ch 236 a transfer of funds from a current to a deposit account following the death of a partner in a banking partnership was held to amount to a novation of liability to the surviving partner.*

In *Sri Lanka Co-operative Marketing Federation Ltd v. Ambewela Livestock Co Ltd* (SC/CHC/APPEAL/54/2007, SC Minutes of 27.03.2014), rejecting the plea of novation, Justice Ekanayake observed:

> *Further, it would be pertinent to note that it is only the description of the name of the creditor that got changed but certainly not the nature and character of the debt. More specifically, Lanka Milk Foods (CWE) Limited has taken over only the operation and management of the said Company (see P35). In order to prove novation the defendant had to establish in evidence the intention of the creditor to discharge the debtor from the obligation. In the case before us, no such evidence was led at the trial. The express and declared will of the creditor is required in order to constitute novation. In this case the defendant has completely failed to produce such evidence. In the circumstances, the defendant in this case cannot avoid liability on the basis that there has been novation.*

In *Attorney General v. Perera* (1908) 12 NLR 161, the Supreme Court held that the mere variation of terms in a contract does not constitute a novation.

In *Mohamedally v. Misso* (1957) 56 NLR 370 it was held that the execution of subsequent additional security on a promissory note does not discharge any obligation unless the intention to provide substitute security, as opposed to additional security, is clearly established. This view was later upheld by the Privy Council in the appeal, *Mohamedally v. Misso* (1957) 58 NLR 457.

I must refer to the judgment of Justice Suresh Chandra in *Hatton National Bank v. Rumeco Industries Ltd* [2011] 2 BLR 329 which is often relied upon by the guarantors on the question of reschedulement and novation since those concepts are referred to in the judgment. In that case, the plaintiff bank instituted action against three defendants to recover the dues to the bank on a term loan given to the 1st defendant in 1995. This loan was secured by two Mortgage Bonds. *Ex-parte*

judgment was entered against the 1st and 2nd defendants. Only the 3rd defendant contested the case. At the *inter-partes* trial, contrary to the pleadings, the bank presented a different case against the 3rd defendant. The 3rd defendant is said to have given a personal guarantee in 1992 regarding some previous loan, which had nothing to do with the term loan given to the 1st defendant in 1995. The District Court, the High Court and the Supreme Court were unanimous in holding that the 1995 loan was on a new term loan agreement and not a rescheduling of the loan given to the 1st defendant in 1992 and therefore the personal guarantee given by the 3rd defendant in respect of the 1992 loan cannot be made use of to recover the dues arising out of 1995 term loan which was secured by separate two Mortgage Bonds. These are unique facts peculiar to that case.

The facts of the instant case are quite different. In the instant case, there is no affirmative evidence for this Court to come to a definite conclusion that the original loan agreement dated 28.02.2001 marked P3 was replaced with a new loan agreement on 30.12.2002.

Let me quote the evidence which the 2nd and 3rd defendants rely on to argue that there is a novation.

This is part of the cross-examination of the plaintiff's witness (the Chief Manager of the Colombo region of the plaintiff bank) by the counsel for the 2nd and 3rd defendants:

> *Q: Now answer my question. In the 5th column [of the loan ledger marked P8] there is a heading balance outstanding on 30.12.2002, there is balance outstanding NIL shown in the 5th column?*
>
> *A. No, balance outstanding is Rs. 34, 099, 341.12.*
>
> *Q. What does the NIL stand for?*

A. The balance outstanding is Rs. 34, 099, 341.12.

Q. A word found in the same column just above that, there is a word NIL?

A. There is an interim figure given for the day but it is not the end of the balance.

Q. So, the balance outstanding is NIL because Rs. 29, 825, 000/00 is shown as recovered in column 4?

A. It is not recovery. It is a re-schedulement.

It is because of the use of the word "reschedulement", the 2nd and 3rd defendants say there is a novation.

Quoting the above evidence, learned counsel for the 2nd and 3rd defendants states:

As admitted by the plaintiff's witness that this is a re-schedulement. The said witness being a senior banker of HNB has clearly used the word "re-schedulement". This amounts to a novation and the guarantors will be discharged.

This argument is unsustainable. As I stated previously, a reschedulement of a loan does not necessarily amount to a novation of the existing loan agreement. The term used in *Luxman Perera's* case discussed above was "restructuring", which is stronger than "rescheduling" but the Supreme Court was not inclined to go by the label given by the parties.

Although the loan ledger marked P8 indicates "Nil" in the 5th column under the heading "CAPITAL Balance O/s (Rs)" on 30.12.2002, in the

last column on the same date under the heading “TOTAL OUTSTANDING (RS)”, it is stated “34,099,341.12”.

The witness explained this in his evidence in the following manner.

> *Q. And on 30.12.2002, the balance outstanding is shown as Nil and the same day it is thereafter made Rs. 34,099,341.12?*
>
> *A. That is balance at the end of the day.*
>
> *Q. Because the bank has given a loan for Rs. 34,099,341.12 and then from that amount recovered the capital due from the original loan of Rs. 30,000,000.00?*
>
> *A. I do not agree.*
>
> *Q. That is what is shown in the ledger called Loan Ledger Sheet?*
>
> *A. The capital of Rs. 29,325 million plus the interest of Rs. 4,203,720 plus the charges of Rs. 70,620.38 was rescheduled and capitalized. <u>And a fresh loan of Rs. 34 million those are internal book keeping arrangements</u>. We capitalized the interest on the request of the applicant. And that is how you can see it is a total of these three items. Rs. 29,825,000, Rs. 4,203,720.74 and Rs. 70,620.38. It was accrued as charges at that particular date.*
>
> *Q. And thereafter, the bank has charged interest on this fresh loan?*
>
> *A. The loan was capitalized. So the capital interest is charged.*
>
> *Q. So, there is a fresh capital amount of Rs. 34,133,719.32 and this case is based on that capital amount? Is that correct?*
>
> *A. Yes.*

Q. I put it to you that you have already answered that this mortgage bond was given to support the loan of Rs. 30 million set out in the document marked P2?

A. Yes.

Q. So, now you are showing a different loan of Rs. 34,133,719.32 which came into existence on 30.12.2002?

A. I do not agree. I confirmed that is the same loan. It is a continuation.

It was not a fresh loan given on 30.12.2002. It is an "internal bookkeeping arrangement" whereby the capital outstanding, the interest and the charges were rescheduled and capitalized on the same terms as agreed upon in the original loan agreement P3. This has been identified in the loan ledger P8 as "Reschedulment entries pertaining to the loan". It cannot be equalised to reschedulement of the loan with new terms. According to the witness, it is a continuation of the original loan agreement.

As seen from the loan ledger, both before and after rescheduling, the total outstanding remains the same.

The entry showing a "Nil" balance did not result from an actual payment to the bank. Furthermore, the notation of Rs. 34,133,719/32 under "granted" does not signify cash disbursement to the 1st defendant on 30.12.2002. No money was given to the 1st defendant on that date or any subsequent date.

If the contract was novated, the original debt should have been substituted by a new debt as opposed to a mere continuation of the original loan agreement. This is confirmed in *Cheshire, Fifoot, and*

Furmston's Law of Contract (Oxford University Press, 16th edn 2012) at 652-653 in the following way:

> *Novation is a transaction by which, with the consent of all the parties concerned, a new contract is substituted for one that has already been made. The new contract may be between the original parties, such as where a written agreement is later incorporated in a deed; or between different parties, such as where a new person is substituted for the original debtor or creditor… Thus novation, unlike assignment, does not involve the transfer of any property at all, for it comprises, (a) the annulment of one debt and then (b) the creation of a substituted debt in its place.*

Chitty on Contracts, 33rd edn (2018), Vol 1, para 22-031 states:

> *Novation is a generic term which signifies: "….that there being a contract in existence, some new contract is substituted for it, either between same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract." (Scarf v. Jardine (1882) 7 App. Cas. 345, 351; The Tychy (No.2) [2001] 1 Lloyd's Rep. 10, 24)*

If this internal bookkeeping arrangement or rescheduling is to be considered as a new loan replacing the old loan as learned counsel for the 2nd and 3rd defendants suggest, the new loan has been given to the 1st defendant without any security because the old loan given with security could not be paid. This is unthinkable in the commercial world.

In *Musst Holdings Ltd v. Astra Asset Management UK Ltd (supra)* the Court of Appeal of the United Kingdom held that a novation will only be inferred from conduct if that inference is required to give business efficacy to what happened. Justice Falk held at para 57:

> *However, a novation will only be inferred from conduct if that inference is required to give business efficacy to what happened. As Lightman J. explained in Evans v. SMG Television Ltd [2003] EWHC 1423 (Ch) at [181]: "The proper approach to deciding whether a novation should be inferred is to decide whether that inference is necessary to give business efficacy to what actually happened (compare Miles v Clarke [1953] 1 WLR 537 at 540). The inference is necessary for this purpose if the implication is required to provide a lawful explanation or basis for the parties' conduct."*

Internal bookkeeping adjustments or rescheduling made for convenience and clarity, without altering the conditions of the original loan agreement, cannot be deemed as novation, thereby creating a new contract. A "mere change of method of payment" or "mere extension of time to the debtor to make payment" are not incidents of substantial alteration that warrant the characterisation of novation or the creation of a new contract.

I hold that the 2nd and 3rd defendants failed to establish that the previous loan was settled and that a new loan with fresh terms (excluding the Mortgage Bond P4) was granted on 30.12.2012, thereby establishing a novation of the old loan agreement.

The plea of novation of the 2nd and 3rd defendants must fail.

Can the plea of novation be taken up for the first time in appeal?

It is admitted that the plea of novation was not taken up by the 2nd and 3rd defendants in the answer, did not raise as an issue at the outset of the trial, did not raise as an issue during the course of the trial, and did not state in the petition of appeal. It was raised for the first time at the argument before this Court – to be specific in the written submissions filed after the matter was fixed for the argument. Can this be done?

A pure question of law can be raised for the first time in appeal but not a question of fact or a question of mixed fact and law (*Ranaweera v. Commissioner of Inland Revenue* (1965) 70 NLR 564 at 566, *Jayawickrema v. David Silva* (1973) 76 NLR 427 at 430, *Rev. Pallegama Gnanarathana v. Rev. Galkiriyagama Soratha* [1988] 1 Sri LR 99 at 120, *Candappa v. Ponnambalampillai* [1993] 1 Sri LR 184 at 189, *Janashakthi Insurance Co. Ltd. v. Umbichy Ltd.* [2007] 2 Sri LR 39 at 45, *Lebbai v. Mohamed Abiyar and Others* [2021] 1 Sri LR 22).

As I held in *Wijesinghe v. Wickramaratne* (SC/APPEAL/154/2017, SC Minutes of 21.11.2022):

> *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.*

The plea of novation is not a pure question of law. It is a mixed question of fact and law.

Learned counsel for the 2nd and 3rd defendants, citing *Somawathie v. Wilmon* [2010] 1 Sri LR 128 seems to suggest that there is no blanket prohibition for a question of fact or mixed question of fact and law to be

raised for the first time in appeal. In *Somawathie's* case, the High Court set aside the judgment of the District Court on the basis that the deed of gift the plaintiff relied on had not been accepted by the donee on the face of the deed. The Supreme Court set aside the judgment of the High Court and restored the judgment of the District Court on the basis that whether the donee accepted the gift constitutes a question of both fact and law, and thus cannot be raised for the first time in appeal. Justice Bandaranayake (as Her Ladyship then was) stated at pages 135-136:

> *It was not disputed that no issue was raised on the non-acceptance of the Deed of Gift. It is also to be noted that the respondent had not contested the validity of the Deed of Gift as to whether there was acceptance by the donees, at the time of the trial in the District Court. Since no such issue was raised, the District Court had not considered the said non-acceptance of the Deed of Gift and therefore there was no material before the High Court on the said issue. In the circumstances, the High Court was in error when it considered the question of non-acceptance of the Deed of Gift, which was at most a question of mixed law and fact.*

In *Musst Holdings Ltd v. Astra Asset Management UK Ltd* (*supra*), the Court of Appeal of the United Kingdom highlighted the role of the trial Judge in deciding whether a novation can be inferred from the parties' conduct:

> *The question whether a novation can be inferred from the parties' conduct is a question of fact, with which this court will not lightly interfere. The judge had the benefit, which we do not, of a consideration of all the evidence. It is quite clear from his decision that he took careful account of the evidence as a whole in reaching his conclusions. This was not simply a question of looking at a few emails and invoices and determining that they amounted to an*

> *offer and acceptance. The judge explained that he was considering the documents to which he referred in their context. As Musst correctly emphasised, this was an evaluative exercise. The comment made by David Richards LJ in UK Learning Academy v Secretary of State for Education [2020] EWCA Civ 370 at [41] bears repeating: "As has been frequently said, the trial judge is in the best position to assess the evidence not only because the judge sees and hears the witnesses but also because the judge can set the evidence on any particular issue in its overall context. This is true also of an assessment of what a particular document would convey to a reasonable reader in the position of the party who received it, having regard to all that had preceded it."*

The proposition that a question of fact can be raised for the first time in appeal is mainly based on the old decision of the House of Lords in *The Tasmania* (1890) 15 App. Cases 223 at 225 where Lord Herschell stated:

> *It appears to me that under these circumstances, a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box.*

In the Supreme Court case of *Appuhamy v. Nona* (1912) 15 NLR 311 at 312, Justice Pereira raised some doubt about the acceptability of the above position in the context of procedure we adopt in Sri Lanka where a civil trial is conducted on identified issues. His Lordship stated that

the new point to be entertained in appeal "*it might have been put forward in the Court below under some one or other of the issues framed*".

> *I am not sure that this ruling would apply to a system of procedure in which the framing of issues at the trial is an essential step except to the extent of admitting a new contention urged for the first time in the Court of Appeal, which, though not taken at the trial, is still admissible under some one or other of the issues framed. Under our procedure all the contentious matter between the parties to a civil suit is, so to say, focused in the issues of law and fact framed. Whatever is not involved in the issues is to be taken as admitted by one party or the other, and I do not think that under our procedure it is open to a party to put forward a ground for the first time in appeal unless it might have been put forward in the Court below under some one or other of the issues framed, and when such a ground, that is to say, a ground that might have been put forward in the Court below, is put forward in appeal for the first time, the cautions indicated in the case of the Tasmania may well be observed.*

Justice Pereira did not entertain the question of fact raised for the first time in that appeal.

The cumulative effect of these two leading decisions (i.e. *The Tasmania* and *Appuhamy v.* Nona) is that a question of fact can be raised for the first time in appeal if:

(a) "*it might have been put forward in the Court below under some one or other of the issues framed*"; and

(b) "*if it is satisfied beyond doubt*" that

(i) "*it [the appellate Court] has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial*"; and

(ii) "*no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box*".

Later cases such as *Arulampikai v. Thambu* (1944) 45 NLR 457, *Setha v. Weerakoon* (1948) 49 NLR 225, *Ranaweera Menike v. Rohini Senanayake* [1992] 2 Sri LR 180 at 191, *Somawathie v. Wilmon* (*supra*) followed the above two decisions.

In *Leechman Co. Ltd v. Rangalle Consolidated* [1981] 2 Sri LR 373, Justice Soza stated at page 391:

> *Where the point depends upon a question of fact which is disputed and should be determined on evidence, then it cannot be taken up for the first time in appeal unless the facts necessary for the determination appear in the evidence and are not in dispute at all.*

The same approach was adopted by the apex Court of Australia in *Water Board v. Moustaka* (1988) 62 ALJR 209 where Chief Justice Mason and Justices Wilson, Brennan and Dawson, after a careful consideration of precedent on the matter held at para 13:

> *More than once it has been held by this Court that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. Where all the facts have been established beyond controversy or where the point is one of construction or of law, then a court of appeal may find it expedient and in the interests of justice to entertain the point, but otherwise the rule is strictly applied.*

As I stated previously, the question of novation or at least the question of reschedulement which are not pure questions of law, were never raised as issues in the trial Court. The 2nd and 3rd defendants do not say that those questions could have been put forward under any of the issues raised at the trial. I am not satisfied "beyond doubt" that this Court has "before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial" Court. The 2nd and 3rd defendants did not even attempt to raise an issue on the question of novation at least during the course of cross-examination. If such an issue was raised, I have no doubt that the plaintiff bank would have led specific evidence to counter that position. The 2nd and 3rd defendants cannot say that the proceedings bear all the evidence which the bank could have led on novation, if the question of novation was raised as a specific issue in the trial Court.

On the facts and circumstances of this case, the question of novation could not have been raised for the first time in appeal.

Peripheral arguments

Learned counsel for the 2nd and 3rd defendants raised the following two arguments as well:

(a) The 2nd and 3rd defendants did not renounce the benefit of the "*beneficium ordinis seu excussionis*".

(b) The renouncing the benefit of the "*senatus consultum velleianum*" and the "*authentica si qua mulier*" was never explained to the 3rd defendant.

Let me now consider them in brief.

Beneficium ordinis seu excussionis

The *beneficium ordinis seu excussionis* is a privilege whereby a surety is entitled to claim that "*as his liability is of an accessory character, it shall not be enforced against him until the creditor has unsuccessfully endeavoured to obtain satisfaction from the principal debtor*". (*Wijeyewardene v. Jayawardene* (1917) 19 NLR 449 at 452-453, *Wijeyewardene v. Jayawardene* (1923) 24 NLR 336, *Seneviratne v. State Bank of India* [2014] 1 Sri LR 320 at 333)

Learned counsel for the 2nd and 3rd defendants, relying on this principle argues that the plaintiff bank has no right to recover the dues from the 2nd and 3rd defendants without first taking all the steps to recover the dues from the principal debtor, the 1st defendant.

This privilege is available to sureties under the common law. Roman-Dutch law is considered as the common law of Sri Lanka because it is the residuary law filling in the gaps only when the statute laws and special laws are silent. The Mortgage Act, No. 6 of 1949, as amended, being a statute enacted by the legislature would supersede any common law principles pertaining to mortgage of properties.

As the long title of the Act indicates, it is "*an Act to amend and consolidate law relating to mortgage*". In *Ramachandran and Others v. Hatton National Bank* [2006] 1 Sri LR 393 at 399, it was observed by Chief Justice S.N. Silva that "*the Act itself is a piece of erudition. It takes over the concept of Roman Law of Hypotheca whereby a real security is created over property with the mortgagor remaining the owner in possession of the property and provides a specific remedy to obtain an order from Court declaring the mortgaged property to be bound executable for the money due and for a judicial sale of the property*." The Mortgage Act prescribes both the substantive law and the procedure

relating to actions based on mortgage bonds and their enforcement (*Brunswick Exports Ltd. v. Hatton National Bank Ltd.* [1999] 1 Sri LR 219 at 223).

According to section 4, Part II of the Mortgage Act containing sections 4-62 is applicable to:

(a) a mortgage of land,
(b) to any action to enforce payment of the moneys due upon a mortgage of land, and
(c) to any hypothecary action in respect of any land.

According to section 2, "hypothecary action" means "*an action to obtain an order declaring the mortgaged property to be bound and executable for the payment of the moneys due upon the mortgage and to enforce such payment by a judicial sale of the mortgage property*".

Section 34 of the Civil Procedure Code enacts that every action shall include the whole claim and if the plaintiff omits to do so (except with the leave of the court obtained before the hearing), he shall not afterwards sue for the remedy so omitted. It further states that for the purpose of this section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.

Section 7 of the Mortgage Act provides an exception to section 34 of the Civil Procedure Code.

> *7(1). Notwithstanding anything in section 34 of the Civil Procedure Code, a claim to enforce payment of the moneys due upon a mortgage may be joined to a claim in a hypothecary action, or a separate action may be brought in respect of each such remedy.*

A close scrutiny of sections 2,4 and 7 referred to above reveals that there are two actions available to a mortgagee. One is a hypothecary

action. The other is an action to claim recovery of the debt secured by the mortgage. He can claim both in one action or file separate actions for each. (*Ahamado Muheyadin v. Thambiappah* (1948) 51 NLR 392 at 395) In the instant case, the plaintiff bank has joined both claims in the same action.

Section 46 of the Act is an important section.

> *46. No decree in any hypothecary action upon any mortgage of land which is created after the coming into force of this section, and no decree in any action for the recovery of any moneys due upon any such mortgage, shall order any property, whatsoever, other than the mortgaged property to be sold for the recovery of any money found to be due under the mortgage, and no property whatsoever, other than the mortgaged property, shall be sold or be liable to be sold in execution of any such decree.*
>
> *In this section "action for the recovery of moneys due upon a mortgage" includes any action for the recovery of any debt secured by a mortgage whether the cause of action sued upon arises by reason of the mortgage or otherwise.*

The two actions which the mortgagee could bring are highlighted in this section as well: (a) "any hypothecary action upon any mortgage of land", and (b) "any action for the recovery of any moneys due upon any such mortgage". Thereafter it states "no property whatsoever, other than the mortgaged property, shall be sold or be liable to be sold in execution of any such decree". The term "any such decree" covers both actions. In the result, section 46 would apply even in an action against the principal debtor as such action would be an action for the recovery of a debt secured by a mortgage.

Section 46 stipulates that a decree in a hypothecary action or any action for the recovery of money due on the mortgage must be limited to the mortgaged property. The prior position under Roman Dutch Law was that the creditor was entitled to resort to the other property of the mortgagor if there was a deficiency after the sale of the mortgaged property (*Wijesekera v. Rawal* (1917) 20 NLR 126). The Mortgage Act has thus introduced a statutory limitation on the liability of the mortgagor.

In reference to section 46, in the Supreme Court case of *Mercantile Bank Ltd v. Anver* (1976) 78 NLR 481, Justice Wijesundera held at 485:

> *The words used are "no decree…shall order". They are emphatic and the prohibition is unqualified. The result is only the mortgaged land can be sold in default of payment whatever be the form of action to recover the debt due on the mortgage.*

Section 47 expressly removes any application of common law to the above principle.

> *47. The provisions of section 46 shall have effect notwithstanding anything in any other law or in any mortgage bond or other instrument.*

However, in terms of section 47A, the mortgagor can renounce the benefit of section 46 thereby allowing the mortgagee to sale any property of the mortgagor other than the mortgaged property to recover the dues.

> *47A(1) Where at the time of the execution of a mortgage bond in favour of a lending institution for the payment of a loan, the principal of which exceeds one hundred and fifty thousand rupees the mortgagor executes a separate instrument, attested by the*

notary attesting the bond and by the witnesses to the bond containing–

(a) a special declaration on the part of the mortgagor that he renounces the benefit of section 46 and that the effect of such renunciation has been explained to him by the notary; and

(b) an endorsement signed by the notary to the effect that he has explained to the mortgagor the effect of such renunciation, then, in addition to the mortgaged property, any other property belonging to the mortgagor shall, subject to the provisions of subsection(2), be liable to be ordered to be sold and to be sold under the decree in an action upon the mortgage, and the provisions of section 218 of the Civil Procedure Code (Chapter 101) shall, mutatis mutandis, apply to the seizure and sale of such other property.

(2) In any case referred to in subsection (1), no process shall issue for the seizure and sale of any property of the mortgagor, other than the mortgaged property, until the mortgaged property is sold and the proceeds thereof applied in satisfaction of the decree.

According to section 47A(3), "*it shall be the duty of the notary to explain to the mortgagor, that the instrument provides for the renunciation of the benefit of section 46 and that the effect of such renunciation is that, in addition to the mortgaged property, other property of the mortgagor is liable to be sold in execution of a decree in an action upon the mortgage.*"

In the instant action, when the plaintiff bank took steps to sell the mortgaged property by *parate* execution in terms of the provisions of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, the 2nd and 3rd defendants challenged it before the Supreme Court. The decision of the Supreme Court is reported in *Ramachandran and Others*

v. Hatton National Bank (*supra*) where it was held by majority decision that the bank cannot sell the mortgaged property by *parate* execution since the 2nd and 3rd defendants are not the borrowers. The Supreme Court at pages 399-400 referred to the Mortgage Act to state that hypothecary action is the proper remedy. This hypothecary action was filed in terms of the Mortgage Act in consequent to the above Supreme Court judgment.

The Mortgage Act does not mandate that the Mortgage Bond cannot be enforced against the mortgagor until the creditor (the bank, in this case) has exhausted all efforts to obtain satisfaction from the principal debtor. The common law benefits available to a surety/guarantor have not been preserved.

A similar argument presented before this Court was rejected by the majority decision in *Sri Lanka Insurance Corporation Ltd v. People's Bank* (SC/CHC/APPEAL/18/09, SC Minutes of 17.03.2017) in respect of two on demand Guarantee Bonds.

> *There was no condition contained in the Guarantee Bond that the Peoples' Bank should first demand from the principal before demanding from the guarantor. When any party grants an assurance to another party guaranteeing to pay on demand, it is accepted that if the principal does not pay that the guarantor shall pay. It is only on that assurance that the Bank grants the facility which the principal requests from the Bank. That is the norm and accepted practice in the business world. If any Bank takes it to mean that it has to first demand from the principal, then file action against the principal and then only the Bank can demand and file action against the guarantor, there will be no bank who would want to grant any facility to any principal on such a guarantee.*

Law of Guarantees by Geraldine Andrews and Richard Millet 2nd Edition at page 192 reads as follows:

"The fact that the obligations of the guarantor arise only when the principal has defaulted in his obligations to the creditor does not mean that the creditor has to demand payment from the principal or from the surety, or give notice to the surety, before the creditor can proceed against the surety."

At page 194 it reads as follows: "There is no obligation on the part of the creditor to commence proceedings against the principal, whether criminal or civil, unless there is an express term in the contract requiring him to do so…"

Similarly, in a mortgage bond there is no condition that the mortgagee must first seek to obtain satisfaction from the debtor before bringing an action against the mortgagor. *Prima facie* the mortgagor's liability is triggered on the default of the debtor.

Even if the creditor were to first bring an action against the principal debtor, the Court by operation of section 46 would be precluded from ordering the sale of any property of the principal debtor for the satisfaction of the debt.

Section 46 clarifies the ambit of its application by specifying that "actions for the recovery of moneys due upon a mortgage" includes any action for the recovery of any debt secured by a mortgage. The intention of the legislature is to limit actions on a mortgage bond to the mortgaged property irrespective of whether the mortgagor is the debtor or a surety/guarantor.

Let me also state that the burden of proof in a hypothecary action is not burdensome. In the Privy Council case of *The Bank of Ceylon, Jaffna v. Chelliahpillai* (1962) 64 NLR 25, Lord Devlin stated at page 28:

> *The distinction between a claim to enforce payment of money due on a mortgage and a claim in a hypothecary action is clearly drawn in section 7 of the Mortgage Act, 1949, notwithstanding that by that section the two claims may be joined. <u>This action in relation to the second and third paragraphs of the prayer is simply a hypothecary action; and to succeed in it the plaintiff need prove only the validity of the bond granting the land as security and the existence of a debt so secured. How the debt was created is for this purpose immaterial</u> and the first bond is not therefore an essential part of the cause of action. It can without being pleaded be produced in evidence to prove the debt.*

Accordingly, to succeed in a hypothecary action, "*the plaintiff need prove only the validity of the bond granting the land as security and the existence of a debt so secured. How the debt was created is for this purpose immaterial*".

Therefore, section 46 of the Mortgage Act must prevail over the principle of *beneficium ordinis seu excussionis* in the event of a conflict as the former is a statute and the latter is a principle in common law. This in essence means that the mortgagors who stand as surety cannot claim the benefit of this principle as section 46 the Mortgage Act allows the creditors to sell the mortgaged property of a surety without first proceeding against the principal debtor.

This may be one of the reasons why Chief Justice S.N. Silva in *Ramachandran and Others v. Hatton National Bank (supra)* at page 399 stated:

> *I have to observe that the [Mortgage] Act itself is a piece of erudition… Although the Act contains several safeguards such as, the registration of a lis pendens, intervention of any party having interest in the land, being necessary in a proceeding that culminates in the sale of property, there are also in-built measures for expedition. If delays resulted in proceedings taken under the Act that may have been due to a failure to understand the provisions correctly and to implement them properly. It is my view that the law itself should not be condemned for these inadequacies.*

The 2nd and 3rd defendants cannot succeed on this argument.

Senatus consultum velleianum and authentica si qua mulier

In support of this Latin maxim, learned counsel for the 2nd and 3rd defendants states:

> *Married women were prohibited under Married Women's Property Ordinance from making contracts/securities for others without the concurrence of their husbands under the law of thesawalamai.*

It is the contention of learned counsel for the 2nd and 3rd defendants that the effect of renouncing the benefit of the said maxim was never explained to the 3rd defendant by an Attorney-at-Law although such a clause is incorporated in the Mortgage Bond marked P4.

The 2nd and 3rd defendants have signed the Mortgage Bond at four different places signifying that they understood the contents of the Mortgage Bond. Just after the last place where the 2nd and 3rd defendants signed together with the Notary, but before the attestation clause of the Notary, the following certificate is found as part of the Mortgage Bond.

Signed by the abovenamed MANOHARY RAMACHANDRAN in my presence and I hereby declare myself to be the Attorney-at-Law for the said MANOHARY RAMACHANDRAN and that I subscribe my name as such her Attorney-at-Law and that I have before the said MANOHARY RAMACHANDRAN set her hand to These Presents read and explained the contents of the above written instrument the nature and meaning of the benefits of the Senatus Consultum Velleianum and the Authentica Siqua Mulier and the effects of the renunciation thereof by her and that she appeared to understand the same.

Sgd
Attorney-at-Law
V. Balasubramaniam

Manohary Ramachandran is the 3rd defendant. V. Balasubramaniam, Attorney-at-Law, is not the Notary Public who executed the Mortgage Bond P4 but a different Attorney-at-Law.

The execution of the Mortgage Bond P4 was recorded as an admission and therefore it was marked in evidence without any objection. The 3rd defendant did not give evidence. The contents of the Mortgage Bond are admitted facts.

In that backdrop, the last argument is also not entitled to succeed.

Case of the 4th-23rd defendants

Despite the agreements between the 2nd and 3rd defendants to sell the apartment units to the 4th-23rd defendants, no deeds of transfer have been executed up to now. There is a special procedure laid down in the Apartment Ownership Law, No. 11 of 1973, as amended, regarding registration of such deeds.

Although these defendants may have a cause of action against the 2nd and 3rd defendants, they do not have a cause of action against the plaintiff bank.

Far from granting reliefs, in my view, they should not have been added as parties to the case (*Weerapperuma v. De Silva* (1958) 61 NLR 481).

The 4th-23rd defendants also state that the 2nd and 3rd defendants have not waived the privilege of *beneficium ordinis seu excussionis* belonging to them in law as guarantors, and that there is a novation of the original loan agreement and therefore the plaintiff is disentitled to enforce the Mortgage Bond given as security for the original loan.

I have already dealt with these two matters.

The appeal of the 4th-23rd defendants must necessarily fail.

Conclusion

The judgment of the Commercial High Court of Colombo dated 26.08.2011 is affirmed and the appeals of the 2nd and 3rd defendants, and the 4th-23rd defendants are dismissed.

The attempt by the bank to recover the dues by selling the mortgaged property by *parate* execution in terms of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, was unsuccessful due to the majority decision of the Supreme Court in *Ramachandran and Others v. Hatton National Bank (supra)* decided on 15.04.2005.

It is after the said decision, the plaintiff bank filed this hypothecary action on 22.06.2006 to recover the dues to the bank by selling the mortgaged property.

According to the loan agreement marked P3 and the loan ledger marked P8, the loan of Rs. 30 million with interest at the rate of 23% per annum and other levies were disbursed to the 1st defendant on 28.02.2001, which is more than 22 years ago. The plaintiff bank was unable to recover this loan fully up to date despite the loan being secured by a primary mortgage of an immovable property.

The 2nd and 3rd defendant-appellants each shall pay Rs. 1 million to the plaintiff bank as costs of this appeal.

The 4th-23rd defendants seem to be innocent buyers of the units of the apartment complex mortgaged to the plaintiff bank. But they have no cause of action whatsoever against the plaintiff bank.

Judge of the Supreme Court

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

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.
I agree.

Judge of the Supreme Court

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

In the matter of an Appeal under and in terms of Section 5(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with the provisions prescribed in terms of chapter LVIII of the Civil Procedure Code.

SC CHC Appeal 06/13

HC (CIVIL)224/06/01

Farzana Clearing Agencies (Private) Ltd.
No. F75, People's Park Complex
Gas Works Street
Colombo 11.

Defendant-Respondent-Appellant

Vs.

Kala Traders (Private) Ltd.
No. 151, Dam Street
Colombo 12.

Plaintiff-Petitioner-Respondent

Before	:	Jayantha Jayasuriya, PC, CJ Murdu N.B. Fernando, PC, J. Arjuna Obeyesekere, J.
Counsel	:	Kamran Aziz with Ms, Farma Latheef instructed by Ershan Ariaratnam for the Defendant-Respondent-Appellant.
Written submissions filed	:	Defendant-Respondent-Appellant on 31.05.2018
Argued on	:	20.07.2023
Decided on	:	16.01.2024

Jayantha Jayasuriya, PC, CJ

The plaintiff-petitioner-respondent (hereinafter referred to as the "respondent") instituted action in the Commercial High Court against the defendant-respondent-appellant (hereinafter referred to as the "appellant"). Both the appellant and the respondent are limited liability companies. The respondent who was an importer of food items had appointed the appellant as his clearing agent. The appellant had agreed to perform all necessary duties subject to payment of his fees. The respondent by the plaint dated 03rd October 2006 instituted action in the Commercial High Court seeking judgment against the appellant in a sum of Rupees 1,588,300,390/- on the basis that the appellant failed to discharge his duties with due care, due diligence and efficiently. The respondent claimed that the abovementioned conduct of the appellant resulted in a customs inquiry against the respondent over a consignment of sugar imported by him. The appellant by his amended answer dated 27th June 2007 claimed, that he always acted on instructions of the respondent and therefore prayed for the dismissal of action.

This action had been initially listed to be called to schedule for trial and thereafter had been called in court on several occasions. However, action had been dismissed on the day it was listed for trial as the respondent was absent and unrepresented. Several months thereafter the respondent, having sought permission of court to revoke the proxy and appoint a new attorney, filed papers to purge its default. The appellant objected to the said application. The court after inquiry made an order setting aside its initial order of dismissal and restored the case. The appellant, impugns the, last mentioned order of the Commercial High Court, by this appeal and moves that the said order be set aside.

When this matter was mentioned in this Court on 20th September 2017 both parties were represented by counsel and of consent, hearing had been scheduled for the 22nd March 2018. On 22nd March 2018, the learned counsel who marked appearance for the respondent on the previous day informed the Court that he has no instructions from the respondent. When this matter came up for argument on 03rd October 2018, the same counsel moved Court to release him from these proceedings and the Court having granted the application directed the petitioner to re- issue notices on the respondent. However, these notices issued on the respondent were returned with the endorsement "closed". Thereafter at several occasions notices were re-issued on the

respondent and the registered attorney. A representative of the company, the secretary of the respondent who appeared before this Court, on notice, informed that they had not had any communication with the respondent since 2015. Under these circumstances this Court decided to take this matter up for argument in the absence of the unrepresented respondent.

The learned counsel for the appellant impugned the Order of the Commercial High Court dated 23rd February 2012. This Order sets aside its initial order of dismissal and allowed the application of the respondent made under section 87(3) of the Civil Procedure Code to restore the case. This decision is now impugned on the basis that the Commercial High Court erred in granting relief to the respondent when the respondent failed to make the aforesaid application within a reasonable time and to disclose reasonable grounds for the default.

The learned trial judge in the impugned Order had set out the sequence of events that ultimately led to the initial order of dismissal made on 10th June 2008. The trial had been initially scheduled for 31st March 2008 after all pleadings were complete. However due to an inadvertence, the case had been called in open court on 03rd March 2008 for trial and neither party had been present. The journal entry of 03rd March 2008 reads “Parties are absent. No order”. Thereafter, the case had been called on 31st March 2008 but both parties had been absent. Again, this matter had been called in open court on 14th May 2008 and had scheduled for trial on 10th June 2008, in the absence of both parties. Finally, on 10th June 2008, the court had ordered that “Plaintiff absent. No appearance. plaint is dismissed without costs”. It is twenty months, thereafter, on 11th February 2010 the respondent made an application under Section 87(3) of the Civil Procedure Code and moved court to set aside the aforesaid order of dismissal. This application was made by way of a petition and an affidavit. The affidavit was sworn by a director of the respondent company. This application was resisted by the appellant company. The Managing Director of the appellant had sworn an affidavit along with the petition resisting the respondent’s application. /
An inquiry had been held by the trial court where the marketing manager and the director whose affidavit was filed had testified on behalf of the respondent whilst no evidence had been presented on behalf of the appellant.

Evidence of the Director who testified at the inquiry reveals that the initial owner of the respondent company was one Nadarajah Sri Skandarajah. According to the evidence, this witness said Sri Skandarajah had owned three other business establishments. In August 2006, said Sri Skandarajah had disappeared. After an investigation by the Criminal Investigations Department two accused had been indicted for the abduction and murder of him. According to this witness after the said Sri Skandarajah disappeared, his wife left Sri Lanka to join with their daughter who was studying in Australia, at that time. Therefore, there had been no one to look after the affairs of the respondent company. However, after this witness became a director on 15th January 2009, he had initially taken necessary steps to obtain a death certificate of the deceased Sri Skandarajah, who died intestate, from the District Court and thereafter had to attend to the affairs of the deceased person's estate including the affairs of the companies. According to this witness he had encountered many difficulties to locate the attorney-at-law who was retained to appear in the Commercial High Court when the proceedings were instituted in 2006 and with great difficulty had managed to obtain papers to revoke his proxy and obtain assistance of a legal firm to restore the case, that had been dismissed in 2008. This witness had admitted that no steps to restore the case had been taken between 2008 and 2009. He had reasoned out this lapse on the basis that no director was present in Sri Lanka who had the capacity to take any meaningful action, as the sole director had proceeded to Australia after her husband was abducted in August 2006.

The learned trial judge had given his mind to the evidence of the above witness in determining whether the court should allow the application of the respondent dated 11th February 2010, to vacate the order of dismissal and restore the case.

Section 87(3) of the Civil Procedure Code 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"

The learned trial judge had followed the dicta in **Rev.Sumanatissa v Harry** [2009] 1 SLR 31 which followed **Chandrawathie v Dharmaratne** [2002] 1 SLR 43 in deciding whether to allow the respondent's application to restore proceedings or not. The learned trial judge had observed that " 'reasonable time' and 'reasonable grounds' cannot be decided on rigid standards with mathematical precision, but have to be decided upon the given facts and circumstances of each individual case. The test is subjective as opposed to objective. It is purely a question of fact and not law".

In my view, the learned trial judge had neither misdirected nor erred in law when he decided to adopt the aforementioned criteria in determining the issue. Furthermore, the evidence as revealed by the witness as described hereinbefore reflects that the learned trial judge did not err or misdirect himself in facts too. I am of the view that there is no merit in this appeal. Hence the appeal of the appellant is dismissed and the order of the learned trial judge dated 23rd February 2012 is affirmed.

The Commercial High Court is directed to give priority to the proceedings in HC (Civil) 224/2006/(1) and conclude proceedings expeditiously.

Chief Justice

Murdu N.B. Fernando, PC, J.

I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.

I agree.

Judge of the Supreme Court

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

Lanka Orix Leasing Company Plc
100/1, Sri Jayawardenapura
Mwatha,
Rajagiriya.
Plaintiff

Vs.

SC (CHC) Appeal No. 23/2016

HC. (Civil) NO. 477/09/MR

1. Meera Mohideen Mohammadu Azar
No.329, Jumma Mosque,
Meerauwodai, Oddamawaddi.

2. Gopalan Kamalanathan,
Visnu Kovil Road,
Kiran.

3. Gopalan Padma Yogan,
Kumaralaya Veethi
Kiran.
Defendants

AND

2. Gopalan Kamalanathan,
Visnu Kovil Road,
Kiran.
3. Gopalan Padma Yogan,
Kumaralaya Veethi
Kiran.
2nd and 3rd Defendants-Petitioners

Vs.

Lanka Orix Leasing Company Plc
100/1, Sri Jayawardenapura
Mwatha,
Rajagiriya.
Plaintiff-Respondent

1. Meera Mohideen Mohammadu Azar
No.329, Jumma Mosque,
Meerauwodai, Oddamawaddi.

1st Defendant-Respondent

AND NOW BETWEEN

2. Gopalan Kamalanathan,
Visnu Kovil Road,
Kiran.
3. Gopalan Padma Yogan,
Kumaralaya Veethi
Kiran.
2nd and 3rd Defendant-Petitioner-Appellants

Vs.

Lanka Orix Leasing Company
Plc.
100/1, Sri Jayawardenapura
Mwatha,
Rajagiriya.
Plaintiff-Respondent-Respondent

1. Meera Mohideen Mohammadu Azar
No.329, Jumma Mosque,
Meerauwodai, Oddamawaddi.

1st Defendant-Respondent-Respondent

BEFORE	**:**	**PRIYANTHA JAYAWARDENA, PC.J.**
		A.H.M.D. NAWAZ, J.
		ACHALA WENGAPPULI, J.
COUNSEL	**:**	Senaka de Silva for the 2nd & 3rd Defendant-Petitioner-Appellants.
		Shanaka De Livera with Miss. Devni Yasara Abeygunawardana, AAL instructed by De Livera Associates for the Plaintiff-Respondent-Respondent.
		No appearance for the 1st Defendant-Respondent-Respondent
ARGUED ON	:	07th June, 2023
DECIDED ON	**:**	27th February, 2024

ACHALA WENGAPPULI, J.

This is a direct appeal preferred by the 2nd and 3rd Defendant-Petitioner-Appellants (hereinafter referred to as the "1st and 2nd Appellants" respectively) seeking to set aside an order pronounced by the Commercial High Court on 13.05.2016. With the pronouncement of the said order, the Commercial High Court dismissed their application under Section 86(2) of the Civil Procedure Code, by which they sought to set aside the *ex parte* decree that had been served on them.

The 1st Defendant-Respondent-Respondent entered into an agreement with the Plaintiff-Respondent-Respondent Company (hereinafter referred to as the "Respondent Company") in September 2008, to purchase a vehicle morefully described in the schedule A to the plaint and to pay its value in 48

instalments of Rs. 51,611.00, at the interest rate calculated at 31% per *annum*. The two Appellants stood as the guarantors for the said 1st Defendant-Respondent-Respondent. The 1st Defendant-Respondent-Respondent, after payment of a sum of Rs. 103,642.00, had fallen into arrears. The said agreement was terminated on 20.12.2008. The Respondent Company had thereupon instituted the instant action on 22.09.2009, seeking to recover its dues from the three defendants. It also sought to recover possession of the said vehicle.

With institution of the instant action before the Commercial High Court, the Respondent Company moved that summonses be served on the three defendants by way of registered post as well as through the Fiscal of the District Court of *Batticaloa,* since they are resident in that jurisdiction. Upon an order of Court made to that effect, the Registrar of the Commercial High Court, by way of a Precept, conveyed the said order of Court to the Fiscal of the District Court of *Batticaloa*.

The entry made on 25.11.2009 in the case record by the Registrar of the Commercial High Court indicated that the Fiscal of *Batticaloa* Court had reported back of the confirmation of personal service of summonses on the 1st and 2nd Appellants on 16.11.2009. This factor was then brought to the notice of Court by Journal Entry No. 2 of the same date. He further reported that the summons issued on the 1st Defendant-Respondent-Respondent could not be served as he was not found in the given address. However, the 1st and 2nd Appellants did not present themselves before the original Court on that day (02.12.2009) nor did they file answer through an Attorney-at- Law. The Court had thereupon decided to proceed with the trial against the Appellants *ex parte*. Court directed the Respondent Company to take necessary steps on the

1st Defendant-Respondent-Respondent, on whom summons could not be served.

The *ex parte* trial against the Appellants commenced and concluded on 26.07.2012. During the said *ex parte* trial, the Respondent Company presented evidence and marked documents P1 to P11 in support of its case. The Commercial High Court thereupon delivered its judgment in favour of the Respondent Company on 06.11.2016. The *ex parte* decree was served on the 1st and 2nd Appellants on 07.02.2013, once again through the Fiscal of the District Court of *Batticaloa*. The Appellants, by their application under Section 86(2) of the Civil Procedure Code dated 20.02.2013, moved Court to set aside the said *ex parte* decree.

At the conclusion of the ensuing inquiry, the Commercial High Court, decided to dismiss the Appellant's application with costs by its order pronounced on 13.05.2016. Being aggrieved by the said order, the Appellants preferred the instant appeal and sought to challenge the validity of the order of the High Court on a total of eleven grounds of appeal, as set out in paragraph 23 of their petition of appeal.

With the presentation of the notice of appeal as well as the Petition of Appeal to the original Court, the Court Record was transmitted to the Registry of this Court for the preparation of appeal briefs. The Appellants have paid brief fees on 13.02.2019 and collected their copies on 05.01.2022 but were not represented when this appeal was mentioned in open Court on 01.10.2021 for the first time. The Court made no order. Thereupon, the Appellants, by way of a motion on 18.05.2022, moved Court that their appeal be restored back to the hearing list. A Counsel, representing the Appellants, supported the said motion on 21.06.2022 and the appeal was accordingly restored and was set down for hearing on 28.11.2022, with consent of the

parties. The Appellants tendered written submissions to Court with a motion dated 20.10.2022.

However, on that day, an application was made on behalf of the Appellants, by which they sought to reschedule the hearing of their appeal on the basis that their Counsel had returned the brief and they have retained a new Counsel recently. The Court considered the application of the Appellants favourably and granted a postponement. The appeal was fixed for hearing once more on 07.06.2023, as it was a convenient date for the said newly retained Counsel for the Appellants. When the appeal was taken up for hearing on 07.06.2023, the Appellants made a similar application for postponement of the hearing, but this time the Court was not inclined to grant any further postponements for hearing of the instant appeal, which had been filed in the year 2016, and decided to take the matter up for hearing.

The oral submissions of the Respondent Company were concluded on 07.06.2023. Although the Appellants have already tendered their written submissions, this Court afforded another opportunity for the parties to tender written submissions, if they so wished. A four-week time period, commencing from the date of hearing, was granted to the parties. Only the Respondent Company availed of this opportunity.

It must be noted at the outset of this judgement that, in spite of setting out several grounds of appeal in paragraph 23 of their petition of appeal, the Appellants have confined themselves into following three grounds of appeal in their written submissions;

a. The Commercial High Court failed to consider that no evidence was led to show that summonses were served on the two Appellants,
b. The Commercial High Court failed to consider that Section 60 of the Civil Procedure Code empowers only a Fiscal Officer or a *Grama*

Niladhari to serve summons on a defendant and the witness who claims to have served summons is a process server of the Court, who is not authorised to serve summons on a defendant,

c. The Commercial High Court erred in admitting evidence of the said process server, who claims to have served summons without any authority.

These three grounds of appeal are considered in this judgment in that order.

In support of their first ground of appeal, the Appellants submitted to Court that the Commercial High Court had fallen into grave error in its failure to consider that the assumption of jurisdiction over two Appellants is made only upon summons being duly served on them. Since the evidence presented by the Respondent Company was insufficient to establish that the summonses were served on the Appellants, they contend that not serving summons is a failure that goes to the root of the jurisdiction of the Commercial High Court to hear and determine the action instituted against them by the Respondent Company. Therefore, the Appellants submit that the *ex parte* judgment is a *nullity* and, in the absence of a valid judgment against them, there was no necessity to move Court to vacate a non-existing *ex parte* decree.

In view of the Appellants' contention that the *ex parte* decree impugned in these proceedings is a *nullity*, it is important to consider the legal effect of an *ex parte* judgment, that had been entered against them without first serving summons. This Court had consistently taken the view that if a defendant, on whom an *ex parte* judgment and decree were entered against, was not served with summons, both the judgment and decree would be considered to be a *nullity*. A series of judgments, commencing with the judgment of Mohammadu ***Cassim v Perianan Chetty*** (1911) 14 NLR 385 accept this

position. *Lascelles* CJ stated in the said judgment that (at p. 388) "*[A] judgment is null and void, and cannot be executed against a person who is not served with summons"*, after following a Queen's Bench decision in ***Wigram v Cox, Sons, Buckley & Co*** (1894) 1 QBD 795.

Thus, if the Appellants could establish before the Commercial High Court that the summonses were not served on them, that factor would undoubtedly render the judgment, upon which the *ex parte* decree was issued, a *nullity*.

The Appellants are perfectly right in their submissions that the legal validity of the *ex parte* judgment and decree of the original Court depends on the fact that the procedure laid down in law for the service of summons was duly complied with. They also contend there was no "evidence" placed before the trial Court by the Respondent Company to establish that the summonses were served on them. In view of the said contention, this is a convenient point to consider whether there was "evidence" before the Commercial High Court confirming service of summonses on each of the Appellants.

The Commercial High Court, in its impugned order, considered the evidence of the Appellants as well as of the Respondent Company, presented before it during the inquiry under Section 86(2). The Court preferred to accept the evidence of the witness for the Respondent Company over the evidence of the two Appellants on the footing that it is "… *totally worthy of credit*" and concluded that the Appellants "… *have not discharged the onus of proving that the summons were not served on them*."

Although the Commercial High Court found that the Appellants have failed to discharge their onus of proving that the summonses were not served on them, they, in presenting their contention before this Court, submitted that

there was no evidence placed before the original Court by the Respondent Company that it had personally served summons on them. Thus, it appears that the Appellants' challenge the validity of the determination made by the Commercial High Court that it was their burden is to establish summonses were not served. It appears that the Appellants dispute on whom the burden lies in an application under Section 86(2). In the circumstances, it is helpful, if a brief reference to the applicable statutory provisions are made on the question whether there was "evidence" presented before the trial Court as to the service of summons, before I venture into determine on whom the burden lies to establish that particular factor.

The Commercial High Court, before making an order under Section 84, to proceed against the Appellants *ex parte*, was satisfied that the Appellants were served with summons and they did not file answer on the summons returnable date. Then the question is on what evidence did the Court satisfy itself that the summonses were served on the Appellants?

The answer to that question could be found upon a consideration of the statutory provisions contained in Section 61 of the Civil Procedure Code. The Civil Procedure Code (Amendment) Act No. 14 of 1997, by Section 3 of that Act, repealed Sections 59, 60 and 61 of the principal enactment and substituted same with new Sections. After the said amendment, Section 61 reads as follows;

> *"When a summons is served by registered post, the advice of delivery issued under the Inland Post Rules, and the endorsement of service, if any, and where the summons is served in any other manner, and affidavit of such service shall be sufficient evidence of the service of the summons and of the date of such service, and shall be admissible in*

> *evidence and the statements contained therein shall be deemed to be correct unless and until the contrary is proved."*

The first part of the Section refers to a situation where the summons served by registered post. It then proceeds to deal with the situation "*where the summons is served in any other manner."* In the instant appeal, the Summonses were served by a process server and therefore such service could clearly be taken as an instance where the summons served "*in any other manner*". The remaining part of the said Section provides for how the service of summons could be established. The applicable part of the Section in this regard reads "*… affidavit of such service shall be sufficient evidence of the service of the summons and of the date of such service, and shall be admissible in evidence and shall be sufficient evidence of the service of the summons."*

The "evidence" before the trial Court which confirm the service of summonses on the Appellant was therefore the affidavit of the process server who affirmed to the fact. The affidavit of the process server was marked as V1 and was annexed to the report prepared by the Fiscal of the District Court of *Batticaloa* addressed to the Commercial High Court. Thus, the contents of that affidavit "*shall be sufficient evidence of the service of the summons*". The contents of the affidavit of the process server, confirming personal service of summons on the defendants named in them accordingly provided a legally valid admissible evidence to the original Court, facilitating it to determine that the summonses were personally served on each of the Appellants. Similar view taken by *Somawansa J* (P/CA) in ***Chandrasena v Malkanthi*** (2005) 3 Sri L.R. 286, where his Lordship observed;

> *"It is to be noted that the affidavits tendered by the Fiscal in proof of service of summons as well as the decree would bring in the provisions contained in section 61 of the Civil Procedure Code for it is provided in*

> *the said Section that an affidavit of such service shall be sufficient evidence of the service of summons and of the date of such service and shall be admissible in evidence and the statement contained therein shall be deemed to be correct unless and until the contrary is proved. Accordingly, if the respondent wishes to contradict the facts stated in those affidavits, it is incumbent on the respondent to lead evidence in order to controvert and or contradict the affidavit.*

Thus, the order of the Court made on 02.12.2009 determining to proceed to try the two Appellants *ex parte* was made on legally admissible direct evidence as to the fact of personal service of summons. This reasoning provide answer to the Appellants' contention that the Respondent Company did not place "*evidence*" to establish on personal service of summons.

In turning to the question on whom the burden lies to establish that the summonses were served, the Commercial High Court held that the Appellants "… *have not discharged the onus of proving that the summons were not served on them*." The Court had thereby imposed the burden of establishment of the fact of not serving summons on the Appellants, which they say is erroneous.

Section 86(2) provides an opportunity for a defendant, who had been served with an *ex parte* decree, to have that *ex parte* judgment and decree set aside by making an application within a stipulated time period to Court. The said Section further imposes a duty on such a defendant to "*satisfy*" Court that "*he had reasonable grounds for such default*", if he was to successfully move Court to set aside the *ex parte* judgment and decree. What the Appellants have urged before the Commercial High Court to purge their default was that the summonses of the action were not served on them, either by post or personally. Undoubtedly, this is a reasonable ground for the trial Court to set

aside its *ex parte* judgment and decree entered against the two Appellants, provided they "*satisfied*" the Court of the existence of the said reasonable ground in terms of Section 86(2).

The use of the word "*satisfy*" in Section 86(2), instead of the word "proof" in terms of Section 3 of the Evidence Ordinance, signifies that the required degree of proof is not beyond reasonable doubt or even the balance of probabilities, but clearly of a lesser degree. This Court even recommended adopting a "liberal approach" as opposed to rigid standard of proof, in satisfying a Court of the reasonableness of the grounds urged by a defaulting defendant (vide judgment of ***Sanicoch Group of Companies by its Attorney Denham Oswald Dawson v Kala Traders (Pvt) Ltd and Others*** 2016 Vol. XXII, 44, at p. 48).

In this context, it is important to note that Section 84, which empowers a Court to proceed to trial *ex pare* of the defendant, provided for several situations to be taken as instances of default. Not only if a defendant fails to file his answer on or before the day fixed for answer is taken as a default, even if he fails to file answer on a subsequent date fixed for answer or even fails to appear on the day fixed for hearing of the action are also be taken as instances of default. In purging default, 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. Since the circumstances that would be urged by a defendant to purge his default may vary in relation to each situation, each of these situations would have to be considered by Courts on case by case basis to satisfy itself, whether the particular set of circumstances urged by a defendant could be considered as reasonable. Hence, the adoption of a

liberal approach is generally recommended in determining what a reasonable ground is; in terms of Section 86(2).

However, adoption of such a liberal approach could not be taken as an universal approach that could be applicable in all situations. This aspect was noted in ***Abdul Wadood v Ahamed Lebbe*** (SC Appeal No. 153/2014 – decided on 10.06.2016) when the Court stated that "*[A] liberal approach is possible where a Court has to decide on the reasonableness of default, but not as regards stringent procedure pertaining to a jurisdictional issue which could be described as a patent want of jurisdiction which is not curable for non-objection/acquiescence or waiver.*" Similarly, if there is a specific legislative provision which sets out the degree to which such a defendant should satisfy Court of the reasonableness of the ground he had relied upon to purge his default, then in such a situation too, a defendant should comply with the statutorily imposed degree of proof.

In this context, a clear distinction could be made in respect of a defendant who, in an application to purge default under Section 86(2), claims that he was not duly served with summons from a defendant, who relied on any other ground he may have chosen to urge before Court, to purge his default.

When a defaulting defendant takes up the position that he was never served with summons as a reasonable ground and thereby seeking to set aside an *ex parte* judgment and decree, the nature of the burden imposed on such a defendant had already been considered by superior Courts. It has been consistently held that it was for the defaulting defendant to establish the fact that summons was not served. In the judgment of ***Sangarapillai and Brothers v Kathiravelu*** (*Sriskantha's* Law Reports, Vol II, p. 99) *Siva Selliah J* held (at. P.106) that "… *the burden squarely lay on the defendant who asserted that no summons was served on him to establish that fact …".* The underlying rationale

for imposition of such a burden of proof on a defendant is due to the deeming provisions contained in Section 61. Relevant part of the Section 61 which states that the affidavit containing that the summons was duly served should be taken as correct "*unless and until the contrary is proved*". Thereby the said Section imposed a heavier burden on such a defendant to prove the contrary to what stated in the affidavit of the process server. In the amended Section 61, the relevant part reads "… *where the summons is served in any other manner, an affidavit of such service shall be sufficient evidence of the service of the summons and of the date of such service, and shall be admissible in evidence and the statements contained therein shall be deemed to be correct* ***unless and until the contrary is proved*"** (emphasis added).

In Civil Procedure Code, the word "*prove*" can be found, in addition to Section 61, in Sections 114(1), 159,161,162 and 163. Section 114(1) provides for the documents to be placed on the record. The Section however, limits those documents to the ones that are "*proved*" or admitted. Section 159(1) deals with how a signature of a person is "*proved*" while Section 160 deals with the "*proving*" of signature of an illiterate person. Section 161 deals with old documents of which actual execution need not be "*proved*". Section 162 provides for "*proving*" of a copy of an absent original and, finally, Section 163 states that each party to "*prove*" its case with oral and documentary evidence.

Thus, the Section 61 too, by adopting the same standard of proof, imposes a similar burden on a defendant to "*prove*" the contrary of what the process server states in his affidavit regarding service of summons. This has been the standard of proof consistently applied by Courts in such situations, as indicative from the judgment of this Court in ***ABN-Amro Bank NV v Conmix (Private) Limited and Others*** (supra) where *Mark Fernando* J, stated (at p. 12) thus;

> "*If there has been no due service of summons (or due notice), but the Court nevertheless mistakenly orders an ex parte trial, then for that breach of natural justice, Section 86 (2) provides a remedy: a defendant's default can be excused* ***if it is established*** *that there were reasonable grounds for such default, and one such ground would be the failure to serve summons*" (emphasis added).

What it means to *"prove"*, a verb used in legal proceedings, was described in relation to Section 3 of the Evidence Ordinance by *Coomaraswamy,* in his treatise titled *Law of Evidence,* Vol 1, at p. 117. Learned author states "*[A] fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon a supposition that it exists.*" He further adds "*[A] fact is said not to be proved when it is neither proved nor disproved*" following the judgment of ***Emperor v Shafi Ahamad*** (1929) 31 Bom. L.R. 515.

Thus, the resultant position would be that a defendant, who seeks to purge his default by claiming that summons was not served on him, should "*satisfy*" Court by "*proving*" that claim, in terms of Section 61. In these circumstances, the question this Court must answer in relation to the ground of appeal is did the Appellants prove that summonses were not served on them either by post or by personally?

In their application under Section 86(2) the Appellants stated that a person claiming to be the Fiscal of District Court of *Batticaloa* had served an *ex parte* decree on them on 07.02.2013 and despite the reference made in the said *ex parte* decree that summonses were duly served on them, they were never served with summons either by post or by personal service.

In this regard, it must be noted that, after an inquiry in to the Appellants application under Section 86(2), the Commercial High Court preferred to accept the evidence presented by the Respondent Company through its witness as "*worthy of credit*" and rejected the Appellant's application. The Court, after citing ***David Appuhamy v Yasassi Thero*** (1987) 1 Sri L.R. 253, acted on the *dicta* of that judgment i.e., an *ex parte* order made in default of appearance will not be vacated if the affected party fails to give a valid excuse for his default, and concluded that the Appellants "have *not discharged the onus of proving that the summons were not served on them*". In other words, the Court held that the Appellants failed to prove that they were not served with summonses.

Significantly, during the inquiry under Section 86(2), both Appellants were content with merely stating in their evidence that they did not receive summons either by post or personally. No specific reference was made to the events of the date referred to in the affidavit of the process server indicating as the date on which the summonses were personally served on the two Appellants. Instead they chose to explain the circumstances under which they signed on the agreement, upon which they were sued. In the end, there were no sufficient material placed before Court by the Appellants in this regard. Accordingly, the evidence presented by the Appellants confine to an isolated verbal assertion that they were not served with summons, which claim the Court decided to reject in its totality.

On the other hand, the record itself indicated that summonses were issued on the Appellants both by post and through the Fiscal of the District Court of *Batticaloa*. The entry in the record signifies the return filed by the said Fiscal, who reported to Court that summonses were served on the two Appellants but not on the 1st Defendant-Respondent-Respondent. A specific

date is mentioned in the entry as the date on which personal service of summons had taken place. Journal Entry No. 2 of 02.12.2009 informs the Court that summonses on the two Appellants were served on 16.11.2009. The two Appellants were neither present in Court nor were represented.

During the inquiry the witness called by the Respondent Company stated that he functioned as the process server ("සිතාසි බෙදන්නා") of the District Court of *Batticaloa* and, in relation to the instant matter, he did personally serve summons on the two Appellants on 13th November 2009 by visiting their places of dwelling, as per the given addresses in the *Precept.* He reported of the confirmation of service of summons by an affidavit, marked as V1.

The Journal Entry No. 2, being a contemporaneous record of the claim that summonses were served on the Appellants, taken together with the contents of the affidavit of the process server, there was sufficient evidence before the Commercial High Court to conclude that the summonses were served on the Appellants, as claimed by the Respondent Company. Section 61 is specific on this aspect as it states the affidavit of the process server being sufficient admissible evidence of the facts it stated. More importantly the Section also stated that, "*… the statements contained therein shall be deemed to be correct* ***unless and until the contrary is proved***" (emphasis added).

The Appellants, upon being cross examined by the Respondent Company, conceded that they were residing in the given addresses both on 13th and 16th November 2009 (the dates on which summonses were served on each of them) and there was no reason for them not to receive any letter, sent by post and delivered to their respective addresses. Of course, both Appellants denied that they were personally served with summons by the same process server, who at a subsequent point of time, had personally delivered the *ex parte* decree on them as well.

The evidence before Court is indicative of the fact that the Appellants were served with summons by way of registered post as well as personally. There is no material to indicate that the registered articles were returned undelivered. None of the Appellants specifically deny not receiving them by post either. However, the Respondent Company did not tender delivery advices or the endorsements of service as evidence before Court, in relation to the fact that summonses were also served through post. However, the affidavit of the process server confirming personal service of summons and the report of the Registrar of District Court of *Batticaloa* addressed to the Registrar of the Commercial High Court, resulting in the making of the Journal Entry No. 2 of 02.12.2009, which conveyed to Court that the summonses were duly served on the two defendants, taken together, is sufficient proof of the completion of the formal process of service of summons. Since, the affidavit V1, in terms of Section 81, *"shall be sufficient evidence of the service of the summons and of the date of such service and shall be admissible in evidence" the* statements contained therein shall be deemed to be correct, until and unless the Appellants prove the contrary.

Once the affidavit of the process server is received by Court providing evidence of proof of service, the burden shifts on to the Appellants to prove that they were not served with summonses. They could have discharged their burden by leading credible evidence to contradict the contents of the affidavit, which are deemed to be taken as correct by operation of law. If they could establish that fact, then the burden shifts back on to the Respondent Company to rebut that evidence by calling the relevant process server who personally delivered summons on them.

When the trial Court decided to treat the evidence of the process server as worthy of credit over the evidence presented by the Appellants to the contrary, it is an indication itself that they have collectively failed in the discharge of their burden, imposed by Section 61. It is also an indication that the statements contained in the affidavit of the process server, coupled with his oral evidence, tested with cross examination, were accepted by the Commercial High Court as credible and reliable evidence reflecting the correct factual position. Despite the unconvincing evidence presented by the Appellant, the Respondent Company did call the process server, who affirmed in V1 and in his oral testimony that the summonses were duly served. That evidence effectively rebutted the Appellant's weak denial. The Commercial High Court, in its impugned order, rightly concluded that the Appellants have failed to successfully discharge the onus of "*proving*" that the summonses were not served on them.

In view of the reasoning contained in the preceding paragraphs, it is my considered view that the first ground of appeal urged by the Appellants is devoid of any merit.

The second and third grounds of appeal urged by the Appellants alleging that the Commercial High Court erred in its failure to consider that the summonses were not duly served on them, as they were not served by the Fiscal or *Grama Niladhari* and that the said Court erred in admitting evidence of the process server, who served summons on them without any authority, should be considered now for merits.

The Appellants, in support of the said grounds of appeal, submitted that the original Court, in reaching the conclusion that the summonses were duly served on the Appellants had erroneously acted upon the irrelevant and inadmissible evidence of a "*process server*", who is not a competent officer of

Court to serve summons. They relied on Section 60(1) of the Civil Procedure Code, in support of that contention, where the provisions conceding to the position that only a Fiscal or *a Grama Niladhari* could duly serve summons on a defendant, and not a process server, who had no such conferment of authority by law. These two grounds of appeal were urged by the Appellants based on the evidence of the witness called by the Respondent Company to give evidence on their behalf to establish the summons and the *ex parte* decree were served upon the two Appellants, who described his job description as "සිතාසි බෙදන්නා" (Server of Summons).

It cannot be helped not to notice the obvious conflict between the first ground of appeal and the other two grounds of appeal, urged by the Appellants. In the first ground of appeal, the Appellant take up the position that summonses were never served on them. In placing reliance on the second and third grounds of appeal, the Appellants tacitly admit that summonses were served, but for want of proper authority conferred on the process server to serve summons, they were not "*duly*" served. Despite the inherent contradiction between these grounds of appeal, it must be acknowledged that this contention relates to an important procedural step in civil litigation. In the circumstances, I propose to deal with these two grounds of appeal in a more descriptive manner. Since the role of the process server in the service of summons is placed under close scrutiny, it is necessary to trace the origins of the term "*process server*", in civil litigation process.

Section 60 of the said Civil Procedure Code (Chapter 86 – Legislative Enactments of Ceylon - Revised Edition 1938) states "… *the service of summons shall be made on the defendant in person; but if, after reasonable exertion, the Fiscal is unable to effect personal service, he shall report such inability to the Court …*". This Section specifies that the service of summons on a defendant should be made

by the Fiscal. However, in proof of service, the term "*process server*" appears in Section 85 of the said Code, instead of "*Fiscal*" as it states "… *if the Court is satisfied by affidavit of the process server, stating the facts and circumstances of the service, or otherwise, that the defendant has been duly served with summons,* …".

The Fiscals Ordinance of 1867 (Chapter 8 – Legislative Enactments of Ceylon - Revised Edition 1938), created a *Fiscal's Department* and the Governor General had power to appoint a Fiscal and Deputy Fiscals for the provinces and districts. Section 4 of the said Ordinance empowered a Deputy Fiscal, who was appointed to a particular district, could license as many process servers for the service and execution of process issued by Courts within that district. The term "*process*" was defined in Section 17 of the said Ordinance to mean "all *citations, monitions, summonses, mandates, subpoenas, notices, rules, orders, writs, warrants and commands issued by Court*."

In view of the said legislative arrangement, Section 85 of the said Code provided statutory recognition to the contents of an affidavit presented by a process server, who could assert that the defendant had duly been served with summons.

The transformation of the service of summons and processes under different enactments over the past two centuries was considered *in* ***Leechman & Company Ltd v Rangalle Consolidated Ltd (***1981) 2 Sri L.R. 373, by Soza J. His Lordship observed (at p. 378);

> *"The Fiscal and his deputy are officials who earlier functioned under the provisions of the Fiscals Ordinance No. 4 of 1867 as amended from time to time (Cap. 11 L.E.C. - 1956 Revision). Under Section 4 of the Fiscals Ordinance it was lawful for the Fiscal or Deputy Fiscal to appoint by writing under his hand any person to execute process in any particular case and process by that ordinance included all citations, monitions,*

summonses, mandates, subpoenas, notices, writs, orders, warrants and commands issued by the Court. The Administration of Justice Law No. 44 of 1973 came into force 1st January 1974 and by its Section 3 Chapter 1, the Fiscals Ordinance was repealed. By virtue of section 39(l) of the Administration of Justice Law, to each court established under the new laws provision was made for the appointment of a Registrar, Fiscal and such other officers as may be necessary for the administration of such Court and the performance of its duties including the service of process and the execution of decrees and other orders. It is a matter of common knowledge that the Registrar of every Court was invariably appointed as Fiscal. Under section 62 of the Judicature Act No. 2 of 1978, Chapter 1 of the Administration of Justice Laws was repealed but of course this did not bring the Fiscals Ordinance back to life. Section 52 of the Judicature Act like section 39 (1) of the Administration of Justice Law before it, provided for the appointment of Registrars, Fiscals and other officers the administration of every Court and the performance of its duties including the service of its process and execution of its decrees and orders. The old practice was adhered to and every Registrar was appointed Fiscal."

A new Constitution was adopted in 1978. In addition, Judicature Act No. 2 of 1978 was enacted. Section 3 of the Civil Courts Procedure (Special Provisions) Law No. 19 of 1979 brought the provisions of the Civil Procedure Code (Ordinance No. 2 of 1889, Cap. 101, Legislative Enactments of Ceylon, Revised Edition 1956) as amended from time to time and was in force on 31st December 1973, back into operation, governing civil Courts and its procedure and thereby replacing the provisions of Administration of Justice Law No. 44 of 1973.

Presently, the Judicial Service Commission, in the exercise of powers conferred under Article 111H (1) of the 1978 Constitution and Section 52(1) of the Judicature Act No. 2 of 1978, appoints Scheduled Public Officers as Registrars/Deputy Fiscals to Courts. Section 52(1) of the Judicature Act No. 2 of 1978 (as amended) empowers the appointment of a Registrar, Deputy Fiscal and *"such other officers"* as may be necessary for the administration and for the due execution of the powers and the performance of the duties of such Courts including the service of process and the execution of decrees of Court and other orders enforceable under any written law. Inclusion of the phrase "service of process "in the said Section is significant in the present context.

Section 5 of the present Civil Procedure Code states the term "Fiscal" includes a Deputy Fiscal. Section 52(3) of the Judicature Act imposes on such a Deputy Fiscal that he "… *shall be responsible for the service of process issued by that Court and the execution of decrees and orders made by that Court …*".

The post of process server that existed and functioned under the Fiscals Ordinance, too was transformed into an appointment under the Public Service Commission with a formal title of "සිතාසි හා ඇස්කීසි ක්‍රියාත්මක කරන්නා" . They are appointed by the Secretary to the Ministry of Justice, acting under the authority of Public Service Commission, according to a Scheme of Recruitment formulated for that post and placed in the salary scale PL 2 - 2016. Once appointed, they are assigned to a specific area within the geographical jurisdiction of a Court to which they are attached to by the judicial officer, who preside over that Court. In the absence of a formal nomenclature for the post of "සිතාසි හා ඇස්කීසි ක්‍රියාත්මක කරන්නා" in English, the more popular description of "*process server*" is used in this judgment.

Thus, the appointment of a process server, who could be considered as *"such other officer"* for the purpose of service of process and execution of decrees, is accordingly sanctioned by Section 52(1) of the Judicature Act.

Once a Court orders that summons be served on a defendant who resides outside of its jurisdiction, the Registrar/Deputy Fiscal of the original Court, by addressing a *Precept to Fiscal to Serve*, would convey the summons issued by that Court to the relevant Registrar/Deputy Fiscal, whose area in which the defendant resides. Section 357 of the Civil Procedure Code made it a duty of every Fiscal, who receives a *Precept to Fiscal to Serve,* execute same either by himself by his officers.

The Registrar/Deputy Fiscal, accordingly assigns the task of serving summons on that defendant to the process server *(සිතාසි හා ඇස්කීසි ක්‍රියාත්මක කරන්නා)",* with the said precept as authorized by Section 357. The process server should report back to his Court by way of an affidavit (Section 371), whether the summons was served personally on the defendant or not for the reasons stated therein. In the instant appeal, since the action was instituted in the Commercial High Court in *Colombo* and the Appellants are residents of *Batticaloa*, the High Court directed its Registrar/Deputy Fiscal to serve summons on the defendants through the Registrar/Deputy Fiscal of the District Court of *Batticaloa*.

The evidence of *Kadiravelu Nallaratne,* who served as the process server of that Court, revealed that the summonses issued on the two Appellants and sent by the Commercial High Court of *Colombo* to his Court were assigned to him for service. The witness being the process server of that Court, after making entries in the relevant Register, had taken steps to serve the summonses personally on the two Appellants. He confirmed that the summonses were duly served on the two appellants in his returns to the

Court. The legally prescribed process of serving summons was therefore complied with by the Deputy Fiscal of the District Court of *Batticaloa* and by the " සිතාසි බෙදන්නා" who acted on his precept.

The Appellants objection to the legality of service of summons by a "සිතාසි බෙදන්නා" and not by the Fiscal or a *Grama Niladhari* is based on the specific reference made to the two officers in that Section. Clearly the Appellants contend that summons could be served properly either by Fiscal or *Grama Niladhari* and no other. In view of the statutory provisions referred to in the preceding paragraphs, it is my view that the mere absence of a specific reference to a process server *(සිතාසි හා ඇස්කීසි ක්‍රියාත්මක කරන්නා)* in Section 60, does not make it illegal for a Court to satisfy itself of the fact that summons was served, (a necessary pre requisite in Section 84 to proceed *ex parte*,) upon the "*affidavit of such service*" as it is a course of action made permissible by provisions of Section 61.

In the absence of any specific words confining the said affidavit only to a Fiscal or a *Grama Niladhari* in Section 84 and since Section 61, makes an affidavit of a " සිතාසි බෙදන්නා/ සිතාසි හා ඇස්කීසි ක්‍රියාත්මක කරන්නා" shall be sufficient evidence of the service of summons, and the contents of the said affidavit of the" සිතාසි බෙදන්නා/ සිතාසි හා ඇස්කීසි ක්‍රියාත්මක කරන්නා" of the District Court of *Batticaloa* is deemed to be correct unless and until the contrary is proved by the Appellants, it is my considered view that the Commercial High Court had rightly relied on the affidavit V1 as well as the oral evidence of the process server to hold that there was due service of summonses on them.

In view of the forgoing, I am of the view that the second and third grounds of appeal of the Appellants are also devoid of any merit. Accordingly, the order of the Commercial High Court dated 13.05.2016,

dismissing the application of the Appellants under Section 86(2) and imposition of costs, is hereby affirmed.

The joint appeal of the Appellants is dismissed with costs.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, 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

Dehigaspe Patabendige Nishantha
Nanayakkara,
No. 34/1,
First Lane,
Egodawatta Road,
Boralesgamuwa.
Petitioner

SC APPEAL NO: SC/CHC/APPEAL/26/2003
CHC CASE NO: HC/CIVIL/01/2000(2)

Vs.

1. Ceylon MKN Eco Power (Pvt) Ltd.,
   No. 202, Moratuwa Road,
   Piliyandala.
2. Yukinori Kyuma,
   No. 11A, Queen's Terrace,
   Colombo 03.
3. Norika Kyuma,
   No. 11A, Queen's Terrace,
   Colombo 03.

Respondents

AND NOW BETWEEN

Dehigaspe Patabendige Nishantha
Nanayakkara,
No. 34/1,

First Lane,
Egodawatta Road,
Boralesgamuwa.
Petitioner-Appellant

Vs.

1. Ceylon MKN Eco Power (Pvt) Ltd.,
   No. 202, Moratuwa Road,
   Piliyandala.
2. Yukinori Kyuma,
   No. 11A, Queen's Terrace,
   Colombo 03.
3. Norika Kyuma,
   No. 11A, Queen's Terrace,
   Colombo 03.

Respondent-Respondents

Before: Hon. Justice Priyantha Jayawardena, P.C.
Hon. Justice Kumuduni Wickremasinghe
Hon. Justice Mahinda Samayawardhena

Counsel: Geoffrey Alagaratnam, P.C., with Anura Ranawaka and Lasantha Garusinghe for the Petitioner-Appellant.
Laknath Seneviratne for the Respondent-Respondents.

Argued on: 14.07.2021

Written submissions:
by the Petitioner-Appellant on 13.06.2011 and 12.08.2021.
by the Respondent-Respondents on 05.05.2011 and 15.09.2021.

Decided on: 28.02.2024

Samayawardhena, J.

Background

The petitioner-appellant filed this application in the Commercial High Court under sections 210 (oppression) and 211 (mismanagement) of the repealed Companies Act, No. 17 of 1982, (which are analogous respectively to sections 224 and 225 of the new Companies Act, No. 7 of 2007) on the basis that the affairs of the 1st respondent company are being conducted in a manner oppressive to the petitioner as a minority shareholder and prejudicial to the interests of the company. The petitioner sought the following reliefs in the prayer to the petition before the Commercial High Court:

(a) An order regulating the conduct of the affairs of the 1st respondent company in future in such a manner as the Court may decide as to protect the 1st respondent company and its minority shareholders including the petitioner.
(b) An order directing the 2nd and 3rd respondents not to remove the petitioner from the office of director of the 1st respondent company.
(c) An order directing the petitioner be permitted to carry out the functions of the Chief Executive Officer of the 1st respondent company.
(d) An order directing that the petitioner be a joint signatory to all Bank Accounts of the 1st respondent company.
(e) An order directing the 2nd and 3rd respondents not to do any act to diminish or suppress the petitioner's shareholding in the 1st respondent company.

Upon completion of the pleadings, the parties agreed that the main inquiry/substantive application could be disposed of on written

submissions. After both parties filed written submissions, the Commercial High Court by order dated 07.05.2003 dismissed the application of the petitioner with costs on the basis that it is not the conduct of the 2nd and 3rd respondents but "*the conduct of the petitioner [that] is oppressive and detrimental to the 1st respondent company.*" Being dissatisfied with the order, the petitioner filed this appeal. The gravamen of the argument of learned President's Counsel for the petitioner before this Court is that the petitioner must succeed in this appeal on oppression and mismanagement particularly in view of the shareholders agreement marked X11.

The 1st respondent company was incorporated under the Companies Act on 20.03.1998 to carry on the business of generating hydro power to be supplied to the national grid and related services (X1). The petitioner, a Sri Lankan national with a PhD in electrical engineering, holds a 20% share in the 1st respondent company, while the 2nd respondent, a Japanese national and the investor, holds 80% of the share capital in the same company. Both were directors at the time of the incorporation of the company. As seen from the minutes of the first board meeting marked X26(a) held on the date of incorporation, the 3rd respondent who is a daughter of the 2nd respondent was appointed a director with the agreement of the petitioner. They started their mini hydro power project at Wijeriya in Kolonne.

Petitioner's allegations

Let me now consider the allegations of the petitioner against the 2nd respondent major shareholder in seeking the said reliefs under oppression and mismanagement.

The petitioner in paragraph 7 of the petition says that the 2nd respondent abused his powers as the major shareholder in that he

rejected a proposed investor (Dr. Rajakaruna); arbitrarily increased the capacity of the project from 500 kW to 750 kW despite an inadequate volume of water; and developed infrastructure facilities causing additional cost overrun. But according to letter X8 written by Dr. Rajakaruna to the petitioner, neither Dr. Rajakaruna nor the petitioner intended to invest any money in the 1st respondent company and instead expected to offer their services/expertise to the company. Furthermore, the documents C1-C3 show that the petitioner approved and actively participated in the decision to increase the capacity of the project from 500 kW to 750 kW. The petitioner's claims lack impact and are unconvincing.

The petitioner says in paragraph 10:

> *Around May 1998, the 3rd respondent who had come to Sri Lanka was made a director of the 1st respondent company by the 2nd respondent. By this time, since the 1st respondent company was facing many problems caused by the 2nd respondent's misuse of power and arbitrary decisions, including the said cost overrun, the petitioner insisted that he should be given certain rights including 50% of profits of the company.*

According to the petitioner, it is against this backdrop that the shareholders' agreement X11 was drawn up in June 1998 and signed after amendments on 29.10.1998.

The 1st respondent company was incorporated in March 1998. According to the petitioner, around May 1998 "*the 1st respondent company was facing many problems*". In the formative stage of any company, this may not be unusual. If the company was facing many problems, is it proper and sensible for the petitioner as a responsible shareholder and director to have demanded further rights including

50% of the profits of the company especially when he held only 20% of the issued share capital? In my judgment, it is not.

I will deal with the shareholders' agreement separately later on.

The petitioner in paragraph 11 of the petition says that in October 1999, the 2nd respondent obtained Rs. 1 million from the company to change his residence to a more luxurious and prestigious place. By producing the lease agreements marked P1 and P2, the respondents show that this was done because the deposit, advance and monthly rentals payable were cheaper for the new residence. Monthly rentals have been paid by the 2nd respondent personally and not by the company.

In paragraph 13 the petitioner speaks of loan facilities obtained for the project with his assistance. Obtaining loans is not mismanagement of the company and there is no allegation that the company was unable to repay such loans. The 1st respondent company was incorporated in March 1998 and the petitioner admits that the Kolonne mini hydro power project was commissioned in February 1999 and the Ceylon Electricity Board commenced purchasing electricity from that month onwards. The project was not a failure but a success.

Paragraph 14 of the petition is revealing. I take the view that the disclosures contained therein is crucial in the determination of this case. The petitioner says he incorporated two companies. One is Hydro Power International (Pvt) Ltd incorporated on 09.06.1999 for the purpose of engaging in mini hydro power projects to supply hydro power to the national grid. This is the same purpose for which the 1st respondent company was incorporated and therefore it is clearly a rival company creating a situation of potential conflict of interest between the petitioner and the 1st respondent company. The shareholders of this

new company are the petitioner and his wife. According to the respondents, it is the formation of the new company that triggered the actual dispute between the petitioner and the respondents. I have no difficulty in accepting this assertion of the respondents, although there would have been differences of opinion between the petitioner and 2nd respondent in managing the affairs of the company before this new development.

In *Re Five Minute Car Wash Service Ltd.* [1966] 1 WLR 745 at 751 Buckley J. stated:

> *The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency, however well founded. Those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed.*

Transgression of fiduciary duty

A company, a fictional entity created by law, is governed by its directors. They have been considered as trustees, partners, agents etc. for the company. Regardless of the categorisation that may apply to directors within a company, the fundamental principle remains unchanged: they owe a fiduciary duty to the company as a whole. Directors must act with good faith and unwavering loyalty, prioritising the best interests of the company over their personal interests. They should never allow their duties to the company to be compromised by conflicts of interest, nor should they engage in competition with the company. (*vide Gower's Principles of Modern Company Law,* 10th Edition

(2016), pp. 462-562; *Charlesworth's Company Law,* 17th Edition (2005), pp. 297-321)

These common law obligations of directors have now been largely replaced by statutory provisions. Our Companies Act of 2007 makes detailed provisions on the duties and responsibilities of directors. (*vide* sections 187-220)

The conflict of interest that arose out of the formation of the new company Hydro Power International (Pvt) Ltd by the petitioner is practically proven when the petitioner joined hands with another company by the name of Natural Power (Pvt) Ltd in setting up a hydro power project at Kabaragala in Nuwara Eliya. The petitioner complains that the 2nd and 3rd respondents approached the directors of Natural Power (Pvt) Ltd "behind his back" to ask them to deal with the 1st respondent company directly, but Natural Power (Pvt) Ltd entrusted their project to be handled by Hydro Power International (Pvt) Ltd. The conduct of the petitioner is reprehensible. There was no reason for the respondents to have approached Natural Power (Pvt) Ltd stealthily. As seen from the document marked F, Natural Power (Pvt) Ltd earlier entrusted the 1st respondent company with setting up a mini hydro power project at Kabaragala on a turnkey basis and informed the same to the Board of Investment of Sri Lanka. As seen from G1-G3, the Board of Investment of Sri Lanka in turn granted approval for the same. However, the document marked H goes to prove that the petitioner thereafter obtained approval for the same project in his personal name. Does this not create a serious conflict between the petitioner's personal interests and the interests of the 1st respondent company of which he is a director? It does, and this conflict is manifestly detrimental to the well-being of the 1st respondent company. The Commercial High Court cannot be found fault with when it stated "*it is the petitioner who had*

breached his fiduciary duties he owes to the 1st respondent company in order to obtain personal benefits."

In relation to the Kabaragala project, by X15(a) dated 25.11.1999, the petitioner had this to say to the 3rd respondent:

> *I have completely given up the idea of doing Kabaragala project by MKN [the 1st respondent company] and informed my decision to NP [Natural Power (Pvt) Ltd] since I should look after the interests of NP being the technical director of that company. Even if you didn't bother to tell me, I was informed by NP that directors of NP were met by you all and wanted to do the project by you all without me. After having judged all aspects, they have decided not to give the project to MKN, and will be handled by "Hydro Power International" [the rival company the petitioner incorporated with his wife]. Since I have big doubts on the success of partnership with you for subsequent projects, I don't want to have any link with you for my future projects.*

By this letter the petitioner makes it clear that he would maintain a business relationship with the 1st respondent company only for the mini hydro power project at Wijeriya in Kolonne. In that context, can he be allowed to continue as a director of the 1st respondent company? In that context, is it unreasonable if the majority shareholder, holding 80% of the shareholding and seemingly the exclusive financial investor, believes that allowing the petitioner to continue as a director would serve no purpose other than to potentially undermine the company's prospects? I am unable to accept the submission of learned President's Counsel for the petitioner that "*allegations of conflict of interest were wrong where the appellant had disclosed his interest in the other company and the 1st respondent company had only one approved project and no further mandate from BOI as revealed through boards minutes.*" If

this submission is correct, for instance, the allegations levelled against the 2nd respondent by the petitioner in X15(a) in relation to dealings with Natural Power (Pvt) Ltd are meaningless. What is the purpose of the petitioner stating in X15(a) that he does not want to work with the 1st respondent company on future projects?

The petitioner states that after Natural Power (Pvt) Ltd rejected the offer of the 2nd respondent and accepted that of the petitioner, the 2nd and 3rd respondents orchestrated a strategy to suppress the rights of the petitioner as a shareholder and director of the 1st respondent company and attempted to remove him from the board of directors. He narrates several episodes in the petition in this regard. These primarily include (a) the respondents breaking into the petitioner's office room in the company premises at night in his absence and sealing it after removing documents and equipment; (b) attempting to remove him from the office of director; and (c) appointing extra security guards to the project premises without board approval.

Regarding the allegation of breaking into and sealing the petitioner's office room, the respondents' explanation is that the 2nd respondent and members of his family went to the company office at night and took charge of the confidential documents and placed them in the directors' room and conference room for safe custody; and on the following day the petitioner broke open the sealed doors and, in the melee, even assaulted the 2nd respondent. Criminal proceedings were instituted against the petitioner and a settlement was reached in Court regarding only the documents in that all documents of the 1st respondent company were delivered to the 2nd and 3rd respondents with copies to the petitioner. The position of the respondents is that the removal of the confidential documents was necessitated because of the dealing of the petitioner with his new company.

In *Re Five Minute Car Wash Service Ltd. (supra)* at 751 Buckley J. stated:

> *First, the matters complained of must affect the person or persons alleged to have been oppressed in his or their character as a member or members of the company. Harsh or unfair treatment of the petitioner in some other capacity, as, for instance, a director or a creditor of the company, or as a person doing business or having dealings with the company, or in relation to his personal affairs apart from the company, cannot entitle him to any relief under section 210.*

The attempt to remove the petitioner as a director of the company and the breakdown of the relationship between him and the other directors are not decisive to decide the question of "oppression". Even if he were removed from the office of director and chief executive officer, such removal *ipso facto* does not qualify the petitioner to successfully make an application under "oppression" because it has *prima facie* nothing to do with his shareholding in the company. The reliefs sought in paragraphs (b)-(d) in the prayer to the petition cannot be granted under the rubric of "oppression" unless the petitioner can affirmatively show how such changes adversely affect him as a shareholder of the company. The petitioner has failed to satisfy the Commercial High Court in this regard. Sweeping statements and mere conjectures, in lieu of substantiated evidence, fall short of the requisite standard.

Oppression

Section 224(1) of the Companies Act of 2007 reads as follows:

> *Subject to the provisions of section 226, any shareholder or shareholders of a company who has a complaint against the company that the affairs of such company are being conducted in a*

> *manner oppressive to any shareholder or shareholders (including the shareholder or shareholders with such complaint) may make an application to court, for an order under the provisions of this section.*

In order to succeed in an application under oppression, the petitioner must establish that the affairs of the company are being conducted in a manner oppressive to the petitioner in his capacity as a shareholder, not as a director or chief executive officer or in any other capacity.

In *Re Lundie Brothers Ltd* [1965] 2 All ER 692 at 699, Plowman J., in an application filed under section 210 of the UK Companies Act of 1948 which allowed a shareholder to come before Court when the affairs of the company were being conducted in a manner oppressive to him opined:

> *[The shareholder] has to establish some element of lack of probity or fair dealing to him in his capacity as a shareholder in the company. In my judgment he has wholly failed to do that. His main grievance is, as he admitted in the witness box, that he has been ousted as a working director. That, it seems to me, has nothing to do with his status as a shareholder in the company at all. The same thing is equally true in regard to his complaint that his remuneration as a director of the company has been reduced. That relates to his status as a director of the company, and not to his status as a shareholder of the company.*

In *Re J.E. Cade & Son Ltd* [1992] BCLC 213 the petition was struck out where the Court found that the petitioner's true motive in bringing the action was not to obtain relief *qua* member of the company operating a farm, but to obtain possession of the agricultural land in his capacity as landlord.

Due to the infinite variability of circumstances in which oppression may arise, it is inherently intricate to provide a precise legal definition to the term “oppression”. The determination of whether oppression exists necessitates a case-by-case evaluation of the unique facts and circumstances. In the House of Lords case of *Scottish Co-operative Wholesale Society Limited v. Meyer* [1958] 3 All ER 66 at 71, Lord Simonds described the meaning of the term “oppression” in this context as the majority exercising authority over the minority in a manner that is “*burdensome, harsh and wrongful*”. This definition was adopted in *Re H.R. Harmer Ltd* [1958] 3 All ER 689 and in many other cases.

Lord Keith in *Scottish Co-operative Wholesale Society Limited (supra)* stated at 86:

> *Oppression under s. 210 may take various forms. It suggests, to my mind, as I said in Elder v. Elder & Watson (1952 SC 49), a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members.*

The oppression and mismanagement shall relate to the “affairs of the company”. The term “affairs of the company” found in relevant sections on oppression and mismanagement, in our jurisdiction, in the UK and India, extends to a wider spectrum of company-related activities and decisions, encompassing various aspects of corporate governance, management, and conduct.

However, a shareholder who seeks relief against oppression can only claim what he is legally entitled to and not what his whims and fancies demand. But I must add that legal rights are not limited to strict legal rights embodied only in the articles of association of the company. It may encompass legal rights grounded in broader equitable considerations, such as legitimate expectations of a shareholder—a

concept traditionally rooted in fairness as evaluated by an objective standard. Additionally, these rights may emanate from statutory provisions (such as section 49(2) of the Companies Act of 2007), contractual agreements (such as shareholder agreements), equity interests in the company, and the governance structures that define the company's management framework and decision-making processes. Moreover, fiduciary duties and responsibilities owed by directors may also give rise to additional legal rights and obligations beyond the confines of the articles of association. However, the bottom line is that both the claim of the shareholder and the granting of that relief by the company must have a legal foundation.

Lord Hoffmann in the House of Lords case of *O'Neill v. Phillips* [1999] 2 All ER 961 at 966-967 opined:

> *In the case of section 459 [of the UK Companies Act of 1985], the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.*

In *Re Elgindata Ltd* [1991] BCLC 959 at 985 Warner J. referring to the cases of *Re Posgate & Denby (Agencies) Ltd* [1987] BCLC 667 and *Re a company (No 005685 of 1988), ex p Schwarz (No 2)* [1989] BCLC 427 stated:

> *In general members of a company have no legitimate expectations going beyond the legal rights conferred on them by the constitution of the company, that is to say its memorandum and articles of association. Nonetheless, legitimate expectations superimposed on a member's legal rights may arise from agreements or understandings between the members. Where, however, the acquisition of shares in a company is one of the results of a complex set of formal written agreements it is a question of construction of those agreements whether any such superimposed legitimate expectations can arise.*

K. Kanag-Isvaran and Dilshani Wijayawardana in Company Law (2014), p.518 state:

> *When a shareholder complains of oppression on the part of the company, he must show that he has been constrained to submit to a conduct, which lacks probity, is unfair to him and which causes prejudice to his legal and proprietary rights as a shareholder. The acts complained of must deny to the complaining shareholder or shareholders their rights, or their legitimate expectations as shareholders. The rights and legitimate expectations of shareholders must be those rights and expectations the company can and should honour on a legal basis, and the shareholders can demand as of right, and not every wish and fancy of a shareholder.*

The term “oppression” generally does not include conduct that is merely inefficient, negligent or careless, although such conduct can fall under “mismanagement” in the event such conduct is persistent and the consequences serious, thereby prejudicially affecting the interests of the company. In *Re Five Minute Car Wash Service Ltd (supra)* at 752 Buckley J. held that allegations that the chairman and managing director of a company had been unwise, inefficient and careless in the performance of his duties could not without more amount to allegations of oppressive conduct for the purposes of section 210 of the UK Companies Act of 1948. However no hard and fast rule can be laid down. In *Scottish Co-operative Wholesale Society Limited (supra) at 88,* Lord Denning considered inaction as a species of oppression:

> *It is said that these three directors were, at most, only guilty of inaction—of doing nothing to protect the textile company. But the affairs of a company can, in my opinion, be conducted oppressively by the directors doing nothing to defend its interests when they ought to do something—just as they can conduct its affairs oppressively by doing something injurious to its interests when they ought not to do it.*

Under our law, it may difficult to establish oppression by referring to one isolated incident of past conduct; it has to be a course of conduct. The oppressive conduct shall be of a recurring nature at the time of filing the application, as section 224(1) of the Companies Act of 2007 provides “*the affairs of such company <u>are being conducted</u> in a manner oppressive to any shareholder*”. Similar wording can be found in section 225(b) under “mismanagement”. However, these terms should not be interpreted overly restrictively. If the effect of a wrongful single act in the past (such as the wrongful issuance of shares, diverting company funds for personal use) continues and results in the persistent

oppression of the minority and mismanagement of the company, this will satisfy the requirement. Section 225(1)(b) refers to the future when it states "*it is likely that the affairs of the company may be conducted in a manner prejudicial to the interests of the company*."

Relevance of UK decisions

Before I move on to mismanagement, a word of caution is required when English authorities are considered by Sri Lankan Courts under "oppression" and "mismanagement" as the statutory provisions are not similar particularly after 1980.

I do not mean to make a close comparative analysis but thought it fit to refer to some conspicuous differences as learned President's Counsel for the petitioner drawing attention to section 3 of the Civil Law Ordinance, No. 5 of 1852, invited the Court to look into English decisions in understanding his main argument on "oppression" and "mismanagement" vis-à-vis the shareholders' agreement, which I will address later.

In the first place we have clear, separate provisions for "mismanagement" (section 211 of the Companies Act of 1982 and section 225 of the Companies Act of 2007). However, there is no counterpart in the UK Companies Act.

There was a provision for "oppression" under section 210 of the UK Companies Act of 1948, in terms of which any member of a company who complained that the affairs of the company were being conducted in a manner oppressive to some part of the members (including himself) could make an application to the Court by petition for an order under that section.

But by section 75 of the UK Companies Act of 1980, the word "oppression" was replaced by "unfair prejudice":

> *Any member of a company may apply to the court by petition for an order under this section on the ground that the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.*

This was repeated in section 459 of the UK Companies Act of 1985, which was later slightly amended by the UK Companies Act of 1989 with the substitution of "unfairly prejudicial to the interests of its members generally or of some part of its members" for "unfairly prejudicial to the interests of some part of the members":

> *Any member of a company may apply to the court by petition for an order under this section on the ground that the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.*

Section 994 of the UK Companies Act of 2006 which represents the current law reiterates the same.

It may be noted that "unfair prejudice" introduced by the UK Companies Act of 1980 and carried forward up to now must be given a broader meaning than "oppression". (*Palmer's Company Law,* 24th Edition (1987), Vol 1, p.989) Hence cases decided under "unfair prejudice" by UK Courts cannot be directly applicable to the

determination of "oppression" in our jurisdiction although they serve as useful guides for interpreting our provisions appropriately.

It may also be relevant to note that even under "mismanagement" (under section 225 of the Companies Act of 2007), only the word "prejudice" is used, not "unfair prejudice". "Unfairness" and "prejudice" are different concepts. This is highlighted in *Gower's Principles of Modern Company Law*, 10th Edition (2016), pp. 672-673:

> *In a number of cases the courts have stressed that the section itself requires prejudice to the minority which is unfair, and not just prejudice per se. Sometimes what was done to the petitioner was unfair, but it caused him or her no prejudice, for example, because no loss was inflicted: in these cases s.994 [of the UK Companies Act of 2006] is not open.*

Section 994 of the UK Companies Act of 2006 makes express provisions to establish "unfair prejudice" not only for the present acts but also for past and future acts when it says "*are being or have been conducted*" and "*any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial*".

Mismanagement

Section 225(1) of the Companies Act of 2007 reads as follows:

> *Subject to the provisions of section 226, any shareholder or shareholders of a company, having a complaint*
>
> *(a) that the affairs of the company are being conducted in a manner prejudicial to the interests of the company; or*
>
> *(b) that a material change (not being a change brought about by or in the interest of any creditors, including debenture holders or*

> *any class of shareholders of the company) has taken place in the management or control of the company, whether by an alteration in its board of directors or of its agent or secretary or in the constitution or control of the firm or body corporate acting as its agent or secretary or in the ownership of the shares of the company or in any other manner whatsoever, and that by reason of such change it is likely that the affairs of the company may be conducted in a manner prejudicial to the interests of the company,*

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

In order to succeed in an application on "mismanagement" under section 225 of the Companies Act of 2007 (211 of the Companies Act of 1982), the petitioner must establish that the affairs of the company are being conducted in a manner prejudicial to the interests of the company or that a material change has taken place in the management or control of the company which makes it likely that the affairs of the company may be conducted in a manner prejudicial to the interests of the company.

Material changes such as the removal of a director or the company secretary or auditors may initially seem significant. However, if these actions are carried out in good faith and in accordance with the company's articles of association for the overall betterment of the company, they may not provide sufficient grounds for a minority shareholder to successfully pursue an application under the claim of mismanagement. It is essential to recognise that not every material change automatically and invariably harms the interests of the company. For example, if such changes are undertaken to enhance corporate governance, streamline operations, or address genuine

concerns, they may ultimately benefit the company and its shareholders as a whole.

In the case of *Re Blue Arrow PLC* [1987] BCLC 585, the Court refused to intervene under "unfairly prejudicial conduct" to cancel a special resolution altering the articles of the company so as to make the president of the company or the chairman of the board of directors removable by board resolution, whereas previously the same was only possible by a resolution passed at a general meeting.

A decision by the board of directors to change the business or to continue carrying on the business despite trading losses or to sell the business to an outsider will not *per se* warrant the Court to give relief to a minority shareholder if those business decisions were made in good faith. (*vide Re Saul D Harrison PLC* [1994] 2 BCC 475, *Re Posgate and Denby (Agencies) Ltd* [1987] BCLC 8)

Under mismanagement, the petitioner must make the application in good faith in furtherance of the best interests of the company as a shareholder and not in the best interests of himself as an investor.

The test to be adopted in deciding whether or not the affairs of a company are being conducted in a manner oppressive to a shareholder (oppression) or in a manner prejudicial to the company (mismanagement) is objective as opposed to subjective. (*Palmer's Company Law*, op. cit., paragraph 66-06, *Halsbury's Laws of England*, Vol.14, (2009) 5th edition, pp 991-993 (paragraph 468)

In *Re RA Noble & Sons (Clothing) Ltd* [1983] BCLC 273 at 290-291, Nourse J. stated that "*it is not necessary for the petitioner to show that the persons who have had de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test…is whether a reasonable*

bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interests."

In reference to section 459(1) of the UK Companies Act of 1985 in the case of *Re Sam Weller & Sons Ltd* [1990] Ch 682 at 690, Peter Gibson J. stated:

> *To my mind, the wording of the section imports an objective test. One simply looks to see whether the manner in which the affairs of the company have been conducted can be described as "unfairly prejudicial to the interests of some part of the members." That, as [counsel for the petitioner] submitted, requires an objective assessment of the quality of the conduct. Thus, conduct which is "unfairly prejudicial" to the petitioner's interests, even if not intended to be so, may nevertheless come within the section.*

The lawful removal of directors in terms of the articles of association, protection of company property including business files, recruitment of additional security personal, attracting new businesses, and (as submitted during the argument) non-payment of dividends etc., which the petitioner in the instant case relies on to establish his case, cannot, on the facts and circumstances of this case, be regarded as oppressive to the petitioner as a shareholder or mismanagement of the company.

In *Re Lundie Brothers Ltd (supra)* at 699, Plowman J. stated:

> *There is also a complaint—or what I take to be a complaint—in the petition that he has received no dividend on his shares in the company. The company in fact has never paid any dividends. Its policy has been substantially to divide its profits between directors and not to pay any dividend on its shares. But no case is either pleaded or has been established for concluding that the company's failure to pay dividends was oppressive to the shareholders of the*

company and, indeed, there may well have been sound commercial reasons for not declaring any dividend.

In the Indian case of *Jaladhar Chakraborty v. Power Tools and Appliances Co* (1992) 2 CALLT 64 HC it was held that omission to declare dividends does not constitute an act of oppression or mismanagement.

The articles of association of the 1st respondent company marked X1(b) provides for the conduct of the affairs of the company including the removal of directors, rights to dividends etc., and therefore both the petitioner and 2nd respondent are lawfully entitled to invoke these provisions.

The need to exercise the jurisdiction of Court with extreme caution

The essence of democracy is majority rule. The general rule is that disputes among shareholders shall be resolved within the scope of the articles of association of the company, which is the constitution of the company. This is done by majority vote of the shareholders at a general meeting or by majority vote of the board of directors. According to section 13 of the Companies Act of 2007, the articles of association is expected to provide for the objects of the company, the rights and obligations of shareholders of the company, and the management and administration of the company.

The Court is unwilling, and indeed lacks jurisdiction, to reevaluate genuine business decisions made by the board of directors or majority shareholders after careful deliberation encompassing a broad spectrum of practical factors. It is not within the purview of the Court to substitute these legitimate business judgments with the judgments of the Court, confined as they are to the strict interpretation of the law and the limited facts presented during the legal proceedings.

Unless the Court is fully convinced that majority power has been abused and used *mala fide* for collateral purposes and not in the best interests of the company thereby suppressing the legitimate rights of the minority camp, the Court need not unnecessarily interfere with matters of commercial judgment or policy or the internal administration of the company so long as they are *intra vires* the company. If the Court still decides to intervene, there shall be compelling, cogent reasons for doing so.

In the Privy Council case of *Burland v. Earle* [1902] AC 83 at 93, Lord Davey was emphatic in confirming this non-interventionist attitude of judges:

> *It is an elementary principle of law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so.*

The Court shall bear in mind the relevant observation made in *Fisher v. Cadman* [2006] 1 BCLC 499 at 530:

> *[T]he mismanagement relied upon for the purposes of a claim under section 459 [of the UK Companies Act of 1985] must be serious, and that the Court will be astute not to 'second guess' legitimate management decisions taken upon reasonable grounds at the time, albeit as events transpired, they may not have been the best decisions in the interests of the Company.*

Kanag-Isvaran and Wijayawardana, op. cit., p. 520 state:

> *Directors in whom are vested the right and duty of deciding where the company's interests lie and how they are to be served, are concerned with a wide range of practical considerations, and when*

> *their judgment, is exercised in good faith and not for an irrelevant purpose, the courts of law will not assume the position of a kind of supervisory board over such decision. It is not unfair for directors in good faith to advance the objects of the company, or to embark upon new business opportunities even to the prejudice of a shareholder or a group of shareholders, where such advancement is in the best interests of the company. Prima facie, it is for the directors, and not for the court, to decide whether the furthering of a corporate interest which is inimical to a shareholder or shareholders should prevail over those interests, or whether some balance should be struck between them.*

However, this should never be taken to mean that there is a general prohibition on Court intervention in the internal affairs of a company. The Court must not always construe the imprecise concepts of "oppression" and "mismanagement" narrowly and technically and render the statutory provisions on oppression and mismanagement nugatory. In appropriate cases, the Court may, nay shall, exercise its statutory duty to protect minority shareholders from oppression by the majority, and to prevent mismanagement that jeopardices the company's best interests. The necessity for intervention depends on the facts and circumstances peculiar to each case.

Warner J. in *Re Elgindata Ltd* [1991] BCLC 959 at 993-994 opined:

> *I do not doubt that in an appropriate case it is open to the court to find that serious mismanagement of a company's business constitutes conduct that is unfairly prejudicial to the interests of minority shareholders. But I share Peter Gibson J's view [in Re Sam Weller & Sons Ltd [1990] BCLC 80 at 89] that the court will normally be very reluctant to accept that managerial decisions can amount to unfairly prejudicial conduct. Two considerations seem to*

> *me to be relevant. First, there will be cases where there is disagreement between petitioners and respondents as to whether a particular managerial decision was, as a matter of commercial judgment, the right one to make, or as to whether a particular proposal relating to the conduct of the company's business is commercially sound. …In my view, it is not for the court to resolve such disagreements on a petition under s. 459. Not only is a judge ill-qualified to do so, but there can be no unfairness to the petitioners in those in control of the company's affairs taking a different view from theirs on such matters. Secondly, as was persuasively argued by [counsel for the respondents], a shareholder acquires shares in a company knowing that their value will depend in some measure on the competence of the management. He takes the risk that that management may prove not to be of the highest quality. Short of a breach by a director of his duty of skill and care (and no such breach on the part of [majority shareholders] was alleged) there is prima facie no unfairness to a shareholder in the quality of the management turning out to be poor. It occurred to me during the argument that one example of a case where the court might nonetheless find that there was unfair prejudice to minority shareholders would be one where the majority shareholders, for reasons of their own, persisted in retaining in charge of the management of the company's business a member of their family who was demonstrably incompetent.*

In *Re Elgindata Ltd,* R and his wife being minority shareholders of the company commenced proceedings under section 459 of the UK Companies Act 1985 alleging that P being the majority shareholder had conducted the affairs of the company in a way that was unfairly prejudicial to their interests. The allegations of unfair prejudice were

broadly that (i) R was not consulted with respect to policy decisions on which he had a right to be consulted, (ii) P managed the affairs of the company in a manner that was incompetent, and (iii) P misused the assets of the company for his own personal and family benefit. The Court held that the affairs of the company have been conducted in a manner unfairly prejudicial to the interests of the petitioners. In the course of the reasoning it was *inter alia* observed that P had improperly used the company's assets for the benefit of himself, his family and his friends; and although this only had a limited impact on the value of the shares of R and his wife nevertheless it constituted unfairly prejudicial conduct since it would be unfair to leave R and his wife locked in the company because of P's propensity for using the company's assets for his personal benefit.

At page 1004 it was emphasised that "*one way, but not the only way, in which a member of a company may bring himself within s. 459 is by showing that the value of his shares in the company has been seriously diminished or at least seriously jeopardised by reason of a course of conduct on the part of those in control of the company which has been unfair to him.*"

In *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354 at 404-405, Arden J. observed:

> *With respect to alleged mismanagement, the court does not interfere in questions of commercial judgment, such as would arise here if (for example) it were alleged that the companies should invest in commercial properties rather than residential properties. However, in cases where what is shown is mismanagement, rather than a difference of opinion on the desirability of particular commercial decisions, and the mismanagement is sufficiently*

> *serious to justify the intervention by the court, a remedy is available under s. 459.*

In *Re Macro (Ipswich)* Ltd, proceedings were instituted *inter alia* under section 459 of the UK Companies Act of 1985 on minority oppression by the majority shareholder. It was held:

> *The question of whether any action was or would be unfairly prejudicial had to be judged on an objective basis. The questions which the court had to answer were (a) was the conduct of which complaint was made prejudicial to the members' interests, and (b) if the answer to the first question was in the positive was it unfairly so? Where conduct was unfairly prejudicial to the financial interests of the company then it would also be unfairly prejudicial to the interests of its members. In assessing the fairness of the conduct, the court had to perform a balancing act in weighing the various interests of different groups within the company. The court did not interfere in questions of commercial management but where the mismanagement was sufficiently significant and serious so as to cause loss to the company then it could constitute the basis for finding unfair prejudice. On the facts, the petitioners had identified sufficient acts of serious mismanagement to show that the affairs of the companies had been conducted in a manner which was unfairly prejudicial to their interests. Also, it was unfairly prejudicial for the petitioning shareholders to remain in the companies which were controlled by T [the majority shareholder] and on the boards of which there was no independent director. The court would order T to purchase the shares of the petitioners, the purchase price to be based on principles of valuation laid down by the court.*

Re London School of Electronics Ltd [1986] Ch 211 is a case where the petitioner filed action seeking relief under section 75 of the Companies Act 1980. In this case the company, London School of Electronics Ltd (LSE) ran courses in electronics. The petitioner was a director and 25% shareholder of the LSE. The remaining shares were held by the respondent company, City Tutorial College Ltd (CTC). CTC employed the petitioner, a director and 25% shareholder, as a teacher. Later on, relationships broke down and CTC passed a resolution removing the petitioner as a director of LSE. Then the most of LSE's students were transferred to CTC. The petitioner set up a rival institution in the same centre as CTC and took 12 LSE students with him. Then the petitioner sought a purchase order for his 25% shares in LSE. He claimed that the conduct of the respondent had been unfairly prejudicial to his interests. The Court granted the petitioner's order for purchasing his 25% shares in LSE. Nourse J. held at 223:

> *In my judgment it was CTC's decision to appropriate the B.Sc students to itself which was the effective cause of the breakdown in the relationship of mutual confidence between the quasi-partners. Furthermore, that was clearly conduct on the part of CTC which was both unfair and prejudicial to the interests of the petitioner as a member of the company.*

The Court did not consider the petitioner's removal of some students to his institution would render the prejudicial conduct no longer unfair since it was CTC which had unfairly brought about the petitioner's departure from the company.

In *Re Haden Bill Electrical Ltd* [1995] 2 BCLC 280, the petitioner had been in *de facto* control of the company as chairman although he owned only 25% of the shares. His own company loaned £200,000 to the company as working capital. He complained under section 459 of the

UK Companies Act of 1985 that he had been removed as a director. It was held that the company was to be treated as a quasi-partnership and, as long as the loan was outstanding, he had a legitimate expectation of being involved in the management of the company and his removal as director was "unfairly prejudicial" to him.

Notwithstanding wide powers have been conferred on the Court to regulate the affairs of the company by way of final orders, interim orders, restraining orders, by sections 224, 225, 228, 233, 521 of the Companies Act of 2007, which empower the Court to make such orders "as it thinks fit" "upon such terms and conditions as appear to it to be just and equitable" akin to the powers of the Labour Tribunal, the Court must be extremely cautious and jealous in exercising these powers. The Court has neither the knowledge nor authority to dictate terms to the board of directors on how to manage the company. The orders which could be made "as it thinks fit" shall be confined to "remedying the matters complained of".

The petitioner cannot couch his reliefs in broad terms. The main relief of the petitioner in paragraph (a) of the prayer to the petition is too wide:

> *An order regulating the conduct of the affairs of the 1st respondent company in future in such a manner as the Court may decide as to protect the 1st respondent company and its minority shareholders including the petitioner.*

The reliefs sought under oppression and mismanagement must be specific so that *inter alia* the opposing party can assist the Court by alerting in advance the consequences that would follow in the management of the company in the event such reliefs are granted. (*Re*

Antigen Laboratories Ltd [1951] 1 All ER 110; *Ghosh & Dr. Chandratre's Company Law*, 13th Edition (2007), Vol 3, pp.4878-4879)

Relief under oppression and mismanagement is discretionary

The remedy provided by the Companies Act for shareholders to seek Court intervention in cases of oppression and mismanagement is both equitable and discretionary. This remedy is rooted in principles of equity and justice, even though it is now based on statutory provisions. According to sections 224 and 225, "the court may make such orders as it thinks fit" on "just and equitable" considerations.

Pennington's Company Law, 7th Edition (1995), p. 901 states:

> *A petition for relief from oppression under the original statutory provision would be dismissed if it was not presented in good faith solely in order to obtain such relief, and because of the equitable and therefore discretionary character of the Court's jurisdiction under both the original [section 210 of the UK Companies Act 1948] and the present provision [section 459 of the UK Companies Act 1985 and section 994 of the UK Companies Act 2006], the requirement of good faith on the part of the petitioner undoubtedly continues.*

The Court will have to give regard to wider equitable considerations including the conduct of the petitioner in deciding the matter. In that context, creating a conflict by seeking to purchase a competing company (*Grace v. Biagioli* [2006] 2 BCLC 70), manifestly improper conduct (*Waldron v. Waldron* [2019] EWHC 115 (Ch)), acquiescence in the improper management of the company without protest (*Re RA Noble and Sons Clothing Ltd (supra)*, delay in initiating proceedings (*Re Jermyn St Turkish Baths Ltd* [1971] 3 All ER 184) etc. are relevant factors.

The jurisdiction of the Court shall not be invoked for collateral purposes. In *Re Bellador Silk Ltd [1965] 1 All ER 667 at 672,* Plowman J. dismissed the application stating:

> *A petition which is launched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose [to get repayment of a loan owed by the company to the petitioner's group of companies] is, in my judgment, an abuse of the process of the court.*

On the facts and circumstances of the instant case, I do not think the High Court exercised its discretion arbitrarily in dismissing the application of the petitioner. In particular, the petitioner's forming up a new competing company together with his spouse militates against him in seeking discretionary relief.

Shareholders' agreement and the Duomatic principle

Learned President's Counsel for the petitioner does not seem to be contesting the fundamental principles of company law outlined above. Nevertheless, he strenuously submits that the shareholders' agreement X11 has the potential to amend or supersede the articles of the company, relying on "the Duomatic principle" elucidated in *Re Duomatic Ltd* [1969] 1 All ER 161, further elaborated upon in *Cane v. Jones* [1981] 1 All ER 533, and consistently applied in recent cases, such as *EIC Services Ltd v. Phipps* [2003] EWHC 1507 (Ch). This constitutes the pivotal argument presented by learned President's Counsel for the petitioner.

The Duomatic principle recognises that unanimous consent or acquiescence among the relevant shareholders can serve as a valid substitute for formal approval at a general meeting, provided that all parties are informed and act in a manner consistent with the proposed

action. Such informal yet informed consent holds binding force on the parties involved. This principle serves the interests of equity and efficiency in closely-held companies or situations where adherence to formal procedures may be impractical.

In *Re Duomatic Ltd (supra)* at 168 Buckley J. formulated the principle in the following manner:

> *[W]here it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.*

In *EIC Services Ltd v. Phipps* [2003] EWHC 1507 at paragraph 122, Neuberger J. lucidly spelled out the nature of the Duomatic principle in the following terms:

> *Although the principle has been characterised in somewhat different ways in different cases, I do not consider that that is because its nature or extent is in doubt or the subject of debate. The difference in language is attributable to the fact that the principle will have been expressed by reference to the particular facts of the case. The essence of the Duomatic principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether*

members of the group give their consent in different ways at different times, does not matter.

This illustrates that the Duomatic principle is not bound by formalities. As noted by Neuberger J., approval can take various forms, including express or implied consent, given in advance or after the event, or through different means at different times. It is not obligatory for assent to be in written form as long as it is conveyed through other means. Similarly, when a shareholder wishes to withdraw his assent, the same principle should apply, and the revocation of assent does not require formalities as long as it is clearly manifested.

Learned President's Counsel for the petitioner admits that the Companies Act of 1982 which was the applicable law at the time of signing X11 did not contain any express provision on the effect of shareholders' agreements on the articles of the company. However he contends that this lacuna was filled by section 31(a) of the new Companies Act of 2007 and, as the 1st respondent company was re-registered under the new Companies Act, the Court can make use of that section to grant relief to the petitioner.

The impugned final order of the Commercial High Court was delivered in 2003. The new Companies Act was enacted in 2007. Hence consideration of the new Companies Act in this final appeal filed against the said order does not arise. Nevertheless, I will consider this argument since it is an important question of law.

Section 31(1) of the new Companies Act of 2007 reads:

Where all the shareholders of a private company agree in writing to any action which has been taken, or is to be taken by the company—

(a) the taking of that action is deemed to be validly authorised by the company, notwithstanding any provision in the articles of the company to the contrary; and

(b) the provisions contained in the list of sections of this Act specified in the Second Schedule hereto, shall not apply to and in relation to that action.

In accordance with section 31(1)(b), shareholders of a private company cannot unilaterally decide on any action outside the scope of the company's articles. However, it is essential to note that there are certain limitations to this authority. Shareholders are restricted from making decisions on matters that are specifically listed under the second schedule to the Act.

Be that as it may, in terms of section 530(1)(a) of the Companies Act of 2007, all agreements made under the repealed Companies Act of 1982 will not continue to be in force under the new Companies Act of 2007 but will continue only the agreements which were "in force on the appointed date" of the new Act. It reads as follows:

> *Without prejudice to the provisions contained in sections 5 and 10 of the Interpretation Ordinance – nothing in the repeal of any former written law relating to companies shall affect any order, rule, regulation, scale of fees, appointment, conveyance, mortgage, deed or agreement made, resolution passed, direction given, proceeding taken, instrument issued or thing done under any former written law relating to companies, but any such order, rule, regulation, scale of fees, appointment, conveyance, mortgage, deed or agreement, resolution, direction, proceeding, instrument or thing shall, <u>if in force on the appointed date, continue to be in force</u>, and so far as it could have been made, passed, given, taken, issued or*

> *done under this Act, shall have effect as if made, passed, given, taken, issued, or done under the provisions of this Act.*

Was the agreement X11 in force when the new Companies Act of 2007 became law? In my judgment, it was not. The petitioner knew this when he filed the application in the Commercial High Court where he said in paragraph 17 of the petition:

> *The petitioner states that in any event, in terms of the shareholders' agreement marked X11 the 2nd and 3rd respondents cannot take control of the 1st respondent company or its finances or oust the petitioner from its board of directors or the post of Chief Executive Officer without first referring the disputes to arbitration.*
>
> *However in X18(e) the said respondents have denied they are bound by X11 and therefore the petitioner verily believes that the said respondents would not agree to proceed to arbitration.*

The petitioner acknowledges that the 2nd respondent denies X11 and he (the petitioner) acquiesces to this denial. If the petitioner considered X11 a binding agreement, he could not have in the first place filed this application in the Commercial High Court without referring the dispute to arbitration. The petitioner cannot approbate and reprobate, blow hot and cold.

The position of the petitioner in his first written submissions that "*The 2nd and 3rd respondents however attempt to distance themselves from X11 stating that they were compelled to sign same. Whatever may be the positions of the parties, but the X11 remains a binding and valid agreement in law and moreover signing of it was admitted by the respondents*" is untenable.

A shareholders' agreement entered into outside the articles of association is binding on the parties so long as the parties agree to it. The parties to a shareholders' agreement are at liberty to withdraw from it. *Kanag-Isvaran and Wijayawardana, op. cit.,* p.90 state:

> *Another new provision that has been introduced under the Act of 2007 enables private companies to validate any action that has been taken, or is to be taken, by the company, where all its shareholders, by unanimous agreement in writing, agree to such an act, notwithstanding that it is contrary to the articles. (Section 31(1)(a) of the Act) The purpose behind introducing this concept of unanimous agreement of shareholders is to allow a private company to undertake certain actions otherwise than in accordance with the formalities prescribed in the articles in the company, if all its shareholders concur in writing to carry out that act. Such written agreement may be entered into for a particular use of a power, or to approve the exercise of a power generally, or an ongoing basis. Though the Act is silent as to the consequences of the withdrawal of the consent given by a shareholder, it can be affirmatively presumed that a shareholder is entitled to withdraw his consent after giving same, in which event section 31 would have no application.*

This appeal is for all practical purposes predicated on the shareholders' agreement X11. Learned President's Counsel begins Part A of the further written submissions "*the appellant relies on the X11 shareholders agreement to establish the oppressive conduct and mismanagement by the 2nd and 3rd respondents-respondents*" and ends Part A "*the appellant's grievance of oppression and mismanagement arose from the respondents' deliberate violation of X11 in conducting affairs of the company*". In other words, on the facts of this case, if there

is no valid shareholders' agreement, there is no oppression and mismanagement. X11 is unenforceable in law.

Resignation from the board and the petitioner's new claim

Learned President's Counsel for the petitioner in the further written submissions states that although the respondents' move to oust the petitioner was unsuccessful in view of this application "*the appellant subsequently had to resign from board in 2003 as he was unwilling to share the liability for the respondent's unilateral acts based on majority which was contrary to X11*." According to the document filed with the written submissions, the petitioner resigned from the office of director on 20.03.2003 even before the Commercial High Court delivered its final order. For reasons best known to him, the petitioner did not inform this to the Commercial High Court.

Learned President's Counsel suggests that the most viable solution seems to be the 2nd respondent purchasing the petitioner's shares at a fair value through a Court-supervised process, thereby enabling the petitioner to exit from the 1st respondent company. If this was indeed the petitioner's intention, he could have brought it to the attention of the Commercial High Court. Even though he resigned from the position of director while the action was pending, he continued to seek relief against the 2nd and 3rd respondents to prevent his removal from the directorship.

The petitioner shall understand that this is a final appeal filed against the final order of the Commercial High Court and not a revision application. In this appeal, the Court will consider whether the order of the Commercial High Court is right or wrong. The petitioner cannot seek different reliefs on appeal.

Additional submissions

At the argument, it was contended on behalf of the petitioner that the learned High Court Judge was in error when he stated in the impugned order that the petitioner did not file a counter affidavit refuting the allegations contained in the statement of objections which amounts to the allegations remaining unchallenged. It was submitted that the counter affidavit of the petitioner is found at page 328 of the brief. This submission is not correct. That is not the counter affidavit filed against the statement of objections to the substantive application but against the application filed by the respondents to vacate the interim orders issued against them *ex parte*. The respondents filed a statement of objections against the substantive reliefs (page 787 of the brief) and a separate application praying for vacation of the *ex parte* interim orders (page 983 of the brief).

Another submission made on behalf of the petitioner was that the 3rd respondent who filed the affidavit in support of the averments in the statement of objections did not have personal knowledge to affirm to the facts contained therein. In the aforesaid counter affidavit tendered for a different purpose, the petitioner says "*Therefore the 3rd respondent had no personal knowledge whatsoever of many statements in her affidavit in respect of the period prior to March 1998*." As I have already stated, the 1st respondent company was incorporated on 20.03.1998 and the 3rd respondent who is a daughter of the 2nd respondent was made a director of the company on the same day. What holds significance in this application is the events that occurred after the company's incorporation. Therefore, even if the 3rd respondent lacks personal knowledge regarding matters preceding the incorporation, it does not impact the respondents' case.

Conclusion

On the facts and circumstances of this case, the Commercial High Court was correct to have held that no cause of action accrued to the petitioner to sue the respondents under "oppression" and "mismanagement". The shareholders' agreement X11, heavily relied upon by the petitioner, is unenforceable in law.

I see no reason to interfere with the order of the Commercial High Court dated 07.05.2003. The appeal is dismissed with costs.

Judge of the Supreme Court

Priyantha Jayawardena, P.C., 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 appeal in terms of Section 5 (2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

Seylan Bank PLC,
No. 69, Janadhipathi Mawatha,
Colombo 01.

Presently at "Ceylinco-Seylan Towers",
No. 90, Galle Road,
Colombo 03.

S.C. Appeal (CHC) No. 45/2014
H.C. (Civil) No. 119/2007/MR

Plaintiff

Vs.

1. Abdul Cader Mohomed Faizer,

2. Seyyed Khan Azad Khan,

Both carrying on business in Partnership under the name, style and firm of "Regal Tyre House" at No. 149, Jayantha Weerasekara Mawatha, Colombo 10.

Defendants

AND NOW BETWEEN

1. Abdul Cader Mohomed Faizer,

2. Seyyed Khan Azad Khan,

Both carrying on business in Partnership under the name, style and firm of "Regal Tyre House" at No. 149, Jayantha Weerasekara Mawatha, Colombo 10.

Defendant-Appellants

Vs.

Seylan Bank PLC,
No. 69, Janadhipathi Mawatha,
Colombo 01.

Presently at "Ceylinco-Seylan Towers",
No. 90, Galle Road,
Colombo 03.

Plaintiff-Respondent

Before: Hon. Priyantha Jayawardena, P.C., J.

Hon. Janak De Silva, J.

Hon. K. Priyantha Fernando, J.

Counsel:

Mohamed Ziras Hassen for Defendant-Appellants

Senaka de Saram for Plaintiff-Respondent

Written Submissions:

10.03.2021 by the Defendant-Appellant

16.10.2020 by the Plaintiff-Respondent

Argued on: 06.06.2023

Decided on: 28.02.2024

Janak De Silva, J.

The Plaintiff-Respondent ("Respondent") instituted this action in the Provincial High Court of the Western Province holden in Colombo (Commercial High Court) ("High Court") on 20.03.2007 to recover the sums due on two loans of Rs. 3,440,181.00 and Rs. 4,173,474.00 from the Defendants-Appellants ("Appellants").

According to the Respondent, it extended two term loan facilities to the Appellants which were later re-scheduled due to non-payment. The Appellants signed promissory notes and loan agreements which formed integral parts of the rescheduled loans. These loans were secured by a Mortgage Bond No. 3575 dated 17.05.1997 (P9). Nevertheless, the Appellants defaulted in making repayment of the two re-scheduled term loan facilities as well. The re-scheduled term loans were payable on demand. This action was instituted since the Appellants failed to pay on demand.

The Appellants denied that any sums were due to the Respondent. They claimed that the Statement of Accounts (P4a, P4b, P7a and P7b) are false, the offer letter (P3) was not known to them, the term loan agreements (P5 and P8) were not signed by them, the Mortgage Bond was not properly stamped and that the Respondent's cause of action is prescribed.

Trial commenced on 01.07.2008 on 3 admissions and 23 issues. Issues pertaining to stamping of the Mortgage Bond (P9) were withdrawn by the Appellants on 10.07.2008. The Respondents led the evidence of one witness, who was the Assistant Manager of

the Respondent Bank Branch office in Maradana. In his evidence it was stated that the Respondent had granted two rescheduled term loans to the Appellants as reflected in the Statement of Accounts and Bank ledgers (P4a, P4b and P7a, P7b).

The witness testified that the Appellants had signed two promissory notes for the two term loans (P5 and P8). He further testified that the Appellants had signed the offer letter (P3) and agreed to its terms and conditions. Since the Appellants had failed and neglected to pay the sums due on the aforementioned re-scheduled loan agreements, a demand had been made by the Respondent on 01.03.2007 (P6).

Having first withdrawn the objection on stamping of Mortgage Bond (P9), the Appellants moved to object to the Mortgage Bond on the basis that the 'facilities' were not granted in 2006, but in 1997 when P9 was made. The Appellants further contended that the offer letter (P3) was not signed before them and there were no other documents to prove the whereabouts of the facilities granted.

The learned High Court Judge held that the documents are not fraudulent, the action is not prescribed, and that the Respondent is entitled to the re-payment of the two loan amounts subject to the limitation of Rs. 5 million in the said Mortgage Bond.

The Appellants have sought to impugn the judgment of the Commercial High Court on the following grounds:

(1) The plaint does not conform to section 40 (d) of the Civil Procedure Code.
(2) The action is prescribed.
(3) The documents produced by the Respondent are in respect of Regal Tyre House and not the Appellants.

Section 40 (d) of the Civil Procedure Code

According to the Appellants, the plaint does not conform to the requirements specified in section 40 (d) of the Civil Procedure Code which reads as follows:

> *"40. The plaint shall be distinctly written upon good and suitable paper, and shall plaint contain the following particulars:*
>
> *…*
>
> *(d) a plain and concise statement of the circumstances constituting each cause of action, and where and when it arose. Such statement shall be set forth in duly numbered paragraphs; and where two or more causes of action are set out, the statement of the circumstances constituting each cause of action must be separate, and numbered"*

This provision is based upon the right to a fair trial. It requires the Plaintiff to set out the details constituting the cause of action so that the defendant becomes fully aware of the case pleaded against him and can accordingly set up the defense. It also enables to establish jurisdiction of Court where it is sought to be done on the basis of the place where the cause of action arose.

The jurisdiction of the High Court was not put in issue at the trial. The answer did not specifically aver that the plaint does not conform to the provisions in section 40 (d) of the Civil Procedure Code. Moreover, the answer has set out several defenses against the causes of action set out in the plaint. In these circumstances, it is too late in the day for the Appellants to raise this issue in appeal. In my view, it is a frivolous and vexatious ground of appeal.

Prescription

In the answer, it was specifically pleaded that the cause of action is prescribed. Issue No. 22 raised the question of prescription.

This issue is based on the assertion by the Appellants that the original term loans were granted in 1997 where as the rescheduled loan facilities were granted in 2007. According to the Appellants, the action was prescribed by the time the rescheduling was done.

This submission is untenable in law. There is sufficient evidence on record to establish that the Appellants agreed to the rescheduling of the earlier loans.

In response to the Appellant's contention that the offer letter (P3) was not signed before them, the following testimony of the 1st Appellant in his evidence on 17.10.2012 is instructive:

> "ප්‍ර: මේ නඩුවේ තවමත් සමථයක් වෙලා නෑ?
>
> උ: මේ නඩුවෙත් දැන් ගිහිල්ලා කතා කරලා තිබෙනවා. තවම අපිට සමථයක් වෙන්න පොඩි කාලයක් ගන්නවා. මොකද යම්කිසි ගානක් මේ ගොල්ලෝ ඉල්ලන මුදල අපිට වැඩියි කියලා හිතෙනවා. මොකද පොළිය වැඩියි. අර වගේ ගිය සැරේ වගේ අපිට සාමාන්‍ය ගානක් අඩු කරලා දුන්නොත් අපි ඉවර කරන්න තමයි බලන්නේ." (at page 6 of the proceedings on 17.10.2012)

The 1st Appellant conceded that the earlier loans were rescheduled. Moreover, he conceded that there had been an attempt to reschedule the two loan facilities on which the present action was instituted. The 2nd Appellant did not testify.

Hence the assertion that the cause of action on the original loans were prescribed are devoid of any merit.

It must be noted that this matter does not arise from the Mortgage Bond, but from the two 'Loan Agreement Forms' (P5 and P8). The learned High Court judge has correctly formed the view that the Appellants have signed these documents.

Clause 1 under 'Terms and Conditions' of both forms explicitly state that the loan amounts are repayable on demand. Moreover, the operative clause of the Mortgage Bond states the following:

> "*NOW KNOW YE AND THESE PRESENTS WITNESS that in pursuance of the said agreement and in consideration of the aforesaid premises the* ***Principal Debtors*** *and the Surety do hereby covenant and agree with and bind and oblige themselves to the said Bank that the* ***principal Debtors shall and will on demand well and truly pay or cause to be paid at Colombo aforesaid to the said bank****.*"

It is settled law that the cause of action concerning a loan repayable on demand will arise only at the time when a demand is made **[*Seylan Bank Ltd v. Inter Trade Garments (Pvt.) Ltd.* (2005) 1 Sri.L.R 80; *Sivasubramaniam v. Alagamutui* (1950) 53 N.L.R 150;** *See also*, ***Bank of Ceylon v. Flex Port (Pvt.) Ltd.*, SC Appeal 120/2012, S.C.M. 03.07.2020 at pages 6-7]**. This extends even to matters which concern rescheduled loan facilities **[*Union Bank v. Emm Chem (Pvt.) Ltd. and Others*, S.C. Appeal (CHC) 22/2011, S.C.M. 07.03.2019]**.

At this point, it is apposite to note that the Appellants did not challenge the demand made by the Respondent dated 01.03.2007. In any case, the 'Letter of Demand' addressed to the Appellants constitute the requisites of an appropriate demand. In ***Re Colonial Finance, Mortgage, Investment and Guarantee Corp. Ltd.*** **[(1905) 6 SRNSW 6]** which was cited with approval in ***Union Bank v. Emm Chem (Pvt.) Ltd. and Others*** **[Supra at page 16]** it was held that:

> "*there must be a clear intimation that payment is required to constitute a demand; nothing more is necessary, and the word 'demand' need not be used; neither is the validity of a demand lessened by its being clothed in the language of politeness. It must be of a peremptory character and unconditional, but the nature of the language is immaterial provided it has this effect.*"

In this context, the learned Judge of the Commercial High Court had accurately analysed the facts and arrived at the correct conclusion. The demand was made by the Plaintiff on 01.03.2007 and the action was filed in the Commercial High Court on 20.04.2007. The plea of prescription is untenable in law.

Documents pertain to Regal Tyre House and not the Appellants

This ground was raised for the first time in appeal. It was not pleaded in the answer, not raised as an issue and not even put to the witness for the Respondent.

It is clear on the evidence that the two Appellants were partners of Regal Tyre House. They have signed all the documents produced in this case in that capacity.

I see no merit on this point. It is a frivolous and vexatious defense.

For all the foregoing reasons, the appeal is dismissed with costs fixed at Rs. 50,000/=.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

K. Priyantha Fernando, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an appeal against the Judgment of the Commercial High Court of Colombo in terms of sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 as amended read with Chapter LVIII of the Civil Procedure Code.

SC (CHC) APPEAL 46/2017

Commercial High Court

Case No. HC/Civil/ 285/2020/MR

Freight Links International (Private) Limited

Level 07, Access Towers 278,

Union Place, Colombo 02.

Plaintiff

Vs.

M.J.N.J. Fernando

No. 290, Thoduwawa North,

Thoduwawa.

Carrying on registered business under the name, Style and firm of Deshan International Imports And Exports.

Defendant

AND NOW BETWEEN

M.J.N.J. Fernando

No. 290, Thoduwawa North,

Thoduwawa.

Carrying on registered business under the name, Style and firm of Deshan International Imports And Exports.

Defendant-Appellant

Vs.

Freight Links International (Private) Limited

Level 07, Access Towers 278,

Union Place, Colombo 02.

Plaintiff- Respondent

BEFORE : P. PADMAN SURASENA J.

JANAK DE SILVA J.

ACHALA WENGAPPULI J.

COUNSEL : Aruna Pathirana Arachchi with Mrs. Inoka Weerakkodi for the Defendant-Appellant.

Chandaka Jayasundara, PC with Mr. Rehan Almeida for the Plaintiff-Respondent.

ARGUED &

DECIDED : 17-01-2024.

P. PADMAN SURASENA, J.

This appeal has been fixed for argument in today's list of cases. When this case was called in Court, Ms. Inoka Weerakkodi Attorney-at-Law made an application for the postponement of the argument on the basis of a difficulty of the Counsel, who is due to appear for the Defendant-Appellant in Court today.

Ms. Inoka Weerakkodi, Attorney-at-Law specially made this application in the capacity of the Instructing Attorney, claiming that she is the Instructing Attorney for the Defendant-Appellant.

On the subsequent questioning by Court also, she continued to maintain the fact that she is the Instructing Attorney on record for the Defendant-Appellant.

However, we have perused the documents in the brief and found that it is not Ms. Inoka Weerakkodi, Attorney-at-Law who is the Instructing Attorney on record for the Defendant-Appellant but, one Ms. Shermila Muthalif, Attorney-at-Law who has filed the proxy dated 11-07-2023 which was filed in Court on the same date.

Therefore, said Ms. Shermila Muthalif must stand as the Instructing Attorney on record for the Defendant-Appellant.

When the Court brought this to the notice of Ms. Inoka Weerakkodi Attorney-at-Law, she thereafter admitted that she is not the Instructing Attorney on record for the Defendant-Appellant.

Therefore, submissions made by Ms. Inoka Weerakkodi, Attorney-at-law cannot be accepted as a submission on which we should act.

The application for a postponement made by Ms. Inoka Weerakkodi, claiming to be the Instructing Attorney on record for the Defendant-Appellant, was on the basis that Mr. Aruna Pathirana Arachchi has been retained to appear as the Counsel today for the Defendant-Appellant and said Mr. Aruna Pathirana Arachchi is unable to appear before the Court today owing to a personal difficulty. However, we observe that Mr. Aruna Pathirana Arachchi has never appeared for the Defendant-Appellant as the Counsel before.

There is no material before us to satisfy ourselves that said Mr. Aruna Pathirana Arachchi is the Counsel for the Defendant-Appellant. We are also not satisfied that a proper application for postponement is before Court as the submission made by Ms. Inoka Weerakkodi Attorney-at-Law has now been held to be a submission on which we cannot act.

We have found that Ms. Inoka Weerakkodi has no status in this case, which she has now admitted.

In these circumstances, we have neither a basis to grant a postponement in this case nor a basis to entertain the submissions made by Ms. Inoka Weerakkody Attorney-at-Law. Therefore, we refuse to grant a postponement in this case.

We proceeded to hear the submissions made by Mr. Chandaka Jayasundara, PC appearing for the Plaintiff-Respondent and concluded the argument of this case.

The Plaintiff–Respondent has filed this case to recover a specified sum of money due to the Plaintiff-Respondent, from the Defendant-Appellant, on account of forwarding some goods by air freight for and on behalf of the Defendant-Appellant.

The case for the Plaintiff-Respondent is that the Defendant-Appellant has failed to make payment for the afore-said forwarding.

The payment claimed in this case by the Plaintiff-Respondent is Rs. 6,458,175.33. Although the Defendant-Appellant has filed an answer, we observe that in the said answer, the Defendant-Appellant has not specifically denied his liability to make the afore-said payment, but had taken certain other positions particularly with regard to a question of setting off, the afore-said due amount of money with the cost for some damage caused to the goods he had previously forwarded through the Plaintiff-Respondent.

We observe that the issues raised in the case relating to the liability of payment by the Defendant-Appellant to pay the sum claimed by the Plaintiff-Respondent revolve around the question whether the claim of the Plaintiff-Respondent must be set off with the afore-said cost for the damage caused to the goods, the Defendant-Appellant had previously forwarded through the Plaintiff-Respondent.

However, we note that in the document marked **X 7** in the trial, the Defendant-Appellant has admitted his liability to pay Rs. 6,458,175.33.

We also observe that the Defendant-Appellant has given evidence on his behalf in the trial. The Defendant-Appellant under cross-examination, has admitted the fact that some of the cheques he had tendered to the Plaintiff-Respondent as the payment for the claimed amount have been dishonored. In his evidence, the Defendant-Appellant does not provide any acceptable explanation for that.

We have perused the Judgment dated 09-05-2017 pronounced by the learned Commercial High Court Judge. We find that the learned Commercial High Court Judge has correctly analyzed the evidence adduced by both parties in the trial before coming to the correct conclusion in favour of the Plaintiff-Respondent in this case. We are unable to find any basis to interfere with this judgment.

For the above reasons, the Defendant-Appellant is not entitled to succeed with this appeal. We decide to affirm the judgment dated 09-05-2017 pronounced by

the learned Commercial High Court Judge and proceed to dismiss this appeal with costs. The Defendant-Appellant must pay a cost of Rs. one million (Rs. 1,000,000/=) to the Plaintiff-Respondent.

Appeal dismissed with costs of Rs. 01 million.

JUDGE OF THE SUPREME COURT.

JANAK DE SILVA J.

I agree

JUDGE OF THE SUPREME COURT.

ACHALA WENGAPPULI J.

I agree

JUDGE OF THE SUPREME COURT.

AG/-

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

In the matter of an Appeal in terms of Section 5(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

Kalutota Investment and Leasing Limited,
No. 49,
Hudson Road,
Colombo 03.

Presently at,
No. 562/16,
Nawala Road,
Rajagiriya.

SC (CHC) Appeal No: 48/17 **Plaintiff**

Commercial High Court
No: 10/12/MR

Vs.

1. Loku Galappaththige Susantha,
   No. 77/5,
   Ranmal Place,
   Hewagama,
   Kaduwela.

2. Ariyawathi Galappaththi,
   No. 77/5,
   Ranmal Place,
   Hewagama,
   Kaduwela.

Defendants

AND NOW BETWEEN

1. Loku Galappaththige Susantha,
   No. 77/5,
   Ranmal Place,
   Hewagama,
   Kaduwela.

2. Ariyawathi Galappaththi,
   No. 77/5,
   Ranmal Place,
   Hewagama,
   Kaduwela.

Defendants-Appellants

Vs.

Kalutota Investment and Leasing Limited,
No. 49,
Hudson Road,
Colombo 03.

Presently at,
No. 562/16,
Nawala Road,
Rajagiriya.

Plaintiff-Respondent

Before : **P. Padman Surasena, J**
Mahinda Samayawardhena, J
K. Priyantha Fernando, J

Counsel :

Samantha Vithana with Kalana Kodikara instructed by Achini Liyanadure for the 1st and 2nd Defendants-Appellants.

Thanuka Nandasiri for the Plaintiff-Respondent.

Argued on : 17.10.2023

Decided on : 17.01.2024

K. PRIYANTHA FERNANDO, J

1. This is an appeal from the judgment of the Commercial High Court of *Colombo* dated 12.06.2017. The 1st and the 2nd Defendants-Appellants (hereinafter referred to as the appellants) were aggrieved by the decision of the learned Judge of the Commercial High Court of *Colombo* in dismissing the claim in reconvention sought by the appellants with costs.

Facts in brief

2. The respondent in the instant case is an Investment and Leasing Company. The respondent has been the owner of the Mitsubishi Pajero Jeep type vehicle bearing Registration No. HD-4206. On 02.04.2008, the appellants have entered into a lease agreement [P-1/V-1] bearing No. CO/02/04/2008/Q-46 with the respondent company in respect of the vehicle aforementioned, for a sum of Rs. 2,500,000 for a period of three years (from 02.04.2008 to 02.04.2011). The lease in question was to be paid off by the appellants in 36 monthly installments.

3. It was the position of the respondent that, according to the agreement [P-1/V-1], the appellants were to pay a monthly installment of Rs. 98,611.11 for a period of 36 months. Therefore, the appellants were to pay Rs. 3,549,999.96 (Rs. 98,611.11 x 36) to the respondent in terms of the lease agreement. The respondent states that, the agreement provides that the failure to pay the monies due would result in the breach of the said lease agreement. It also provides that, in breach, the respondent company is entitled to terminate the lease agreement and recover loss of profit, all rentals, interests

payable, damages and compensation and may also recover the possession of the said vehicle from the appellants. Further, the appellants have agreed under the agreement [P-1/V-1] that a monthly interest of five percent would be charged as penalty in the instance there is a delay on the part of the appellants in settling the payments due.

4. The respondent states that, although the period for which the lease agreement was entered into has expired, the appellants have failed to duly settle the monthly lease payments and defaulted the lease agreement and has also failed to hand over the possession of the said vehicle back to the respondent. Admittedly, the appellants have settled a sum of Rs. 2,887,259 to the respondent. The computer-generated statement of accounts maintained by the respondent has been produced as [P-2/V-2]. Consequently, the respondent has sent a letter of demand [P-3] to the appellants requesting the appellants to pay a sum of Rs. 1,864,316.31 and to hand over the possession of the vehicle to the respondent. The respondent states that the appellants have failed to comply with the letter of demand. The appellants however deny receiving the document [P-3].

5. Thereafter, the respondent instituted action against the appellants in the Commercial High Court of *Colombo* on 06.01.2012 to recover a sum of Rs. 1,864,316.31, an interest of five percent upon that sum from the date of instituting proceedings until the payment in full, the possession of the vehicle or a sum of Rs. 5,000,000 which was the valuation of the vehicle as at the date of filing the action, and for costs and further relief. While the case has been pending, on 06.07.2012, the respondent has taken possession of the vehicle which the appellants valued at Rs. 6,000,000 at the time.

6. The appellants in their answer dated 17.07.2012, prayed that the plaint of the respondent be dismissed and made a claim in reconvention to recover Rs. 5,337,259.04 with legal interest from 06.07.2012 (the date on which the respondent recovered the possession of the vehicle) to be recovered from the respondent until the payment in full, together with costs and

further relief. Thereafter, respondent has filed a replication dated 24.09.2012 seeking to dismiss the claim in reconvention of the appellants and for further costs and relief.

7. When the case was taken up for trial, the respondent informed Court that they wish to withdraw the plaint. The appellants informed Court that they would proceed with the claim in reconvention.

8. The learned Judge of the Commercial High Court of *Colombo* by judgment dated 12.06.2017 held in favour of the respondent and dismissed the appellants' claim in reconvention with costs, stating that the appellants have failed to prove the claim in reconvention. Thereafter, the appellants preferred the instant appeal to this Court seeking that the claim in reconvention of the appellants be allowed.

9. At the argument of this appeal, the main points in contention were based on the issues of compound interest and unjust enrichment. I will first deal with the issue of compound interest.

10. It was submitted by the learned Counsel for the appellants that the learned High Court Judge has failed to take into consideration that the respondent company in their Statement of Accounts [P-2/V-2] has included compound interest instead of calculating interest on reducing balance method as stated in Sri Lanka Accounting Standard No. 17 [V-4] issued by the Institute of Chartered Accounts of Sri Lanka. It was further submitted that in cross examination, the respondent's witness has clearly stated that the respondent company has not followed Sri Lanka Accounting Standard No.17 [V-4] in preparing the document [V-2/P-2].

11. The learned Counsel submitted further that, the learned High Court Judge has erred in ignoring the fact that compound interest cannot be charged for the subject of leasing facilities according to the Roman Dutch Law. The learned Counsel relied on the case of ***Mudiyanse v. Vanderpoorten [1922] 23 N.L.R. 342*** and submitted that Roman Dutch Law is the law

applicable to leasing facilities granted by financial companies in Sri Lanka which does not allow compound interest even in an instance where it is expressly stipulated.

12. His Lordship *Janak De Silva, J.* in the case of ***Harankaha Arachchige Menaka Jayasankha and another v. Standard Credit Lanka Limited S.C. (CHC) Appeal No. 72/2013 S.C. Minute 23.11.2023*** has dealt extensively on the issue of the applicability of compound interest in Sri Lanka.

> *"…in **Mudiyanse v. Vanderpoorten [23 N.L.R. 342]** and **Obeyesekere v. Fonseka [36 N.L.R. 334]**, an authority relied on by the Appellants, where it was held that Roman-Dutch law does not allow compound interest even though expressly stipulated for.*
>
> *Nevertheless, in **Abeydeera v. Ramanathan Chettiar [38 N.L.R. 389]**, it was held that in Ceylon (as it was then) compound interest may be recovered where the party charged has agreed to pay it. In **Marikar v. Supramaniam Chettiar (44 N.L.R. 409)** the majority held that compound interest is recoverable under the law of Ceylon, although the question of such a charge may be considered on the reopening of a transaction in terms of the Money Lending Ordinance. Section 5 of the Civil Law Ordinance was believed by the majority to have abolished the Roman-Dutch law rule against compound interest.*
>
> *Weeramantry in The Law of Contracts [Vol. 2, (Lawman (India) (Pvt.) Ltd., 1969 reprint in 1999), page 925] clarified this position and stated:*
>
> > *"The Roman Law prohibited compound interest so also the Roman Dutch Law did not allow compound interest even though expressly stipulated for, but the Roman Dutch law prohibition against compound interest is no longer in force in South Africa or in Ceylon."*
>
> *The Court of Appeal in **Kiran Atapattu v. Pan Asia Bank Ltd. [(2005) 2 Sri.L.R. 276]** adopted this position.*

On the basis of the above authorities and the reasoning therein, I am of the opinion that compound interest is not prohibited in Sri Lanka."

13. In light of the above, as the position stipulated in the case of ***Mudiyanse v. Vanderpoorten [1922] 23 N.L.R. 342*** has now been changed in Sri Lanka, it is my finding that the respondent company in the instant case has not acted contrary to law and are entitled to charge compound interest in respect of the leasing facility.

14. The learned Counsel for the appellants submitted that the learned Judge of the High Court has also failed to consider section 5 of the Introduction of Law of England Ordinance No. 05 of 1852, which does not permit to charge interest exceeding the capital amount. The learned Counsel relied on the case of ***Nimalrathna Perera v. Peoples Bank [2005] 02 SLR 67*** in support of this position.

15. Section 5 of the Introduction of Law of England Ordinance No. 05 of 1852 ("Civil Law Ordinance") provides that,

> *"Provided that no person shall be prevented from recovering on any contract or engagement any amount of interest expressly reserved thereby or from recovering interest at the rate of twelve per centum on any contract or engagement, in any case in which interest is payable by law and no different rate of interest has been specially agreed upon between the parties, but the amount recoverable on account of interest or arrears of interest shall in no case exceed the principal."*

16. His Lordship *Janak De Silva, J.* in ***Harankaha Arachchige Menaka Jayasankha(supra)*** stated that,

> *"The ambit of Section 5 of the Civil Law Ordinance was considered in Fernando and Another v. Sillappen & Others [5 C.W.R. 301] which was decided in 1918, where Bertram C.J. explained the meaning of the words "the amount recoverable on account of interest". He did so after*

interpreting Section 192 of the Civil Procedure Code to provide for the adjustment of three sums, firstly, the principal sum, secondly, the interest on the principal sum up to the date of action, and in the third place, a supplementary sum in respect of interest from the date of action brought to the date of judgment.

In so far as the interest is concerned, Section 192 of the Civil Procedure Code allows the Court to award interest on the principal sum at the rate agreed between parties firstly, for any period prior to the institution of the action, and secondly, from the date of action to the date of the decree. Furthermore, the Court is competent to grant interest on the total amount decided upon from the date of the decree to the date of payment.

Bertram C.J. [ibid., page 303] took the view that the words "the amount recoverable on account of interest" in Section 5 of the Civil Law Ordinance did not apply to the aggregate amount made up of the two sums of "interest", i.e., firstly, the interest due up to the date of action brought, and secondly, the interest due from the date of action brought to the date of judgment.

In other words, the prohibition in Section 5 of the Civil Law Ordinance applies only to the amount of interest due on the principal sum as at the date of the institution of the action."

17. The appellants in the instant case have failed to show how the respondent company has charged interest exceeding the capital amount as at the date of instituting action. Therefore, it is my view that the position of the appellants is without merit.

18. Now I will consider the issue on unjust enrichment that has been advanced by the appellants. It was the submission of the learned Counsel for the appellants that the learned High Court Judge failed to consider that the appellants have paid Rs. 2,887,259 to the respondent in terms of the lease agreement [V-1] and that the respondent also recovered the value of the vehicle amounting to Rs. 6,000,000. It was submitted that the

learned High Court Judge has failed to consider that the respondent has recovered a sum of Rs. 8,887,259.00 against the recovery of the lease of Rs. 2,500,000 in terms of the lease agreement.

19. In terms of the lease agreement, 36 installments of Rs. 98,611.11 were to be paid which amounts to Rs. 3,549,999.96 (Rs. 98,611.11 x 36). It was submitted that, had the appellants complied with the lease agreement, the total monies to be recovered by the respondent would have been Rs. 3,549,999.96 of which the appellants have settled Rs. 2,872,240.99. Therefore, what was yet to be paid by the appellants to the respondent was Rs. 677,758.97 (Rs. 3,549,999.96- Rs. 2,872,240.99).

20. The learned Counsel submitted that, as the respondent has recovered a sum of Rs. 8,887,259.00 and as a sum of Rs. 3,549,999.96 (Rs. 98611.11 x 36) was to be paid to the respondent under the lease agreement, a sum of Rs. 5,337,259.04 (Rs. 8,887,259.00 -Rs. 3,549,999.96) should be returned to the appellants.

21. Paragraph 12.3 of the lease agreement [V-1] provides that,

> "*On the termination howsoever or whenever occasioned or on expiry of the Lease constituted by this Agreement the Lessee shall forthwith return the equipment to the Lessor as such address as the Lessor may direct in good order and in good working condition and at the Lessee's expense and risk. Without prejudice to the foregoing or to the Lessor's claim for any arrears of rent or damages for any breach of this agreement or any other right hereunder the Lessor may at any time after any such termination or expiry of the lease constituted by this Agreement without notice retake possession of the equipment and for such purpose enter upon any premises belonging to or in the occupation for all costs, charges, and expenses incurred by the Lessor in retaking possession of the equipment as aforesaid*"

22. Paragraph 6 (k) of the lease agreement [V-1] provides that,

    "The lessee acknowledges that the title to the property shall at all times remain vested in the lessor…"

23. According to the above paragraphs of the lease agreement [P-1/V-1], the respondent has rightly taken possession of the vehicle as it has been expressly provided for in the lease agreement. Further, as the appellants have not duly complied with the lease agreement [P-1/V-1] the title to the vehicle in question has not been passed to the appellants. In an instance where one does not own the vehicle, one cannot claim compensation in respect of it once it has been taken into possession by the respondent.

24. In light of the issue of unjust enrichment by the respondent, it is pertinent to note that, it is admitted that the appellants have defaulted the lease agreement by not paying the installments that were due. The appellants admit that the vehicle in question has been in their possession even when they had defaulted the lease agreement, until it was taken into possession by the respondent on 06.07.2012. Therefore, at no point in time did the appellants become the owners of the said vehicle. Further, although the appellants claim that they would only have to settle a sum of Rs. 677,758.97 (3,549,999.96-2,872,240.99) had the appellants paid the dues duly complying with the lease agreement, this position would not have any merit as in reality the appellants have admittedly not complied with the terms of the lease agreement by failing to pay the monies due under the lease agreement and also by failing to hand over the possession of the vehicle. Further, it is vital to note that the appellants have continued to use the vehicle for a period exceeding an year even after the lease agreement had expired. Therefore, within the facts and circumstances of this particular case, I am unable to see how the respondent has been unjustly enriched at the expense of the appellants.

25. Although it was not pursued at the argument of this appeal, the learned Counsel for the appellants in his written submissions stated that the respondent has breached section 20(b)(ii), section 22 and 23 of the Finance Leasing Act No. 56 of 2000. However, when considering the facts and circumstances of the instant case, the above provisions have no applicability. Therefore, it is my position that the respondent has not acted in contravention of the provisions of the Finance Leasing Act.

26. It was the submission of the learned Counsel for the appellants that, according to the document [V-3] (page 372 of the brief) the 'analysis of custom payment card' which has been prepared by the accountant of the appellants, the respondent has already recovered a sum of Rs. 1,866,393.14 in terms of the lease agreement. Therefore, the outstanding amount to be settled was Rs. 633,606.86. It is also submitted that according to the document [V-3], the respondent has already recovered the total interest from the appellants amounting to Rs. 1,005,855.86.

27. When considering the evidence of *K.R. Nilanthi Roshini* who has been the accountant of the appellants who prepared the document [V-3], she states that she has prepared the said document for the purpose of understanding the manner in which the interest has been calculated in the document [V-2]. In her evidence she states that she has prepared the said document [V-3] based on the document [V-2] and the entirety of the said document [V-2] has not been included in the document [V-3] (page 8 of her evidence on 2015.03.10). Further, when considering pages 11 to 13 of her evidence on 2015.03.10 it is my view that the contents of the document [V-3] cannot be accepted as it is not a complete document. The learned High Court Judge in his judgment has laid down a detailed analysis on the lack of completeness of the document [V-2].

28. Therefore, in light of the above observations, it is my finding that the respondent company in the instant case has neither

acted contrary to law in charging compound interest nor has the respondent company been unjustly enriched at the expense of the appellants when considering the entirety of the facts and circumstances of the case. The appellants in the instant case have failed to prove the claim in reconvention.

29. Hence, I dismiss the appeal of the claim in reconvention sought by the appellants. The judgment of the learned Judge of the Commercial High Court of *Colombo* is affirmed. I order the respondent be granted the cost of the cause.

The appeal is dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA.

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

Sri Lanka Savings Bank Limited,
No. 110, D.S. Senanayake Mawatha,
Colombo 08.
Plaintiff

SC APPEAL NO: SC/CHC/APPEAL/81/2014
CHC NO: HC (CIVIL) 283/2001

Vs.

01. Globe Investments (Private) Limited,
    No. 233/8, Cotta Road, Colombo 08.
    Presently at: No. 65/09,
    Wickramasinghe Mawatha,
    Battaramulla.
02. Nirmala Anura Fernando,
    No. 233/8, Cotta Road, Colombo 08.
    Presently at: No. 65/09,
    Wickramasinghe Mawatha,
    Battaramulla.
03. Estelita Rozobelle Dolores Fernando,
    No. 233/8, Cotta Road, Colombo 08.
    Presently at: No. 65/09,
    Wickramasinghe Mawatha,
    Battaramulla.
    Defendants

AND NOW BETWEEN

Nirmala Anura Fernando,
No. 233/8, Cotta Road, Colombo 08.
Presently at: No. 65/09,
Wickramasinghe Mawatha,
Battaramulla.
2nd Defendant-Appellant

Vs.

01. Sri Lanka Savings Bank Limited,
No. 110, D.S. Senanayake Mawatha,
Colombo 08.
Plaintiff-Respondent

02. Globe Investments (Private) Limited,
No. 233/8, Cotta Road, Colombo 08.
Presently at: No. 65/09,
Wickramasinghe Mawatha,
Battaramulla.
1st Defendant-Respondent

03. Estelita Rozobelle Dolores Fernando,
No. 233/8, Cotta Road, Colombo 08.
Presently at: No. 65/09,
Wickramasinghe Mawatha,
Battaramulla.
3rd Defendant-Respondent

Before: Hon. Justice Priyantha Jayawardena, P.C.
Hon. Justice A.H.M.D. Nawaz
Hon. Justice Mahinda Samayawardhena

Counsel: Shivan Coorey with Manjula Fernandopulle for the 2nd Defendant-Appellant.

Erusha Kalidasa for the Plaintiff-Respondent.

Argued on : 08.09.2022

Written submissions:

by the Plaintiff-Respondent on 26.03.2021 and 03.10.2022.

Decided on: 28.02.2024

Samayawardhena, J.

Introduction

The plaintiff filed this action against the three defendants in the Commercial High Court of Colombo seeking to recover a sum of Rs. 19,810,648.00 together with interest at a rate of 32% per annum on a sum of Rs. 12,574,121.12 with 1% Business Turnover Tax and 6.5% National Security Levy. The 1st defendant, who is the borrower, is an incorporated company and the 2nd and 3rd defendants are the guarantors to the loan. The address stated in the summons for all three defendants is No. 233/8, Cotta Road, Colombo 8 which appears to be the registered address of the 1st defendant company. However, in the guarantee agreement marked P9 the address of the 2nd and 3rd defendant guarantors is given as No. 3, Torrington Avenue, Colombo 7. Summons issued on the defendants to be served through the fiscal could not be served on two occasions since the premises were reportedly closed but on the third occasion on 10.05.2002 the fiscal reported personal service of summons on all three defendants (in that the 2nd defendant reportedly accepted his summons and that of the 1st defendant company). The defendants did not respond to summons and the case was fixed for *ex parte* trial and the judgment was delivered against all three defendants

as prayed for in the plaint. The *ex parte* decree was reportedly served on all three defendants on 15.11.2002 in the manner the summons was served. The plaintiff did not take steps until 2008 to make an application for the execution of writ. The notice of the application for writ was reported to have been served on a different person at a different address, namely, the Manager of Rhythm Collection (Pvt) Ltd of No. 10/209, 4th Floor, Union Place, Colombo 2.

The 2nd defendant filed an application in terms of section 839 read with section 86(2) of the Civil Procedure Code by petition dated 19.10.2009 supported by affidavit and documents seeking to set aside the *ex parte* judgment and decree on the basis that he did not reside at No. 233/8, Cotta Road, Colombo 8 but was overseas at the time summons and decree were reported to have been served on him.

At the inquiry into this matter the 2nd defendant gave evidence. He produced two of his passports marked P1 and P2. He also called an officer from the Department of Immigration and Emigration as a witness to corroborate the fact that he had been overseas during the relevant period. The plaintiff called the process server (commonly but erroneously known as "fiscal") to give evidence.

After the inquiry, the learned High Court Judge by order dated 29.08.2014 dismissed the application of the 2nd defendant on the basis that the 2nd defendant had not shown on a balance of probability that summons was not served on him on 10.05.2002 as the passports tendered to Court did not corroborate that he was abroad on that day.

In respect of service of the *ex parte* decree on 15.11.2002, however, the learned High Court Judge accepts that there is an endorsement on page 9 of the passport marked P2 that the 2nd defendant had left Sri Lanka on 14.11.2002. According to page 36 of the passport P2, there is an entry

stamp from "Immigration Bangkok Thailand" that the 2nd defendant had been "Admitted 15.11.2002" "Until 12.02.2003". The exit stamp on page 36 of P2 indicates that the 2nd defendant "Departed" Thailand on 08.02.2003. Although there had been some confusion whether the endorsement in relation to the period of 15.11.2002 to 12.02.2003 pertains to the visa or whether it is an endorsement made after the 2nd defendant arrived in Thailand, the validity period of the visa (from 04.04.2002 to 03.04.2003) is separately available at page 35 of P2 and hence there cannot be such confusion. It is clear that the 2nd defendant was in Thailand when the fiscal reported to Court that he served the *ex parte* decree personally on the 2nd defendant on 15.11.2002 at No. 233/8, Cotta Road, Colombo 8.

The learned High Court Judge in the impugned order states that no prejudice has been caused to the 2nd defendant due to this fact because the 2nd defendant's application to purge default was not objected to on the basis that it was filed out of time.

Of the two passports, what is relevant to this case is P2. It has multiple entries and it is not possible to clearly identify the 2nd defendant's movements during the relevant period from the said passport. The evidence of the officer from the Department of Immigration and Emigration is not helpful to ascertain the specific dates on which the 2nd defendant had left Sri Lanka and returned to Sri Lanka during the relevant period. The fact in issue is whether the 2nd defendant was abroad on 10.05.2002, i.e. the date on which summons was reportedly served on the 2nd defendant. The officer's evidence was that the department had no data in its system prior to 29.10.2002.

The fiscal had been cross-examined on the service of summons and decree. It had been suggested to him that at the time the decree was

reported to have been served on the 2nd defendant, the 2nd defendant had been abroad. His reply was that he has no recollection or personal knowledge of those matters as they took place more than 10 years ago.

This is a direct appeal against the order of the Commercial High Court. The grounds of appeal as set out in the petition of appeal are (a) the order is contrary to law, (b) the order is against the weight of the evidence, (c) the Court failed to properly evaluate the evidence, and (d) the Court erred in law in holding that the summons and the decree were duly served on the 2nd defendant.

Let me now consider the law relating to the application for setting aside *ex parte* judgments and decrees in order to properly consider whether the conclusion of the learned High Court Judge is justifiable.

When shall the defendant make the application to purge default?

In terms of section 84 of the Civil Procedure Code, upon the defendant having been duly served with summons, if he fails to file answer or having filed answer fails to appear on the trial date (in person or through his recognised agent or Attorney-at-Law as provided for in section 24 of the Civil Procedure Code) when the plaintiff appears, the Court shall fix the case for *ex parte* trial. 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.

After the *ex parte* trial, if the Court decides to enter judgment for the plaintiff as prayed for or subject to modification, the *ex parte* decree drawn up in terms of the judgment shall be served on the defendant.

Once the decree is served, in terms of section 86(2) of the Civil Procedure Code, the defendant may with notice to the plaintiff make an application within fourteen days of service of the decree to purge default. 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.*

In terms of section 86(3), the application shall be made by petition supported by affidavit.

It was held in *Karunadasa v. Rev. Phillips* [2003] 2 Sri LR 140 that the language used in section 86(2) does not suggest that the defendant is required to give notice of his application to the plaintiff simultaneously with the filing of such application.

How to calculate fourteen days?

The period of fourteen days is referred to in several other sections of the Civil Procedure Code.

Section 754(4), which deals with when a notice of appeal shall be tendered against a judgment, states that it shall be tendered "*within a period of fourteen days from the date when the decree or order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of Sundays and public holidays*".

Section 757(1) which deals with when an application for leave to appeal shall be made against an order is couched in identical terms.

In contrast, section 86(2) which enacts that the application shall be presented "*within fourteen days of the service of the decree*" does not specify which days are excluded. Comparing the wording of section 86(2) with the wording of sections 754(4) and 757(1), the intention of the legislature is clear. In calculating fourteen days for the purpose of purging default in terms of section 86(2), the date when the decree was served, the date when the application to purge default is presented to Court, Sundays and public holidays are not excluded. The word "within" in section 86(2) means the application shall be presented to the Court within the specified fourteen-day window and not beyond that period. In the case of *Flexport (Pvt) Ltd v. Commercial Bank of Ceylon Ltd* (SC/APPEAL/3/2012, SC Minutes of 15.12.2014) the Supreme Court reached the same conclusion.

The *Black's Law Dictionary* (6th Edition, pages 1602-1603) defines the word "within" as *"when used relative to time, has been defined variously as meaning anytime before; at or before; at the end of; before the expiration of; not beyond; not exceeding; not later than".*

Nevertheless, if the fourteenth day falls on a day on which the office of the Court is closed, filing the application on the next day on which the office of the Court is open would be in compliance with section 86(2).

In *Fernando v. Ceylon Brewerys Ltd.* [1998] 3 Sri LR 61, the decree was served on the defendant on 03.02.1997 and he filed the application under section 86(2) on 18.02.1997. The finding of the Court of Appeal that the application to the District Court was late by one day was upheld by the Supreme Court in *The Ceylon Brewery Ltd. v. Jax Fernando, Proprietor, Maradana Wine Stores* [2001] 1 Sri LR 270.

Even though the word "within" is used in a section, if the section specifies the days which shall be excluded within that period, the strict application of the rule is relaxed. In other words, the specified days shall be excluded notwithstanding the use of the word "within". This can be understood by reading the above quoted section 754(2) and the Supreme Court judgment in *Selenchina v. Mohamed Marikar* [2000] 3 Sri LR 100 at 102.

What section 86(2) states is "*within fourteen days of the service of the decree*". The word used here is "of", not "from". Section 14(a) of the Interpretation Ordinance, No. 21 of 1901, as amended, states "*for the purpose of excluding the first in a series of days or any period of time, it shall be deemed to have been and to be sufficient to use the word "from"*.

Maxwell on *The Interpretation of Statutes*, 12th edition, page 309, states:

> *Where a statutory period runs "from" a named date "to" another, or the statute prescribes some period of days or weeks or months or years within which some act has to be done, although the computation of the period must in every case depend on the intention of Parliament as gathered from the statute, generally the first day of the period will be excluded from the reckoning, and consequently the last day will be included.*

In the context of tendering a petition of appeal, section 755(3) states "*Every appellant shall <u>within sixty days from the date of the judgment</u> or*

decree appealed against present to the original court a petition of appeal". It may be noted that the word used in this section is "from", not "of". Hence it was held in the Divisional Bench decision of the Court of Appeal in *Jinadasa v. Hemamali* [2006] 2 Sri LR 300 that the date of pronouncing the judgment should be excluded from the computation of the time within which the petition of appeal should be presented.

Section 8(1) of the Interpretation Ordinance states "*Where a limited time from any date or from the happening of any event is appointed or allowed by any written law for the doing of any act or the taking of any proceeding in a court or office, and the last day of the limited time is a day on which the court or office is closed, then the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day thereafter on which the court or office is open.*"

Fourteen days is "a limited time" given to a party to make the application. It is in that context I stated that if the fourteenth day coincides with a day when the office of the Court is closed, submitting the application on the next day when the office is open would be sufficient compliance with the time limit stipulated in section 86(2). This is in consonance with the finding in *Jinadasa v. Hemamali (supra)* where the calculation of time was done in relation to section 755(3).

Can the application be made before the service of the *ex parte* decree?

Does the term "within fourteen days of the service of the decree" in section 86(2) mean that the defaulting defendant must make the application after service of the decree? In other words, can the Court state that there is no proper application filed in terms of section 86(2) when the application has been filed between fixing the case for *ex parte* trial and before service of the *ex parte* decree? The answer is in the negative.

Justice Weerasuriya in *Coomaraswamy v. Mariamma* [2001] 3 Sri LR 312 at 315 held "*the requirement for the party to make an application within 14 days of the service of the decree does not preclude the defendant to make an application before service of the decree and for the Court to inquire into such application after decree was served.*" This was followed by Justice Somawansa in *Ranasinghe v. Tikiri Banda* [2003] 3 Sri LR 252.

Is the fourteen-day period mandatory?

The fourteen-day period within which the application to purge the default shall be made is mandatory, not directory.

Provisions of statutes conferring private rights are in general construed as being imperative and those creating public duties are construed as directory. (*Perera v. Perera* [1981] 2 Sri LR 41)

N.S. Bindra Interpretation of Statutes, 13th Edition (2023), at page 464 quotes the following dicta expressed in *Executive Engineer v. Lokesh Reddy* 2003 (4) KarLJ 151 with approval:

> *It is a well-settled principle that if an act is required to be performed by a private person within a specified time, the same would primarily be mandatory, but when a public functionary is required to perform a public function within a timeframe, the same will be held to be directory unless the consequences therefore are specific.*

In *The Ceylon Brewery Ltd. v. Jax Fernando, Proprietor, Maradana Wine Stores (supra)*, Justice Fernando attributed the mandatory nature of the fourteen-day period as an essential requirement for the proper invocation of jurisdiction:

> *We are of the view that Section 86(2) of the Civil Procedure Code is the provision which confers jurisdiction on the District Court to set*

> *aside a default decree. That jurisdiction depends on two conditions being satisfied. One condition is that the application should be made within 14 days of the service of the default decree on the defendant. It is settled law that provisions which go to jurisdiction must be strictly complied with. See Sri Lanka General Workers Union Vs. Samaranayake [1996] 2 Sri LR 265 at 273-274.*

Vacating the *ex parte* decree by invoking the inherent jurisdiction of Court

However, the above time limit shall be understood subject to the condition that the defendant, although not admitting service of summons, nevertheless admits service of the decree. If the defendant does not admit service of both summons and decree, then the fourteen-day period is inapplicable. In such a situation, the defendant can make an application invoking the inherent jurisdiction of the Court under section 839 of the Civil Procedure Code (perhaps read with section 86(2) of the Civil Procedure Code) soon after he becomes aware that an *ex parte* decree has been entered against him without his knowledge (despite the fact that the application is made well beyond the fourteen-day period of the alleged service of the decree).

Ittepana v. Hemawathie [1981] 1 Sri LR 476 is the leading case which illustrates this position. In that case the wife came to know that her husband had obtained a decree of divorce against her when she appeared in the Magistrate's Court on 09.03.1979 in her maintenance case. The District Court had made the decree *nisi* absolute on 16.06.1978. The District Court had concluded the divorce case as an *inter partes* uncontested trial but the wife stated that despite what was stated in the case record she had not filed proxy or instructed an Attorney-at-Law to appear for her and consent to the *a vinculo matrimonii* decree being

entered against her. After inquiry, the District Court set aside the *ex parte* decree and the Court of Appeal affirmed it. On appeal to the Supreme Court, Justice Sharvananda (later C.J.) stated at page 484 that if decree had been entered against a defendant without summons being served, the decree is a nullity and the District Court can set it aside *ex debito justitiae* (i.e. as a debt of justice or a remedy that can be invoked as of right) in the exercise of the inherent jurisdiction of the Court.

> *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. 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. Where there is no act, there can be no question of the power to revoke or rescind. One cannot alter that which does not exist. The exercise of power to declare such proceedings or judgment a nullity is in fact an original exercise of the power of the Court and not an exercise of the power of revocation or alteration. 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.*

The same conclusion was reached in several other cases including *Perera v. Commissioner of National Housing* (1974) 77 NLR 361.

In *Ittepana's* case, in relation to the applicability of section 839, the Supreme Court at page 485 stated:

> *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.*

The Supreme Court at the same page further fortified the exercise of inherent power to undo injustice by the application of another principle of law – *actus curiae neminem gravabit* – an act of the Court shall prejudice no man. In this regard, Justice Sharvananda quoted the following passage of the judgment of Lord Cairns in *Rodger v. Comptoir D'Escompte de Paris* (1871) 3 PC 465:

> *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.*

Knowledge of the case despite non-service of summons

There is some uncertainty as to whether the defendant's knowledge of the case, notwithstanding that summons was not served, will deprive the defendant of invoking the provisions of section 86(2) with/or section 839 to vacate the *ex parte* decree.

This may be due to the *obiter dictum* of Justice Sharvananda in *Ittepana's* case where it was held at page 486 "*It is to be noted that it was never the position of the plaintiff that even though the defendant had not been served with summons, she had become otherwise aware of the proceedings against her and had acquiesced in or waived the irregularity or failure, in which event there would not have been any failure of natural justice*." This shall not be misconstrued to say that service of summons is not mandatory if the defendant had knowledge of the proceedings.

In terms of section 84 of the Civil Procedure Code, the Court shall fix the case for *ex parte* trial "*if the Court is satisfied that the defendant has been duly served with summons*". If there is no due service of summons in Form 16 of the first schedule to the Civil Procedure Code (together with a copy of the plaint and annexures), the Court cannot fix the case for *ex parte* trial against the defendant. The Court is clothed with jurisdiction over the defendant only upon due service of summons on him. Knowledge of the case by any other means is no substitute for the due service of summons.

In *Leelawathie v. Jayaneris* [2001] 2 Sri LR 231, the plaintiffs filed action for declaration of title to the land in suit and damages. They also sought an enjoining order and an interim injunction in the plaint. Notice of interim injunction was served on the defendants but not summons. This happened by oversight. The Court entered *ex parte* judgment against the defendants and the application to vacate the *ex parte* decree was refused. The 1st defendant had filed objections to the application for interim injunction. On appeal by the 1st defendant, one of the questions to be decided was whether the 1st defendant could complain about the case having been fixed for *ex parte* trial on non-service of summons when he was fully aware of the case. Justice Wigneswaran at pages 236-237

emphasised service of summons as a condition precedent to fixing the case for *ex parte* trial:

> *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. 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 Defendants 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.*

In *Joyce Perera v. Lal Perera* [2002] 3 Sri LR 8 also, there was no doubt that there was no service of summons on the defendant but only service of the order *nisi* in respect of the alimony *pendente lite*. In such circumstances, Justice Nanayakkara held that service of summons on the defendant is a fundamental and imperative requirement before a case is fixed for *ex parte* trial by Court. The Court rejected the argument that the appearance by the defendant in response to the order *nisi* and the

filing of objections along with the counter claim for alimony would regularise the non-service of summons on the defendant.

In *Dharmasena v. The People's Bank* [2003] 1 Sri LR 122 the Supreme Court gave purposive interpretation to the term "*duly served with summons*". The plaintiffs filed action against the defendant on 01.02.2002. Summons was issued returnable on 05.04.2002 but served on the defendant only on 03.04.2002, two days before the case was to be called for proxy and answer. On 05.04.2002 an Attorney-at-Law appearing on behalf of the defendant informed Court that the proxy was not ready and the Court granted a date (10.05.2002) for proxy and answer. On 29.04.2002 the plaintiffs moved for an order for *ex parte* trial on the ground that the defendant had failed to appear on 05.04.2002 and the defendant's Attorney-at-Law was not duly authorised to move for time. The District Judge refused that application. On appeal, whilst affirming the said order, Justice Fernando stated at page 124:

> *Ex parte trial can be ordered only if the court is satisfied that the defendant has been duly served with summons. The question then is whether the court shall proceed to hear the case ex parte even where the summons is served so soon before the date for answer that it is not reasonably possible for the defendant to prepare and file his answer. The Code must be interpreted, as far as possible, in consonance with the principles of natural justice, and the court can only be satisfied that summons has been "duly" served where the Defendant has been given a fair opportunity of presenting his case in his answer. If not, the court has the power to give further time for answer even if the Defendant does not ask. In this case summons was served at such short notice that the Defendant hardly had time even to grant a proxy to an attorney-at-law. An attorney-at-law having actual authority to appear was entitled to move for further time to file a proxy, and any*

> *irregularity in that regard was cured by the subsequent filing of a proxy within the time granted by the court.*

Onus of proof in a default inquiry

The fiscal's report on any process (service of summons, *ex parte* decrees etc.) is accompanied by an affidavit as stated in sections 371 and 372 of the Civil Procedure Code. Such reports present *prima facie* evidence of service on the defendant. In terms of illustration (d) to section 114 of the Evidence Ordinance, the Court can presume that all official acts have been done regularly. The burden of proof is on the defendant to rebut that presumption by leading evidence. The right to begin the inquiry lies with the defendant and not with the plaintiff. This is by application of section 102 of the Evidence Ordinance which states that 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. Once the defendant discharges that burden, the burden shifts to the plaintiff to lead evidence in rebuttal. An important witness for the plaintiff in leading evidence in rebuttal is the fiscal.

In the case of *Sangarapillai & Brothers v. Kathiravelu,* Vol II Sri Kantha Law Reports 99 at 106, Justice Siva Selliah made the following observation regarding the onus of proof in an inquiry into purging default.

> *Further, the District Judge has misdirected himself on the onus of proof – for the burden squarely lay on the defendant who asserted that no summons was served on him to establish that fact and it was wrong for the District Judge to require from the Plaintiff beyond reasonable doubt of the service of summons on the defendant.*

The above position of law was recognised in a series of cases including *Wimalawathie v. Thotamuna* [1998] 3 Sri LR 1, *Chandrasena v. Malkanthi*

[2005] 3 Sri LR 286, *Wijeratne v. Abeyratne* [2008] BLR 193 and *Malani Aponso v. Karunawathi Aponso* [2008] BLR 302.

In *Selliah Ponnusamy v. People's Bank* [2016] BLR 128, the Supreme Court stated that once the defendant gives affirmative evidence that summons was not served on him, the failure on the part of the plaintiff to rebut such evidence by calling the fiscal as a witness warrants setting aside the *ex parte* decree entered against the defendant.

Standard of proof

In an inquiry into vacating an *ex parte* judgment and decree, the standard of proof expected from the defaulting defendant is not of a high degree. It is a misconception that, in order to succeed at a default inquiry, the defendant must prove that summons was not served on him. That is the most common ground but not the only ground. The defendant can successfully make an application under section 86(2) despite summons being duly served on him if he can adduce reasons acceptable to Court for his failure to appear in Court. In terms of section 86(2), the law requires the defendant only to satisfy Court that he had reasonable grounds for such default. Similar terms are used in section 87 when the defaulter is the plaintiff. Whether or not what is elicited by way of evidence constitutes reasonable grounds is a question of fact and not of law. This needs to be decided on the unique facts and circumstances of each individual case. The test is subjective as opposed to objective. The Court shall view the issue with flexibility rather than rigidity in considering whether the defendant discharged the burden expected of him.

This is clear from a plain reading of section 86(2) of the Civil Procedure Code.

> *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.*

In *Sanicoch Group of Companies by its Attorney Denham Oswald Dawson v. Kala Traders (Pvt) Ltd* [2016] BLR 44 there was no issue that summons was served on the company but the company was not represented in the Commercial High Court. After *ex parte* trial, the Court entered judgment for the plaintiff. At the inquiry into purging default, the sole witness called by the company testified that there were only two directors of the company and one director had been kidnapped and possibly murdered and the other director who was the daughter of the missing director was in Australia pursuing her studies and had never participated in the affairs of the company. The wife of the missing director also lived overseas and, due to death threats, stayed in temporary places such as hotels during her short visits to Sri Lanka. The evidence of the sole witness was that the company was in a state of collapse and there was no proper person to take decisions on behalf of the company. The wife and the daughter of the missing director did not give evidence. The High Court refused to vacate the *ex parte* decree predominantly on the basis that mismanagement of the affairs of the company would not constitute a reasonable ground for purging default.

On appeal, the Supreme Court took the view that although the mismanagement of a company cannot normally be considered a reasonable ground, in the unique facts and circumstances of that case, it was a relevant fact which should have been considered by the High

Court in favour of the defaulter. Whilst vacating the *ex parte* judgment, Justice Gooneratne stated at page 48:

> *Section 86(2) of the Code contemplates of a liberal approach emphasising the aspect of reasonableness opposed to rigid standard of proof. That being the yardstick, the learned Judge's order should indicate with certainty that reasonable grounds for default had not been elicited at the inquiry. Nor does the order demonstrate by reference to evidence and provisions contained in Section 86(2), that there was a willful abuse of the process or willful default which would enable court to reject the Defendant-Petitioner-Appellant's case. This is essential in the background of undisputed facts referred to in this judgment at the very outset. I cannot lose sight of the fact that undisputedly the two Directors of the company who are responsible and bound to take decisions on behalf of the company were not available since one went missing and the other not resident in Sri Lanka, which resulted in mismanagement of the affairs of the company at the relevant time. In the context of the case in hand with reference to evidence led at the inquiry, death threats to the family which resulted in the Managing Director going missing and suspected of being murdered would have had a serious adverse impact on the rest of the family and their affairs with its business establishment at the relevant period.*
>
> *Ordinarily in the absence of a plausible explanation it is possible to conclude that reasonable grounds had not been elicited as regards the case in hand. If that be so, mismanagement of the company may not be a reasonable ground, and this court would not have had a difficulty in affirming the views of the learned High Court Judge. However the facts placed before the High Court is an extreme and an unavoidable situation where a court of law cannot ignore having*

regard being had to the common course of events, human conduct and public and private business in their relation to the facts of the case in hand.

A genuine mistake as opposed to willful negligence made by a lawyer is considered as a ground to purge default. In *Kathiresu v. Sinniah* (1968) 71 NLR 450, Chief Justice H.N.G. Fernando at page 451 stated:

The affidavit and the evidence are to the effect that the Proctor and the plaintiff himself were absent on the trial date because the Proctor had by mistake taken down the date of trial as 18th August, when in fact the trial was fixed for 10th of August. It is clear from the order of the District Judge that he has accepted this evidence as correct. He nevertheless refused to set aside the decree nisi because he relied on certain decisions in which the failure of a party to appear was due to his own negligence. Counsel for the plaintiff has now referred us to a case reported in 16 Times of Ceylon Reports, page 119, in which the only reason for non-appearance was a mistake made by the parties' Proctor. The present case is on all fours with that.

We allow the appeal and send the case back to the District Court. The District Judge will then fix a date, on or before which, the plaintiff will deposit a sum of Rs. 150 as costs of the past proceedings. If this amount is duly paid the District Judge will set aside the decree appealed from and set the case down for trial. If the costs are not paid before the fixed date, the decree under appeal will stand affirmed.

In the case of *Ariyaratne v. Attorney-General* [2015] BLR 33 the Supreme Court regarded a "slip of counsel" as a ground to vacate *ex parte* orders. In *Ariyaratne's* case the accused was convicted by the High Court and when the appeal was taken up for argument in the Court of Appeal the appellant being absent and unrepresented having been represented by

counsel previously, the Court of Appeal had proceeded to hear the appeal *ex parte* and dismissed the same. In the Special Leave Application before the Supreme Court, counsel filed an affidavit explaining his absence in court in that he had erroneously and inadvertently taken down the wrong date as the date for argument. Counsel tendered unreserved apology. Allowing the appeal and setting aside the judgment of the Court of Appeal, Justice Sripavan (as he then was) observed:

> *From the contents of the affidavit, I do not think that Counsel had the intention to offend the dignity of the court or to abuse the process of court. It is not always possible to lay down any rigid, inflexible or invariable rule which would govern all cases of default by counsel. Each case has to be considered on its own merits. If, however, the default was in fact accidental and committed without any evil or ulterior motive, latitude has to be given to counsel to plead his case.*
>
> *The legal profession is a noble one and the mark of nobility includes the straightforward habit of owning mistakes or errors and apologizing to the opposite party and/or to court once such mistakes or errors are realized. When counsel tenders an unreserved apology and explained to the satisfaction of court, the circumstances under which the mistakes or errors were committed, it may be appropriate for the court to accept it. Once the counsel regrets his act, it is the duty of court to make him feel that he is an essential link in the administration of justice and that his apology is accepted with a view that he will henceforth uphold the highest tradition with due diligence and thereby uphold the prestige of court.*
>
> *No counsel in my view should be punished for bona fide mistakes. The learned counsel frankly admitted his default on 02.02.2009 for reasons adduced in his affidavit. It appears to me that it was really a slip on his part not to have taken the date of hearing correctly.*

Slips of counsel have been held to be sufficient to set aside decrees or dismissal for default.

Procedure

No specific procedure is laid down in the Civil Procedure Code for the conduct of default inquiries whether the application is filed under section 86(2) or section 839. In *De Fonseka v. Dharmawardena* [1994] 3 Sri LR 49 it was held "*An inquiry on an application to set aside an ex parte decree is not regulated by any specific provision of the Civil Procedure Code. Such inquiries must be conducted consistently with the principles of natural justice and the requirement of fairness.*" (*vide* also *Wimalawthie v. Thotamuna* [1998] 3 Sri LR 1)

There are no hard and fast rules. In *Inaya v. Lanka Orix Leasing Company Ltd* [1999] 3 Sri LR 197 at 200, Justice Jayasinghe observed that the application to have an *ex parte* judgment and decree set aside can be disposed of even without oral testimony. But, Justice Somawansa in *Ravi Karunanayake v. Wimal Weerawansa* [2006] 3 Sri LR 16 at 25 opined that leading oral evidence is preferable.

The question whether process was duly served and whether there were reasonable grounds for the default etc. are questions of fact and therefore it is not possible to successfully pursue an application to purge default without oral evidence being led.

Analysis of evidence in light of the law

There cannot be any doubt that the report and the oral evidence of the fiscal on the alleged personal service of the *ex parte* decree on 15.11.2002 on the 2nd defendant in respect of himself and the 1st defendant company is false in the teeth of the passport entries which prove that the 2nd defendant was in Thailand on that date. The learned High Court Judge

ignored this reasoning that the 2nd defendant suffered no prejudice from the false evidence because the plaintiff did not object to the application being filed after the fourteen-day period following the service of the *ex parte* decree had elapsed. This approach of the learned High Court Judge does not commend itself to me. The Court has not considered whether the fiscal is a trustworthy witness on the question of service of summons on the 2nd defendant. It is the same fiscal who claims to have served summons on the 2nd defendant personally on 10.05.2002.

The evidence of the 2nd defendant is that the office at No. 233/8, Cotta Road, Colombo 8 was closed during the relevant period and he was abroad. I accept that the 2nd defendant could not prove by the entries in the passport that he was abroad on 10.05.2002. The officer from the Department of Immigration and Emigration could not assist Court in that regard either since computer evidence was not available for that period.

In my view, the 2nd defendant's failure to prove by independent evidence that he was aboard on 10.05.2002 does not *ipso facto* conclusively prove that summons was served on him on that day. Even if he were in Sri Lanka, if the Court is not satisfied that summons was not served, the Court can vacate the *ex parte* decree.

If the registered address of the 1st defendant company, No. 233/8, Cotta Road, Colombo 8, was the residential address of the 2nd and 3rd defendant, I cannot understand why they gave a different address for the guarantee agreement.

Another point of concern arises: if the summons and the decree were served properly, why did the plaintiff not promptly initiate the process of taking out a writ?

Conclusion

On the facts and circumstances of the case, I take the view that the High Court ought to have considered the application of the 2nd defendant favourably and vacated the *ex parte* judgment and decree, thereby allowing the 2nd defendant to contest the case. I am inclined to concur with the primary argument presented on behalf of the 2nd defendant, which asserts that the Commercial High Court did not properly evaluate the evidence and imposed a higher burden of proof on the 2nd defendant than what is required by the law. The 2nd defendant in my view has satisfied Court that he had reasonable grounds for the default.

I set aside the order of the Commercial High Court dated 29.08.2014 and vacate the *ex parte* judgment and decree entered against the 2nd defendant. The Commercial High Court will now allow the 2nd defendant to file answer and the trial will be conducted *inter partes* against the 2nd defendant.

Judge of the Supreme Court

Priyantha Jayawardena, P.C., J.
I agree.

Judge of the Supreme Court

A.H.M.D. Nawaz, J.
I agree.

Judge of the Supreme Court

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

In the matter of an application for under and in terms of Article 99(13) of the Constitution

Safiul Muthunabeen Mohamed Muszhaaraff
Lake View, 418, Vaathiya Road,
RM Nagar, Pottuvil-27

Petitioner

SC Expulsion No. 02/2022

vs

1. S. Suairdeen
   Secretary General,
   All Ceylon Makkal Congress

2. Rishad Bathiudeen,
   Leader,
   All Ceylon Makkal Congress

3. N. M. Shaheid, Attorney-at-Law

4. M. S. S. Asmeer Ali

5. Hussein Bhaila

6. Y. L. S. Hameed

7. M. H. M Navavi

8. Hon. Ishak Rahuman

9. Dr. M. S. Anees
10. Abdullah Mahroof
11. K. M. Abdul Razzak
12. M. I. Muththu Mohamed
13. Dr. A. L. Shajahan
14. A. J. M. Faiz
15. M. N. Nazeer
16. M. A. M. Thahir
17. M. A. Anzil
18. Rushdy Habeeb, Attorney-at-Law
19. Dr. Y. K. Marikkar
20. M. R. M. Hamjath Haji
21. R. M. Anwer
22. I. L. M. Mahir
23. I. T. Amizdeen
24. Januafer Jawahir
25. S. H. M. Mujahir

26. Hon. Ali Sabry Raheem

27. All Ceylon Makkal Congress

(The 1st to 27th Respondents all of No. 23/4, Charlemont Road, Colombo 06)

28. Dhammika Dasanayake
Secretary General of Paliament
Parliament of Sri Lanka
Sri Jayewardenepura Kotte

29. Mr. Nimal Punchihewa
Chairman,
Election Commission
Election Secretariat,
P. O. Box 02, Sarana Mawatha,
Rajagiriya.

Respondents

Before : Priyantha Jayawardena PC, J
: A. L. Shiran Gooneratne, J
: Arjuna Obeyesekere, J

Counsel : Dr. Romesh De Silva PC with Uditha Egalahewa PC, Niran Anketell, Harith De Mel and N. K. Ashokbharan for the Petitioner.

: Mr. M.A. Sumanthiran PC with H. Hisbullah and Suren Fernando for the 1st to 7th Respondents.

: Mr. M.A. Sumanthiran PC with D. Mascrange for the 8th Respondent.

: Mr. M.A. Sumathiran PC with K. Wickramanayake for the 9th to 18th Respondents.

: Mr. Hejaaz Hizbullah with Chalana Perera for the 19th, 20th, 22nd to 25th and 27th Respondents.

: Indumini Randeny, SC for the 28th and 29th Respondents.

Argued on : 14th February, 2023

Decided on : 29th February, 2024

Priyantha Jayawardena PC, J

Facts of the application

The petitioner is a member of Parliament elected from the Digamadulla District at the General Election in August, 2020 from the All Ceylon Makkal Congress (hereinafter referred to as the "ACMC").

The petitioner stated that he was expelled from the party on the allegation that he voted for the 2nd and 3rd reading of the Budget 2022 in defiance of the party decision not to vote for the said Budget. He stated that the said decision to expel him from the party is unlawful and violates the principles of natural justice as he was not given an opportunity to Show Cause in respect of the charges levelled against him and a proper disciplinary inquiry was not held prior to expelling him.

The petitioner further stated that on the 29th of November, 2021, he received a Show Cause Notice dated 26th of November, 2021 from the 1st respondent stating that as he had voted for the Budget 2022 against the decision of the ACMC and therefore, disciplinary action would be taken against him by the Political Authority. Further, it was stated that if no written explanation

was sent within 14 days, it would be considered that he has no cause to show and he would be expelled from the party. Thereafter, on the 8th of December, 2021, he replied to the said letter stating that he was unaware of the decision referred to in the same letter.

Furthermore, the decision to vote against the Budget 2022 was decided by the Political Authority at the meeting held on the 21st of November, 2021, when the petitioner was absent. The petitioner stated that he did not read the WhatsApp messages, nor the other forms of communication alleged to have been sent to him by the Political Authority informing him not to vote for the Budget 2022. Hence, he was not aware of the said decision.

The petitioner stated that he and the 1st respondent exchanged several letters, consequent to which, a purported inquiry was scheduled to be held on the 23rd of May, 2022. The petitioner also stated that the purported Disciplinary Committee of the party has no jurisdiction to make a decision to expel him from the party. In any event, he informed the 1st respondent that the allegations levelled against him were baseless, and that he was not aware of any decision to vote against the Budget. He further stated that he requested for the minutes of the meetings of the Political Authority held on 21st of November, 2021, 22nd of November, 2021, and 12th of March, 2022 in order to get ready with disciplinary inquiry.

He further stated that on the 23rd of May, 2022, he attended the inquiry with his lawyers and requested that the minutes of the said meetings be handed over to them prior to the reading of the charges. Accordingly, the minutes of said meetings were handed over at the inquiry. However, those minutes were in the Tamil language and his lawyer could not read them as he was not conversant in the Tamil language. Hence, the counsel for the petitioner requested for additional time to translate the said minutes and study them. However, the said request was refused, and the charges were read out to him immediately despite the objections raised by them. Thereafter, the 3rd respondent re-fixed the inquiry for the 31st of May, 2022.

Furthermore, the petitioner stated that a stenographer was not present at the inquiry held on the 23rd of May, 2022, but the proceedings were video recorded. Later, the transcript of the said proceedings was emailed to the petitioner's Attorney-at-Law. However, the petitioner stated that the transcript was inaccurate and distorted. Further, it did not reflect some of the proceedings that took place at the said inquiry. Hence, he requested, *inter alia,* that a stenographer be arranged for the next date of inquiry and that a copy of the videotaped

proceedings of the meeting be handed over in order to correct the transcript of the proceedings held on the 23rd of May, 2022.

Moreover, two other members of the party, Ali Sabry Raheem and Ishak Rahuman, facing inquiries on similar charges, were represented by the same counsel. Similar to the petitioner, their inquiries were held initially on the 23rd of May, 2022 and then postponed for the 31st of May, 2022.

The petitioner stated that at the inquiry held on the 31st of May, 2022, the petitioner's counsel commenced submissions and raised several preliminary objections. The counsel further stated in his objections that the Disciplinary Committee has no jurisdiction to expel the petitioner. Moreover, the said Disciplinary Committee comprised of the Political Authority. In that capacity, they had not only framed the charges and issued the Charge Sheet to the petitioner, but they were also holding the inquiry and would make the final determination on the said charges. However, halfway through the proceedings, the 3rd respondent terminated the proceedings without making a ruling on the said preliminary objections and informed that the Political Authority will communicate the final decision to the petitioner later.

Subsequently, on the 1st of June, 2022, the petitioner was informed via WhatsApp that he was expelled from the party. Further, on the 14th of June, 2022, a document containing the purported reasons for the decision to expel him from the Party was sent to him.

It was further stated that no disciplinary action was taken against the other two Members of Parliament who voted for the 2nd and 3rd reading of the Budget 2022. Thus, the petitioner stated that the 1st to 26th respondents were biased and acted with *mala fides* against him.

The petitioner stated that in the circumstances, the respondents violated his right to be heard and to face a proper disciplinary inquiry before he was expelled from the party. Further, the petitioner stated that the said disciplinary inquiry was not held according to the principles of natural justice and the Constitution of the ACMC. In the circumstances, the petitioner stated that his expulsion from the party was unlawful, *void ab initio* and without force or effect in law. Furthermore, the decision to expel him from the party was unreasonable, irrational and capricious.

Objections of the 1st to 7th, the 9th to 18th, the 19th, 20th, 22nd to the 25th and the 27th respondents

The respondents filed objections and stated that during the campaign for the 2020 general election, the ACMC heavily campaigned against the policies of the Sri Lanka Podujana Peramuna (SLPP). As a party member, the petitioner was expected to act in accordance with the mandate received by the ACMC and the policies which they campaigned for at the said election.

Further, on the 14th of November, 2021, the petitioner was notified that an important meeting of the party was to be held on the 21st of November, 2021. However, on the 20th of November, 2021, the petitioner informed that he will not be able to attend the meeting due to *"impromptu matters of grave urgency"*. Thereafter, on the 21st of November, 2021, the meeting was held, and it was unanimously decided to vote against the Budget 2022.

Hence, by letter dated 21st of November, 2021, the political authority informed the petitioner of the said party decision. The said letter was delivered by hand to the petitioner by the 8th respondent, prior to the vote on the Second Reading of the Budget. However, acting contrary to the decision of the ACMC, on the 22nd of November, 2021, the petitioner voted in favour of the Budget 2022 at the Second Reading of the Budget.

The respondents further stated that the petitioner acted against the best interests of the country and against the best interests of the ACMC by voting for the Budget against the said decision of the party. Moreover, the petitioner acted in his personal interests by voting in favour of the said Budget.

The respondents stated that in an interview published in a Tamil language newspaper on 19th of November, 2021, the petitioner had stated that those who love the country cannot oppose the Budget 2022. He further justified his support for the Budget 2022 and criticised the opposing parties.

It was further stated that on the 26th of November, 2021, the Political Authority issued a Show Cause Notice requesting a written explanation from the petitioner with regard to his voting in favour of the Budget 2022 at the Second Reading. However, by letter dated 8th of December, 2021, the petitioner informed that he was unaware of the aforesaid decision of the Political Authority and sought further time to respond to the said Show Cause Notice.

Thereafter, prior to the Third Reading of the Budget, by letter dated 3rd December, 2021, the petitioner was informed not to vote for the Budget at its Third Reading. However, the petitioner voted in favour of the Budget 2022 at the Third Reading on the 10th of December, 2021.

It was further stated that the petitioner at no time, either prior to the Second Reading of the Budget 2022 or the Third Reading, expressed any view to the ACMC that he or the Party should vote in favour of the Budget.

In the circumstances, on the 25th of April, 2022, the petitioner was informed that he has not shown sufficient cause, and as such, it was decided to hold a disciplinary inquiry against him on the 23rd of May, 2022.

Moreover, the respondents stated that on the 23rd of May, 2022 at the inquiry, as requested, the petitioner was furnished with the copies of the minutes of the meetings of 21st of November, 2021, 22nd of November, 2021, and 12th of March 2022. However, the petitioner did not inform the Disciplinary Committee that he would be represented by lawyers and an English translation of the said minutes were not requested. Hence, the said minutes of meetings were provided in Tamil as the political party conducts its proceedings and keeps the minutes of its meetings in Tamil. Moreover, as the petitioner understands Tamil, the Disciplinary Committee provided extra 15 minutes to the petitioner to discuss the minutes with his counsel.

Furthermore, it was stated that the Charge Sheet in Sinhala, Tamil and English languages were handed over to the petitioner at the inquiry. Thereafter, the charges were read out at the inquiry, but the petitioner did not plead to the charges. Nevertheless, at the request of counsel for the petitioner, a further date was granted and the inquiry was adjourned to the 31st of May, 2022.

The respondents stated that as per the petitioner's request, a stenographer was made available at the proceedings held on the 31st of May, 2022. However, at the inquiry, the counsel for the petitioner stated that the transcripts of proceedings held on the 23rd of May, 2022 were inaccurate and requested for the video recordings of the said inquiry. The 3rd respondent rejected the said request and asked the petitioner to plead for the charges and continue with the proceedings. Further, the 3rd respondent offered to read out the charges again on the 31st of May, 2022. However, the petitioner did not agree for it.

Moreover, the counsel for the petitioner raised objections alleging that the members of the Political Authority were not in fact members of the Political Authority. However, the

respondents stated that the petitioner having participated at the meetings of the party as an ex officio member of the Political Authority along with the 1st to 26th respondents, he was estopped from disputing the composition of the Political Authority. Thus, it was stated that the petitioner cannot now request the respondents to furnish details as to the validity of their appointments. It was further stated that the petitioner's contention that he did not know the composition of the Political Authority is false.

Furthermore, the respondents stated that the disciplinary inquiry was conducted in accordance with the Constitution of the Party and was not contrary to the principles of natural justice. Moreover, the 3rd respondent terminated the disciplinary inquiry proceedings stating that the petitioner was not cooperating. Further, he stated that the petitioner "*does not want to plead to the Charge Sheet and make his defense".* Moreover, the 3rd respondent stated that the petitioner was raising various technical objections with the intention of delaying the proceedings. Hence, the petitioner was informed that the Political Authority will take a decision and communicate it to him.

Thereafter, the petitioner was informed of the final decision of the party by letter dated 1st of June, 2022. The petitioner was also provided with the reasons for the decision by the document delivered on the 14th of June, 2022. Furthermore, it was stated that the expulsion of the petitioner was lawful and justified. The respondents stated that the application of the petitioner is misconceived in fact and law and that the petitioner is not entitled to maintain the instant application or to obtain the relief prayed for.

Allegation of suppression and misrepresentation of facts by the petitioner

The respondents stated that the decision to vote against the Budget 2022 was taken at the Political Authority meeting of the ACMC on the 21st of November, 2021, in which the petitioner was absent. The said decision was communicated to the petitioner by email and SMS on the 21st of November, 2021. However, the said materials were not produced by the petitioner along with his application. Further, the petitioner is guilty of suppression and misrepresentation as the petitioner denied the knowledge of the decision of the party to vote against the Budget for the year 2022, notwithstanding the fact that the petitioner was informed several times of the said decision. Hence, the instant application should be dismissed in *limine.*

Article 99(13)(a) of the Constitution states;

> *"Where a Member of Parliament ceases, by resignation, expulsion or otherwise, to be a member of a recognized political party or independent group on whose nomination paper (hereinafter referred to as the "relevant nomination paper") his name appeared at the time of his becoming such Member of Parliament, his seat shall become vacant upon the expiration of a period of one month from the date of his ceasing to be such member:*
>
> *Provided that in the case of the expulsion of a Member of Parliament his seat shall not become vacant if prior to the expiration of the said period of one month* ***he applies to the Supreme Court by petition in writing, and the Supreme Court upon such application determines that such expulsion was invalid.*** *Such petition shall be inquired into by three Judges of the Supreme Court who shall make their determination within two months of the filing of such petition. Where the Supreme Court determines that the expulsion was valid the vacancy shall occur from the date of such determination."*

[emphasis added]

The jurisdiction of this court under Article 99 (13)(a) of the Constitution is *sui generis*, original and exclusive. Further, an application filed under the said Article 99 (13)(a) of the Constitution acts as a right of appeal provided to a Member of Parliament who was expelled from a Party. Therefore, such an application should not be dismissed in *limine* without considering the merits of the application.

A similar view was expressed in ***Peramulli Hewa Pivasena v. ITAK*** **SC Special (Expulsion) 3/2010 at pages 6, 7,** where Justice Marsoof held;

> *"The jurisdiction of this Court conferred by Article 99(13)(a) of the Constitution is sui generis, original and exclusive, and does not confer any discretion to this Court to dismiss in limine an application filed there under merely on the ground of suppression or misrepresentation of material facts, as in cases involving injunctive relief or applications for prerogative writs."*
>
> ....
>
> ....

"I am therefore of the opinion that even in a case where there is cogent evidence to establish that an expelled Member of Parliament did not come to Court with clean hands, if this Court finds that the purported expulsion is invalid, "his seat shall not become vacant" and he will continue to hold office, and ***this Court does not have the discretion to make a contrary determination on the sole ground of suppression misrepresentation of material facts****, or dismiss the application in limine. I am of the opinion that it is* ***therefore not necessary to make any findings in regard to the question whether the Petitioner has suppressed or misrepresented any material facts*** *in his Petition or in the course of the hearing, and accordingly, the preliminary objection raised by the 3rd Respondent has to be overruled."*

[emphasis added]

In view of the above, the application of the respondents to reject/dismiss the instant application of the petitioner on the alleged suppression and misrepresentation of facts is overruled.

Were the principles of Natural Justice adhered to at the disciplinary inquiry?

Members of the Parliament exercise the sovereignty of the People. Further, they represent the voters/people in the country in Parliament. However, if a Member of Parliament is expelled from the party, he will lose his seat in Parliament. Hence it is imperative to hold a proper disciplinary inquiry before a decision is taken to expel a member from a political party. Furthermore, it is necessary to give a fair hearing to the member at the disciplinary inquiry. Further, it does not matter that the outcome of the inquiry may be obvious or may not be different. In the circumstances, it is essential that the petitioner was given a fair hearing to justify his actions before being expelled from the party or being subjected to any other punishment by the political party.

A similar view was expressed in ***Tissa Attanayake v. United National Party and Others*** **(2015) 1 SLR 319 at page 331** where it was held**;**

"Admittedly, the opportunity of a fair hearing mas be limited in the circumstances. For instance, the time for responding to a charge sheet or making submissions may be reduced. Yet, the person is entitled to be told what he is charged with and

> ***afforded some opportunity of explaining himself.*** *The Petitioner is a Member of Parliament and expulsion could lead to lose his seat.* ***The very gravity of the matter required that at least a limited hearing ought to be given to the Petitioner."***
>
> [emphasis added]

Similarly, in ***General Medical Council v. Spackman*** **(1943) AC 627 at page 644** it was held;

> *"If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision"*

However, at the inquiry under consideration, the petitioner was not given an opportunity to present his case. Only preliminary objections raised on his behalf were heard at the said inquiry. However, no decision was made in respect of the preliminary objections raised by the petitioner. Further, a Charge Sheet was issued to the petitioner and the charges were read at the inquiry. Thereafter, the proceedings were terminated abruptly.

The disciplinary inquiry proceedings marked as 'IR15' by the respondents contain the following statement made by the 3rd respondent, the Chairperson of the disciplinary inquiry panel;

> *"The Political Authority is of the opinion that the Hon. Member though given an opportunity does not want to plead to the Charge Sheet and make his defense. At this stage he is trying to make various objections with the deliberate intention of delaying these proceedings, which the Political Authority is not prepared to accommodate. In the circumstances, I would like to inform the Member since he has not cooperated and his attitude and his representatives who made submissions before this Political Authority, do not in any way could be justifiably accommodated. In the circumstances the Political Authority will retire and make a decision, a final decision of the Political Authority."*

The failure to proceed with the disciplinary inquiry deprived the petitioner of explaining his actions at the disciplinary inquiry. Thus, it violates the principle of natural justice i.e., *audi alteram partem*.

In ***Tissa Attanayake v. United National Party and Others*** (supra) at **page 334,** a similar view was expressed. i.e.;

> *"...the observance of natural justice depicted in the maxim Audi Alteram Partem provides the foundation for the manner and form in which Administrative Law is applied. Whether or not the other party has reasons or defences to submit is not the issue. The basic issue is to provide the other party an opportunity to explain himself."*

Moreover, no evidence was led at the inquiry to establish the charges levelled against the petitioner. Thus, the decision to expel the petitioner from the party is not based on the evidence led at the disciplinary inquiry and therefore, the said decision to expel the petitioner is arbitrary and capricious.

Was the decision to expel the petitioner valid in law?

By the letter dated 1st of June, 2022, (marked and produced as 'P10'), the petitioner was informed that a decision has been taken to expel him from the party by the Political Authority at the meeting held on the 31st of May, 2022. The said letter, *inter alia*, states;

> *"This is further to the disciplinary inquiry held against you on May 23rd, 2022 and May 31st, 2022.*
>
> *I write to inform you that* ***the Political Authority of the All Ceylon Makkal Congress at its meeting held on May 31st, 2022 has decided to expel you*** *from the party and you shall forthwith cease to be a member of the party. As such, you are requested not to hold out or claim that you are a Member of the All Ceylon Makkal Congress hereinafter.*
>
> *A written report with reasons will be sent to you during the course of this week."*

[emphasis added]

However, the final page of the document which contained the reasons to expel the petitioner, which was marked and produced as 'P11' stated;

> *"At the* ***meeting of the Political Authority held on June 01st, 2022*** *all members present agreed that Hon Mr Muszhaaraff ought to be expelled from the Party. All members present except Mr Hussain Bhaila also approved this order.* ***Mr Bhaila requested further time to consider the same*** *and convey his position. He* ***conveyed his consent to this order on June 11th, 2022."***
>
> [emphasis added]

The aforementioned vital discrepancy in the dates which refers to the purported expulsion of the petitioner prevents considering the contents of the said documents as it not clear whether in fact, a decision was taken by the Political Authority to expel the petitioner. Furthermore, the respondents did not produce the minutes of the meeting which is alleged to have taken the decision to expel the petitioner from the party. Thus, it is uncertain whether a meeting to expel the petitioner had ever taken place.

A similar view was expressed in ***Ameer Ali and Others v. Sri Lanka Muslim Congress and Others*** **(2006) 1 SLR 189** at **pages 198, 200** where it was held;

> ***"****Since the final decision to expel the Petitioners is said to have been made at this meeting* ***it was essential for the Respondents to have produced the minutes of the meeting that indicate the persons who were present and the manner in which the serious issues raised by the Petitioners were considered before a final decision was made."***
>
> ...
>
> ...
>
> *"The burden of proof is on the Respondents to satisfy the Court as to the competence of the expelling authority, being in this instance the High Command of the Party. To get to this point it is the burden of the Respondents to establish that the validly constituted High Command convened and took the decision reflected in the several letters written by the General Secretary.* ***At the least, the Respondents should have produced the book containing minutes of the meeting of the High Command that include the minutes of the relevant meetings. They have failed to produce even such prima facie evidence of the meetings. It is also the burden of the Respondents to satisfy this Court that the High Command considered the evidence and the relevant***

material in respect of the charges that have been made against the Petitioners *in the light of the matters urged by the Petitioners (in their reply to the show cause notice) and came to findings adverse to petitioners from the perspective of the overall interests of the Party and its electorate."*

[emphasis added]

Moreover, the petitioner was informed by letter dated 1st of June, 2022 that the Political Authority had decided to expel him from the Party. Thereafter, the petitioner was provided with the reasons for the decision to expel him by the document delivered on the 14th of June, 2022. The said document containing the reasons to expel the petitioner was signed by N. M. Shaheid, the 3rd respondent on the 1st of June, 2022 and by S. Suairdeen, the 1st respondent on the 12th of June, 2022.

Further, the said document appears to have been printed on a computer and thereafter signed twice on two separate dates. However, both signatures cannot appear on the last page if the signatures were placed on the paper on two separated dates; one on the 1st of June, 2022 and the other on the 12th of June, 2022. Moreover, the said discrepancy cast a doubt on the authenticity of the document.

Moreover, the respondents have not produced materials to prove that they have considered the relevant material and taken a decision to expel the petitioner. Accordingly, I hold that the expulsion of the petitioner is invalid.

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

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. 14/2017

1. N.C. Gajaweera,
   No. 366/15A, 3rd Lane,
   Dharmapala Road, Pamburana, Matara.

2. D.C. Wewitawidhane,
   No. 118, School Road, Gurulana,
   Bope, Padukka.

3. S.D. Bandusiri,
   'Manel,' Elaihala, Kolonne.

4. S.A.C. Ashoka,
   M2, STF Quarters, Gonahena, Kadawatha.

5. D.M.U.K. Abeyratne,
   No. 38/2, Medagoda, Pujapitiya.

6. W.R.V.M. Abeysekera,
   'Sekkuwatte,' Pannala, Kurunegala.

7. H.K.R.A. Henepola,
   A/3/1, STF Quarters,
   Biyanwila, Kadawatha.

8. W.G.A. Premasiri,
   No. 137/9, Old School Road, Aluwihare, Matale.

9. S.A.S.L. Bandara,
   No. 36, Diddeniya Watte,
   Dambokke, Kurunegala.

PETITIONERS

Vs.

1. Prof. Siri Hettige

1A. P.H. Manatunga

1B. K.W.E. Karaliyadda

1st, 1A & 1B Respondents –
Chairman, National Police Commission

2. P.H. Manatunga,

2A. Prof. Siri Hettige

2B. Gamini Nawaratne

3. Savitree Wijesekara

4. Y.L.M. Zawahir

5. Anton Jeyanadan

5A. Asoka Wijetilleke

6. Tilak Collure

7. F. de Silva

7A. G. Jeyakumar

2nd, 2A – 7A Respondents are members of the National Police Commission

8. N. Ariyadasa Cooray,
Secretary, National Police Commission

8A. Nishantha A Weerasinghe
Secretary, National Police Commission

1st to 8A Respondents at the
National Police Commission, BMICH, Bauddhaloka Mawatha, Colombo 7.

9. Pujith Jayasundara,
Inspector General of Police.

9A. C.D Wickremaratne,
Inspector General of Police.

9th and 9A Respondents at
Police Headquarters, Colombo 1.

10. Jagath Wijeweera,
Secretary, Ministry of Law and Order and Southern Development,
Sethsiripaya Stage II, Battaramulla.

10A. Major General Kamal Guneratne,
Secretary, Ministry of Internal Security,
Elvitigala Mawatha, Colombo 5.

10B. Major General Jagath De Alwis,
Secretary, Ministry of Public Security,
Battaramulla.

11. R.M. Wimalaratne,
No. 592/1, Moragathalanda Road, Arawwala, Pannipitiya.

12. A.P.M. Pigera,
No. 309, Abaya Mawatha, Nagoda, Kalutara.

13. Y.P.P.K. Wijayasundara,
No. 425/5B, Makola South, Makola.

14. H.D. Wattegedera,
No. 29/C1, Centre Road, Ratmalana.

15. W.R.A.D.A.K. Ranasinghe,
'Shanthi,' Battuwatta, Ragama.

16. R.M.S. Jayatissa,
N1, STF Quarters, Gonahena, Kadawatha.

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

18. Hon. Justice Jagath Balapatabendi,
Chairman

19. Indrani Sugathadasa

20. V. Shivagnanasothy

21. T.R.C. Ruberu

22. Ahamed Lebbe Mohamed Saleem

23. Leelasena Liyanagama

24. Dian Gomes

25. Dilith Jayaweera

26. W.H. Piyadasa

19th – 26th Added Respondents are members of the Public Service Commission

18th to 26th Added Respondents all of the Public Service Commission, No. 1200/9, Rajamalwatta Road, Battaramulla.

RESPONDENTS

Before: **Vijith K. Malalgoda, PC, J**
Achala Wengappuli, J
Arjuna Obeyesekere, J

Counsel: Viran Corea, PC with Thilini Vidanagamage for the Petitioners

Rajiv Goonetilleke, Deputy Solicitor General for the 1st – 10th and 17th Respondents

Rasika Dissanayake with Chandrasiri Wanigapura for the 11th, 14th and 16th Respondents

J.M. Wijebandara with Chamodi Dayananda for the 15th Respondent

Argued on: 17th November 2022

Written Submissions: Tendered on behalf of the Petitioners on 16th October 2020 and 21st December 2022

Tendered on behalf of the 1st – 10th and 17th Respondents on 15th November 2021 and 27th December 2022

Decided on: 20th March 2024

Obeyesekere, J

The issue that needs to be determined in this application is whether the decision of the National Police Commission reflected in its letter dated 29th November 2016 [**R2B**] to appoint the 11th – 16th Respondents to the rank of Assistant Superintendent of Police [ASP] without following the procedure laid down in the Procedural Rules of the Public Service Commission is arbitrary and violative of the fundamental rights of the Petitioners guaranteed by Article 12(1) of the Constitution.

At the time of the filing of this application, the Petitioners were Chief Inspectors of Police attached to the Special Task Force of the Police Department. The 11th – 16th Respondents too were attached to the Special Task Force and held the rank of Chief Inspector of Police until their impugned promotion to the rank of ASP in December 2016. The Petitioners have subsequently been promoted to the rank of ASP based on the results of an interview held in 2019, and their appointments have been backdated to 10th July 2018. The learned President's Counsel for the Petitioners however submitted that the Petitioners are desirous of pursuing this application for a declaration that their fundamental rights guaranteed by Article 12(1) have been infringed by the National Police Commission [the 1st – 8th Respondents], the Inspector General of Police [the 9th Respondent] and the Secretary, Ministry of Law and Order [the 10th Respondent] and an order that their promotion to the rank of ASP be backdated to the same date as that of the 11th – 16th Respondents.

Calling for applications

By a notice issued in August 2014 [**P3**], the Commandant of the Special Task Force had called for applications for promotion to the rank of ASP from Chief Inspectors of Police attached to the Special Task Force to fill the cadre vacancies that existed in that rank within the Special Task Force. The said notice stipulated further that in order to be eligible to apply, an applicant had to be a Chief Inspector of Police confirmed in the rank and possess an unblemished record of service during the period of five years immediately prior to 13th January 2014, **which was the date on which the vacancies that were to be filled had arisen**. Whilst reiterating the above criteria, the marking scheme attached to the said notice provided that a total mark of 100 would be allotted on the following basis:

(a) 50 marks for the period of service in the rank of Chief Inspector of Police, with 5 marks being allotted for each year completed in such rank.

(b) A maximum 20 marks for outstanding performance and service in Functional Divisions / serving as an Officer Commanding in STF, while being in the rank of Chief Inspector of Police. This was split into four sub-components, with a maximum of 10 marks being allotted for having been an Officer-in-Charge of a Functional Division, a maximum of 10 marks for serving as an Officer Commanding, a maximum of 6 marks for commendations received while serving as a Chief Inspector of Police, and a maximum of 4 marks for special rewards received while being in the rank of Chief Inspector of Police.

(c) 5 marks for medals.

(d) 4 marks for achievements in sports while in the rank of Chief Inspector of Police.

(e) 8 marks for academic and professional qualifications acquired while serving as an Inspector of Police or Chief Inspector of Police.

(f) 3 marks for language skills.

(g) 10 marks for performance at the interview.

Categories (b), (d) and (e) related to the period that an applicant had served as a Chief Inspector of Police, thus stressing the importance of having acquired such qualifications while serving in that rank.

Interviews and initial appointment of 15 ASP's

A total of 39 applications, including those of the Petitioners and the 11th – 16th Respondents had been received in response to the notice P3. All applicants had been called for the interview that was conducted by the Promotion Board on 14th and 29th May 2015. By RTM 158 dated 3rd March 2016 [**P4**], the appointment of fifteen applicants to the rank of ASP **with effect from 13th January 2014** was announced by the Acting Inspector General of Police. It is perhaps important to reiterate that the appointments were made with effect from 13th January 2014 since that was the date on which the vacancies for which P3 had been issued had arisen.

The Petitioners claim that even though the Promotion Board had considered extraneous matters and awarded marks outside the marking scheme, the Petitioners did not challenge the said appointments except for an appeal made by the 1st Petitioner to the National Police Commission against his non-selection, which appeal admittedly had not been considered by the National Police Commission even at the time of the filing of this application in January 2017. Be that as it may, the process that commenced in August 2014 to fill the vacancies that existed on 13th January 2014 ought to have come to an end with the aforementioned promotions made in March 2016.

Promotion of the 11th – 16th Respondents

It is an admitted fact that the Department of Management Services created **six cadre vacancies** in the rank of ASP by its letter dated 24th March 2016 and a further twelve cadre vacancies in the rank of Superintendent of Police, again with effect from the same date. The Petitioners state that as at 1st December 2016, there were nineteen vacancies in the ASP cadre within the Special Task Force, a claim which has not been contradicted by the 1st – 10th Respondents, even though there is some ambiguity whether the number of vacancies ought to have been eighteen.

The Petitioners state that they were expecting the National Police Commission to call for applications to fill the said nineteen vacancies, in accordance with the procedure set out in the Procedural Rules of the Public Service Commission to which I shall advert later. However, instead of calling for fresh applications as required by the Procedural Rules, by an internal circular dated 3rd December 2016 [**P6**] the Commandant of the Special Task Force notified that the 11th – 16th Respondents had been appointed to the rank of ASP with effect from 24th March 2016.

It is common ground that these appointments were based on the results of the aforementioned interview held in May 2015. I must state that according to the marks sheet of the said interview tendered to this Court by the learned Deputy Solicitor General together with a motion dated 5th October 2021, the 11th – 16th Respondents were placed just below the fifteen candidates who received appointments in March 2016. Thus, the said fifteen successful candidates and the 11th – 16th Respondents had

secured more marks than the Petitioners, irrespective of whether it is the aggregate mark or the aggregate mark less the mark given for the interview that is considered.

According to the National Police Commission, the vacancies which were filled with the said appointments of the 11th – 16th Respondents had arisen as a result of the aforementioned increase in the cadre positions in the rank of ASP within the Special Task Force. It must however be noted that although the name of the 15th Respondent appears on the list of officers promoted with effect from 24th March 2016, the 15th Respondent had received his promotion as an ASP with effect from 1st January 2008 pursuant to a settlement entered into by the National Police Commission in SC (FR) Application No. 453/2010 on 21st October 2016, which means that the appointment of the 15th Respondent is outside the appointments made pursuant to the said cadre increase.

Infringement of Article 12(1) of the Constitution

Aggrieved by the said decision of the National Police Commission to appoint the 11th – 16th Respondents on the results of the interviews held in May 2015 without calling for fresh applications to fill vacancies that had arisen after 13th January 2014, the Petitioners invoked the jurisdiction of this Court in terms of Article 126(1) claiming that their fundamental right to the equal protection of the law guaranteed by Article 12(1) has been infringed by the 1st – 10th Respondents. The Petitioners had sought *inter alia* a declaration that the decision of the 1st – 10th Respondents to promote the 11th – 16th Respondents is violative of Article 12(1), and in the alternative, that the Petitioners be promoted to the rank of ASP with effect from 24th March 2016. It must perhaps be noted that the Petitioners have not prayed for a specific order to quash the appointments of the 11th – 16th Respondents, even though such a result is a possible consequence were this Court to grant the above declaration.

Article 12(1) of the Constitution provides that, "*All persons are equal before the law and are entitled to the equal protection of the law*". Reviewed in the backdrop of this case, Article 12(1) in its own right, or together with Article 12(2) brings within its reach equal opportunity for employment and such guarantee of equality applies not only in the matter of selection for employment, but also at the stage of selection for promotion.

In **W.P.S. Wijeratne v Sri Lanka Ports Authority and Others** [SC (FR) Application No. 256/2017; SC minutes 11th December 2020], Kodagoda, PC, J stated that, "*It is well settled law that, at the core of Article 12 of the Constitution is a key concept, namely the concept of 'equality'. The concept of equality is founded upon the premise that, all human beings are born as equals and are free. … The right to equality is a fundamental feature of the Rule of Law, which is a cornerstone of the Constitution of Sri Lanka, and hence the bounded duty of the judiciary to uphold*." [emphasis added]

Shirani Bandaranayake, J (as she then was) held in **Karunathilaka and Another v Jayalath de Silva and Others** [2003 (1) Sri LR 35; at pages 41 - 42] that:

> "*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 v Ceylon Petroleum Corporation and Others** [(2001) 2 Sri LR 409; at pages 416 – 417], 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.

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."* [emphasis added]

It is in the above background that the learned President's Counsel for the Petitioners submitted that:

(a) Failure to follow the Procedural Rules in promoting the 11th – 16th Respondents is arbitrary and is an infringement of the Petitioners right to equality guaranteed by Article 12(1);

(b) Calling for applications would have afforded the Petitioners with an equal opportunity of competing with the 11th – 16th Respondents for the vacancies that had arisen in March 2016 pursuant to the increase in cadre positions;

(c) The Petitioners would have performed better than at the previous interview held in May 2015 as they had acquired more qualifications since 13th January 2014 under the categories listed at (b), (d) and (e) above;

(d) It is illegal and arbitrary to act on the results of an interview to fill vacancies that had arisen after such interview has been concluded and that too, after the initial vacancies had been filled.

The above submissions require me to consider three matters. The first is to consider whether it is mandatory to follow the Procedural Rules, and whether there has been a failure to do so. If answered in the affirmative, the second matter that I must consider is whether the Petitioners have satisfied this Court that the aforementioned decision of the National Police Commission has deprived the Petitioners of an equal opportunity for promotion to the rank of ASP. If this too is answered in the affirmative, I shall finally consider the reasons for the deviation and whether such reasons are unreasonable and unfair and is therefore arbitrary.

<u>The Procedural Rules and Article 12(1)</u>

It is admitted that the Procedural Rules on appointment, promotion and transfer of public officers [the Procedural Rules] prepared by the Public Service Commission by virtue of the powers vested in it in terms of Articles 61B and 58(1) of the Constitution have been adopted by the National Police Commission and are applicable to the impugned promotions.

Prior to the promulgation of the Procedural Rules, the procedure that was required to be followed with regard to appointments, promotion, transfer etc., were set out in the

Establishments Code [the Code]. The need to strictly adhere to and follow the provisions of the Code has been repeatedly emphasised by this Court over the years.

In **Elmore Perera v Major Montague Jayawickrema Minister of Public Administration and Plantation Industries and Others** [(1985) 1 Sri LR 285], it was held by Wanasundera, J that:

> "*It would however appear that the Cabinet, after due deliberation, has sought to formulate a Code of regulations containing fair procedures and safeguards balancing the requirements and interests of the Government with the rights of public officers, and the legal protection now provided by the law to public officers is contained in this Code. These procedures are therefore mandatory and cannot be superseded or disregarded without due legal authority*." [page 335]
>
> "***This Code constitutes the norm and embodies the necessary safeguards to protect the rights of public officers.*** *It constitutes the state of the law on this matter and is and should be applicable, without exception, to all public officers of the class or category to which the petitioner belongs.* ***Any departure in a particular case from this basic norm, which is of general application, would be a deprivation of the protection given by the law and must be regarded as unequal treatment and a violation of Article 12(1) of the Constitution***." [page 338][emphasis added]

Kulatunga, J observed in **Perera v Ranatunga** [(1993) 1 Sri LR 39] that the Establishments Code had been formulated in pursuance of the duty cast on the Cabinet to provide for and determine all matters of policy relating to the appointment, transfer, dismissal and disciplinary control of public officers and that, accordingly, the Code is in the nature of '..... *a constitutional recognition of the concept of the Rule of law, in particular, that government should be conducted within the framework of recognised rules and principles and that, in general, decisions should be predictable and the citizen should know where he is which in turn restricts arbitrary action or discrimination. The relevant provisions of the Establishments Code are in conformity with this concept and through Article 55 (4) are made complementary to Article 12*."

Even though the Procedural Rules may not stand on the same legal pedestal as the Code, the principle sought to be established by this Court by drawing a nexus between

the provisions of the Code and Article 12(1) would apply with equal force to the Procedural Rules.

The importance of having a well-defined set of rules and adhering thereto was emphasised in **K.W.S.P Jayawardhana v Gotabhaya Jayaratne** (SC (FR) Application No. 338/2012; SC Minutes of 07th September 2018), where Prasanna Jayawardena, PC, J observed that, "… *it is hardly necessary to emphasize that, the efficiency and integrity of the public administration system of a country is dependent on the quality of the officers who serve that system. Therefore, it is important to ensure that the recruitment of such officers is made in the best possible manner.* ***A key to achieving that objective is to ensure that recruitment to the Public Service of a country is effected according to published procedures which incorporate proper selection criteria and due and fair process****.*" [emphasis added]

Similar sentiments were expressed in **W.P.S. Wijeratne v Sri Lanka Ports Authority and Others** [supra] where it was held that:

> *"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***." [emphasis added]

There are three Rules in Chapter III of the Procedural Rules which capture the need to have a well-defined and well demarcated set of criteria for appointment together with the resultant requirement for strict adherence with such Rules.

The first is Rule 34 which provides that, "*For each approved service in the public service, there shall be a Service Minute and for each post falling outside those services, there shall be a Scheme of Recruitment. Such Service Minute or Scheme of Recruitment shall contain qualifications for recruitment, method of recruitment, salary scales, service conditions, methods of promotion and all other relevant information*."

The second is Rule 29 in terms of which, "*All appointments in the public service, other than casual and substitute appointments shall be made in accordance with the Service Minute or the Scheme of Recruitment of the respective post*."

The third, and the Rule which is most critical to this application is Rule 25, which reads as follows:

> "***To fill vacancies*** *in the public service* ***the appointing authority shall call for applications by advertisement*** *in accordance with the service minute or scheme of recruitment approved by the Commission except where the appointment is on acting basis or to attend to the duties*." [emphasis added]

Calling for applications to fill vacancies that arise, giving due notice of such vacancies and thereby creating a level playing field for all those eligible to apply is the best way of eliminating opaqueness in the selection process. Rule 25 reflects the policy reasoning of affording everyone eligible in applying for a particular post fair notice of such vacancy, and therefore a fair and equal opportunity of being selected, thereby encapsulating the essence of Article 12(1). Such provisions must be followed, and to do otherwise would be unreasonable and arbitrary.

<u>The need to maintain transparency at all times</u>

A fundamental requirement inherent in a fair selection process is the need to maintain transparency throughout all stages of recruitment and promotion. The fact that transparency is cardinal in the filling of vacancies and that transparency must be maintained at all times is reflected in Rule 189 of the Procedural Rules, in terms of which, "*The process of promotion shall be conducted in a transparent manner so that it will generate confidence among the Public Officers that* ***promotions are done solely as provided for in the Service Minute or the Scheme of Recruitment*** *and not in any other manner or due to extraneous influences*." [emphasis added]

The key emphasis in Rule 189 is that the process must be carried out in a manner that generates confidence among Public Officers that the Service Minute and the Scheme of Recruitment will always be followed and adhered to. The emphasis on ensuring transparency and for that purpose, creating a Service Minute and a Scheme of Recruitment and adhering thereto is explicitly recognised by the Public Service Commission in the introduction to its 'Guideline for Preparing Schemes of Recruitment' where it is stated that*, "Streamlined Schemes of Recruitment should be prepared in order to recruit persons replete with most appropriate knowledge, skills and attitudes to the respective positions in a transparent manner with a view to efficiently maintaining the public service with high productivity **providing equal opportunities to all those who fulfill required qualifications**."* [emphasis added]

Mark Fernando, J in **Jayawardena v. Dharani Wijayatilake, Secretary, Ministry of Justice and Constitutional Affairs and Others** [(2001) 1 Sri LR 132; at page 143] stated that:

> *"Respect for the Rule of Law requires the observance of minimum standards of openness, fairness, and accountability in administration; and this means – in relation to appointments to, and removal from, offices involving powers, functions and duties which are public in nature – that **the process of making a decision should not be shrouded in secrecy**, and that there should be no obscurity as to what the decision is and who is responsible for making it."* [emphasis added]

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 page 166] Amerasinghe, J expressed similar views when he held that:

> "*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 order to ensure that justice is done and seen to be done, it is at least desirable that cadres, the criteria for*

> *selection, the method of selection* ***and the eventual basis for selection*** *– for instance by the publication of marks obtained –* ***be made known*** *to those concerned.* ***Ideally, the whole process from the determination of the cadre to selection must be easily recognized and seen through, if not obvious. A selection process veiled in secrecy and not openly avowed and expressed is at least open to the suspicion of the existence of something evil or wrong****. It is of a questionable character*." [emphasis added]

Thus, the stated intention of the Public Service Commission in formulating the Procedural Rules which have been adopted by the National Police Commission is to create a level playing field thus affording an equal opportunity to those who are eligible for any appointment or promotion, as the case maybe, and to ensure the selection of the most suitable person through a transparent recruitment/promotion process. While the path to ensuring such transparency is laid down *inter alia* in Rules 25, 29 and 34 to which I have already referred to, in reality, this would generally be achieved if applications are called for once the vacancies arise and the due process laid down in the Procedural Rules are followed, and not where scores and ranks from old interviews are dug up in an arbitrary manner to fill vacancies that arose years after the date on which the initial vacancies had arisen, and well after the interviews and the selection procedure had been completed.

Absolute or unfettered discretion

While the adoption of scores from previous interviews would, on the face of it, be contrary to the Procedural Rules, I must observe that deviation from the Procedural Rules is permissible in terms of Rule 3 which provides that, "***Subject to Article 12(1)*** *of the Constitution the Commission reserves to itself the right to deviate from rules, regulations and procedure laid down by the Commission under* ***exceptional circumstances***." [emphasis added].

Although deviation from the Rules is permissible, it is duly recognised that such deviation cannot be violative of Article 12(1). Furthermore, deviation must not only be the exception but should only be done in exceptional circumstances. The reasons for such deviation demonstrating the existence of reasonable grounds for such deviation and the reasons for such deviation shall accordingly be recorded.

Even though the National Police Commission has a discretion in deciding to deviate from the procedure laid down in the Procedural Rules, such discretion must be exercised reasonably. As held in the Order of this Court read out by Chief Justice G.P.S. De Silva in **Premachandra v Jayawickreme and Another** [(1994) 2 Sri LR 90], "*There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted*."

Mark Fernando, J in **Jayawardena v. Dharani Wijayatilake, Secretary, Ministry of Justice and Constitutional Affairs and Others** [supra; at page 159], stated that, "*It is accepted today that powers of appointment and dismissal are conferred on various authorities in the public interest, and not for private benefit, that they are held in trust for the public and that the exercise of these powers must be governed by reason and not caprice*."

In "**The Modern Benchmarks of Sri Lankan Public Law**" [Dr Mario Gomez; (2001) 118(3) South African Law Journal 581] the author, referring to several judgments of this Court, has stated that:

> "*It [the Court] has conceptualised the holders of public power as trustees: public institutions and personalities hold power in trust to be used solely for public benefit. That power is never unfettered or absolute. That power must be exercised fairly. This means that, at least, public decision-making should be transparent, reasonable and fair. It cannot be exercised in an arbitrary or capricious manner. It has also come to mean that government should be conducted within a framework of recognized rules and principles*." [at page 586]

> "*Discretionary powers given to public institutions are never untrammeled. They are to be used to achieve the purpose for which they were conferred. Arbitrary and unreasonable decisions are the antithesis of fair play and equal treatment. They violate the 'trust' placed in public officials.*" [at page 592]

In the Determination of this Court in **<u>The Special Goods and Services Tax Bill</u>** [SC/SD/1-9/2022, page 36], it was observed that, "… *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*."

It is therefore clear that arbitrariness and unreasonableness in decision-making in selections, appointments and promotions deprives a citizen of the equal opportunities that he is entitled to, are inconsistent with the concept of equality and attracts Article 12(1) of the Constitution.

Any deviation by the National Police Commission from the procedure laid down in the Procedural Rules would be arbitrary in the absence of proper justification for such deviation. An arbitrary exercise of discretion is *per se* violative of Article 12(1) and particularly in the context of the facts of this case such arbitrary exercise of discretion has also resulted in depriving the Petitioners of an equal opportunity of being considered for promotion and unequivocally paved the way to a violation of Article 12(1).

<u>Chapter VII of the Procedural Rules</u>

The procedure that should be followed by the Public Service Commission in making appointments is set out in Chapter VII of the Procedural Rules. Rules 62 – 65 in particular highlight the strict procedure that has been put in place to ensure that due process is followed.

The first step as set out in Rule 62 reads as follows:

> "*Where the Head of Department recommends the filling of the vacant post he shall forward to the Administrative Authority a certified copy of (the) Service Minute or Scheme of Recruitment in force,* ***a draft advertisement calling for applications*** *prepared in accordance with the approved Service Minute or Scheme of Recruitment, where the selection is to be based on a structured*

interview its marking scheme, and the persons recommended for inclusion in the interview board in terms of Section 69 & 70." [emphasis added]

The second step is contained in Rule 63 and provides as follows:

"*The Administrative Authority of the respective service or post shall forward to the Commission without delay the documents mentioned in Rule 62 above for approval together with his recommendations. On receipt of the approval from the Commission, the Administrative Authority* ***shall make arrangements to call for applications as per the approved advertisement*** *internally or externally, as the case may be, by advertisement in the Government Gazette and/or national newspapers*." [emphasis added]

Rule 64 sets out the third step that should be followed, upon the receipt of applications and requires the Administrative Authority to *"take action to* ***duly hold the competitive examinations and/or interviews*** *as the case may be in accordance with the service minute or scheme of recruitment, marking scheme and forward to the Commission the list of applicants prepared in order of merit together with examination results, interview Schedules, the number of posts for which appointment should be made and the recommendation of the Board of Interview*." [emphasis added]

The role of the Public Service Commission and in this case, the National Police Commission is laid down in Rule 65, which reads as follows:

"*On receipt of document in terms of Section 64,* ***the Commission having satisfied itself that examinations and/or interviews have been held in accordance with the Service Minute or the scheme of recruitment****, where relevant in accordance with the approved marking scheme and having considered the recommendations of the interview board, if there are any,* ***shall select a person*** *on the order of merit of marks obtained at the examination and/or interview. The Administrative Authority shall be informed of the selections and a formal letter of appointment shall be issued by the Commission as per Appendix 01 or 02 with changes where necessary*." [emphasis added]

While in terms of Rule 191, "*The provisions in Chapter VII on 'General Conditions relating to Appointments' in these procedural rules shall apply, mutatis mutandis, with regard to promotions.*", Rules 62 – 65 emphasise the necessity to call for applications once vacancies arise, and demonstrates in no uncertain terms that the results of today's interviews cannot be re-purposed and re-calibrated to fill tomorrow's vacancies, as today's interviews are to fill a specific number of vacancies that exist today. Rules 62 – 65 set out in unequivocal terms the onerous responsibility cast on the National Police Commission, and the trust that has been placed in the members of such Commission in order to ensure that all appointments and promotions in the Police Department shall be in accordance with the law.

Chapter XVII of the Procedural Rules and the need to make timely promotions

The frustration experienced by the Petitioners as a result of long delays in making promotions reverberates right throughout the petition, and therefore is a matter that I must address, as such delays appears to have become the norm in our Public Service today.

Chapter XVII of the Rules contain specific provisions relating to promotions. Rules 184 and 187 are important in ensuring that the Appointing Authority **takes steps as expeditiously as possible to ensure that promotions are carried out as soon as vacancies arise**, and are re-produced below:

Rule 184

> "*Every promotion in the Public service shall be made only in accordance with the approved Service Minute or scheme of recruitment.* ***It shall be the responsibility of the Appointing Authority to promote officers on due time as provided for in the Service Minutes*** *or Schemes of Recruitment approved by the Commission*."
> [emphasis added]

Rule 187

> "*It shall be the duty of Appointing Authorities or Administrative Authorities to conduct the required examination, trade test, interview etc.* ***on the due dates*** *in*

order to provide Public Officers with an opportunity to acquire the qualification for promotion." [emphasis added]

The above Rules demonstrate the duty cast on the Appointing Authority to make timely appointments and promotions. The public servants of this Country render yeoman service to the Public notwithstanding the fact that their remuneration may not be commensurate with the services they perform. What motivates them to continue to work for the State is the great pride one derives in being a public servant and the rewards for such service by way of periodic promotions that they are entitled to in terms of the relevant service minute. It would not be an exaggeration to say that all public servants look forward to receiving promotions that they are entitled to in a timely manner. It is therefore the paramount duty of the Inspector General of Police, with a view to keeping his staff motivated, to ensure that steps are taken to fill the vacancies that arise in accordance with the duly established Rules.

I say this for the reason that in this case:

a) Applications were called only in August 2014 for vacancies that had arisen in January 2014;

b) The closing date for applications being 15th September 2014, it took the Police Department a further eight months to conduct the interviews of 39 applicants;

c) The National Police Commission took a further six months to submit its approval to the 15 candidates recommended by the Promotion Board;

d) The appointments were made in March 2016, which is 26 months after the vacancies had arisen.

I simply cannot understand why it took 26 months to complete the process, especially when there were only 39 applicants. With a further nineteen vacancies available in the rank of ASP as at 1st December 2016, the National Police Commission failed to initiate the procedure laid down in the Procedural Rules to call for applications and fill such vacancies. Instead, it took an unexplainable but easy route of resorting to the results of an interview conducted over 1 ½ years ago to fill six vacancies, and then went into deep slumber until July 2018, when applications were called to fill the consequential

vacancies in the rank of ASP, which is 28 months after the Department of Management Services had increased the cadre in the ranks of ASP and SP. **The inequality created by the delay is obvious.** While both the 11th – 16th Respondents and the Petitioners are beneficiaries of the vacancies created as a consequence of the increase in cadre, the former received their promotions with effect from 24th March 2016, while the latter received their promotions only in July 2018.

Be it due to the lethargy or the inefficiency on the part of the Inspector General of Police, the relevant officers in the Police Department or the National Police Commission, the damage caused to those who are entitled to promotions including the Petitioners is immeasurable. What aggravates this lethargy and inefficiency is the thinking that all such sins could be laundered by backdating the date of promotion to the date on which the vacancy arose.

Whether undue delay in granting promotions could amount to a violation of Article 12(1) was answered in the affirmative in **W. A. J. H. Fonseka and Others v Piyadigama, Chairman, National Police Commission and Others** [SC (FR) Application No. 73/2009; SC minutes of 8th September 2020] where Priyantha Jayawardena, PC, J held as follows:

> *"I am of the view that the administrative authorities who hold power in trust to perform the functions of the State shall not delay and/or neglect to fill the vacancies when and where such vacancies arise. Hence, promotions in the public sector should be filled in time without undue delays.*
>
> *Referring to the need to act without delay to achieve efficiency, Leonardo da Vinci stated that: 'Iron rusts from disuse, stagnant water loses its purity, and in cold weather becomes frozen; even so does inaction sap the vigours of the mind'.*
>
> *It is important to keep in mind that when an individual joins the public service, he or she entirely bases his/her life-long expectation in the public service for the betterment of his/her life. Further, given the nature of the public service, it is common for an individual serving in the public sector to expect certain benefits such as security in tenure, advancement in their career and retirement benefits…*

Further, given the limited opportunities to obtain promotions in the public sector, the delay in giving promotions in due time will demoralize public servants in performing their duties.

Thus, the stipulated procedure must be complied with and unwanted delay must be avoided at all times to have an efficient public service. I am of the view that unreasonable and undue delay in promoting employees is a violation of Article 12(1) of the Constitution."

<u>The position of the National Police Commission and the Inspector General of Police</u>

The provisions of the Procedural Rules that I have referred to makes it clear that, (a) it is mandatory for the National Police Commission and the Inspector General of Police to follow the Procedural Rules in making appointments and promotions; (b) the National Police Commission have deviated from the said procedure laid down in the Procedural Rules; and (c) the course of action adopted by the National Police Commission has deprived the Petitioners of the equal opportunity that they were entitled to in terms of the law of competing with others who were similarly placed.

I shall now consider the position of the National Police Commission and the Inspector General of Police in order to decide if such deviation is fair and reasonable. However, prior to doing so, I must state that I am mindful that when it comes to selection of persons for initial appointment to the Public Service as opposed to promotion, there may be situations where some of those selected may opt not to accept the appointment. In those situations, it may be in order to select those who had faced the interview and obtained the next highest mark/s. Such a situation is different to what has arisen in this application.

The learned Deputy Solicitor General, referring to the letter dated 30th October 2016 sent by the Inspector General of Police to the National Police Commission [**R2A**], submitted that the Department of Management Services had created six cadre positions in the ASP cadre with effect from 24th March 2016, and that the Inspector General of Police had recommended that the **six new cadre positions** be filled with the 11th – 16th Respondents, who, as I have already stated, had obtained the next highest marks after those appointed in March 2016. The said letter does not provide

any reasons for the said recommendation nor has the Inspector General of Police thought it fit to offer an explanation to this Court. Such an explanation was necessary not only in view of the admitted failure to follow the Procedural Rules but also since the Department of Management Services had also created twelve vacancies in the rank of Superintendent of Police, with the consequence that the number of vacancies in the rank of ASP amounted to eighteen.

In an extremely brief and vague affidavit filed before this Court, the Chairman of the National Police Commission has stated that shortly after promotions were made on 3rd March 2016, a further six vacancies arose on 24th March 2016 and that steps were taken to promote the next six persons in order of merit. While no further explanation has been offered for not following the provisions of the Procedural Rules and calling for fresh applications, the Chairman has the audacity to state that the members of the National Police Commission and he have "*acted in terms of the law, within the powers, acted in good faith, reasonably, rationally, and neither discriminatory, arbitrarily nor capriciously and that the fundamental rights enshrined in Article 12(1) have not been breached.*"

Attached to the said affidavit are two documents, namely letter dated 30th October 2016 sent by the Inspector General of Police to the National Police Commission [**R2A**] in response to the letter dated 18th October 2016 of the National Police Commission [which letter has not been tendered to this Court] and letter dated 29th November 2016 sent by the National Police Commission to the Inspector General of Police [**R2B**] in response to R2A.

In the absence of an explanation from the National Police Commission and the Inspector General of Police for not following the Procedural Rules and why it effected appointments on the strength of stale interview results, I have sought to piece together the following sequence of events from R2A and R2B:

(a) It is the National Police Commission that initiated the correspondence with the Inspector General of Police by its letter dated 18th October 2016 under the heading "**විශේෂ කාර්ය බලකායේ ප්‍රධාන පොලිස් පරීක්ෂක තනතුරේ සිට සහකාර පොලිස් අධිකාරී තනතුරට උසස්වීම් ලබාදිමේදි සිදුවී ඇති අසාධාරණය සම්බන්ධ අභියාචනය – ආර්.එම්. විමලරත්න මහතා**" and invited the Inspector General of Police to provide his

recommendations with regard to the promotion of the 11th – 16th Respondents to the rank of ASP. Thus, the National Police Commission had identified well in advance the need to promote the 11th – 16th Respondents even though the caption referred to an appeal only from the 11th Respondent.

(b) In response to the said letter, the Inspector General of Police has informed the National Police Commission by R2A that the Department of Management Services has created six vacancies, that reports have been called from various divisions within the Police Department relating to the 11th – 16th Respondents and that there are no adverse reports relating to them. While the Inspector General of Police should have mentioned the creation of twelve vacancies in the cadre of Superintendent of Police, in fairness to the Inspector General of Police, I must state that he has also mentioned that **there are twenty four Chief Inspectors of Police who have not received promotions**, which is a reference to the twenty four candidates who were not successful at the interview, and thus alerting the National Police Commission that their decision will have an impact on those twenty four Chief Inspectors of Police, including the Petitioners.

(c) In paragraph 7 of R2A, the Inspector General of Police has stated as follows:

> "2014.01.13 දින සහකාර පොලිස් අධිකාරි තනතුරට උසස්වීම් ලැබූ නිලධාරීන් 15 දෙනාට පහලින් (කුසලතා අනුපිළිවෙලට අනුව පහලින්) සිටින ඉහත ජේද 01 හි නම් සඳහන් ප්‍රධාන පොලිස් පරීක්‍ෂක වරුන් 06 දෙනා හට සම්මුඛ පරීක්‍ෂණ මණ්ඩලය විසින් ලකුණු ලබාදීමේදි යම් අසාධාරණයක් සිදුවී ඇති බවට නිරීක්ෂණය වේ. එබැවින් 2016.03.24 දිනට සහකාර පොලිස් අධිකාරි තනතුරේ ඇති වී ඇති පුරප්පාඩු 06 පිරවීමේ බලතල ජාතික පොලිස් කොමිෂන් සභාව වෙත පැවරී ඇති බැවින් ඒ සම්බන්ධයෙන් කටයුතු කිරීම සඳහා ඔබ වෙත යොමු කරමි."

(d) At its meeting held on 3rd November 2016, the National Police Commission had considered R2A, and decided to grant approval to promote the 11th – 16th Respondents to the rank of ASP. This is reflected in the letter R2B.

There are several infirmities that arise from R2A and R2B. The first is that R2A does not contain any further details of the alleged "යම් අසාධාරණයක්" that the 11th – 16th Respondents had been subjected to, nor has the Inspector General of Police offered any explanation to this Court in this regard. The second is that a copy of the decision said to have been taken by the National Police Commission at its meeting held on 3rd November 2016 has not been briefed to this Court. The third is that in any event, R2B

too does not contain the reasons that led the National Police Commission to arrive at its decision disregarding the procedure laid down. The National Police Commission has not been forthright to this Court, and their actions lack transparency.

I must reiterate that the Department of Management Services not only created six vacancies in the post of ASP but a further twelve vacancies in the post of Superintendent of Police. Thus, with at least eighteen vacancies being available [as opposed to the nineteen claimed by the Petitioners] by the time the National Police Commission met on 3rd November 2016 and with the Inspector General of Police informing the National Police Commission that there were twenty-four other candidates who had faced the interview, the question that arises in my mind is what led the National Police Commission to limit the appointments to only the 11th – 16th Respondents, as opposed to considering all those who faced interviews in May 2015. While such a course of action would still have begged the question as to why the procedure of calling for applications to fill those vacancies was not followed, it would have at least shed some light as to why the decision was limited to six candidates.

In these circumstances, I am of the view that:

(a) The National Police Commission has failed to satisfy this Court that there existed exceptional circumstances that warranted a deviation from the Rules;

(b) The National Police Commission has deprived the Petitioners of the equal opportunity that should have been afforded to them to seek promotion to the rank of ASP;

(c) The National Police Commission has breached the trust placed in them;

(d) The decision of the National Police Commission to promote the 11th – 16th Respondents is unreasonable, arbitrary and irrational;

(e) The National Police Commission has infringed the fundamental rights of the Petitioners guaranteed by Article 12(1) of the Constitution.

I am however not inclined to quash the appointments of the 11th – 16th Respondents as the material before me does not indicate that the 11th – 16th Respondents have

manipulated the National Police Commission to have their promotions granted in an arbitrary manner. Furthermore, at least one more round of promotions have taken place after December 2016 which culminated in the appointment of the Petitioners to the rank of ASP, and the consequence of quashing the appointments of the 11th – 16th Respondents would gravely prejudice the 11th – 16th Respondents in that they would revert to their previous rank and cause administrative chaos within the Police Department.

Relief sought by the Petitioners

This brings me to the submission of the learned President's Counsel for the Petitioners that the Petitioners appointment to the rank of ASP be backdated to 24th March 2016. The basis for this argument is that the Petitioners have acquired additional qualifications during the period January 2014 and March 2016 and that, had applications been called afresh, the Petitioners would have scored more marks than what they did in May 2015, and possibly more marks than the 11th – 16th Respondents and that the failure to follow due procedure has deprived them of competing with the 11th – 16th Respondents on a level playing field.

While the Petitioners have certainly been deprived of the equal protection of the law, I am not inclined to backdate their promotions to 24th March 2016 for the following reasons:

(a) The Petitioners as well as the 11th – 16th Respondents barring the 15th Respondent have all been promoted to the rank of Chief Inspector of Police on the same date, thus entitling them to equal marks for period of service. Therefore, the Petitioners would not have scored more marks than the 11th – 16th Respondents for the period of service for which 50% of the marks are allotted;

(b) Although details of such additional qualifications the Petitioners claim they have acquired since January 2014 have not been disclosed in the petition, the Petitioners have annexed to the counter affidavit, a list of qualifications that the Petitioners claim they acquired during the aforementioned period. Even if that is correct, the Petitioners have failed to demonstrate the manner in which the said additional qualifications would improve their overall mark;

(c) The 11th – 16th Respondents too may have acquired additional qualifications during such period, and therefore, it is not possible for this Court to conclude that the Petitioners would have scored more marks than the 11th – 16th Respondents had fresh applications been called;

(d) Although it is only the Petitioners who have challenged the appointment of the 11th – 16th Respondents by way of this application, there may have been others holding the rank of Chief Inspector of Police who would have become eligible to apply had applications been called in 2016, and who may have scored more marks than the Petitioners had the proper procedure been followed.

Conclusion

Whilst acknowledging that the Petitioners have been unfairly treated as a result of the arbitrary action of the National Police Commission and that such injustice must be corrected, I am mindful that any decision of this Court must not adversely affect others holding the same rank as that of the Petitioners.

There are three matters that I have considered in deciding on the manner in which the injustice to the Petitioners could be corrected. The first is that no material has been placed before this Court to indicate that there were others who fared better than the Petitioners at the interviews that culminated in the promotion of the Petitioners in July 2018 and as a result have been placed above the Petitioners. The second is that of the other candidates who faced the interview in May 2015, there were several candidates who had obtained marks higher than some of the Petitioners – e.g. Chief Inspector of Police Deshapriya had marks higher than all Petitioners except the 2nd and 9th Petitioners. However, these candidates including Chief Inspector of Police Deshapriya had retired while holding the post of Chief Inspector of Police either prior to P6 or a few months after P6. Thus, the question of those who faced the interview in May 2015 but did not receive their promotions being prejudiced does not arise. The third is that according to the learned Deputy Solicitor General, even though the 11th – 16th Respondents have completed the required number of years required in the rank of ASP to be considered for promotion, they have not been promoted to the next rank due to the non-availability of vacancies.

In these circumstances, I am of the view that it would only be just and equitable for the Petitioners to be placed on par with the 11th – 16th Respondents in calculating the period of service required for promotion to the rank of Superintendent of Police. Thus, provided the Petitioners have fulfilled all other criteria required to apply for promotion to the rank of Superintendent of Police, the Petitioners shall be deemed to have become eligible to apply or be considered for promotion to the rank of Superintendent of Police on the same date that the 11th – 16th Respondents became eligible, with the period of service of the Petitioners in the rank of ASP deemed to have commenced on 24th March 2016, only for that purpose. This would afford the Petitioners an opportunity of competing with the 11th – 16th Respondents and equalise the level playing field that was distorted by the decision of the National Police Commission.

The National Police Commission shall pay a sum of Rs. 10,000 as costs to each Petitioner.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J

I agree.

JUDGE OF THE SUPREME COURT

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

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.

Mathiparanan Abraham Sumanthiran
3/1, Daya Road,
Colombo 00600

PETITIONER

Supreme Court Fundamental
Rights Application No. 37/2024

Vs.

1. Honourable Mahinda Yapa Abeywardana
Speaker of Parliament,
Parliament of Sri Lanka,
Sri Jayawardenapura Kotte

2. Honourable Attorney General,
Attorney Genenral's Department,
Colombo 01200

RESPONDENTS

Before : Priyantha Jayawardena PC, J
A.L. Shiran Gooneratne, J
Achala Wengappuli, J

Counsel : Suren Fernando with Khyati Wickramanyake for the petitioner

Sanjaya Rajaratnam PC, Attorney General with Viraj Dayaratne PC, ASG, Nirmalan Wigneswaran DSG and Medhaka Fernando SC for the Respondents

Argued on : 20th February, 2024

Decided on : 29th February, 2024

Petition

The petitioner filed the instant application, alleging that there was non-compliance with the determination made by the Supreme Court in legislating the 'Online Safety Bill'. Further, in the prayer to the petition, the petitioner prayed, *inter alia;*

"(b) Issue an **interim order** suspending the operation of the purported document published as "Online Safety Act No. 9 of 2024" (marked P9(a)-(c)), and / or such other appropriate order;

(c) **Declare** that the fundamental rights guaranteed by Articles 12(1) and 14 of the Constitution to the Petitioner and the citizens of Sri Lanka, have been infringed by the purported certification by the 1st Respondent of the 'Online Safety Act No. 9 of 2024" P9(a)-(e)), and that such conduct entails further imminent infringement of such rights, and amounts to a continuing violation of the said fundamental rights, and/or such other appropriate order;

(d) **Declare** that the fundamental rights guaranteed by Articles 12(1) and 14 of the Constitution to the Petitioner and the citizens of Sri Lanka, have been infringed by the 2nd Respondent, by failing to advise the 1st Respondent and/or Parliament that the purported Committee Stage Amendments did not make the Online Safety Bill compliant with the Determination of Your Lordships' Court and/or that the said Bill would still require a 2/3 Special Majority vote in order to be enacted into law;

(e) **Declare** that the purported certification of the 1st Respondent of the purported 'Online Safety Act' (P9(a)-(c)), is a nullity in law, and of no force and/or effect in law, and/ or such other appropriate order;

(f) **Declare** that the purported document published as "Online Safety Act No. 9 of 2024" (P9(a)-(c)) is *ultra vires* the Constitution and of no force and / or effect in law, and/or such other appropriate order;"

The petitioner stated that on the 18th of September, 2023 a Bill titled 'Online Safety Bill' was published in the Gazette. Further, since the provisions in the said Bill were inconsistent with the Constitution, the jurisdiction of this court was invoked in terms of Article 120 read with Article 121 of the Constitution by the petitioner and several others to determine whether any of the Clauses in the said Bill were inconsistent with the Constitution.

The petitioner stated that when the Bill was taken up for hearing in court on the 18th of October 2023, the learned Additional Solicitor General, who appeared in court on notice issued by court, proposed several amendments to the Bill and informed court that the said amendments would be moved at the Committee Stage in Parliament. After the hearing in court, the determination of the court was forwarded to the 1st respondent and the President of the Republic. Thereafter, the 1st respondent read out the determination in Parliament on the 7th of November, 2023.

Further, this court determined that several Clauses of the Bill were inconsistent with the Constitution, and thus, such Clauses should be passed in Parliament by a Special Majority. However, the court further determined that if the proposed amendments referred to in the determination were incorporated into the Bill, then the inconsistencies in the Bill would cease, and the Bill could be passed with a simple majority vote of Members of Parliament.

Moreover, on the 23rd of January 2024, the debate relating to the 'Online Safety Bill' commenced in Parliament. Furthermore, during the Committee Stage in Parliament, several Members of Parliament, including the petitioner, brought to the notice of the 1st respondent that there were several inconsistencies between the determination and the Committee Stage amendments proposed in Parliament. Further, the petitioner identified the said discrepancies and offered to list them out to Parliament or give them to the relevant Minister.

Thereafter, during the course of the Parliamentary proceedings, the petitioner was asked to speak to the Additional Solicitor General, who was present in the Public Officers' Box and was accompanied by the Assistant Secretary General of Parliament. There, the petitioner raised the issue of non-compliance with the determination made by this court but was informed that all of the amendments required by the Supreme Court would be incorporated into the Act. However, at the third reading, despite requests for a division, the 1st respondent proceeded to declare that the

Bill was passed without taking a vote thereon. The petitioner further stated that the Bill was not passed by a special majority vote in Parliament, either at the second reading or at the third reading.

The petitioner further stated that, in the absence of complying with the amendments suggested in the determination of the Supreme Court, the Bill was required to be passed by a special majority in Parliament. Hence, the speaker shall certify the Bill only if it has been passed by a special majority in Parliament.

The petitioner stated that in terms of Gazette Extraordinary No. 2368/25 dated 26th of January 2024, published by the President in terms of Article 70 of the Constitution, Parliament was prorogued with effect from midnight on the 26th of January, 2024, and was to commence its next session on the 7th of February, 2024. However, the 1st respondent purportedly certified the 'Online Safety Bill' on the 1st of February, 2024.

Thus, the purported certification is invalid in law as the purported certification took place while Parliament remained prorogued. Hence, the 'Online Safety Bill' has not become law. Further, the 'Online Safety Bill' cannot be considered as passed into law in terms of the Constitution, particularly in view of Article 123 read with Articles 79 and 80.

The petitioner stated that by purporting to endorse the certificate on the 'Online Safety Bill' under Article 79 of the Constitution, the 1st respondent has acted in violation of the Constitution and violated the Fundamental Rights of the petitioner and the citizens of Sri Lanka. In the circumstances, the petitioner stated that his Fundamental Rights and the Fundamental Rights of the citizens of Sri Lanka guaranteed under Article 12(1) have been violated by the actions of the 1st respondent.

Further, the purported act of the 1st respondent in endorsing the certificate of the said Bill amounts to executive and/or administrative action within the meaning of Article 17 read with Article 126 of the Constitution. In any event, the purported actions of the 1st respondent are *ultra vires* the Constitution and a nullity in law. Hence, the purported actions of the 1st respondent is not protected by any form of privilege or immunity.

Preliminary Objections raised by the respondents

When this application was supported in court, the Attorney General who appeared for the respondents raised the following preliminary objections;

(i) The matters urged in the petition do not fall within the ambit of 'executive and administrative action' referred to in Article 126 of the Constitution. In this regard, he drew the attention of court to averments in the petition and the prayer (b) to the petition. Hence, as the allegations levelled in the petition do not fall within the 'executive and administrative action', the instant application should be dismissed in *limine*. In support of his contention, he submitted that the powers of the legislature are set out in Chapter 11 of the Constitution and the allegation levelled in the petition falls outside the scope of 'executive and administrative' action.

(ii) Further, he drew the attention of court to the averments in the affidavit filed along with the petition and submitted that the matters referred to in the said averments had taken place in the chamber of Parliament. Therefore, such matters fall within Parliamentary privileges and thus, the courts have no jurisdiction to look into the matters referred to in the petition.

(iii) Moreover, the 1st respondent has certified the 'Online Safety Bill' under Article 79 of the Constitution. Hence, the court cannot consider the legality of the Act in view of Article 80(3) of the Constitution. In this regard, he cited the judgment delivered in ***Gamage v Perera* (2006) 3 SLR 354 at 359**.

(iv) Matters averred in the petition refers to the legislative process and therefore, Article 124 of the Constitution has ousted the jurisdiction of courts in considering the procedure that the 'Online Safety Bill' was enacted into law.

(v) In terms of section 3 of the Parliament (Powers and Privileges) Act the courts have no jurisdiction to consider the allegations stated in the petition as the said section has taken away the jurisdiction of courts with regard to matters relating to parliamentary affairs.

Do the events referred to in the petition constitute an executive or administrative action referred to in Article 126 of the Constitution?

The learned counsel for the petitioner contended that the 1st respondent purportedly issued the certificate on the 'Online Safety Bill' in terms of Article 79 of the Constitution. Thus, the 1st

respondent has acted in violation of and outside the provisions of the Constitution and violated the Fundamental Rights of the petitioner and the citizens of Sri Lanka. In this regard, it was submitted that, as the 1st respondent has acted outside the powers conferred on him by the Constitution, his actions do not fall within the 'business of Parliament'. Hence, the instant application can be maintained under Article 126 of the Constitution.

However, the Attorney General submitted that the matters referred to in the petition do not fall within Article 126 of the Constitution, and such matters refer to the legislative process. Thus, it needs to be considered whether the events referred to in the petition comes within the purview of the legislative process or amounts to an executive or administrative action referred to in Article 126 of the Constitution.

Legislative Process

The Constitution and the Standing Orders of Parliament provide for the presentation of two types of Bills in Parliament. Namely, Private Member's Bills and Government Bills. (Only Government Bills are discussed in this Order). A Government Bill is initiated by the line Ministry, and the Minister in charge of the subject will present a Cabinet Memorandum to the Cabinet of Ministers setting out the policy and the justification to enact the legislation and seeking the approval of the Cabinet of Ministers to draft the Bill. If the Cabinet of Ministers approves it, the line ministry will forward the said Cabinet Memorandum and the decision of the Cabinet of Ministers to the Legal Draftsman's Department to draft legislation.

After the Legal Draftsman prepares a draft Bill it will be sent to the Attorney General to examine the constitutionality of the Bill in terms of Article 77 of the Constitution. If the draft Bill is in conformity with the Constitution, a certificate is issued by the Attorney General in terms of Article 77(1) of the Constitution stating that the Bill is in conformity with the Constitution. Thereafter, the draft Bill will be forwarded to the Cabinet of Ministers by the Minister in charge of the subject, along with the certificate issued by the Attorney General, seeking the approval of the Cabinet of Ministers to publish the Bill in the Government Gazette and to table it in Parliament. After the approval of the Cabinet of Ministers is obtained, the Bill is tabled in Parliament and published in the Government Gazette. Once the Bill is read in Parliament, it will be deemed to have been read for the first time.

Once the Bill is placed in the Order Paper of Parliament, any citizen may challenge the constitutionality of a Bill in terms of Article 120 read with Article 121 of the Constitution, by filing a petition in the Supreme Court within fourteen days. If a Bill is challenged, the Supreme Court will determine, in terms of Article 123 of the Constitution, whether the Clauses in the Bill are inconsistent with the provisions of the Constitution.

Once the constitutional jurisdiction of the Supreme Court is invoked, no proceedings shall take place in Parliament in relation to such Bill until the determination of the Supreme Court has been made or until the expiration of three weeks from the date of filing such petition. Once the determination of the Supreme Court in respect of the Bill is delivered to the President and the Speaker, the Speaker shall read out the determination in Parliament. Thereafter, the second reading of the Bill will commence in Parliament. On the Second Reading of a Bill, a debate will take place in Parliament covering the general merits and principles of the Bill.

When a Bill has been read for the second time, upon a motion made by a Minister of the Cabinet of Ministers or a Deputy Minister, the Bill shall be referred to the Committee of the Whole Parliament or may be referred to a Select Committee or a Legislative Standing Committee or an appropriate Sectoral Oversight Committee for its views. Where the Bill has been referred to a Committee other than a Committee of the whole Parliament, no further proceedings should be taken until that Committee has reported to Parliament.

Thereafter, the third reading of the Bill takes place when a motion is made that the Bill be read for the third time and passed by a vote in Parliament. If a Sectoral Oversight Committee or the Legislative Standing Committee or a Select Committee has suggested amendments to the Bill, it will be read for the third time and passed after Parliament has considered the amendments proposed by the Committee.

After the Bill is passed by Parliament it will become law once the Speaker endorses the certificate specified in Article 79 of the Constitution.

Further, Article 80(1) of the Constitution states;

> *"Subject to the provisions of paragraph (2) of this Article, a Bill passed by Parliament shall become law when the certificate of the Speaker is endorsed thereon."*

Accordingly, the legislative process ends when the Speaker endorses the certificate. Hence, endorsing the certificate is not executive or administrative action.

Applicability of the Parliament (Powers and Privileges) Act

The Attorney General further submitted that the events referred to in the petition were events that took place within the course of parliamentary proceedings. Thus, the aforementioned events fall within the ambit of section 3 of the Parliament (Powers and Privileges) Act, and therefore, the courts have no jurisdiction to impeach or question the said events.

Section 3 of the Parliament (Powers and Privileges) Act states;

> *"There shall be freedom of speech, debate and* ***proceedings in Parliament*** *and such freedom of speech, debate or* ***proceedings shall not be liable to be impeached or questioned in any court or place out of Parliament****."*
>
> [emphasis added]

As stated above, the legislative process commences with the line Ministry forwarding a Memorandum to the Cabinet, seeking approval from the Cabinet to enact legislation on the matter referred to in the Memorandum. After the aforementioned procedure is completed, the Bill will be tabled in Parliament. Up to that stage of the Bill, all the necessary steps to enact legislation will take place outside Parliament.

Tabling of the Bill in Parliament is part of the business or proceedings of Parliament. However, Articles 120 to 124 of the Constitution have conferred power on the Supreme Court to consider the constitutionality of the Bill if the jurisdiction of the Supreme Court is invoked in terms of Article 120 read with Article 121 of the Constitution, notwithstanding the fact that the Bill is tabled in Parliament. Articles 120, 121, 122, 123 and 124 of the Constitution are an exception to the separation of powers enshrined in the Constitution and the Parliament (Powers and Privileges) Act.

Further, once a determination is made by the Supreme Court under Articles 122, it will be communicated to the President and the Speaker in terms of Article 121(3) of the Constitution.

Thereafter, the determination of the Supreme Court will be announced in Parliament by the Speaker. From that point onwards, the Parliament will take steps to pass the Bill in terms of the

Constitution and Standing Orders of Parliament until the Bill becomes law. Further, all such steps would be taken according to the legislative process of Parliament.

A careful consideration of the averments in the petition demonstrates that the events referred to in the petition fall under the legislative process of Parliament.

Further, Article 124 of the Constitution states;

> *"Save as otherwise provided in Articles 120, 121 and 122,* ***no court or tribunal created and established for the administration of justice, or other institution, person or body of persons shall in relation to any Bill, have power or jurisdiction to inquire into, or pronounce upon, the constitutionality of such Bill or its due compliance with the legislative process, on any ground whatsoever."***
>
> [emphasis added]

Moreover, the phrase *'its due compliance with the legislative process'* in Article 124 shows that the Supreme Court is vested with the jurisdiction to determine whether the legislative process has been duly complied with in respect of a Bill, subject to Articles 120, 121 and 122 of the Constitution.

However, once a Bill becomes law, in terms of Article 124 of the Constitution, no court or tribunal, etc. have the power or jurisdiction to consider the constitutionality of a Bill or its due compliance with the legislative process, on any ground whatsoever. The phrase *'on any ground whatsoever'* has been used by the legislation to give a wide meaning to said Article. Thus, this court has no power or jurisdiction to inquire into or pronounce upon the legislative process that has taken place in enacting the said Bill into law or the constitutionality of the Bill.

A similar view was expressed by a full bench of the Supreme Court in ***Wijewickrema v. Attorney General*** **(1982) 2 SLR 775** where it was held;

> *"On the alleged ground that 144 members of Parliament had signed and delivered undated letters resigning their office to His Excellency the President, the plaintiff contends that "the said 144 members of Parliament were incapable of voting according to the law and the Constitution for the Fourth Amendment to the Constitution on the 4th November, 1982, and that notwithstanding the purported certification of the Speaker of the Parliament that the Fourth Amendment to the*

Constitution has been duly passed by a two-thirds majority of Parliament, the Fourth Amendment to the Constitution is not a Bill that has been duly passed by the Parliament at all and cannot therefore be submitted to the People at a Referendum.

…

…

The fundamental question involved in this action is whether Article 124 of the Constitution bars the jurisdiction of any Court to decide the constitutional issue raised by plaintiff.

In our view the plaintiff's action involves basically the question whether the Fourth Amendment to the Constitution has been validly voted upon as a Bill for the amendment of the Constitution. Our unanimous decision in this basic question is that the Court is barred by the provisions of Article 124 of the Constitution which provides:

> *"Save as otherwise provided in Article 120, 121 and 122 no Court ……shall in relation to any Bill, have power or jurisdiction to inquire into, or pronounce upon, the constitutionality of such Bill or its due compliance with the legislative process, on any ground whatsoever."*

from inquiring into or pronouncing upon the validity of the Bill for the amendment of the Constitution, referred to in the plaint."

Applicability of Article 80(3) of the Constitution

Further Article 80(3) of the Constitution states;

> *"Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be being endorsed thereon,* ***no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever****."*

[emphasis added]

It was submitted by the learned counsel for the petitioner that the provisions stipulated under Article 80(3) would not be a bar to reviewing the constitutionality of a Bill passed purportedly by Parliament if due legislative process stipulated in the Constitution has not been complied with. Hence, it was submitted that the certificate of the Speaker does not provide validity to the legislative process, which has missed a vital step in legislating the Act.

Article 80(1) of the Constitution states that a Bill passed by Parliament becomes law upon the Certificate of the Speaker "being endorsed thereon". Further, in terms of Article 80(3) of the Constitution, no court or institution administering justice may "*inquire into, pronounce upon or in any manner call in question, the validity of an Act on any ground whatsoever".* Moreover, the phrase "*on any ground whatsoever"* in the said Article has ousted the jurisdiction of courts, tribunals, etc. in considering the validity of a law after the Speaker endorses the certificate under Article 79 of the Constitution, even if an Act is passed in Parliament without adhering to the due legislative process as stipulated in the Constitution.

A similar view was held in ***Gamage v Perera* (2006) 3 SLR 354 at 359** where it was held;

> *"Article 80(3) of the Constitution refers to a Bill becoming law and reads as follows:*
>
> *"Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no Court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever".*
>
> *The aforesaid Article thus had clearly stated that in terms of that Article, the constitutional validity of any provision of an Act of Parliament cannot be called in question after the certificate of the President or the Speaker is given. Reference was made to the provisions in Article 80(3) of the Constitution and its applicability by Sharvananda, J. in re the Thirteenth Amendment to the Constitution and had expressed his Lordship's views in the following terms:*
>
> *Such a law cannot be challenged on any ground whatsoever even if it conflicts with the provisions of the Constitution, even if it is not competent for Parliament to enact it by a simple majority or two third majority."*

In the circumstances, Article 80(3) of the Constitution has taken away the power and the jurisdiction of this court in inquiring into, pronouncing upon the matters referred to in the petition filed in the instant application, including the legality of the endorsement made by the 1st respondent in the certificate issued to the 'Online Safety Bill'.

Applicability of Article 70 of the Constitution

The counsel for the petitioner submitted that the 1st respondent has endorsed the certificate under Article 79 of the Constitution when Parliament remained prorogued. Hence, the 1st respondent is not entitled in law to make the endorsement in the certificate of the Bill. Thus, the Bill has not become law in terms of Article 80(1) of the Constitution.

Article 70 (3) and (4) of the Constitution reads as follows;

> *"(3) A Proclamation proroguing Parliament shall fix a date for the next session, not being more than two months after the date of the Proclamation:*
>
> *Provided that at any time while Parliament stands prorogued the President may by Proclamation –*
>
> *(i) summon Parliament for an earlier date, not being less than three days from the date of such Proclamation; or*
>
> *(ii) subject to the provisions of this Article, dissolve Parliament.*
>
> *(4) All matters which, having been duly brought before Parliament, have not been disposed of at the time of the prorogation of Parliament, may be proceeded with during the next session."*

Article 70(4) of the Constitution refers to matters pending before Parliament at the time of the prorogation of Parliament. As stated above, the certificate issued by the 1st respondent under Article 79 of the Constitution is the last step in the legislative process. Hence, in terms of Article 124 of the Constitution, this court has no power or jurisdiction to consider whether the certificate issued by the 1st respondent in respect of the Bill is contrary to Article 70 of the Constitution, and thereby the 'Online Safety Bill' has not become law.

Mistakes or omissions in enacting legislation

If any mistakes or omissions takes place in the legislative process in enacting laws the remedy is to amend the relevant law. Such an amendment can be effected either by an amendment proposed by the Government or by way of an amendment brought before Parliament as a Private Members Bill.

Erskine May *Parliamentary Practice* (24th Edition) at page 183 states;

> *"... A law might be unjust or contrary to sound principles of government; but Parliament was not controlled in its discretion, and when it erred, its errors could be corrected only by itself ..."*

Hence, if the suggestions made in the determination with regard to the 'Online Safety Bill' have not been incorporated into the Bill before it was passed into law, either the Government or a Member of Parliament can take steps to move an amendment in Parliament to rectify such errors or omissions in enacting the legislation. Furthermore, in view of the aforementioned ouster clauses in the Constitution, the legislative process is not justitiable.

The learned counsel for the petitioner cited ***Jackson and others v Her Majesty's Attorney General*** **[2005] UKHL 56** in support of his contention. However, the said case has no application to the instant application as ouster clauses in respect of the legislative process and post review of laws have been enshrined in our Constitution.

Conclusion

A careful consideration of the provisions of the Constitution shows that the legislature has intentionally ousted the jurisdiction of courts, tribunals, etc., not only reviewing the legislation passed by Parliament but also the legislative process in enacting legislation 'on any ground whatsoever'. In this regard, the legislature has included two separate Articles in the Constitution to oust the jurisdiction of courts, tribunals, etc. Thus, it shows the importance placed by the drafters of the Constitution in preventing courts, tribunals, etc. from interfering not only with the legislative process but also the laws passed by Parliament. Thus, Articles 80(3) and 124 of the Constitution have prevented the post legislative scrutiny of Acts passed by Parliament 'on any ground whatsoever'.

Moreover, the phrase ‘on any ground whatsoever’ prevents this court exercising power or jurisdiction in considering the matters referred to in the instant petition as they refer to the legislative process.

In the circumstances, the preliminary objections raised by the Attorney General are upheld. Therefore, leave to proceed is refused and the application is dismissed without costs.

Priyantha Jayawardena PC, J

Judge of the Supreme Court

A.L. Shiran Gooneratne, J

Judge of the Supreme Court

Achala Wengappuli, J

Judge of the Supreme Court

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

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

1. Jayasinghe Herath Mudiyanselage Kusum Indika Jayasinghe,
   No. 14, 3rd Lane,
   Dharmasoka Mawatha, Aruppola, Kandy.

2. Jayasinghe Herath Mudiyanselage Swetha Arundathi Jayasinghe,
   No. 14, 3rd Lane,
   Dharmasoka Mawatha, Aruppola, Kandy.

Petitioners

SC/FR Application No. 38/17

Vs.

1. Secretary,
   Ministry of Education,
   'Isurupaya', Battaramulla.

2. I. Withanachchi,
   Principal,
   Mahamaya Girls College, Kandy.

3. Y.M.T. Kumarihamy,
   Principal, Sangamitta Girls School, Matale.

(Chairman, Board of Appeals and Objections)

4. H.M.P.K. Nawaratne,
Vice Principal,
Kingswood College, Kandy.
(Member, Board of Appeals and Objections)

5. K.P.C. Kurukulasuriya,
Secretary,
Mahamaya Girls College, Kandy.

6. S.A.R.A. Senaweera,
Mahamaya Girls College, Kandy.

7. T.S. Kodikara, Agent for School Development Society, Mahamaya Girls College, Kandy. (Member, Board of Appeals and Objections)

8. S.D. Nawaratne, Member of Old Girls Union, Mahamaya Girls College, Kandy. (Member, Board of Appeals and Objections)

3rd to 8th Respondents are members of the Board of Appeals and Objections

9. C.L. Mabopitiya (minor)

10. M.S. Jayaratne (Guardian for the 9th Respondent)

Both of No. 66/32A, Rajapihilla Mawatha, Kandy.

11. N.D.H. Hettiarachchi (minor)

12. G.C.H. Hettiarachchi (Guardian for the 11th Respondent)
    Both of No. 199 B1/1,
    Rajapihilla Mawatha, Kandy.

13. W.S.A.V. Abhimani (minor)

14. W.S.A.D.D. Senarathne (Guardian for the 13th Respondent)
    Both of No. 16/1, Tekkawatta, Tennakumbura, Kandy.

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

Respondents

Before : Priyantha Jayawardena PC, J
: A.H.M.D. Nawaz, J
: Achala Wengappuli, J

Counsel : S.N. Vijithsingh for the Petitioners.

: Rajitha Perera, DSG for the Respondents.

Argued on : 15th February, 2024

Decided on : 29th February, 2024

Priyantha Jayawardena PC, J

Facts of the case

The instant application was filed challenging the refusal to admit the 2nd petitioner to Grade 1 of Mahamaya Girls College, Kandy, for the Year 2017. The 1st petitioner has made the application to admit the 2nd petitioner to the said school based on the "children of occupants in close proximity to the school" category.

The 1st petitioner stated that the scheme of admission to Grade 1 of National Schools for the Year 2017 was published by the Ministry of Education in Circular No. 17/2016 dated 16th of May, 2016. As per Clause 6.0(a)(i) of the said scheme, 50% of the vacancies in Grade 1 of a school would be filled by "children of occupants in close proximity to the school".

The 1st petitioner further stated that he, his spouse and his daughter, the 2nd petitioner, reside at No. 14, 3rd Lane, Dharmasoka Mawatha, Aruppola, Kandy. He stated that he has been living in the said premises since his childhood. Further, he purchased the said premises in the year 2001 by Deed of Transfer bearing No. 41054 dated 15th of February, 2001 and the 2nd petitioner was born in the said residence.

Furthermore, the 1st petitioner stated that he submitted an application to admit the 2nd petitioner to Grade 1 of Mahamaya Girls Collage in the Year 2017 under the children of occupants in close proximity category. Further, he is qualified to apply under the occupant's category as he was residing in the said house for over 21 years. The 1st petitioner stated that the distance from their residence to the nearest boundary of Mahamaya Girls College is 1.2 km.

The 1st petitioner stated that the 2nd respondent requested him to attend an interview on the 22nd of September, 2016, by letter dated 24th of August, 2016. At the interview, the relevant documents were examined and the 2nd petitioner was given only 85 marks out of 100.

Furthermore, under Clause 6.1 (III)(a) of the Circular, out of 50 marks, 5 marks are deducted for each school in closer proximity to the petitioner's residence than the school under consideration. However, the 1st petitioner stated that instead of deducting only 10 marks from 50 for the schools situated closer to the residence of the 1st petitioner namely, D.S. Senanayake Vidyalaya and

Dharmasoka Vidyalaya, further 5 marks were deducted by including Hemamali Vidyalaya as a school closer to his house than Mahamaya Girls College. Hence, 15 marks were deducted from 50. In total, the 2nd petitioner was given 85 marks out of 100 instead of 90 out of 100.

It was further stated that the said Hemamali School is situated far away from the 1st petitioner's residence, across the Udawatta Kele Sanctuary. Moreover, Clause 6.0(f) of the said Circular states that marks should not be deducted if there are rivers, lagoons, marshy lands, forest etc. that restrict access between a residence and a school in close proximity.

The 1st petitioner stated that on the 7th of October, 2016, the provisional list of selected students and the waiting list were displayed on the notice board of the Mahamaya Girls College and the names of 85 children were displayed as selected students. The 2nd petitioner's name was displayed as No. 5 in the waiting list.

Being aggrieved by the decision not to admit the 2nd petitioner to Mahamaya Girls College, the 1st petitioner forwarded an appeal to the 2nd respondent dated 17th of October, 2016. Further, the 2nd respondent by her letter dated 19th of December, 2016, informed the 1st petitioner that the cut off mark was 85. However, though the 2nd petitioner's mark is same as the cut off mark, her name was displayed on the waiting list.

Thereafter, on the 10th of December, 2016, the final list of selected students and the names of the students in the waiting list were displayed on the notice board of the Mahamaya Girls College. Accordingly, 85 names were displayed as selected students and the 2nd petitioner's name was displayed as No. 3 in the waiting list.

The 1st petitioner stated that he has a legitimate expectation that the 2nd petitioner's name would be included in the final list of selected students as Mahamaya Girls College was close to his residence.

Moreover, as the 2nd petitioner was not admitted to Mahamaya Girls College, he sent a letter to the 2nd respondent requesting necessary action to be taken to admit the 2nd petitioner to Year 1 of the Mahamaya Girls College. However, he did not receive a response to the said letter.

In the circumstances, the petitioners stated that the refusal by the respondents to admit the 2nd petitioner to Mahamaya Girls College is arbitrary, capricious, unreasonable and against the legitimate expectation of the petitioners. Thus, it was stated that the Fundamental Rights guaranteed to the 2nd petitioner under Article 12(1) of the Constitution was violated by the respondents.

After the application was supported by the counsel for the petitioner, this court granted leave to proceed with the said application under Article 12(1) of the Constitution.

Statement of Objections of the 2nd respondent

The Principal of Mahamaya Girls College, Kandy, the 2nd respondent, filed objections and stated that D.S. Senanayke Vidyalaya, Dharmasoka Vidyalaya and Hemamali Vidyalaya are schools closer to the residence of the petitioners than Mahamaya Girls College, Kandy. Therefore, in terms of Clause 6.0(f) read with Clause 6.1(III)(a) of the School Admission Circular No.17/2016, a total of 15 marks was deducted from 50, for schools in closer proximity to the petitioner's residence.

Moreover, Clause 8.3(b) of the School Admission Circular No.17/2016 states that in the event several applicants obtain the same marks, those applicants are required to be ranked in the order of proximity to the school, with those living closest to the school ranking higher than those who live further away from the school. Accordingly, all applicants who obtained 85 marks were ranked according to their proximity to the school and the first five applicants closest to the school were included in the final list, while the remaining applicants were placed in the waiting list. The 2nd petitioner was placed third in the waiting list.

Further, as two applicants selected for admission to Mahamaya Girls College, Kandy declined to attend the said school, the two applicants who were placed first and second in the waiting list were admitted to Grade 1 of Mahamaya Girls College, Kandy. Accordingly, the 2nd petitioner became the first on the waiting list. However, as there were no vacancies left in Grade 1 of Mahamaya Girls College, Kandy, the 2nd petitioner was not admitted to the school.

Hence, the 2nd respondent stated that the respondents acted according to law and have not infringed the Fundamental Rights of the petitioners.

Did the proximity calculation adhere to the Circular?

It is common ground that the 2nd petitioner was allocated 85 marks out of 100 on the basis that there were three schools in closer proximity to her residence.

Clause 6.0 (f) of the Circular No. 17/2016 dated 16th of May, 2016, states that when calculating the distance from one's residence to the school, the aerial distance should be taken. Further, marks should be deducted for each school that falls within the distance stipulated by the said Circular applicable to student admission. The said Circular states that if it is not possible to travel to a school due to a natural cause such as rivers, lagoons, marshes, forests, etc., then the marks should not be deducted.

Clause 6.0 (f) of the Circular states;

> *"පදිංචි ස්ථානයේ සිට පාසලට ඇති ආසන්නතාවය සලකා බැලීමේ දී පාසලේ සිට පදිංචි නිවස සඳහා වූ අහස් දුර ගණනය කරන අතර රජයේ මිනින්දෝරු දෙපාර්තමේන්තුව මගින් නිකුත් කර ඇති සිතියම භාවිතා කළ යුතු ය. අයදුම්කරුගේ නිවස (ප්‍රධාන දොරටුව) කේන්ද්‍රය කර ගෙන ඉල්ලුම් කරන පාසලේ ප්‍රධාන කාර්යාලයට (ප්‍රාථමික අංශය වෙන ම ස්ථානයක පවතින්නේ නම් එම කාර්යාලයට) ඇති දුර අරය ලෙස ගෙන අඳින වෘත්තයක සීමාව තුළට ඇතුළත් පාසල් සඳහා ලකුණු අඩු කරනු ලැබේ. යම් පාසලක් ඉහත වෘත්ත සීමාව තුළ පිහිටිය ද පවතින ස්වාභාවික බාධාවන් නිසා (උදා: ගංගා, කලපු, වගුරු බිම්, රක්ෂිත වනාන්තර ආදිය) එම පාසලට ගමන් කිරීමට නොහැකි නම් අදාළ පාසලට ලකුණු අඩු නොකළ යුතු ය."*

A careful consideration of the map produced marked as '2R7' by the petitioners, shows that Udawatta Kale Sanctuary lay between Hemamali Vidyalaya and the residence of the petitioner. Clause 6.0 (f) of the Circular states that even though the distance is calculated using the aerial distance, if the path to the school is blocked by a natural cause such as a sanctuary (forest), then marks shall not be deducted for that school. Therefore, the respondents cannot deduct 5 marks on the basis that Hemamali Vidyalaya is closer to the residence of the petitioners. Hence, the 2nd petitioner is entitled to 90 marks out of 100.

Conclusion

In the aforementioned circumstance, the 2nd petitioner is entitled to an additional 5 marks as Hemamali Vidyalaya cannot be taken into consideration in deducting marks. Thus, the 2nd petitioner is entitled to 90 marks out of 100 in the children of occupants in close proximity category. However, the 2nd petitioner was not admitted to the school alleging that she did not obtain the required marks to gain admission to Mahamaya Girls College, Kandy.

In view of the above, I am of the opinion that the petitioners have established the violation of their Fundamental Rights guaranteed under Article 12(1) of the Constitution by the respondents. Further, the respondents have violated their Fundamental Rights guaranteed under Article 12(1) of the Constitution.

In the circumstances, I direct the respondents to admit the 2nd petitioner to a suitable grade in Mahamaya Girls College, Kandy within two weeks from the receipt of this judgment, and to pay a sum of Rs. 100,000/- to the petitioners.

I further direct the Registrar of this court to send copies of this judgment to the respondents to act in terms of the law.

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

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. NO. 50/2021

1. D. Wathsala Subhashini De Silva
78/E, Gangarama Road, Urawatte,
Ambalangoda.

2. Menuwara Gedara Viheli Sehansa
Devhari Samarathunga
78/E, Gangarama Road, Urawatte,
Ambalangoda.

PETITIONERS

Vs.

1. Hasitha Kesara Wettimuni
Former Principal of Dharmasoka College,
C/O, Principal, Dharmasoka College,
Ambalangoda.

1A. Sanuja Jayawickrama
Principal,
Dharmasoka College,
Ambalangoda.

2. B. Anthony
Secretary,
Interview Board,
C/o Principal,
Dharmasoka College,
Ambalangoda.

3. T.M. Dayaratne
Member,
Interview Board,
C/o Principal,
Dharmasoka College,
Ambalangoda.

4. L.N. Madhavi Dedunu
Member,
Interview Board,
C/o Principal,
Dharmasoka College,
Ambalangoda.

5. N. Channa Jayampathi
Member,
Interview Board,
C/o Principal,
Dharmasoka College,
Ambalangoda.

6. Gamini Jayawardene
Chairman,
Appeals and Objections Investigation Board,
Principal,
Mahinda College,
Galle.

7. Rekha Malawaraarachchi
Secretary,
Appeals and Objections Investigation Board,
C/o, Principal,
Dharmasoka College,
Ambalangoda.

8. J.P.R. Malkanthi
Member,
Appeals and Objections Investigation Board,
C/o, Principal,
Dharmasoka College,
Ambalangoda.

9. S.A.B.L.S. Arachchi
Member,
Appeals and Objections Investigation Board,
C/o, Principal,
Dharmasoka College,
Ambalangoda.

10. Rasika Prabhoda Hendahewa
Member,

Appeals and Objections Investigation Board,
C/o, Principal,
Dharmasoka College,
Ambalangoda.

11. Prof. Kapila C.K. Perera
Former Secretary to the Ministry of Education,
C/o Secretary,
Ministry of Education,
'Isurupaya',
Battaramulla.

11A. M. N. Ranasinghe
Secretary,
Ministry of Education,
'Isurupaya'

12. Sobanahandi Dilani
No.77/B/1, Gangarama Road,
Urawatte,
Ambalangoda.

13. R.T. Dahamsara de Zoysa
No.77/B/1, Gangarama Road,
Urawatte,
Ambalangoda.

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

RESPONDENTS

BEFORE : **P. PADMAN SURASENA, J.**
MAHINDA SAMAYAWARDHENA, J. &
ARJUNA OBEYESEKERE, J.

COUNSEL : Shyamal A. Collure with Prabhath S. Amarasinghe,
A.P. Jayaweera instructed by Ravindra Silva for the Petitioners.
Ganga Wakishta Arachchi DSG for the Respondents.

ARGUED &
DECIDED ON : 08-01-2024.

P. PADMAN SURASENA, J.

Court heard the submissions of the learned Counsel for the Petitioner as well as the submissions of the learned Deputy Solicitor General and concluded the argument.

The 1st Petitioner is the mother of the 2nd Petitioner who is a minor and whose admission was sought to the school of which the 1A Respondent is the Principal. The 1st Respondent has produced (marked **1R2**), the application made by 1st Petitioner seeking the admission of her child (the 2nd Petitioner) to the above school from the "close proximity category". According to the said application (**1R2**), the address of the permanent residence of the Petitioners is mentioned as No. 78/E Gangarama Road, Urawatta, Ambalangoda.

The 1st Petitioner has also produced the Deed (marked **P4**) and the plan relevant to the property (marked **P14**). The Petitioners' residential premises is depicted as Lot X in Plan No. 2134/2015 (**P14**) in which two permanent buildings marked "P" have been clearly depicted. It is important to note that both the permanent buildings are situated within the afore-said Lot X.

It is not disputed between parties that there are two houses in the Petitioners' compound: one an old house; the other, a newly constructed house.

We observe that the 1st Petitioner has claimed her entitlement to admit her child, the 2nd Petitioner on the basis that they are living in house No. 78/E (old house).

The learned Deputy Solicitor General conceded before this Court that if in fact the Petitioners are living in the old house, the school authorities must admit the 2nd Petitioner to the relevant school. Thus, the issue we have to decide is whether the Petitioners are entitled to succeed with their application for the admission to the relevant school on the basis of their claim that they live in the address provided in the application they had submitted. i.e. No. 78/E, Gangarama Road, Urawatta, Ambalangoda.

Although, the learned Deputy Solicitor General concedes that the child must be admitted if the Petitioners' family is living in the old house, the school authorities had not admitted the child. The reason provided to this Court by the learned Deputy Solicitor General for not admitting the 2nd Petitioner to the school is the fact that the Petitioners' family is in fact living

in the newly constructed house and not in the old house. Moreover, it is the submission of the learned Deputy Solicitor General that the distance to the school was measured from the newly constructed house as that was the premises shown by the Petitioners to the school authorities.

At the outset, we need to state here that, so long as both premises (the old house and the new house) and the land on which those houses are situated, are owned by the 1st Petitioner; so long as there is no other family living in any of those two houses; so long as the Petitioners have submitted the other relevant documents such as Water Bills, Electoral Registers & Electricity Bills, it should be irrelevant for the school authorities to go on the voyage of discovery as to which part of the premises owned by the Petitioners' is actually occupied by the Petitioners' family. Indeed, it is not disputed that the school authorities have awarded marks for those documents submitted by the Petitioners. However, we wish to add a caution that the position might have been different if another family is found living in one of those houses. In the absence of any other family living in any of these houses, we have no basis to hold that the 1st Petitioner, for the purposes of the application for the admission of her child to the relevant school, is not occupying the old house.

The Petitioners are relying on the documents produced (marked **Y19** and **Y20**) to further establish this fact.

According to these two documents, the old house is a house which is 35 years old and is the house which has been assigned the Assessment No. 78E. Those two documents also establish that the new house has not been assigned any Assessment Number.

It appears from the document **Y19** that the new house has been constructed without a proper approval from the Rajgama Pradeshiya Sabha. Indeed, the document **Y20** states (a letter by the Divisional Secretariat, Madampagama) that it is not certain as to which house of the compound has been assigned the Assessment No. 78E.

In the factual circumstances of this case, we are of the view that the Petitioners are free to reside in any of the houses they own. As to which portion of their properties (in the same compound) the Petitioners must reside should not be a serious matter for the school authorities to decide on the application to admit the child particularly in view of the fact that no other family is occupying any of those houses as has already been mentioned earlier.

We also wish to add that we are mindful that the parties are not permitted to rely on documents obtained after completion of the admissions/ interview process in School Admission cases. Documents produced marked **Y19** and **Y20** are documents which the 1st Petitioner had obtained subsequently in order to establish the injustice she had suffered at the hands of the School Authorities.

We note that one need not rely on the documents marked **Y19** and **Y20** to establish that the School Authorities had infringed the Fundamental Rights of the Petitioners guaranteed to them under Article 12 (1) of the Constitution as on the face of the application made by the 1st Petitioner, the school authorities should have admitted the 2nd Petitioner to the school on merits. We are unable to accept the reason provided by the learned Deputy Solicitor General for the refusal by the School Authorities to admit the child. Thus, the presence of the documents produced marked **Y19** and **Y20** before us would not create any new grounds for the Petitioners' success. In other words, even in the absence of **Y19** and **Y20** which are documents obtained at a later stage, the original decision made by the school authorities not to admit the 2nd Petitioner to the school still remains illegal. Therefore, one does not have to rely on the subsequently obtained documents (**Y19** and **Y20**) to decide that the 2nd Petitioner should have been admitted to the relevant school on the application submitted by the 1st Petitioner.

We have already held that on the material adduced by the 1st Petitioner with the application and as per the relevant provisions in the relevant circular produced marked **1R1**, the School Authorities should have admitted the 2nd Petitioner to the relevant school. The refusal by the School Authorities to admit the 2nd petitioner to the relevant school is therefore an infringement of the Fundamental Rights of the Petitioners guaranteed to them under Article 12(1) of the Constitution.

It also must be mentioned here that it is not the position of the School Authorities, that the premises in which two permanent buildings are situated is not owned by the 1st Petitioner.

For the forgoing reasons, we decide to grant a declaration that the Petitioners' Fundamental Rights enshrined in Article 12(1) of the Constitution have been infringed by the respondent school authorities.

We direct the incumbent Principal of Dharmashoka College Ambalangoda (1A Respondent) to admit the 2nd Petitioner to the relevant grade as the 2nd Petitioner was entitled to have been admitted to Grade-I of Dharmashoka College, Ambalangoda in the year 2021. We make no order for costs.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J
I agree,

JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE, J
I agree,

JUDGE OF THE SUPREME COURT

Mks

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

The matter of an application under and in terms of Article 126 read together with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. P. D. A. Panapitiya,
   No. 36/2,
   Kaduboda,
   Delgoda.

2. H. L. H. Gayathri Hewawasam,
   No. 36/2,
   Kaduboda,
   Delgoda.

SC/FR Application No. 136/2022

Petitioners

Vs.

1. Mangala De Soyza Amarasekara,
   Chief Inspector of Police,
   Officer in Charge,
   Police Station,
   Kosgoda.

2. Asela Premanath De Silva,
   Inspector of Police,
   Officer in Charge, Crimes Division,
   Police Station,
   Kosgoda.

3. Wickrama Dilan Indika De Silva,
   Police Sergeant (9476),
   Police Station,
   Kosgoda.

4. U. M. Amarasiri,
   Assistant Superintendent of Police I,

Officer of Assistant Superintendent of Police,
Ambalangoda.

5. Y. L. Leelawansa,
Senior Superintendent of Police,
SSP's Office,
Elpitiya.

5A. Mahesh Kumarasinghe,
Superintendent of Police,
SSP's Office,
Elpitiya.

6. D. S. Wickramasinghe,
Senior Superintendent of Police,
Special Investigation Unit (SIU),
Technical Junction,
Colombo 10.

7. M. D. R. S. Daminda,
Senior DIG Southern Province,
Senior DIG's Office,
Anagarika Dharmapala Mawatha,
Matara.

7A. Ajith Rohana,
Senior DIG Southern Province,
Senior DIG's Office,
Anagarika Dharmapala Mawatha,
Matara.

7B. Mr.S.C. Medawatta,
Senior DIG Southern Province,
Senior DIG's Office,
Anagarika Darmapala Mawatha,
Matara.

8. C. D. Wickramarathne,
Inspector General of Police,
Police Headquarters,
Colombo 01.

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

Respondents

Before :

P. Padman Surasena, J
Janak De Silva, J
K. Priyantha Fernando, J

Counsel :

Geeth Karunarathna with Bhagya Peiris for the Petitioners.

Anoopa de Silva, DSG for Respondents.

Argued on : 13.10.2023

Decided on : 31.01.2024

K. PRIYANTHA FERNANDO, J

1. The petitioners in the instant case alleged that the fundamental rights guaranteed to them in terms of Articles 12(1), 13(1), 13(2), 13(5) and 14(1)(g) of the Constitution of Sri Lanka had been infringed due to the actions and or inactions of the respondents. At the hearing of this application, this Court was inclined to grant leave for the alleged violations of Articles 12(1), 13(1), 13(2) and 14(1)(g) of the Constitution. The Court was also inclined to grant interim relief prayed for as per prayers (c), (d) and (e) of the petition dated 08.04.2022.

The Petitioners' version

2. The 1st and the 2nd petitioners in this case (hereinafter sometimes referred to as the petitioners) are husband and wife. The 1st petitioner has been a police constable (No. 28442) attached to the Vice Branch of the *Kosgoda* Police Station.

3. The petitioners state that, during the 1st petitioner's tenure in the police force, he has carried out his duties vigilantly providing the fullest support to *Mr. Bandara,* who was the Officer in Charge

(OIC) of the Vice Branch in the *Kosgoda* Police Station. The 1st respondent has been the OIC of the police station, the 2nd respondent has been the OIC of the crimes division and the 3rd respondent has been a sergeant attached to the said police station. The petitioners state that, the 1st-3rd respondents have at times pressured the 1st petitioner to release several suspects who were involved in his investigations relating to drug trafficking offences. However, he has disregarded these unlawful interferences of the 1st-3rd respondents and carried out his duties. The petitioners state that, this course of events has led the 1st-3rd respondents to develop an animosity with him.

4. On 02.11.2021, at about 11:00 a.m. while the 1st petitioner was waiting in the hall next to the Vice Branch of the *Kosgoda* police station, the 1st-3rd respondents have made an accusation that the 1st petitioner was consuming illicit drugs while waiting in the reading hall of the police premises. The OIC of the Vice Branch has been away on official duty in *Ambalangoda* on this day. At about 2:00 p.m. on the same day, the 1st petitioner has been informed to come to the office of the 1st respondent. On his way there, the 3rd respondent has uttered the words "මල්ලී උඹ මෙහෙ ඇවිල්ලා දැගලුවා වඩියි, බලාගනින් උඹට මොකද වෙන්නේ කියලා, උඹේ ජොබ් එකට කෙලිනවා". The 1st and the 2nd respondents have also made similar remarks to the 1st petitioner.

5. The 4th respondent who was the Assistant Superintendent of Police (ASP) of the *Ambalangoda* division has come to the office of the 1st respondent and threatened him in foul language stating "ආ.. තෝද මිනිහා, ඉදපන් මම උඹට කෙලෝලා ගන්නම්, තොගේ ජොබ් එකට මං කෙලිනවා, තෝ හිරේ තමයි යවන්නේ.". The 1st petitioner states that this has been a well-planned conspiracy by the respondents in order to frame him. The 1st petitioner states that, almost all the senior officers were involved in this accusation. He has been in shock and as he could not defend himself, he has immediately left the *Kosgoda* police station.

6. When the 1st petitioner returned home, he was informed that the 1st and the 2nd respondents have arrived at his residence along with a few other police officers and has taken his wife (the 2nd

petitioner) and their son who was nine months of age at the time to the *Kosgoda* police station. They have not been given a reason for their arrest and have been detained at the police station for more than five hours. The 2nd petitioner has been subject to questioning and the 1st and the 2nd respondents have also tried to record a statement from the 2nd petitioner to the effect that the 1st petitioner is consuming illicit drugs. The 2nd petitioner has lodged a complaint in the Human Rights Commission (HRC) with regard to her arrest and it has received the attention of the HRC.

7. The 1st respondent filed a B-report on 03.11.2021 [P-4A] before the learned Magistrate of *Balapitiya* under the case bearing no. 42474, stating that he received a complaint from the 2nd respondent that the 3rd respondent has informed him that the 1st petitioner was consuming heroin in the reading hall of the police station. It was stated in the B-report that this constitutes an offence under section 09 of the Poisons Opium and Dangerous Drugs Ordinance No. 13 of 1984. Whatever that was discovered in searching the premises has been made productions and the 1st respondent has also moved the Magistrate's Court to call for a Government Analyst Report.

8. The petitioners state that, subsequent to the filing of charges under B 42474, by letter dated 02.11.2021 [P-9] issued by the 4th respondent who was the Assistant Superintendent of Police (ASP), the 1st petitioner has been interdicted from the police service with immediate effect. Thereafter, the 1st petitioner has received a letter dated 24.12.2021 [P-11] informing him that an inquiry would be held regarding his interdiction and that the 1st respondent should be reported to the office of the 4th respondent to make a statement. However, the 1st petitioner has not attended the said inquiry.

9. The 1st petitioner, upon getting to know that a B-report has been filed against him, has on his own appeared for a '*Drug abuse screening profile, urine, rapid test'* on 07.11.2021 and obtained a report [P-5] from the *Nawaloka Laboratory Colombo*. This test identifies whether any person has consumed any illicit substance three months prior to the date of testing. The said report

indicated that no illicit substance has been detected. Thereafter, on 10.11.2021 by filing a motion to the case no. 42474 the 1st petitioner has surrendered himself to the Magistrate Court of *Balapitiya*. The learned Magistrate has enlarged him on bail but was ordered to be produced before the Judicial Medical Officer (JMO) of *Balapitiya* in order to discover if the 1st petitioner has been consuming any illegal substance. The JMO's report [P-4B] which has been issued on 25.11.2021 was negative and indicated that there was no use of any illegal substance by the 1st petitioner. The report that was called by the learned Magistrate from the Government Analyst [P-4C] has been issued on 19.01.2022. The said report also indicated that no illicit substance has been identified.

10. The 1st petitioner has lodged a complaint at the HRC which initiated an inquiry and called explanations from the 1st-4th respondents. However, the 1st-4th respondents have not provided any explanation to the HRC. The 1st petitioner has also lodged a complaint to the Special Investigations Unit (SIU) of the Sri Lanka Police, which has proceeded to record statements from the 1st-4th respondents.

11. While the case no. 42474 was pending, the learned Magistrate of *Balapitiya* has ordered the 1st petitioner to give a statement to the *Kosgoda* police. On 10.11.2021, when the 1st petitioner arrived at the police station, the 1st respondent has ordered the 3rd respondent who was the main witness in case no. 42474 to record his statement. The 3rd respondent has refused to record any statements implicating the 3rd respondent and when the 1st petitioner objected to this unfair manner of recording his statement, another police officer has recorded the 1st petitioner's statement.

12. Based on the 1st petitioner's statement regarding the unfair procedure, and his assertion that he would take legal action against the 1st and the 3rd respondents who would have to face repercussions, the 1st respondent has filed a B-report bearing no. 44910 [P-7] in the Magistrate's Court of *Balapitiya* on 31.01.2022. The B-report has been filed on the basis that the

actions of the 1st petitioner constitutes an offence under the sections 344 and 486 of the Penal Code, read with Assistance to and Protection of Victims of Crime and Witnesses Act No. 04 of 2015.

13. The learned Magistrate by order dated 09.03.2022 [P-4D] has discharged the 1st petitioner from case no. 42474 on the basis of the JMO's Report and the Government Analyst's Report.

The respondents' version

14. None of the respondents except for the 1st respondent have filed objections or affidavits denying the position of the petitioners.

15. The 1st respondent in his affidavit has deposed that, on 02.11.2021 he has been informed that the 1st petitioner has been using an illicit substance in the reading hall of the police premises. Upon rushing to the reading hall, the 1st respondent has discovered two empty polythene packets which were similar to the polythene packets used for packing Crystal Methamphetamine (ice), a lighter, a rolled currency note along with four blue coloured pills in the drawer of the cupboard that was situated close to where the 1st petitioner was seated. Thereafter, the 1st respondent has taken these items into custody and has also informed the ASP of the area (4th respondent). The 4th respondent has arrived at the police station and instructed the 1st respondent to arrest the 1st petitioner and produce him before a JMO. However, at this instance, the 1st petitioner has run away from the premises. The notes on the information book have been marked [R-1] to substantiate this position.

16. According to the affidavit of the 1st respondent, he has then proceeded to the 1st petitioner's residence along with a team of police officers in order to arrest the 1st petitioner. However, as the 1st petitioner was not present, the police have recorded a statement [R-2] from his wife (2nd petitioner). Thereafter, a B-report bearing no. 42474 has been filed by the 1st respondent in the Magistrate's Court. On 02.11.2021, the 4th respondent has interdicted the petitioner in terms of section 31.6 of Chapter

XLVIII of Volume II of the Establishment Code. On 10.11.2021 the 1st petitioner has come to the police station of *Kosgoda* to make a statement as ordered by the learned Magistrate. In this instance, the 1st petitioner has threatened the 3rd respondent and consequently a further B-report bearing no. 44910 has been filed by the 1st respondent.

Alleged violation of fundamental rights in respect of the 2nd petitioner.

17. It was the position of the petitioners that the 2nd petitioner and their son were subjected to arbitrary arrest by the 1st and the 2nd respondents on 02.11.2021. They further state that, arresting the 2nd petitioner without providing a valid reason or without a female police officer being present to achieve the ulterior motives of the 1st-4th respondents were arbitrary, illegal, and violative of the fundamental rights guaranteed to her in terms of Article 12(1) and 13(1) of the Constitution.

18. The 1st respondent in his affidavit took the position that, he along with a team of police officers had in fact gone to the residence of the petitioners and had proceeded to record a statement from the 2nd petitioner. This statement has been produced as [R-2]. However, the 1st respondent does not mention of any arrest carried out in respect of the 2nd petitioner or their son and neither is there any denial of such arrest. It is also vital to note that the 2nd respondent has also not denied going to the residence of the petitioners and arresting the 2nd petitioner.

19. Article 13(1) of the Constitution reads,

> *"No person shall be arrested except according to the procedure laid down by law. Any person arrested shall be informed of the reason for his arrest"*

20. The 2nd petitioner in this case alleges that she and her son were arrested and detained at the police station for five hours and was subject to questioning. The documents pertaining to the inquiry

regarding the complaint made by the 1st petitioner to the Special Investigations Unit (SIU) has been submitted to Court as per the document dated 24.10.2023, signed by Senior Superintendent of Police, Director of Discipline, *K.R. Nishantha De Silva*. The position of the 2nd petitioner has been corroborated by the statement of Police Constable *K.D. Madhuka Nayanjith Gunathunga* in the investigation that has been carried out by the SIU. He has stated that he saw the 2nd petitioner with her child at the Police Station. It is admitted that a statement has been recorded by the police, which has been produced as [R-2]. However, the 1st respondent in his affidavit does not specify the place in which the statement was recorded. The document marked [R-2] seems to specify that the statement was made at the residence of the petitioners. When considering the facts of this case as a whole, I am inclined to believe the version of the 2nd petitioner.

21. There exists no justification which allows the arrest of family members of a person against whom an order for arrest has been made. Therefore, the arrest that has been carried out in respect of the 2nd petitioner is arbitrary. In light of the above, as there exists no justification for the 2nd petitioner to be detained simply for the purposes of questioning, it is my position that the 2nd petitioner and her son has been arrested and detained contrary to the first limb of Article 13(1) of the Constitution. Although I see no reason to consider the second limb of Article 13(1) in an instance where I have already found it to be infringed, I am inclined to state that even if the reason for arrest had been informed, in the peculiar circumstances of this case, the reason itself would be contrary to law.

22. Article 12(1) of the Constitution sets out that *"all persons are equal before the law and are entitled to the equal protection of the law."* While a violation of Article 13(1) of the Constitution does not automatically make it a violation of Article 12(1) in every instance, in the circumstances of this case, the manner in which Article 13(1) has been violated has also deprived the 2nd petitioner of the 'equal protection of the law' guaranteed in terms of section 12(1) of the Constitution.

23. Therefore, in considering the circumstances of this case, and the document [R-2], I am of the view that the 1st and the 2nd respondents have violated the rights guaranteed to the 2nd petitioner in terms of Articles 12(1) and 13(1) of the Constitution.

Alleged violation of fundamental rights in respect of the 1st petitioner.

The Malicious prosecutions

24. It was the position of the petitioners that the malicious prosecutions that were carried out against the 1st petitioner by the respondents were a violation of the fundamental rights guaranteed to the 1st petitioner in terms of Articles 12(1), 13(1) and 13(2) of the Constitution. It was also alleged that these actions of the respondents were arbitrary, unlawful, malicious and amounts to an abuse of power.

25. It was the position of the petitioners that the charges that were levelled against the 1st petitioner in case no. 42474 was based on a fabricated incident by the 1st-3rd respondents, which is clear when considering the report of the JMO [P-4B] and the report of the Government Analyst [P-4C] which indicated negative for any illicit substance. It was also their position that, the B-report no. 42474 that was filed by the 1st respondent was maliciously made as a means of exacting revenge from the 1st petitioner as there existed an animosity between the 1st petitioner and the 1st-3rd respondents.

26. The petitioners allege that by the time the 1st petitioner was discharged by the order of the learned Magistrate dated 09.03.2022 [P-4D], the good reputation of him and his family has been ruined as the false news naming the 1st petitioner as a drug addicted police constable has been circulated through several newspapers and the mainstream media.

27. The petitioners further state that, although the HRC has initiated an inquiry, the 1st-4th respondents have failed to provide any explanation to the HRC and are deliberately absconding from the inquiry of the HRC, as they have no justification for the arbitrary acts committed by them.

28. The petitioners allege that, the action in case no. 44910 filed in terms of sections 344 and 486 of the Penal Code, read with Assistance to and Protection of Victims of Crime and Witnesses Act that has been filed against the 1st petitioner, is a clear malicious prosecution by the respondents and such actions by the respondents are arbitrary. The petitioners further allege that the B-report no. 44910 marked [P-7] is a belated report as it has been filed three months after the alleged incident.

29. The fact that the 1st petitioner uttered the words to the effect that he would take legal action against the officers who were involved in the malicious and illegal actions carried out against him is admitted. However, the petitioners state that those words do not constitute an offence in terms of sections 344 and 486 of the Penal Code read with the Assistance to and Protection of Victims of Crime and Witnesses Act No. 04 of 2015. It was further alleged that this action has been instituted in order to incarcerate the 1st petitioner. The petitioners also alleged that the B-report bearing no. 44910 [P-7] has been maliciously filed immediately after the receipt of the JMO's report [P-4B] and the Government Analyst's report [P-4C] which cleared the 1st petitioner from the case bearing no. 42474.

30. The petitioners also take the position that, the order of the 1st respondent in making the 3rd respondent record the statement of the 1st petitioner relating to a case where the 3rd respondent was the main eyewitness is a grave violation of natural justice.

The Interdiction

31. It was the position of the petitioners that the interdiction of the 1st petitioner by the 4th respondent constitutes a violation of

fundamental rights guaranteed to the 1st petitioner in terms of Article 14(1)(g) of the Constitution.

32. The petitioners state that the interdiction letter [P-9] dated 02.11.2021 has been issued to the 1st petitioner even before filing the case bearing no. 42474 which was on 03.11.2021. Further, the said interdiction letter was issued based on the malicious prosecution carried out in case no. 42474 from which the 1st petitioner was subsequently discharged.

33. The petitioners further state that, the said interdiction letter was tainted with malice and that the 4th respondent has also been involved in the malicious prosecution of the 1st petitioner along with the 1st-3rd respondents.

34. **Alleged violation of Article 13(1) and 13(2) of the Constitution.**
At the argument of this appeal, the learned Deputy Solicitor General (DSG) for the respondents took the position that the fundamental rights guaranteed to the 1st petitioner in terms of section 13(1) of the Constitution could not have been violated in the instant case, as the 1st petitioner has himself claimed that he surrendered to the Magistrate's Court.

35. It is vital to note that, Article 17 of the Constitution recognises 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.

36. Article 126(1) of the Constitution sets out 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 or language right declared and recognized by Chapter III or Chapter IV"*
>
> [Emphasis mine]

37. In the instant case, the interdiction of the 1st petitioner clearly shows that the respondents were preparing to arrest the 1st petitioner. Further, there is no denial of the same on the part of the respondents. Therefore, in these circumstances, I take the view that there was an imminent infringement of Article 13(1) of the Constitution in respect of the 1st petitioner.

38. Article 13(2) of the Constitution sets out that,

> "*Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.*"

39. I am unable to see how the rights guaranteed to the 1st petitioner in terms of Article 13(2) of the Constitution is infringed in the instant case.

40. **Alleged violation of Article 12(1) of the Constitution.**

Article 12(1) of the Constitution sets out that,

> *"All persons are equal before the law and are entitled to the equal protection of the law."*

41. In ***Wijerathna v. Sri Lanka Ports Authority [2020] SC (FR) Application No. 256/2017 - SC Min. 11.12.2020*** His Lordship *Kodagoda J.* explains the concept of equality as provided within Article 12(1) of the Constitution as follows,

> *"The concept of 'equality' was originally aimed at preventing discrimination based on or due to such immutable and acquired characteristics, which do not on their own make human being unequal. It is now well accepted that, the 'right to equality' covers a much wider area, aimed at preventing other 'injustices' too, that are recognized by law. Equality is now a right as opposed to a mere privilege or an entitlement,*

and in the context of Sri Lanka a 'Fundamental Right', conferred on the people by the Constitution, for the SC F/R 231/2018 JUDGEMENT Page 8 of 17 purpose of curing not only injustices taking the manifestation of discrimination, but a host of other maladies recognized by law."

42. Article 12(1) of the Constitution captures within its realm, decisions made *mala fide* for an improper purpose. In the case of ***Karunathilake v. Dayananda Dissanayake [1999] 1 Sri.L.R. 157*** it was held by the Supreme Court that postponing provincial council elections had been done for a collateral purpose and such *mala fide* actions violated Article 12(1) of the Constitution. When considering the 1st petitioner's case, it is clear when perusing the report of the JMO and the report of the Government Analyst, that the case no. 42474 has been filed by the 1st respondent in order to frame the petitioner as both the reports have returned a negative result for any illicit substance.

43. Malice on the part of the 1st-3rd respondents can be clearly observed, as a further B-report bearing case no. 44910 has been filed by the 1st respondent on the basis that the 1st petitioner threatened the 3rd respondent who was the main witness in case no. 42474. It must be noted that the basis upon which the B-report no. 44910 has been filed is *prima facie* erroneous as the words uttered by the 1st petitioner does not fall within the purview of the offence described. Further, although the alleged incident has taken place on 10.11.2021, the B-report bearing no. 44910 pertaining to the incident has been filed on 31.01.2022 which was almost three months after the date of the incident. These events also portray malice on the part of the 1st-3rd respondents and seems to be a deliberate attempt to incarcerate the 1st petitioner at any cost.

44. Further, when considering the statement of the 4th respondent in threatening to remove the 1st petitioner from his services, it is clear that the 4th respondent has acted in an arbitrary manner together with the 1st-3rd respondents.

45. The entire course of actions of the 1st-4th respondents against the 1st petitioner has been arbitrary, unlawful, malicious and a clear abuse of power. When considering the chronology of events that had occurred, it is clear that the 1st-4th respondents have made a very crafty attempt to frame the petitioner in order to satisfy their personal animosities.

46. At the argument of this application, it was brought to the attention of Court that the 1st petitioner has made a complaint to the Special Investigations Unit (SIU). The SIU has decided to frame charges against some of the respondents. The learned DSG upon undertaking to submit the relevant documents to Court, has submitted a detailed report by the SIU.

47. According to the documents pertaining to the inquiry carried out by the SIU, charges have been framed against a number of police officers including the 1th respondent. According to the report of the SIU, the 3rd respondent police sergeant *Indika De Silva* has pleaded guilty for the charges including that of making a false complaint against the 1st petitioner in this case, and has pleaded in mitigation for a lenient sentence and an inquiry is pending regarding the other matters pertaining to abuse. Two other police officers, namely *W.N. Kumara De Silva* (P.S. 28190) and *Anil Shantha* (P.S. 58913) have also pleaded guilty for making false entries stating that a woman Chief Inspector *S. Niroshini De Soysa Weerawardane* also accompanied the officers who went in search of the 1st petitioner.

48. The report of the JMO [P-4B] and the report of the Government Analyst [P-4C] which led to the dismissal of the case against the petitioner by the Magistrate's Court and the detailed report of the SIU makes the malicious conduct of the 1st-4th respondents apparent and makes it an extremely compelling case for the 1st petitioner.

49. Thus, in the circumstances of this case, it is apparent that the arbitrary actions of the 1st-4th respondents have infringed the

fundamental rights guaranteed to the 1st petitioner in terms of Article 12(1) of the Constitution.

50. **Alleged violation of Article 14(1)(g) of the Constitution.**

Article 14(1)(g) of the Constitution sets out that,

"*Every citizen is entitled to-*

(g) the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise"

51. Article 14(1)(g) of the Constitution provides protection to citizens from being denied their employment arbitrarily. In the case of ***Nimal Bandara v. National Gem and Jewellery Authority SC FR 118/2013, SC Min. 13.12.2017*** it was held that, the chairman of the National Gem and Jewellery Authority had acted with malice in discontinuing the petitioner's employment.

52. When considering the facts and circumstances of the instant case, it can be observed that the 1st-3rd respondents have repeatedly filed false actions against the 1st petitioner. It is also clear that there had been a growing animosity between the 1st-3rd respondents and the 1st petitioner when considering the exchange of words that have taken place between them as set out in the petition and the B-report no. 44910 [P-7]. Further, the fact that the letter of interdiction [P-11] issued by the 4th respondent had been dated a day prior to the date of filing action under case no. 42474 even without holding an inquiry on the matter, clearly portrays that the interdiction of the 1st petitioner has been arbitrary, malicious, and calculated. It can also be observed that, the 1st petitioner was subsequently cleared of the allegation upon which his employment was terminated, which confirms that the course of conduct by the 1st-4th respondents have been malicious throughout.

53. Thus, it is my view that the rights guaranteed to the 1st petitioner in terms of Article 14(1)(g) of the Constitution has been violated

as the 1st petitioner has been arbitrarily denied his employment as a police officer by the 1st-4th respondents.

Declarations and Compensation

54. In light of the above findings, I declare that the fundamental rights guaranteed to the 1st petitioner in terms of Articles 12(1),13(1) and 14(1)(g) of the Constitution have been infringed by the actions of the 1st-4th respondents.

55. I also declare that the fundamental rights guaranteed to the 2nd petitioner in terms of Articles 12(1) and 13(1) of the Constitution have been infringed by the actions of the 1st and the 2nd respondents.

56. As per Article 126(4) of the Constitution, the Supreme Court is empowered to grant such relief as it may deem just and equitable in the circumstances, in respect of any petition referred to it under Article 126(2) of the Constitution. Thus, in the circumstances of this case, considering the discomfort and the losses that were suffered by the petitioners due to the arbitrary acts of the respondents, the State is directed to pay a sum of Rs. 25,000 (Rupees twenty-five-Thousand) each to the 1st and the 2nd petitioners.

57. I order the 1st-4th respondents to pay a total sum of Rs. 2,000,000 (Rupees two-million) to the 1st petitioner which must be shared equally by the 1st-4th respondents (Rs. 500,000 each). All such compensation should be paid out of their personal funds. The aforementioned compensation should be paid within six months from the date of delivery of this judgment.

58. The Sri Lanka Police have been vested with the duty to maintain law and order. They are the guardians of public safety. However, the facts and circumstances of this case raise the question of who guards the guards.

59. In the aforementioned circumstances, the Registrar is directed to forward a copy of this judgment to the National Police Commission, for the commission to take appropriate disciplinary actions against the aforementioned respondents who were found responsible for the violation of fundamental rights of the petitioners.

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE JANAK DE SILVA

I agree

JUDGE OF THE SUPREME COURT

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

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

Poorna Mayura Kankanige,
'Jaliya Sevana' No 363 Udupila,
Delgoda

Petitioner

Vs

SC/FR/Application No. 160/2014

1. Police Sergeant No. 24141 Senadheera,
   Police Station, Bandaranaike Memorial
   International Conference Centre,
   Colombo 07.

2. Police Constable No. 70825
   Jayawardena,
   Police Station, Bandaranaike Memorial
   International Conference Centre,
   Colombo 07.

3. Police Constable No. 77341 Ruwan
   Police Station, Bandaranaike Memorial
   International Conference Centre,
   Colombo 07.

4. Inspector of Police Attharagama
   Officer-in-Charge
   Police Station, Bandaranaike Memorial

International Conference Centre,
Colombo 07.

5. N. K. Illangakoon,
Inspector General of Police
Police Head Quarters,
Colombo 01.

6. The Hon. Attorney General,
Attorney General's Department,
Colombo-12.

Respondents

Before : Priyantha Jayawardena PC, J
Achala Wengappuli, J
Arjuna Obeyesekere, J

Counsel : Shantha Jayawardena with D.D Silva for the petitioner
Canishka Witharana with H.M Thilakaratne for the 1st respondent
Saman Galappatti for the 2nd and 3rd respondents
Sajith Bandara, SC for the 5th and 6th respondents

Argued on : 18th January, 2022

Decided on : 29th February, 2024

Priyantha Jayawardena PC, J

Facts of the application

The petitioner filed the instant application stating that his Fundamental Rights guaranteed under Articles 11 and 12(1) of the Constitution were infringed by the aforementioned respondents.

The petitioner was twenty three years of age at the time of the alleged incident and was a student of the 'City School of Architecture'. It was stated that he was an 'Ordinary rating' in the Sri Lanka Volunteer Naval Force and a member of the water polo team of the Sri Lanka Navy.

Further, an exhibition was organized by the Sri Lanka Institute of Architects at the Bandaranaike Memorial International Conference Center (hereinafter referred to as 'BMICH') from the 22nd to 26th of February, 2012. The petitioner stated that the City School of Architecture at which he was studying had a stall at the said exhibition and the petitioner was one of the students in charge of the said stall. The petitioner further stated that during the exhibition he and the other students who were working at the stall entered and exited BMICH through 'Gate No 03' on a pass issued by the management of the BMICH.

The petitioner stated that the exhibition ended at 10.00 p.m. on the 26th of February, 2012. Thereafter, the petitioner along with two of his friends, loaded part of the equipment from their stall into the lorry belonging to the petitioner's father and left BMICH along with another lorry carrying equipment from their stall through Gate No. 03.

After the goods were unloaded, both vehicles returned to BMICH to collect the rest of the equipment from the stall as the management of BMICH wanted the equipment cleared out before the next day. Thereafter, the other lorry entered BMICH through Gate No. 03 ahead of the petitioner's lorry.

However, when the petitioner attempted to follow the other lorry into the said premises, he was stopped at the gate by the 1st respondent. The petitioner stated that he showed the 1st respondent a pass and his student identity card issued by the City School of Architecture. However, the 1st respondent refused to allow the petitioner to enter the premises with that particular pass. Hence, the petitioner parked his lorry on the side of the road and got down from it and walked in through the gate. Thereafter, he gave a telephone call to the management of the City School of Architecture to inform them of the refusal by the 1st respondent to take his lorry inside BMICH.

While the petitioner was attempting to contact the management of the City School of Architecture, he observed that the 1st respondent was walking towards the conference center. The petitioner further stated that while he was on the telephone, the 1st respondent came back and closed the gate preventing the petitioner from leaving the BMICH compound.

The petitioner stated that thereafter, the 1st respondent came up to the petitioner and asked him "who do you think you are, to call all sorts of people?". The petitioner had informed the 1st respondent that he attempted to call the management of the City School of Architecture. Thereafter, 1st respondent suddenly slapped the petitioner on the face. The petitioner then held the hand of the 1st respondent and told him, "uncle, don't hit me. I have done nothing wrong". The 1st respondent then pushed the petitioner and tried to slap him again. As the petitioner fell down, the 1st respondent also lost his balance and fell on the petitioner.

The petitioner further stated that when he was on the ground, he saw the 2nd and 3rd respondents who were wearing traffic uniforms and some other persons dressed in civilian clothing come towards him. Thereafter, the 2nd respondent who was wearing shoes came up to the petitioner who was lying on the ground and kicked the petitioner's head with his foot while the 3rd respondent assaulted him. The petitioner stated that he pleaded with the 2nd and 3rd respondents not to hit him.

Moreover, there were two persons dressed in a yellow t-shirt and a black t-shirt who came with the 2nd and 3rd respondents and assaulted the petitioner with clubs. Thereafter, his two friends who were in the other lorry came running towards him. However, the two persons who were assaulting him prevented them from intervening.

The petitioner stated that he pleaded with his attackers not to hit him. However, he stated that they dragged him by his legs to the security hut. Thereafter, they closed the door of the said hut and pushed him to the ground facing him downwards and bound his hands and legs tightly with a thick elastic cord. Moreover, the 1st to 3rd respondents along with the two other men dressed in civilian clothing assaulted the petitioner. The petitioner stated that he also heard the person dressed in a yellow t-shirt saying, "it is better to kill this fellow here".

Whilst the petitioner was being assaulted in the security hut, another unknown person entered the said hut and informed them to stop assaulting him, as the 4th respondent (the OIC) was approaching the said security hut. After the 4th respondent entered the said hut, the 1st respondent immediately informed him that the petitioner pushed him to the ground and assaulted him.

The 4th respondent inquired as to whether anyone saw the incident and the two friends of the petitioner informed him that the petitioner was assaulted by the 1st respondent and others, and

they did not know the reason for it. Then, the 4th respondent slapped one of the petitioner's friends and asked them to leave if they did not know what happened.

Thereafter, the petitioner stated that his legs and hands were untied and he was pushed into the rear portion of the jeep. Further, he stated that the 4th respondent had sat in the front seat of the jeep. Furthermore, the 2nd respondent and the unidentified person wearing a black t-shirt got into the back of the jeep with the petitioner.

The petitioner further stated that he was taken to the Cinnamon Garden Police Station where the 2nd respondent held the petitioner by the neck and dragged him into the Police Station and the 4th respondent followed them into the Police Station.

At the Minor Offences Branch, the 2nd respondent pushed the petitioner to the floor and ordered him to sit on the floor. Thereafter, an unknown policeman approached him and pointed a gun at him, asking the respondents "why did you bring him here? You should have killed him there itself" and then trampled the right hand of the petitioner with his shoe. The petitioner further stated that the said policeman slapped him on the face. The petitioner heard the 2nd respondent saying "don't hit him now. We have already assaulted him well. We will take care of him later tonight".

Thereafter, the Principal of the City School of Architecture arrived at the Police Station and spoke to the petitioner on the events that took place and the petitioner who was in extreme pain told him with the greatest difficulty what had transpired. The principle then spoke to the police officers who were at the Police Station and left. The petitioner's parents were informed of his plight by his friends and they arrived at the police station. However, when his parents arrived, he was in a semi-conscious state and was unable to speak to them.

Afterwards, the petitioner vaguely remembered hearing that he was to be taken to the J.M.O. and was lifted and put into a vehicle where his father was also present. He stated that he was then taken to a doctor. However, he did not examine the petitioner but gave a 'chit' to the police officer to have the petitioner admitted to the hospital. The petitioner stated that he had no recollection of the events that took place later that night and he was informed by his parents that he was taken to the Colombo National Hospital where he was admitted to the 'accident ward'. The petitioner further stated that he remembers being on a trolley to which one of his hands was handcuffed and two policemen were guarding him.

Thereafter the petitioner was admitted to ward No. 72 of the said hospital on the 27th of February, 2012 at 1.55 a.m. and a series of medical tests, including X-rays were taken by the said hospital. Further, on the same day a Judicial Medical Officer examined the petitioner. A Magistrate also visited the petitioner and he informed the said Magistrate about his injuries and showed him the wounds he had sustained.

On the 27th of February, 2012 (on the same day) in the evening, the petitioner was transferred to ward No. 32 of the National Hospital and was handcuffed to the bed in the said ward. Further, on the 29th of February, 2012 a Magistrate visited the ward and remanded the petitioner until the 2nd of March, 2012. However, on that day, the learned Magistrate enlarged the petitioner on bail. Thereafter, the petitioner was discharged from the National Hospital on the 5th of March, 2012.

The petitioner also stated that on the 27th of February, 2012 his father made a complaint to the Human Rights Commission regarding the assault and torture of the petitioner by the 1st, 2nd 3rd and 4th respondents. Thereafter, the Human Rights Commission assigned No. HRC/955/12 to the said complaint. The petitioner's father also complained to the Police Head Quarters 'Sahana Mediriya' on the 27th of February, 2012 regarding the assault of the petitioner by the BMICH Police.

Subsequently, the petitioner produced the diagnosis card issued by the hospital which shows *inter alia*, subconjunctival hemorrhage and ecchymosis on the right-side of the eye and an undisplaced fracture of the right side fronto-zygomatic suture. Further, the medico-legal report referred to seven injuries on the petitioner, one of which was a fracture of the right fronto-zygomatic suture, which is considered as a 'grievous injury' as defined by section 311 of the Penal Code.

In addition to the physical injuries suffered as a result of the assault on the petitioner by the 1st to 4th respondents, he stated that he also suffered severe psychological trauma. The petitioner stated that he was examined by Dr. Neil Fernando, Consultant Psychiatrist at the National Hospital of Colombo on the 14th of March, 2012 and on 21st of March, 2012. Dr. Neil Fernando by his report dated 21st of March, 2012 informed the J.M.O that the petitioner 'had psychological evidence of trauma' which may progress to 'post-traumatic stress disorder'.

The petitioner further stated that he became aware that the OIC of the Cinnamon Garden Police Station had filed a case bearing No. B-8711/01/11 in the Chief Magistrates' Court of Colombo

alleging that the petitioner assaulted a police officer. Further, the said case was still being called in the Magistrates' Court of Colombo as it was referred to the Attorney General's Department for advice.

Furthermore, the petitioner stated that he made a written complaint dated 19th of March, 2012 regarding the assault by the 1st, 2nd, 3rd and 4th respondents to the Human Rights Commission of Sri Lanka, the Chairman of the National Police Commission and the 5th respondent.

On the 14th of September, 2012 the petitioner received a letter from the Officer in Charge of the 'Sahana Mediriya' of the office of the Inspector General informing him that his complaint was referred to the Deputy Inspector General of Police of the Colombo District and an inquiry was conducted in which it transpired that the petitioner had been remanded by the learned Magistrate on charges of assaulting a police officer and that further inquiries will be conducted on the matter. The petitioner however stated that no further steps were taken by the 5th respondent with regard to the complaint of the petitioner.

Thereafter, the petitioner stated that the Human Rights Commission of Sri Lanka held an inquiry into the complaint of the petitioner and by its decision dated 12th of May, 2014 found that the 1st, 2nd and 3rd respondents violated the petitioner's rights guaranteed to him by Articles 11 and 12 of the Constitution and ordered to pay a sum of Rs. 1,000,000 as compensation to the petitioner.

The petitioner further stated that the Human Rights Commission ordered that a copy of its findings be transmitted to the 5th and 6th respondents. The decision of the Human Rights Commission was posted to the petitioner's father under registered cover on the 21st of May, 2014 and it was received on the 23rd of May, 2014. Furthermore, the petitioner stated that the 5th respondent has not taken any action with regard to the decision of the Human Rights Commission of Sri Lanka to date. Further, the 5th respondent failed to act on the complaints made to them by the petitioner.

The petitioner in his petition sought to challenge *inter alia,* the arbitrary arrest, detention, the torture, cruel and degrading punishment meted out to him by the 1st to 4th respondents and the failure on the part of the 5th respondent to take action regarding the torture of the petitioner while in police custody.

Objections raised by the 1st respondent

The 1st respondent filed objections and stated that he was a Police Sergeant working at the Police Station at BMICH. He further stated that it is an important location where special security is needed and therefore, a separate police post was established at the BMICH premises in order to guard the said premises. It was also stated that stringent traffic controlling measures were implemented at the said premises in order to ensure the security of the public who enter the premises and also to ensure smooth traffic flow within the said premises without any congestion.

The 1st respondent stated that on the 26th of February, 2012 he assumed duty at 'Gate No. 3' situated at Sarana Road, Colombo 07 at around 10.00 p.m. He further stated that since it was the final day of the said exhibition, Gate No. 3 was allocated to the vehicles which were coming to clear the goods brought inside for the said exhibition and a large number of heavy vehicles were lined up outside the said gate to enter the BMICH premises.

Due to security reasons and space available within the premises, only a limited number of vehicles were allowed to enter the premises at a given time. Thus, the vehicles which were lined up outside Sarana Road were allowed to enter the BMICH premises after departure of vehicles which were inside the premises.

The 1st respondent further stated that when he assumed duties, there was a long queue of vehicles including lorries, trucks and cabs outside the gate which were waiting for their turn to enter the premises and he was controlling the vehicle inflow to the BMICH premises where he allowed the vehicles to enter according to the order in the queue. He further stated that the entrance of the gate was always kept clear in order to allow the vehicles to exit the premises. Furthermore, vehicles waiting to enter the premises were kept at a distance so that the entrance would not be blocked for the exiting vehicles.

However, during this time the petitioner came in his lorry disregarding the queue and stopped the lorry in front of the gate and blocked the entrance. The petitioner then informed the 1st respondent to allow him to take his vehicle inside the said premises. At that time, the 1st respondent informed the petitioner that he could not be allowed to enter the said premises disregarding the others in the queue, as they were waiting for a long time to enter the said premises. Hence, the petitioner was ordered to join the queue of the vehicles waiting to enter

the BMICH premises. However, the petitioner refused to do so and insisted that he be permitted to enter the premises out of turn, claiming that he was a Naval Officer.

Further, the 1st respondent also requested the petitioner to move his vehicle from where it was parked since his lorry was obstructing the exiting vehicles. However, the petitioner disregarded and disobeyed the said directions given by him and he got down from his vehicle without moving it.

Thereafter, the petitioner insisted that the 1st respondent open the gate for him to take the lorry inside. The 1st respondent stated that the petitioner became violent and abused him by grabbing his uniform and punching him in the face. As a result, both of them lost control and fell down and thereafter, the petitioner assaulted him.

The 1st respondent stated that he was forty eight years of age at the time of the incident and hence, he was unable to control the violent behavior of petitioner. Therefore, he called for help through his walky talky.

Meanwhile, the drivers of the other vehicles who were waiting outside the gate got agitated and came there and pulled the petitioner away from the 1st respondent. The 2nd respondent who heard the call for help over the radio communication and the 3rd respondent who saw the incident arrived at the scene and apprehended the petitioner. The 1st respondent stated that H.A.S. Indrajith attached to a private security service, who was working at the same gate along with him, witnessed the entire event. Thus, a statement was recorded from him and it was produced along with his objections. The 1st respondent also stated that he was severely assaulted by the petitioner and therefore, he was admitted to the National Hospital of Colombo.

Furthermore, later he became aware that the petitioner was a person with a violent character and he was charged before the Magistrates' Court of Colombo on a previous occasion on charges of assault and robbery. He also stated that he had an unblemished career in the Police Department and he would never assault a young boy of the age of 21 years. He stated that it was the petitioner who assaulted him after having disobeyed his orders.

In the circumstances, the 1st respondent denied the arbitrary arrest, detention, torture, cruel or degrading treatment of the petitioner as alleged in the petition.

Objections of the 2nd and 3rd respondents

The 2nd and 3rd respondents stated that they did not arrest the petitioner nor was the petitioner subjected to cruel, inhuman and degrading punishment by them.

The said respondents stated that they heard the 1st respondent calling over the walky-talky saying 'he is being assaulted and that there is a situation he cannot control' and pleaded 'assistance from other police officers'. Having heard the said message, they rushed to the scene. The 2nd and 3rd respondents stated that when they reached the scene, they saw the petitioner on top of the 1st respondent, attacking him while the public was shouting 'do not hit the police officer'.

Moreover, it was stated that a few civilians dragged the petitioner away from the 1st respondent and the petitioner ran out of the gate to avoid being attacked by the civilians. At that time, he slipped and fell on the pavement.

The said respondents stated that, once they took control of the petitioner, they handed him over to the OIC of the BMICH Police Post. Thereafter, the petitioner was handed over to the Cinnamon Gardens Police station. Therefore, he was produced under case No. B 8711/01 in the Magistrates' Court Colombo.

The respondents admitted that the Human Rights Commission had given its decision dated 12th of May, 2014. However, the respondents stated that they had not meted out cruel, inhuman or degrading punishment or treatment on the petitioner and therefore, have not violated any Fundamental Rights of the petitioner.

Did the respondents infringe the Fundamental Rights of the petitioner?

Medical Evidence

The 'Diagnosis Ticket' marked as 'P4' produced along with the petition, shows that the petitioner was treated for 'Sub- Conjunctival Hemorrhage' and 'Ecchymosis' on the right-side eye and an 'undisplaced fracture' of the right side of fronto-zygomatic suture. Further, in the Medico-Legal Report issued by Dr. M.R.O. Suffyan, JMO observed the following 7 injuries on the petitioner;

"1. Bilateral intra orbital contusion noted during my examination;

i. Right side measuring 6 × 2 cm

ii. left side measuring 4 × 2 cm.

2. During my examination I had an elicited tender swelling over the right side of the face. Medical notes revealed undisplaced fracture at the right fronto-zygomatic suture.

3. Abrasion measuring 4×1 cm situated over the left lower face.

4. During my examination I had observed swelling over the left upper lip associated with the inner upper lip contusion.

5. During my examination I had elicited tender swelling over the left shoulder area, both calf muscles and right foot.

6. Linear abrasion measuring 7 cm situated over the back of upper chest on the right.

7. Tramline contusion, measuring 6×2 cm situated over back of the left lower chest."

Further, according to the X-ray, it revealed no fractures in the cervical spine and chest and according to medical opinion injuries 1 to 7 as mentioned above were all non-grievous injuries. Furthermore, in the Medico-Legal Report it was stated that the injuries mentioned above were all caused by a blunt weapon.

Moreover, the injuries referred to above in (2) is a grievous injury.

According to the medical report dated 21st of March, 2012 issued by Dr. Neil Fernando, Consultant Psychiatrist produced marked as 'P6', the petitioner "has psychological evidence of trauma". Moreover, the said report stated that the consultant doctor recommended a regular assessment of symptoms severity, trauma focused counseling and medications to improve his symptoms, at the forensic psychiatry Unit of National Hospital of Colombo.

The allegation of torture and violation of equal protection of the Law

In the statement of objections, the 1st, 2nd and 3rd respondents admitted their presence at the scene and taking the petitioner to the security hut at the BMICH. The petitioner submitted that he was admitted to the National Hospital of Colombo on the 27th of February, 2012 early in the morning and was discharged from the hospital on the 5th of March, 2012. Further, according to the said medical records the injuries were caused by a blunt weapon. Furthermore, the petitioner was examined by the JMO on the 27th of February, 2012 and the Medico-Legal Report stated 'the short history given by the patient' as;

> *"Alleges to had been assaulted by a Police Officer (who was on duty) by hand to the head and same time another 10 Police Officers in civil assaulted him with wooden pole to the body and taken him into Police guard room and assaulted by another 3 Police Officers. Incident took place on 26.02.2012 10.30 pm at B.M.I.C.H Colombo."*

Therefore, the petitioner was consistent in his narration of the incident and his version is corroborated by the medical evidence. Thus, he satisfied the test of consistency in establishing his credibility. Moreover, the petitioner disclosed the alleged incident without any delay to the doctors at the hospital and the JMO, thus satisfied the test of spontaneity.

On the other hand, according to the 1st respondent, he was severely assaulted by the petitioner. However, according to the medical report pertaining to the 1st respondent, he had only one contusion, whereas, the petitioner had sustained severe injuries was in hospital from the 27th of February, 2012 to 5th of March, 2015. Thus, the medical evidence shows that the petitioner had been assaulted by the 1st, 2nd and 3rd respondents.

The material before court corroborates the version of the petitioner. Particularly by the medical evidence. Further, the medical reports show that the petitioner has suffered severe injuries. Such injuries could not have been caused by a fall. Hence, the version of the respondents cannot be accepted.

The Police Notice dated 26th of February, 2012 at 11.55 p.m. shows that the petitioner's body was examined and there were no injuries to be found on the surface of his body. Hence, the petitioner was handed over to the Cinnamon Gardens Police until his matter was taken up in courts.

Article 11 of the Constitution provides as follows;

> "*no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*"

Further, apart from the physical injuries caused to the petitioner, he suffered psychological trauma as a result of the incident under reference by the 1st, 2nd and 3rd respondents.

Hence, the injuries, the mental trauma and the pain inflicted on the petitioner amounts to an infringement of Article 11 of the Constitution.

A similar view was expressed in ***Adikari and another v Amarasinghe and others*** **(2003) 1 SLR 270 at 274** where it was held;

> *"However, the fundamental rights guaranteed in terms of Article 11 are not restricted to mere physical injury. The words used in Article 11, viz. 'torture. cruel, inhuman or degrading treatment or punishment would take many forms of injuries which could be broadly categorized as physical and psychological and would embrace countless situations that could be faced by the victims. Accordingly, the protection in terms of Article 11 would not be restricted to mere physical harm caused to a victim, but would certainly extend to a situation where a person had suffered psychologically due to such action."*

Further, in ***G.Jeganathan v Attorney General*** **(1982) 1 SLR 294 at 302** it was held;

> *"... where public officers are accused of violating the provisions of Article 11, the allegations must be 'strictly proved', for if proved they will carry 'serious consequences' for such officers"*

Moreover, having regard to the facts and circumstances of the said incident, I am of the opinion that the petitioner proved his case with a high degree of certainty. Accordingly, I hold that the 1st to the 3rd respondents have violated the Fundamental Rights of the petitioner guaranteed by Articles 11 and 12(1) of the Constitution.

I order the 1st to 3rd respondents to pay a sum of Rs. 30,000/- within a month from the delivery of this judgment (each of the said respondents should pay Rs. 10,000/-).

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 and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

L. Saman Kumara,
No. 04/3, Jaya Samarugama,
Kandana.

Petitioner

S.C.(F.R.) Application No: 171/2017

Vs.

1. Rathnakumara Collure,
   District Medical Officer,
   District Hospital, Kandana.

2. U. L. Perera,
   Director, Colombo Teaching Hospital,
   Ragama.

3. S. K. Gamage,
   Administrative Officer, Medical Support Division, No. 357, Baddegama,
   Wimalawansa Mawatha, Colombo 10.

4. D. M. C. K. Dissanayake,
   Director (Control) 04.

5. J. M. W. Jayasundara Bandara,
   Director General of Health Services.

   4th to 5th Respondents all of;

   Ministry of Health, Nutrition and Indigenous Medicine, "Sawsiripaya",
   No. 385, Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10.

6. The Honourable Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before: Hon. Murdu N. B. Fernando, PC, J.

Hon. Janak De Silva, J.

Hon. K. Priyantha Fernando, J.

Counsel:

Pulasthi Hewamanna with Githmi Wijenarayana for the Petitioner

Rajitha Perera, D.S.G. for the Respondents

Written Submissions:

17.06.2020 and 09.10.2023 by the Petitioner

13.01.2021 and 25.10.2023 by the Respondents

Argued on: 25.09.2023

Decided on: 26.01.2024

Janak De Silva, J.

At all times material to this application, the Petitioner was an Assistant Sanitary Labourer at the Ministry of Healthcare & Nutrition. He was attached to the District Hospital of Kandana. By letter dated 08.12.2016 (P6), the 2nd Respondent transferred the Petitioner to the North Colombo Base Hospital, Mulleriyawa due to administrative reasons. This transfer was sanctioned by the then Acting Director General of Health Services (5R3a).

This application was filed on 12th May 2017. The salary of the Petitioner was not paid for more than three months from the date of transfer to the date of filing.

The Petitioner alleges that his transfer was arbitrary, capricious, irrational, tainted with malice, ultra vires the powers of any one or more of the Respondents and constitutes an infringement and continuous infringement of the fundamental rights guaranteed under Article 12 (1) and 14 (1) (g) of the Constitution.

It is further alleged that the 2nd and 4th Respondents acted in contravention of sections 219, 220 and 221 of the Procedural Rules on Appointment, Promotion and Transfer of Public Officers ("PSC Rules").

Leave to proceed was granted only under Article 12 (1) of the Constitution.

According to the Petitioner, by letter dated 08.03.2015 [P2(a)], he made a request to the 1st Respondent for official quarters due to difficulties in travelling. Consequent to another appeal made to the 1st Respondent, the Petitioner was informed that a committee will convene on 30.11.2016 [P3] to assess requests made to provide quarters for applicants.

On or about 30.11.2016 [P4], the Petitioner attempted to submit his letter of request for quarters. The security officer attached to the District Hospital Kandana forcibly read the letter of request that the Petitioner had prepared to submit to the committee. After an altercation with the Petitioner, the security officer, who himself is residing in one of the official quarters deemed that the letter is averse to his interests and to the utter surprise and dismay of the Petitioner, tore the letter.

The Petitioner complained of this conduct to the 1st Respondent. The 1st Respondent, by letter dated 30.11.2016 [P5(a)], informed him that a complaint had been lodged by the said security officer against the Petitioner alleging that the Petitioner had berated a female patient who attended the hospital to receive medication. The Petitioner was directed to provide reasons to exonerate himself from the allegations within three days. The Petitioner submitted his reply by letter dated 01.12.2016 [P5(b)].

Thereafter, the Petitioner received letter dated 08.12.2016 [P6] issued by the 2nd Respondent informing him of his transfer to the Colombo North Teaching Hospital, Ragama with immediate effect due to *administrative reasons*. Aggrieved by the sudden and arbitrary transfer, the Petitioner sought redress by appealing to the 4th Respondent. Consequently, the Petitioner was transferred to the Medical Supplies Division in Colombo by letter dated 06.01.2017 [P7(b)].

Since commencing work in the Medical Supplies Division, the Petitioner has not been assigned any work. According to the Petitioner, this is indicative that his services are not required there.

Moreover, the Petitioner has been forced to report for work for four months, from December 2016 till April 2017 without any pay. According to the Petitioner, in order for him to receive his salary, his personal file needs to be released from his previous work station in District Hospital Kandana to the Medical Supplies Division. The District Hospital, Kandana comes under the supervision of the Colombo North Teaching Hospital of Ragama and all the records of the Petitioner's service are kept with the said Ragama Teaching Hospital.

The Petitioner alleges that these records are under the direct purview of the 2nd Respondent. It is alleged that the release of these records was requested by the 3rd and 4th Respondents [P7(a) and P7(b)]. It is further alleged that although the 5th Respondent had directed the Petitioner to be reinstated at his previous work place at District Hospital, Kandana [P8], the 2nd Respondent has failed to consider this direction. The Petitioner claims that there is a history of animosity towards the Petitioner by the 2nd Respondent. He goes onto specify details of it at paragraph 14 of the Petition.

Notices on all the Respondents were dispatched by registered post on 05.07.2015, 06.06.2018 and 17.08.2018. Objections have been filed only on behalf of the 5th Respondent.

According to the then holder of office of the 5th Respondent, there were several complaints against the Petitioner made by the other staff members of the hospital in relation to various incidents. The incident on 30.11.2016 and other related complaints were considered by the District Medical Officer of the Kandana Hospital and a report dated 03.12.2016 was submitted to the Director, Teaching Hospital, Ragama.

The Director, Teaching Hospital, Ragama, by letter dated 07.12.2016 [5R3] submitted a copy of the report dated 03.12.2016 and another report dated 06.07.2015 to the Director General of Health Services in relation to another complaint received against the Petitioner.

Thereafter, steps were taken to transfer the Petitioner by letters dated 07.12.2016 [5R3(a)] and 08.12.2016 [5R3(b) and P6]. Due to appeals made by the Petitioner, the transfer orders marked 5R3(a) and 5R3(b) were subsequently changed by letters dated 09.12.2016 [5R4(a)] and 19.12.2016 [5R4(b)] and the Petitioner was transferred to the Medical Supplies Division.

According to letter dated 08.12.2016 (P6), the 2nd Respondent transferred the Petitioner to the North Colombo Base Hospital, Mulleriyawa due to administrative reasons. Even the letter dated 07.12.2016 [5R3(a)] sent by the then Acting Director General of Health Services ordering the transfer of the Petitioner refers to administrative reasons as the grounds for the transfer.

However, the PSC Rules do not contemplate a transfer of a public officer on administrative grounds.

According to Rule 196 of the PSC Rules, transfers are four-fold. They are:

(i) Transfers done annually;

(ii) Transfers done on exigencies of service;

(iii) Transfers done on disciplinary grounds;

(iv) Mutual transfers on requests made by officers.

Hence the impugned transfer of the Petitioner is *per se* flawed.

Nevertheless, in ***K. P. K. L. P. Maduwanthi v. S. M. G. K. Perera, District Secretary and Others*** **[S.C. (F/R) 23/2021, S.C.M. 18.11.2022]** I restated the 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 to make such an order. I went on to hold that the PSC Rules provided for the transfer of the Petitioner in the circumstances of that matter.

The Respondents categorically assert that the transfer of the Petitioner was not on disciplinary grounds. Neither was it an annual transfer nor a mutual transfer on requests made by public officers.

The Respondents submitted that the transfer was one made on exigencies of service. According to Rule 218 of the PSC Rules, a Public Officer may be transferred on exigencies of service by the Appointing Authority for any one of the following reasons:

(i) Where the services of an officer are no longer needed at his present station;

(ii) Where an officer is needed for service in another station or that particular officer himself is needed;

(iii) Where it is found, due to administrative reasons, that the retention of an officer in his present station is not suitable.

In ***K. P. K. L. P. Maduwanthi v. S. M. G. K. Perera, District Secretary and Others*** (supra.), the request to transfer the petitioner in that case was made to facilitate an investigation into alleged misconduct. I held that the conduct of such an investigation is part of the administrative functions of the Public Service and hence such a transfer was in accordance with the PSC Rules.

I observe that the 2nd Respondent has, in letter dated 07.12.2016 [5R3] made a request to the 5th Respondent to transfer the Petitioner to a place outside his purview. It is further suggested that an inquiry be held in relation to several matters referred to therein including the incident on 30.11.2016.

The Acting Director General of Health Services had made a minute dated 07.12.2016 thereon to transfer the Petitioner and hold an inquiry. Hence, it is arguable that the transfer given to the Petitioner falls within Rule 218 (iii) of the PSC Rules.

Nevertheless, no such inquiry had commenced by the time this application was filed on 12th May 2017. The affidavit of the then holder of office of the 5th Respondent filed in this case is dated 10th September 2019. It does not refer to any inquiry commenced or concluded as suggested by the Acting Director General of Health Services.

Hence, I am inclined to accept the submission made by Ms. Wijenarayana, learned counsel for the Petitioner that the transfer of the Petitioner was not to facilitate the conducting of an inquiry into the allegations made against the Petitioner.

This finding is supported upon an examination of the specific and detailed allegations of malice made against the 2nd Respondent by the Petitioner. The 2nd Respondent has failed to file an affidavit responding to these allegations though notice was served on him and being represented in the proceedings. This is further corroborated by the fact that the minute made by the then Director General of Health Services in P8 [dated 02.01.2017], directing that the Petitioner be reinstated at the previous hospital, has been disregarded.

The Petitioner was deprived of his salary for nearly four months allegedly due to his personal file not been sent to his new place of work. The salary arrears were paid only after this application was filed. The then holder of office of the 5th Respondent has not satisfactorily explained this except to claim that the matters referred to in P7(a) and P7(b) are ordinary matters that are involved in any transfer situation. It is a tragedy if the public service has fallen into such depths of inefficiency.

I can do no more than reiterate Rule 224 of the PSC Rules which reads as follows:

> *"224. It shall be the responsibility of the former Head of the Department or Head of the Institution, as the case may be, to duly transmit the following documents regarding the officer to his new Head of Department or Head of Institution* ***within two weeks of the transfer of a Public Officer****.*
>
> *(i) Updated Personal File with the updated History Sheet;*
>
> *(ii) Recommendation in respect of the period, from the date of the officer's last increment up to the date of implementation of the transfer, regarding the payment of the officer's next increment;*
>
> *(iii) Performance Evaluation Report of the officer;*
>
> *(iv) Leave particulars of the officer;*
>
> *(v) Statement on Holiday Railway Warrants obtained by the officer;*
>
> *(vi) Salary particulars of the officer;*
>
> *(vii) Credit Balance Statement of the officer;*
>
> *(viii) Report containing details of all foreign travel of the officer during his service;*

(ix) *Report containing the details of all study courses, workshops and various conferences attended by the officer;*

(x) *Other important documents relating to the officer."* (emphasis added)

The 2nd Respondent has failed to comply with this requirement. This failure lends further credence to the specific allegations of malice made against him.

Moreover, the Petitioner was not provided with a copy of letter dated 07.12.2016 [5R3] when he was transferred due to administrative reasons. At a minimum, he was not even given sufficient details of the reasons leading to his transfer on exigencies of service. This becomes significant in view of Rule 221 of the PSC Rules which reads as:

"221. The Appointing Authority shall record in the relevant file clearly all the factors that caused the transfer of an officer on exigencies of service. ***The Appointing Authority shall convey the reasons to the officer concerned****."* (emphasis added)

This is an important safeguard given to a Public Officer, and as the learned counsel for the Petitioner Ms. Wijenarayana correctly submitted, it must be read and understood in the context of Rules 230 and 231 of the PSC Rules which reads as follows:

"230. In terms of Article 58 (1) of the Constitution any Public Officer aggrieved by an order relating to a promotion or transfer made by an Authority with Delegated Power in respect of the officer so aggrieved may appeal to the Commission against such order.

231. A Public Officer making an appeal against an order relating to a transfer or promotion to the Commission shall do so only as per Appendix 23. He shall also submit certified copies of the documents in support of his representation along with the appeal."

Item 03 of Appendix 23 of the PSC Rules requires a Public Officer aggrieved by a transfer to give *"reasons for making an appeal against the decision/order"*. Hence, in order to exercise the constitutional right given to a Public Officer to appeal against a transfer order, he must be made aware of the grounds of the transfer. Merely stating that it is made on administrative grounds is untenable in law.

It is important that the Petitioner was at a minimum given sufficient details of the reasons leading to his transfer on exigencies of service since the letter dated 07.12.2016 [5R3] refers to other matters dating back to 2015 in addition to the incident that took place on 30.11.2016.

In ***Dayasena v. Bindusara, Director, National Blood Transfusion Service and Others*** **[(2003) 1 Sri.L.R. 222]**, Court was called upon to examine the legality of a transfer order. Fernando J. held (at page 227):

> *"While the 2nd Respondent had authority to transfer the Petitioner on one or more of the grounds stated above, there is no proof that he did actually make a transfer order. Even assuming that he did make a transfer order, there is no evidence as to the basis on which he acted, and it cannot be assumed that it was on one of the four permitted grounds. But even if I were to assume that he did act on one of those grounds, yet that ground and the supporting reasons were not disclosed to the Petitioner when the transfer order was made, and even when his appeals were refused and that was a fatal flaw…In the present case, not only the reasons but even the ground had not been disclosed. I therefore hold that the Petitioner's transfer was wrongful and arbitrary."*

For all the foregoing reasons, I make declaration that the failure to inform the Petitioner sufficient details to enable him to exercise his constitutional right of appeal against the impugned transfer and the failure to pay his salary for nearly four months is violative of his fundamental right to equality guaranteed under Article 12 (1) of the Constitution.

When this matter was taken up for argument and in the post-argument written submissions filed on behalf of the Petitioner, the learned counsel for the Petitioner informed that the Petitioner has now got acclimatized to his present workplace. Accordingly, we were informed that he does not wish to pursue the retransfer to the District Hospital, Kandana. The Petitioner instead sought a declaration that the Petitioner's fundamental rights guaranteed to him under Article 12 (1) and any other equitable relief under Article 126 (4) or relief to protect and advance the fundamental rights of the Petitioner under Article 118 (b) read with Article 4 (d) of the Constitution and/or compensation/costs that Court may deem fit.

The transfer of the Petitioner was made by the then Acting Director General of Health Services who has not been made a party to this application. Hence, no order for compensation can be made against him.

The objections filed by the then holder of office of the 5th Respondent shows that there were serious concerns about the conduct of the Petitioner prior to the incident on 30.11.2016. Although these matters were brought to the attention of the Ministry of Health, no action appears to have been taken. Taking into consideration all these matters, I am not inclined to award any compensation for the infringement of Article 12 (1) due to the failure to inform the Petitioner sufficient details to enable him to exercise his constitutional right of appeal against the impugned transfer.

Nevertheless, such considerations do not apply to the failure to pay the Petitioner his salary for nearly four months. This was brought about due to the failure on the part of the 2nd Respondent to comply with Rule 224 of the PSC Rules. I therefore order the 2nd Respondent to pay the Petitioner a sum of Rs. 25,000/= as compensation from his personal funds. This must be paid within one month of this judgment.

Furthermore, the State shall pay Rs. 25,000/= as costs to the Petitioner within one month of this judgment.

Judge of the Supreme Court

<u>Murdu N. B. Fernando, PC, J.</u>

I agree.

Judge of the Supreme Court

<u>K. Priyantha Fernando, J.</u>

I 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. 221/2021

1. Hirunika Eranjali Premachandra
507/A/18 Privilege Homes,
Maharagama Road, Arangala,
Hokandara North.

PETITIONER

Vs.

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

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

1. C. (Former) President Gotabaya
Rajapaksa
26A Pengiriwatta Road,
Mirihana.
and also at
308, Malalasekara Mawatha,
Colombo 07.

2. Arumadura Lawrence Romelo
Duminda Silva,

40/8, Perera Mawatha,
Pelawatta,
Battaramulla.

3. Hon. M. U. M. Ali Sabry PC,
Minister of Justice,
Ministry of Justice,
Superior Courts Complex,
Colombo 12.

3. A. Hon. Dr. Wijeyadasa Rajapakshe,
Minister of Justice,
Ministry of Justice,
Superior Courts Complex,
Colombo 12.

4. Saliya Pieris PC,
President,
Bar Association of Sr Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

RESPONDENTS

SC FR Application No. 225/2021

1. Sumana Premachandra
A1/ F12/ U6,
Treasure Trove,
Dr. N. M. Perera Mawatha,
Colombo 08.

PETITIONER

Vs.

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

1. A. (Former) President Gotabaya
   Rajapaksa
   26A Pengiriwatta Road,
   Mirihana.

2. Arumadura Lawrence Romelo
   Duminda Silva,
   40/8, Perera Mawatha,
   Pelawatta,
   Battaramulla.

3. Hon. M. U. M. Ali Sabry PC,
   Minister of Justice,
   Ministry of Justice,
   Superior Courts Complex,
   Colombo 12.

3. A. Hon. Dr. Wijeyadasa Rajapakshe,
   Minister of Justice,
   Ministry of Justice,
   Superior Courts Complex,
   Colombo 12.

4. Saliya Pieris PC,
   President,
   Bar Association of Sr Lanka,
   No. 153, Mihindu Mawatha,
   Colombo 12.

5. Rajeev Amarasuriya
   Secretary,

Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

RESPONDENTS

SC FR Application No. 228/2021

1. H. Ghazali Hussain
Attorney-at-Law
No. 30, Jayah Road,
Colomnbo 04.

PETITIONER

Vs.

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

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

2. C. (Former) President Gotabaya
Rajapaksa
26A Pengiriwatta Road,
Mirihana.
and also at
308, Malalasekara Mawatha,
Colombo 07.

2. H. M. T. N. Upuldeniya
Commissioner General of Prisons,
Prison Headquarters,
No. 150, Baseline Road,

Colombo 09.

3. Hon. M. U. M. Ali Sabry PC,
   Minister of Justice,
   Ministry of Justice,
   Superior Courts Complex,
   Colombo 12.

4. Arumadura Lawrence Romelo
   Duminda Silva,
   40/8, Perera Mawatha,
   Pelawatta,
   Battaramulla.

5. A. Saliya Pieris PC,
   President,
   Bar Association of Sr Lanka,
   No. 153, Mihindu Mawatha,
   Colombo 12.

5. B. Rajeev Amarasuriya
   Secretary,
   Bar Association of Sri Lanka,
   No. 153, Mihindu Mawatha,
   Colombo 12.

5. C. Isuru Balapatabendi
   Secretary,
   Bar Association of Sri Lanka,
   No. 153, Mihindu Mawatha,
   Colombo 12.

6. Hon. Dr. Wijeyadasa Rajapaksa
   Minister of Justice

Minister of Justice, Prison Affairs and Constitutional Reforms,
Superior Courts Complex,
Colombo 12.

RESPONDENTS

Before: **P. PADMAN SURASENA J**
E. A. G. R. AMARASEKARA J
ARJUNA OBEYESEKERE J

Counsel: **SC FRA No. 221/21**

M. A. Sumanthiran PC with Suren Fernando, Niranjan Arulpragasam & Khyati Wickramanayake for the Petitioner.

Nerin Pulle PC ASG with Vishmi Ganepola SC, Medhaka Fernando SC & M. B. M. Sajith Bandara SC for the 1A 1B & 3A Respondents.

Gamini Marapana PC with Navin Marapana PC, Kaushalya Molligoda and Uchitha Wickremasinghe for the 2nd
Respondent.

Dr. K. Kanag-Isvaran PC with Lakshmanan Jeyakumar and Aslesha Weerasekara instructed by G. G. Arulpragasam for the 4th Respondent

SC FRA No. 225/21

Eraj de Silva with Daminda Wijayarathne & Janagan Sunderamoorthy instructed by Dimuthu Kuruppuarachchi for the Petitioner.

Manohara de Silva PC with Harithriya Kumarage, Kaveesha Gamage, Nadeeshani Lankathilake and Sasiri Chandrasiri instructed by Senal Mathugama for the 2nd Respondent.

Nerin Pulle PC ASG with Vishmi Ganepola SC, Medhaka Fernando SC & M. B. M. Sajith Bandara SC for the 1st and 3A Respondents.

Dr. K. Kanag-Isvaran PC with Lakshmanan Jeyakumar & Ms. Asleesha Weerasekara instructed by G. G. Arulpragasam for the 4th & 5th Respondents.

SC FRA No. 228/21

Geoffrey Alagaratnam PC with Vishakan Sarveswaran instructed by Shammas Ghouse for the Petitioner.

Anuja Premaratna PC with Naushalya Rajapakshe & Tarangee Muthukumarana for the 4th Respondent.

Nerin Pulle PC ASG with Vishmi Ganepola SC, Medhaka Fernando SC & M. B. M. Sajith Bandara SC for the 1A, 1B & 2nd and 6th Respondents.

Dr. K. Kanag-Isvaran PC with Lakshmanan Jeyakumar & Ms. Asleesha Weerasekara instructed by G. G. Arulpragasam for the 5A & 5B and 5C Respondents.

Ruwantha Cooray for the 1C Respondent.

Argued on: 07-02-2023, 20-03-2023, 18-05-2023, 19-05-2023, 26-06-2023

Decided on: 17-01-2024

P Padman Surasena J

BACKGROUND

The Attorney General had indicted the thirteen accused mentioned in the indictment which has been produced (marked **P8**) in case SC FRA No. 225/2021 in the High Court of Colombo under 17 counts. Some of the counts in the said indictment had alleged that the accused had committed the murder of one Bharatha Lakshman Premachandra who is the father of the

Petitioner in SC FRA No. 221/2021 and the husband of the Petitioner in SC FRA No. 225/2021. The names of the accused who had stood indicted as per the said indictment are as follows:

i. Vithanalage Anura Thushara de Mel;
ii. Hetti Kankanamlage Chandana Jagath Kumara;
iii. Sri Nayaka Pathiranage Chaminda Ravi Jayanath;
iv. Kodippili Arachchige Lanka Rasanjana;
v. Wijesooriya Arachchige Malaka Sameera;
vi. Vidanagamage Amila;
vii. Kovile Gedara Dissanayake Mudiyanselage Sarath Bandara;
viii. Morawaka Dewage Suranga Premalal;
ix. Chaminda Saman Kumara Abeywickrema;
x. Dissanayake Mudiyanselage Priyantha Janaka Bandara Galagoda;
xi. Arumadura Lawrence Romelo Duminda Silva (the recipient of the pardon):
xii. Rohana Marasinghe; and
xiii. Nagoda Liyana Arachchi Shaminda.

The trial against them was conducted and concluded before a Trial-at-Bar (High Court Case No. HC 7781/2015) comprising of three Judges of the High Court.

The High Court-at-Bar had delivered two judgments on 08-09-2016. The High Court-at-Bar by majority judgment (by two Judges) convicted the 1st, 3rd, 7th, 10th and 11th accused and acquitted 2nd, 4th,5th, 6th, 8th, 9th, 12th and 13th accused. The other Judge in the minority judgment acquitted all the accused from all the charges. The conviction and sentences imposed by High Court-at-Bar on the several accused are set out in the chart below.[1]

Accused	Conviction	Sentence
1st Accused	Convicted	Count 1: Six months Rigorous Imprisonment and a fine of Rupees 10,000 (default of which 3 months simple imprisonment) Count 5-8: **Death Sentence** Count 9: Twenty years Rigorous Imprisonment Count 17: Life imprisonment
2nd Accused	Acquitted	-

[1] Vide SC judgment in SC/TAB/2A-D/2017 produced marked **P 10A** in case No. 225/2021 (vol II).

3rd Accused	Convicted	Count 1: 6 months Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple Count 2: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment) Count 3: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment) Count 4: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment) Count 5-8: **Death sentence** Count 9: 20 years Rigorous imprisonment Count 10: Life imprisonment
4th Accused	Acquitted	-
5th Accused	Acquitted	-
6th Accused	Acquitted	-
7th Accused	Convicted	Count 1: 6 months Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple) Count 2: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment) Count 3: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment) Count 4: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment) Count 5-8: **Death sentence** Count 9: 20 years Rigorous imprisonment Count 10: Life imprisonment
8th Accused	Acquitted	-
9th Accused	Acquitted	-
10th Accused	Convicted	Count 1: 6 months Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple

		Count 2: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment) Count 3: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment) Count 4: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment) Count 5-8: **Death sentence** Count 9: 20 years Rigorous imprisonment Count 10: Life imprisonment
11th Accused (The recipient of the pardon)	Convicted	Count 1: 6 months Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple) Count 2: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment) Count 3: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment) Count 4: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment) Count 5-8: **Death sentence** Count 9: 20 years Rigorous imprisonment Count 10: Life imprisonment
12th Accused	Acquitted	-
13th Accused	Acquitted	-

The High Court-at-Bar in the course of the trial appears to have recorded the evidence of over forty witnesses.[2] This indicates that the High Court-at-Bar had undoubtedly spent tremendous number of judicial hours/resources to conduct and conclude the trial in that case. This can be

[2] Vide pages 11 and 12 of the majority judgment of the High Court dated 08-09-2016 produced marked 2R1(b) in SC FR A 225/2021.

seen both from the judgment of the High Court-at-Bar[3] as well as the judgment of this Court pronounced after hearing the appeal of that case.[4] The first, third, seventh and eleventh accused, who were convicted by the High Court-at-Bar, being aggrieved by the said convictions and the sentences, had thereafter appealed to the Supreme Court. The tenth accused who was tried in absentia and who was also convicted by the High Court-at-Bar had not appealed. The Supreme Court, as has been required by law, had taken up that appeal before a bench comprising of five Justices of this Court presided by the then Hon. Chief Justice.

The judgment pronounced by this Court indicates that the five Judge bench of this court had considered that Appeal, the hearing of which, had run throughout fifteen judicial days. It was thereafter that the said bench had pronounced the final judgment of that Appeal on 11-10-2018 which consists of 51 pages[5]. The said five Judge bench of this court, having considered the said appeal, had affirmed the conviction and sentences imposed on the accused convicted by the majority judgment of the High Court at Bar except the conviction and sentence imposed on them on count No. 17.

As the convictions and the sentences imposed on the accused convicted in that case stand affirmed (except the conviction and sentence on count No. 17), even after they had exhausted their right of appeal provided by law, they had commenced serving their respective sentences in prison. As far as the death sentence of the convicted accused are concerned, they were kept in Prison awaiting the implementation of their death sentences. It was thereafter, that 1C Respondent in SC FRA No. 221/2021, 1A Respondent in SC FRA No. 225/2021 and 1C Respondent in SC FRA No. 228/2021 (who will hereinafter sometimes be referred to as "the former President of the Country" or "the former President") had granted a pardon only to the 11th accused named in the afore-stated indictment. The said 11th accused is Arumadura Lawrence Romelo Duminda Silva (who will hereinafter sometimes be referred to as "the recipient of the pardon" or "the recipient"). He, the recipient of the pardon stands as the 2nd Respondent in SC FRA No. 221/2021 and SC FRA No. 225/2021 and stands as the 4th Respondent in SC FRA No. 228/2021. The Petitioners in all three instant Fundamental Rights Applications, have challenged the afore-stated pardon granted to the recipient by the former President of the Country. It is in this backdrop, that the Petitioners in their respective Petitions have prayed *inter alia* for a declaration that the former President by the grant of the Pardon

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[3] Supra.
[4] Judgment of the Supreme Court dated 11-10-2018 produced marked P10(A) in SC FR A 225/2021.

[5] This judgment has been produced marked **P10A** SC TAB 2A-T17 dated 11-10-2018 annexed to the petition filed in SC FR 225/2021.

to the recipient, has violated the Fundamental Rights guaranteed to them by Article 12(1) of the Constitution and certain other consequential relief.

This Court having heard the submissions of the learned counsel for all three Petitioners as well as the submissions of the learned counsel for the Respondents in these three petitions, by its order dated 31-05-2022 had granted:

i. Leave to Proceed in respect of the alleged infringements of the Fundamental Rights of the Petitioners guaranteed under Article 12(1) of the Constitution, and;
ii. an interim order as per prayers (b) and (c) of SC FRA No. 221/2021, prayers (e) and (f) of SC FRA 225/ 2021 and prayers (d), (f) and (h) of SC FRA 228/ 2021.

The Petitioners have cited Hon. Attorney General as 1A Respondent in SC FRA No. 221/2021 and SC FRA No. 228/2021 and cited Hon. Attorney General as the 1st Respondent in SC FRA No. 225/ 2021, in terms of Article 134(1) of the Constitution read with Rule 44 of the Rules of the Supreme Court.

The Petitioners in SC FRA No. 221/2021 and SC FRA No. 228/2021 have again cited Hon. Attorney General as 1B Respondent on the basis that the Fundamental Rights of the Petitioners have been infringed by the act of granting the afore-stated pardon by the President of the country acting in his official capacity and the Petitioner in SC FRA No. 225/ 2021 has also cited Hon. Attorney General as the 1st Respondent, on this basis as well. This is in terms of Article 35 (1) of the Constitution.

The 3rd Respondent in all three Petitions was the Hon. Minister of Justice at the time relevant to the granting the afore-stated pardon by the Former President of the country. The 3A Respondent in SC FRA No. 221/2021 and SC FRA No. 228/2021 as well as the 6th Respondent in SC FRA 228/ 2021 is the incumbent Hon. Minister of Justice. The 4th Respondent in SC FRA No. 221/ 2021 and SC FRA No. 225/2021 and the 5A Respondent in SC FRA No. 228/2021 is the former President of the Bar Association of Sri Lanka, who has been made a respondent to these Petitions in his official capacity.

The 5th Respondent in SC FRA No. 225/2021 and the 5B Respondent in SC FRA 228/ 2021 is the former Secretary of the Bar Association of Sri Lanka, who has been made a respondent to that Petition in his official capacity.

Since the issue this court has to decide in all these cases (i.e., SC FRA No. 221/2021, SC FRA No. 225, SC FRA No. 228/ 2021) is the same, all the learned counsel who appeared for all the

parties in all three cases, concurred that these three cases could be amalgamated and heard together so that they would make composite submissions and it would suffice for this Court to pronounce one composite judgment in respect of all these three cases. Hence this judgment will contain the material, arguments, reasons and conclusions which would be composite in nature and common to all three cases.

REVIEWABILITY OF GRANT OF PARDON BY COURT.

Mr. Manohara De Silva PC appearing for the 2nd Respondent in SC FRA No. 225/2021 at the commencement of his submissions, clearly stated to court that it is not his position that the Supreme Court cannot review a pardon granted by the President. However, for the reasons he adduced in his oral submissions and also in the written submissions subsequently filed, it was his submission that this Court should not exercise its powers of review in the instant case.

Both Mr. Gamini Marapana PC appearing for the 2nd Respondent in SC FRA 221/2021 and Mr. Anuja Premaratne PC appearing for the 4th Respondent in SC FRA 228/2021 informed Court that they would associate themselves with the submissions made by Mr. Manohara De Silva PC in regard to the reviewability of grant of pardon by court. Mr. Nerin Pulle PC ASG appearing for the 1A, 1B & 3A Respondents in SC FRA 221/2021, for the 1st and 3A Respondents in SC FRA No. 225/2021 and for the 1A, 1B, 2nd and 6th Respondents in SC FRA No. 228/2021 also took up a similar position with regard to the reviewability of grant of pardon by court.

The position taken up by Mr. Manohara de Silva PC is that 'any power entrusted with any person is reviewable and this includes the President but the nature and extent to which the judiciary may intervene would differ from case to case'.[6] Focusing on the question of reviewability of the orders of the President, Mr. Manohara de Silva PC sought to segment President's powers under the four following headings:

i. Statutory powers exercised by the President qua President.
ii. Constitutional powers exercised by the President qua President.
iii. Constitutional/ statutory powers exercised by the President qua member of the cabinet.
iv. Constitutional powers exercised by the President qua Head of State.

[6] Vide post argument written submissions filed with the motion dated 04-08-2023 by the 2nd Respondent in SC FRA 225/2021.

It was his submission that whilst the first three categories referred to above, are reviewable on its merits, the fourth category namely, the exercise of constitutional powers by the President qua Head of State, isreviewable by court only to ascertain whether exercise of such powers has been done in accordance with the constitution. It is his position that Court cannot review the exercise of such powers, on their merits. It is also his position that the powers of the President that needs to be exercised qua Heads of State are incorporated in Articles 33 and 34 (1) (c) of the Constitution. Further, it is also his position that the powers enumerated in Art 33 (a) to (h), are all traditional powers that are to be generally exercised by the Head of State.

Having formulated the above argument, Mr. Manohara de Silva PC then sought to argue that the granting of a pardon to an offender as per Article 34 of the Constitution, is traditionally a power given to the Head of State and when the President grants a pardon to an offender he does so in the exercise of his powers as the Head of State. Thus, it was Mr. Manohara de Silva PC's argument that the Court's power of Judicial Review must be limited in this instance, only to examine whether the president, as the Head of State, has exercised his power of granting pardon to the offender in accordance with the Constitution.

Relying on Articles 3 and 4 of the Constitution, Mr. Manohara de Silva PC sought to justify the above position equating the power of granting pardon to an act of sovereignty exercised by the Executive. In order to examine this position, let me reproduce here, Article 3 and 4 of the Constitution.

<u>Article 3 of the Constitution</u>

> *"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."*

<u>Article 4 of the Constitution</u>

> *"The Sovereignty of the People shall be exercised and enjoyed in the following manner :—*
>
> > *a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;*

b) *the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;*
c) *the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members wherein the judicial power of the People may be exercised directly by Parliament according to law;*
d) *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; and*
e) *the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors."*

According to Article 4 of the Constitution, the People can exercise and enjoy their Sovereignty which consists of their legislative power, their executive power, their judicial power, their fundamental rights and their franchise in the five ways described therein. Thus, I can state at the outset, that Articles 3 and 4 of the Constitution have made it unequivocally clear that the Fundamental Rights are part and parcel and embedded in the Sovereignty which is vested in the people. Thus, Fundamental Rights of the people cannot under any circumstance be pushed to a 'second row'. This is because according to Article 4, all five items set out in sub-Articles (a) to (e) i.e., their legislative power, their executive power, their judicial power, their fundamental rights and their franchise are all equal components of the Sovereignty of the People. The People can exercise and enjoy them in the manner set out in Article 4. Thus, none of the five components of the Sovereignty of the People is second to any other.

Article 4(d) not only unequivocally calls upon all the organs of government to respect, secure and advance, the Fundamental Rights which the Constitution has declared and recognized, but also calls upon all the organs of government not to abridge, restrict or deny, save in the manner and to the extent provided in the Constitution. When considering the above legal obligation on all the organs of government one must not forget the fact that according to

Article 3 of the Constitution, the Sovereignty of the People includes the powers of government. Thus, none of the organs of government can distance itself and move away from the Sovereignty of the People.

Undoubtedly then, the only way to protect and preserve both the components of Sovereignty set out in Article 4(b) and 4(d) in their original positions which the Constitution expected them to be, is by ensuring compliance of the provision in Article 4(d) when exercising sovereign power of people provided for in Article 4 (b) by the President of the Republic who is elected by the People.

This Court has consistently taken the above stand to which some of the judicial precedence quoted below would bear testimony. In *Edirisuriya* Vs. *Navaratnam*,[7] a case decided by this Court in 1984, Ranasinghe J stated the following:

> *"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".*[8]

In *Mutuweeran* Vs. *The State*,[9] a case decided by this Court in 1987, this Court was called upon to consider the Attorney General's preliminary objection that the petition in that case had been filed out of time i.e., out of one month prescribed by Article 126(2). This Court

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[7] 1985 (1) SLR 100.
[8] At page 106.
[9] Sriskantha's Law Reports Vol V 126.

having observed that the Petitioner had been prevented from making his application within the permitted one-month period due to his detention which had prevented him from having access to his lawyer in order to access this Court, proceeded to hold that his delayed application for relief under Article 126 should not be ruled out, if he had made his application as soon as he became free from those constraints. Sharvananda CJ in that case stated the following:

> *"It is significant that Article 17 which provides that every person shall be entitled to apply to the Supreme Court as provided by Article 126 in respect of the infringement by executive or administrative action of his fundamental right, is itself included in the Chapter on fundamental rights. 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****".*[10]

While being in agreement with the above views taken by this Court from time to time, I also agree with the submission of Mr. Manohara de Silva PC, that the Constitution has (placed in it), inbuilt checks and balances against each stakeholder of the powers, namely, Executive, Legislature and the Judiciary and it is these checks and balances which ensure the smooth functioning of the country according to the provisions of the Constitution. Thus, I would always be mindful of that aspect when I deal with the complaints made by the Petitioners in these cases.

Learned counsel who appeared in the instant cases, cited and referred to number of judgments both local and foreign. Foreign judgments may only have interpreted the provisions of law prevailing in those jurisdictions in keeping with the systems, conditions and other requirements prevailing in those jurisdictions. Thus, they may only have a persuasive value for us. The local judgments cited before us must be identified carefully as falling into two categories: first being the judgments decided before the 19th Amendment to the Constitution which were decided on the basis that Article 35 of the Constitution had conferred immunity on the President; and the second being the judgments decided after the 19th Amendment to the Constitution which permitted any person to challenge the President's action through a Fundamental Rights Petition filed under Article 126 of Constitution. In other words, it was for the first time in the constitutional history of this country that the Constitution itself has deliberately brought in a provision (by the 19th amendment to the Constitution) to specifically

[10] At page 130; emphasize is mine.

recognize the right of any person to challenge any action or omission done by the president in his official capacity, through the jurisdiction conferred on the Supreme Court under Article 126 of the Constitution making the Attorney General a respondent in the relevant petition.

At the same time, one must bear in mind that even when there was full immunity given to the President before the 19th Amendment to the Constitution, Courts have reviewed actions of the President on the basis that such immunity conferred by the then existed Article 35 of the Constitution covered only the President as a person but did not cover his actions. Vide *Visualingam Vs. Liyanage* .[11] It was also held in *Karunathilaka* Vs. *Dayananda Dissanayake,*[12] that the immunity in its former absolute capacity only shielded the person i.e., the President and not the President's acts.

In *Visualingam's* case, one of the issues that came up for consideration and decision before nine judges of this Court which sat as a Full Bench of this Court was whether this Court is empowered directly or indirectly to call in question or making a determination on any matter relating to the performance of the official acts of the President. This was sequel to the learned Deputy Solicitor General who appeared in that case raising a preliminary objection to that effect. All the nine judges of the Full Bench of this Court which heard *Visuvalingam's* case, had pronounced separate judgments; some of them, albeit brief. The said Full Bench of this Court, by majority, had overruled the said preliminary objection.

Out of the nine judges of the Full Bench of this Court in *Visuvalingam's* case, Wimalaratne J,[13] Ratwatte J,[14] Soza J,[15] Abdul Cader J,[16] had agreed with the following part of the judgment of Sharvananda J (as he then was):

> *"Before concluding my judgment I must refer to a preliminary objection raised by the Deputy Solicitor General. It was contended by the Deputy Solicitor General that this Court is precluded from directly or indirectly calling in question or making a determination on any matter relating to the performance of the official acts of the President. He supported this objection by reference to Article 35 of the Constitution. I cannot subscribe to this wide proposition. Actions of the executive are not above the law and can certainly be questioned in a Court*

[11] 1983 (1) Sri. L. R. 203.
[12] 1999 (1) Sri. L. R. 157.
[13] At page 257.
[14] At page 260.
[15] At page 261.
[16] At page 293.

of Law. Rule of Law will be found wanting in its completeness if the Deputy Solicitor General's contention in its wide dimension is to be accepted. Such an argument cuts across the ideals of the Constitution as reflected in its preamble. 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. Though the President is immune from proceedings in 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".[17]

Samarakoon CJ and Wanasundera J in *Visuvalingam's* case, although not specifically agreeing with the above sentiments of Sharvananda J, had nevertheless not upheld the aforesaid preliminary objection raised by the learned Deputy Solicitor General who appeared in that case. Ranasinghe J and Rodrigo J in their dissenting judgments had gone on the basis that the time limit of one month specified in Article 126 is mandatory and therefore the Court did not have jurisdiction to entertain that application any longer. Thus, the above view expressed by Sharvananda J in *Visuvalingam's* case, stands as the view of the Full Bench of this Court.

Let me now turn to the case of *Karunathilaka and another* Vs. *Dayananda Dissanayake, Commissioner of Elections and others (Case No. 1).*[18] The two petitioners in that case complained to this Court that the failure of the 1st respondent (the Commissioner of Elections), and the 2nd to 13th respondents (the Returning Officers of the twelve districts) to hold elections to the five Provincial Councils, on and after 28-08-1998, was an infringement of the Fundamental Rights guaranteed to them under Articles 12 (1) and 14 (1) (a).

In *Karunathilaka's* case, the five-year terms of office of those Provincial Councils of the Central, Uva, North-Central, Western and Sabaragamuwa provinces came to an end in June, 1998. Notices under section 10 of the Provincial Councils Elections Act, No. 02 of 1988 were duly published in June 1998 fixing 28-08-1998 as the date of poll. It was not disputed that all the

[17] At pages 240-241.

[18] 1991 (1) Sri. L. R. 157.

returning officers had given notice that postal ballot papers would be issued on 04-08-1998. The petitioners had averred that *"by telegram dated 3.8.98, the respective returning officers had suspended the postal voting that was fixed for 4.8.98 . . . and no reasons were given for such suspension".*[19] The respondents had admitted that position. The very next day, on 04-08-1998, the President had issued a Proclamation under Section 2 of the Public Security Ordinance bringing the provisions of its Part II into operation throughout Sri Lanka, and made the following Regulation under Section 5 which was impugned in that case:

> *"For so long, and so long only, as Part II of the Public Security Ordinance is in operation in a province for which a Provincial Council specified in Column I of the Schedule hereto has been established, such part of the Notice under section 22 of the Provincial Councils Elections Act, No. 2 of 1988, published in the Gazette specified in the corresponding entry in Column II of the Schedule hereto, as relates to the date of poll for the holding of elections to such Provincial Council shall be deemed, for all purposes, to be of no effect."*[20]

The petitioners in *Karunathilaka's* case filed their petition on 03-09-1998, alleging inter alia, that:

a. the Proclamation was an unwarranted and unlawful exercise of discretion contrary to the Constitution, not made bona fide or in consideration of the security situation in the country or the five provinces, but solely in order to postpone the five elections;
b. the Proclamation and the impugned Regulation constituted an unlawful interference with and usurpation of functions vested in the Commissioner of Elections, under the Constitution and the Act, and compromised his constitutionally guaranteed independent status.

One of the arguments put forward by the learned Solicitor-General in *Karunathilaka's* case was that since the President could not be made a party by virtue of the then existed Article 35, and since the petitioners in that case had not cited as respondents any other persons who could answer the allegations pertaining to the *vires* of the impugned Proclamation and Regulation, this Court should make no pronouncement pertaining to their validity. Fernando J having held that the making of the Proclamation under section 2 of the Public Security Ordinance, the Regulation under section 5 thereof, and the conduct of the respondents in that

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[19] At page 157
[20] At page 163

case, in relation to the five elections, had clearly constituted "executive action" over which this Court would ordinarily have jurisdiction under Article 126, went on to consider the question whether that jurisdiction is ousted by the presence of the then existed Article 35, or by the failure to join necessary parties, or by any relevant ouster clause. The approach taken by this Court to that issue at that time is reflected in the two following paragraphs quoted from Fernando J's judgment.

First paragraph.

> *"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 that 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"…*[21]

Second paragraph.

> *"I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity: immunity is a shield for the doer, not for the act. Very different language is used when it is intended to exclude legal proceedings which seek to impugn the act. Article 35, therefore, neither transforms an unlawful act into a lawful one, nor renders it one which shall not be questioned in any Court. It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or a respondent who relies on an act done by the*

[21] At page 176.

> *President, in order to justify his own conduct. It is for that reason that this Court has entertained and decided questions in relation to emergency regulations made by the President (see Joseph Perera v. AG[22], Wickremabandu v. Herath[23], and Presidential appointments (see Silva v. Bandaranayake[24]). It is the respondents who rely on the Proclamation and Regulation, and the review thereof by this Court is not in any way inconsistent with the prohibition in Article 35 on the institution of proceedings against the President".[25]*

The two judgments of this Court relied upon by Mr. Manohara de Silva PC, i.e., *Edward Francis William Silva President's Counsel and three others* *Vs.* *Shirani Bandaranayake and three others* ,[26] *Victor Ivan and others* *Vs.* *Sarath N. Silva and others*,[27] are judgments decided by this Court before the 19th Amendment to the Constitution. Therefore, this Court had decided those cases on the basis that the then existed Article 35 of the Constitution had conferred immunity on the President leaving no room for any person to file a petition under Article 126 in respect of anything done or omitted to be done by the President.

Let me first consider *Edward Francis William Silva's* case. The petitioners in that case, had challenged the appointment of a Judge to this Court on the basis that the President had made that appointment without consultation or any other form of co-operation with the judiciary namely the Chief Justice. Let me first refer to the minority judgment of that case. In refusing Leave to Proceed in that case, the minority judgment by Perera J with two other judges agreeing with him, had proceeded on the then existed Article 35 of the Constitution to hold that an act or omission of the President is not justiciable in a Court of law, more so where the said act or omission is being questioned in proceedings where the President is not a party and in law could not have been made a party because it is only the President who could furnish details relating to the said appointment. In the minority judgment Perera J had further held that the said matter cannot be canvassed in Court when the Constitution had specifically prohibited the institution of proceedings against the President, and the challenge to that appointment cannot be isolated from the President in those proceedings since the basis for that appointment falls within the purview of an act or omission of the President.

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[22] 1992 (1) SLR 199, 230.
[23] 1990 (2) SLR 348, 361, 374.
[24] 1997 (1) SLR 92.
[25] At page 177.
[26] 1997 (1) SLR 92.
[27] 2001 (1) SLR 309.

In *Edward Francis William Silva's* case, in the majority judgment of the seven Judge bench of this Court refused Leave to Proceed in that case, on the basis that the petitioners in that case had not only failed to establish, prima facie, that there was no co-operation between the President and the Chief Justice but had also failed to indicate how they propose to supply that deficiency. It was on that basis that Fernando J in that case, in the majority judgment of this Court held that it was futile to grant Leave to Proceed in respect of the alleged infringement of their Fundamental Rights under Article 14(1) (g), which the petitioners in that case had alleged as having resulted from that alleged want of co-operation. Even in that case, Fernando J in the majority judgment of this Court had stated the fact that this Court in common with Courts in other democracies founded on the Rule of Law, has consistently recognized that there are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public; to be used for the public good; the propriety of the exercise of such discretions should be judged by reference to the purposes for which they were so entrusted. It is noteworthy that the majority of the seven Judge bench of this Court did not opt to base their decision to refuse to grant Leave to Proceed and dismiss that case on the basis adopted in the minority judgment. Thus, the majority of the seven Judge bench of this Court in that case, had opted not to endorse the view that an act or omission of the President is not justiciable in a Court of law on the then existed Article 35 of the Constitution.

Wade & Forsyth in their work on Administrative Law (Twelfth Edition) has also highlighted the fact that the other democracies founded on the Rule of Law, has recognized that there are no absolute or unfettered discretions in public law (as referred to above, by Fernando J in *Edward Francis William Silva's* case). This could be seen in the following two paragraphs quoted from that work:

> *"Judicial control, therefore, primarily means review, and is based on a fundamental principle, inherent throughout the legal system, that powers can be validly exercised only within their true limits. The doctrines by which those limits are ascertained and enforced form the very marrow of administrative law. But there are many situations in which the courts interpret Acts of Parliament as authorising only action which is reasonable or which has some particular purpose, so that its merits determine its legality. Sometimes the Act itself will expressly limit the power in this way, but even if it does not it is common for the court to infer that some limitation is intended. The judges have been deeply drawn into this area, so that their own opinion of the reasonableness or motives of some government action may be the factor which determines whether or not it is to*

be condemned on judicial review. The further the courts are drawn into passing judgment on the merits of the actions of public authorities, the more they are exposed to the charge that they are exceeding their constitutional function. But today this accusation deters them much less than formerly, particularly now that Parliament has licensed more intrusive review by the courts via the Human Rights Act 1998.

It is a cardinal axiom that every power has legal limits. If the court finds that the power has been exercised oppressively or unreasonably, or if there has been some procedural failing, such as not allowing a person affected to put forward their case, the act may be condemned as unlawful. Although lawyers appearing for government departments have often argued that some Act confers unfettered discretion on a minister, they are guilty of constitutional blasphemy. Unfettered discretion cannot exist where the rule of law reigns. The same truth can be expressed by saying that all power is capable of abuse, and that the power to prevent abuse is the acid test of effective judicial review". [28]

Let me now turn to *Victor Ivan's* case. The petitioners in *Victor Ivan's* case, had challenged the appointment of the then Chief Justice made by the President under Article 107(1) of the Constitution, alleging that their Fundamental Rights guaranteed under Articles 12(1) of the Constitution had been infringed by reason of the said appointment. Court in that case heard three petitions together and the Petitioners in all three applications had cited the then Chief Justice as the 1st Respondent (the main Respondent), and alleged that their Fundamental Rights guaranteed under Articles 12(1) of the Constitution had been infringed by reason of the appointment of the said 1st Respondent as Chief Justice. Thus, all three Petitioners had mounted a direct challenge to the validity of the appointment of the 1st Respondent as the Chief Justice in all three cases. However, in view of the provisions in then existed Article 35 of the Constitution, none of the petitioners had sought to name as respondent, the President who in fact made that appointment; in view of the same Article, none of the petitioners had sought to institute proceedings against the Attorney-General for the purpose of representing and defending the President. Therefore, in all those three cases, the Attorney-General had appeared only on his own behalf.

The provision in the then existed Article 35(1) which this court had to consider in *Victor Ivan's* case is as follows:

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[28] Wade & Forsyth's Administrative Law (Twelfth Edition) page 16.

> *"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."*

The five Judges of the bench of this Court in that case, was unanimous and proceeded to hold thus: *"Although the President's immunity remains inviolable, her acts under certain circumstances, may not."* The judgment (by Wadugodapitiya, J) proceeded to further state as follows:

> *"This case confirms the proposition that the President's acts cannot be challenged in a Court of law in proceedings against the President. However, where some other official performs an executive or administrative act violative of any person's fundamental rights, and in order to justify his own conduct, relies on an act done by the President, then, such act of such officer, together with its parent act are reviewable in appropriate judicial proceedings."* [29]

In the course of arriving at that conclusion, Wadugodapitiya J in *Victor Ivan's* case,[30] stressed the point that the President, even though he holds high office, is, nevertheless by virtue of Article 42 of the Constitution, responsible to Parliament for the due exercise, performance and discharge of her constitutional powers, duties and functions.

As has already been mentioned above, both the above cases (*Edward Francis William Silva's* case and *Victor Ivan's* case) relied upon by the learned President's Counsel who appeared for the recipient of the pardon in the instant case, are judgments decided by this Court before the 19th Amendment. Then existed Article 35 of the Constitution had at that time conferred immunity on the President leaving no room for any person to file a petition under Article 126 in respect of anything done or omitted to be done by the President. Thus, it was in the presence of that provision that this Court had proceeded to hold that some acts or omission of the President cannot be challenged under certain circumstances. Therefore, those judgments are not directly relevant to Article 35 of the Constitution in the present form. However, we agree with the submission made by the learned President's Counsel for the recipient of the pardon that it is important for this Court to ensure maintaining the comity between the Judiciary and Executive as has been stressed in *Edward Francis William Silva's*

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[29] At page 324.
[30] At page 322.

case. Thus, as has already been mentioned before, I would always be mindful of that aspect when I deal with the complaints made by the Petitioners in these cases.

Mr. Manohara de Silva PC referred us to Page 110 of the judgment of *Premachandra Vs. Major Montague Jayawickrema and another*,[31] where there had been some discussion on Monarchial prerogative powers in UK. The suggestion inherent in that submission is that the President, in his capacity as the Head of State, has a power somewhat similar to a power held by a monarch. Samarakoon CJ in *Visuvalingam's* case,[32] has emphatically rejected the proposition advanced on behalf of the Attorney General in that case that the President of Sri Lanka has "inherited the mantle of a Monarch". Samarakoon CJ in *Visuvalingam's* case, proceeded to state as follows:

> *"… Sovereignty of the People under the 1978 Constitution is one and indivisible. It remains with the People. It is only the exercise of certain powers of the Sovereign that are delegated under Article 4 as follows:-*
>
> *a) Legislative power to Parliament*
> *b) Executive power to the President*
> *c) Judicial power through Parliament to the Courts.*
>
> *Fundamental Rights (Article 4(d)) and Franchise (Article 4(e)) remain with the People and the Supreme Court has been constituted the guardian of such rights. (Vide Chapter XVI of the Constitution). I do not agree with the Deputy Solicitor General that the President has inherited the mantle of a Monarch and that allegiance is owed to him. The oath in terms of the Fourth Schedule which the Judges were required to take or affirm in terms of Article 107(4) swore allegiance to the Second Republican Constitution and the Democratic Socialist Republic of Sri Lanka. I cannot therefore accept this reasoning of the Deputy Solicitor General."*

Moreover, the following portion from the judgment of a Divisional Bench of this Court in the case of *Singarasa Vs. Attorney General*,[33] would also be relevant in that regard. In that case, Sarath N. Silva (CJ), stated as follows:

> *"The President is not the repository of plenary executive power as in the case of the Crown in the U.K. As it is specifically laid down in the basic Article 3 cited*

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[31] 1994 (2) SLR 90.
[32] 1983 (1) Sri L. R. 203 at page 222.
[33] 2013 1 SLR 245 at 260.

above the plenary power in all spheres including the powers of Government constitutes the inalienable Sovereignty of the People. The President exercises the executive power of the People ….".[34]

I also observe that this Court has repeated this position more recently in *R. Sampanthan's* case which I will deal with in more detail later in this judgment.

Further, I also observe that the questions referred to this Court in the case of *Premachandra Vs. Major Montague Jayawickrema and another*,[35] had primarily involved two basic issues of law which are as follows:

i. Is the exercise of the power vested in the Governor of a Province under Article 154F(4), excluding the proviso, immune from judicial review, either because it is a purely subjective discretion, or because it is intrinsically a political decision, the nature of which is not fit for judicial review ?
ii. In any event, has judicial review been excluded by Article 154F(2) or Article 154F(6)?

Thus, it was not a case in which this Court was called upon to consider the acts of the Head of the Executive, but only to consider some acts of a subordinate executive body (Governor of a province). Be that as it may, it is noteworthy that this Court even in that case stated the following:

> *"All statutory powers have legal limits; "the real question is whether the discretion is wide or narrow, and where the legal line is to be drawn"; and it is the Judiciary which is entrusted with the responsibility of determining those questions. When it comes to powers and discretions conferred by the Constitution, it is the special responsibility of the Judiciary to uphold the constitution by preventing excess or abuse by the Legislature or the Executive. Any exception to these principles must be clearly and expressly stated".*[36]

Having observed thus, this Court in that case has rejected the arguments advanced on behalf of the Governor such as: the phrase "in his opinion" had conferred on the Governor a purely subjective discretion; whom to appoint as Chief Minister was a matter solely and exclusively for the Governor's subjective assessment and judgment; the decision was essentially political in nature, and for that reason, too, it was not reviewable.

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[34] At page 74
[35] 1994 (2) Sri L. R. 90.
[36] At page 18 & 109.

We must decide the instant cases before us according to the provisions of the Constitution as it presently stands. This is because the alleged act of the President which is the subject matter of the complaint made by the Petitioners had occurred after the then existed Article 35 of the Constitution was significantly amended by the 19th Amendment to the Constitution. Article 35 of the Constitution now stands (after the 20th Amendment to the Constitution), in the following way:

> ***Immunity of President from suit***
>
> *35. (1) 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:*
>
> *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 paragraph (g) of Article 33.*
>
> *(2) Where 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.*
>
> *(3) 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 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.]*

Indeed, it was Article 35 which stood in the 19th Amendment to the Constitution,[37] which this Court was called upon to interpret in *Rajavarothiam Sampathan Vs. Attorney General* (*R. Sampanthan's* case).[38] It was also the submission of Dr Kanag Iswaran PC that, this Court in its seven Judge bench judgment in *R. Sampanthan's* case has rejected the argument of the Attorney General in that case that the powers conferred on the President by the Constitution in this country is similar to Royal prerogative. Dr. Kanag Iswaran PC appearing for the Bar Association of Sri Lanka, made his submissions widely on the following two aspects.

1) Nature of the power to grant pardon under Article 34 of the Constitution
2) Once such pardon is granted under that provision by the president, whether such grant of pardon can be reviewed by the Supreme Court (reviewability).

Dr. Kanag Iswaran PC in the course of his submission relied *inter alia* primarily on *R. Sampanthan's* case to which I would now turn.

This Court in *R. Sampanthan's* case heard nine petitions together and the petitioners in all nine applications complained to this Court that the President intentionally and/or willfully and/or unlawfully had violated the Constitution and/or committed an abuse of the powers of his office. They challenged before this Court, a proclamation made by the President dissolving the Parliament of the country before the lapse of four and a half years which was the criterion specified in the proviso to Article 70 (1) as it stood at that time. Some of the Respondents in that case including the secretary to the then President of the country and the Hon. Attorney General, had taken up the position in that case before this court, that this court had no jurisdiction to hear and determine the applications filed by the petitioners in that case. It was their position that the said proclamation was not subject to Judicial Review. One of the reasons set out by the said Respondents is that the procedure referred to in Article 38 (2), with regard to the impeachment of the President is a 'specific mode' prescribed by the Constitution and the Supreme Court should not disregard those specific provisions referred to in Article 38 (2) and proceed to exercise its jurisdiction to protect Fundamental Rights of citizens under Article 118 (b).

Pursuant to the above, one of the two preliminary objections raised by the Hon. Attorney General in *R. Sampanthan's* case was that the Supreme Court is precluded from exercising its Fundamental Rights Jurisdiction in respect of those applications because in such a situation

[37] The provision in Article 35 is substantially same in both the 19th Amendment to the Constitution and the 20th Amendment to the Constitution; the first proviso to Article 35(1) is similar in both those Amendments to the Constitution.
[38] SC FR 351-361/ 2018 (decided on 13-12-2018).

Article 38 (2) of the Constitution has provided a "specific mechanism" or "a specific procedure or mechanism" setting out the manner in which the Supreme Court can exercise jurisdiction with regard to the Petitioners' complaints of alleged intentional violation of the Constitution. Article 38 (2) of the Constitution is a provision under which a notice of resolution to initiate proceedings for the removal of the President on such allegations could be given. It was on that basis that the Hon. Attorney General had made extensive submissions in *R. Sampathan's* case that, the complaints made to this Court by the Petitioners in that case were 'not justiciable' under Article 126 of the Constitution.

The seven-judge bench of this court in *R. Sampanthan's* case had pronounced two judgements. One, with the concurrence of six judges and the other by the remaining judge. Both judgments reached the same conclusion and therefore there was no dissenting judgment in that case. Thus, both judgments in *R. Sampanthan's* case, have rejected the above argument put forward by the Hon. Attorney General. Six out of seven Judges of this Court had concurred with the then Chief Justice when he stated the following in his judgment:

> *"Finally, it has to be observed that the acceptance of the submission made by the Hon. Attorney General will render the first proviso to Article 35 (1) meaningless for the most part. That is because the President has an array of duties, powers and functions under the Constitution and many of the acts done or omitted to be done by the President in his official capacity will relate to his duties, powers and functions under the Constitution. Thus, if the submission made on behalf of the Hon. Attorney General is carried to its logical end, the result will be the emasculation of the first proviso to Article 35 (1). That cannot be permitted by this Court which must honour its constitutional duty under Article 4 (d) and vigorously protect the totality of its jurisdiction for the protection of fundamental rights conferred by Article 118 (b) read with Article 126 of the Constitution."*

The remaining Judge Hon. Sisira J de Abrew, J who pronounced his own judgment in *R. Sampanthan's* case, also rejected the above argument put forward by the Hon. Attorney General the basis for which could be seen in the following paragraph I have quoted from Hon. Sisira J de Abrew, J's judgment in that case.

> *"When Article 38 (2) of the Constitution is examined, it is clear that the mechanism provided in Article 38 (2) of the Constitution is only available to the Members of Parliament. This mechanism is not available to the other citizens of the country. In fact there are several petitions filed in this court seeking to quash the Proclamation dissolving Parliament. The said petitioners are not Members of Parliament. For the*

> *above reasons, I reject the above contention advanced by the learned Attorney General".*

H. N. J. Perera CJ in *R. Sampanthan's* case, adopted *the 'maxim expressio unius est exclusio alterius'* which enunciates the principle of interpretation that the specific mention of only one item in a list implies the exclusion of other items in order to fortify his conclusion contained in the following paragraph:

> *"It appears to me that this is an appropriate instance in which the maxim should be applied to raise the inference that the exclusion of the power to declare War and Peace under Article 33 (2) (g) from the ambit of the Proviso to Article 35(1) of the Constitution denotes that all the other powers of the President which are listed in Article 33 (2) are, subject to review by way of an application under Article 126 in appropriate circumstances which demand the Court's review of those powers".*[39]

Thus, all seven Judges of this Court in the two judgments referred to above, in *R. Sampanthan's* case, have rejected the argument that there are some powers which are vested in the President which are not subject to review by this Court by way of proceedings under Article 126 of the Constitution in appropriate circumstances.

I agree with the above conclusion reached in the seven-judge bench judgment of this Court. I have no reason to disagree with Their Lordships. Thus, I reject the argument that the grant of a pardon to an offender by the President is not reviewable by this Court in terms of its jurisdiction under Article 126 read with the proviso to Article 35 of the Constitution.

In view of the previous conclusions arrived at by fuller benches of this court particularly in the more recent times in *R. Sampanthan's* case, I really do not have to consider in depth the foreign judgments cited before us by the learned President's Counsel who appeared for the Petitioners as well as for the Respondents. As I have mentioned before, the foreign judgments would have only a persuasive value in the absence of any clear conclusion by our Courts on a certain matter. But here, it is not the case. As has been shown above, the points agitated by the learned President's Counsel for some of the Respondents have been considered and clearly decided by this Court in its previous judgments. Thus, suffice it to repeat here that I agree with those previous decisions made by this Court.

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[39] At page 42 of the judgment of Hon. H. N. J. Perera CJ in R. Sampanthan's case.

Having come to the above conclusion, let me now examine the complaint of the Petitioners that their Fundamental Rights guaranteed under Article 12(1) of the Constitution have been infringed. That is the issue on which this Court had granted Leave to Proceed.

It would be convenient for me to list out at this juncture, the composite arguments advanced by the learned Counsel who appeared for the Petitioners in all three applications. They are as follows,

1. Since the former President of the Country had completely ignored the provisions in Article 35 of the Constitution, he has acted arbitrarily and outside the powers given to him by the Constitution.
2. In any case, the decision taken by the former President of the Country is irrational, unreasonable and cannot be supported by any reason.
3. The former President of the Country has failed to adduce any reason whatsoever to justify his decision.
4. The former President of the Country has infringed the Fundamental Right guaranteed to each citizen, in terms of Article 12 of the Constitution, when he chose to grant a pardon only to the recipient of the pardon in the instant case, ignoring the presence of the other convicted accused, who are undergoing similar sentences in the same case after their convictions by the Trial-at-Bar was affirmed by the Supreme Court, and also in view of the presence of many other convicts waiting in the death row of the prisons of this country.
5. The former president of the Country has completely ignored the provisions in Section 3 (Q) of the Assistance to and Protection of Victims of Crime and Witnesses Act No. 04 of 2015 as amended.
6. The former President of the Country had made a partisan decision when he chose to grant the pardon to the recipient of the pardon alone, who is one of his close friends and a political ally.
7. The instant grant of pardon to the recipient of the pardon, by the former President of the Country, totally erodes the confidence the public has reposed in the criminal justice system of the country.

WHERE IS THE PARDON GRANTED TO THE RECIPIENT?

In order to ascertain whether the former President had completely ignored the provisions in Article 34 of the Constitution and has acted arbitrarily outside the powers vested in him by the Constitution this Court at the outset would need to look at the impugned grant of pardon relevant to the instant case and the underlying reasons upon which the former President had decided or justified the granting of the said pardon.

Let me at this stage, reproduce one of the interim orders this court had made on 31/05/2022 as per paragraph (b) of the prayers of the petition dated 19-07-2021 in SC FR 221/2021. The said prayer is as follows:

> b) *Direct any one or more of the Respondents and in particular, the 1A and/or 1B and/or 3rd and/or 4th Respondent, to submit to Court, the Record pertaining to the impugned Pardon, including but not limited to, the decision to pardon the 2nd Respondent and all antecedent documentation relevant to the granting of a Presidential Pardon to the 2nd Respondent, including communications sent by the President, and recommendations/advice tendered in respect of same, including but not limited to:*
>
> I. *Any petition for release/pardon submitted by or on behalf of the 2nd Respondent;*
>
> II. *The Report(s) (if any), caused to be made to the President, by the Hon. Judges who tried the case pertaining to the 2nd Respondent as required by the proviso to Article 34(1) of the Constitution;*
>
> III. *The advice of the Hon. Attorney General (if any), pursuant to the proviso to Article 34(1) of the Constitution in respect of the 2nd Respondent who was sentenced to death, and the documentation that was forwarded to the 3rd Respondent Minister;*
>
> IV. *The recommendation of the 3rd Respondent Minister (if any), pursuant to the proviso to Article 34(1) of the Constitution in respect of the 2nd Respondent who was sentenced to death as submitted to the President along with any other documentation so submitted;*
>
> V. *Correspondence between the Bar Association of Sri lanka and the President pertaining to the above;*

VI. A true copy of the Gazette, Proclamation or document containing the decision for and/or grant of the pardon in respect of the 2nd Respondent.

Pursuant to that interim order, the Hon. Attorney General, by his motion dated 28-07-2022, submitted before this Court, only the following documents,

1. The request made by the mother of the 2nd Respondent marked as **1R1**,

2. The request made by the Members of Parliament marked as **1R2**,

3. The letter by the Secretary to the President addressed to the Hon. Attorney General along with the reports of the Judges of the Trial-at-Bar marked as **1R3**,

4. The reports of the Judges of the Trial-at-Bar marked as **1R4(a)**, **1R(b)** and **1R4(c)**;

5. The advice of the Hon. Attorney General marked as **1R5**,

6. The recommendation of the Hon. Minister of Justice marked as **1R6**,

7. The Letter of the Secretary to the President addressed to the President of the Bar Association marked as **1R7**.

By making the interim order made by this court on the date of support i.e., 31-05-2022, as per paragraph 3 of the prayers, this Court expected the relevant Respondents to submit to this Court for its perusal, the record pertaining to the impugned pardon, including a copy of the Gazette, Proclamation or document containing the decision for and/or grant of the pardon in respect of the recipient of the pardon in the instant case.

Although this court has ordered the Respondents in particular 1A and/or 1B Respondents (in SC/FR/221/2021), to submit to this court, the decision to grant the impugned pardon the said Respondents have failed to submit to this court the said decision to grant the impugned pardon by the former President of the country. The only document which indicates that such pardon has been granted to the recipient is the letter produced marked **1R7** dated 05-07-2021. We note that the Petitioners had filed these cases to challenge the impugned pardon on 20-07-2021 (SC/FR/221/2021). **1R7** is a letter written by the Secretary to the President Mr. P.B. Jayasundara addressed to the President of the Bar Association which had only answered a request made by the Bar Association from the President to convey the basis upon which the President had decided to grant the impugned pardon. The Petitioner in SC FRA 221/2021 has

produced a copy of this request marked **P8** with her petition. The letter by the Bar Association **P8** is dated 24-06-2021; it is this letter **1R7** that has referred to the letter dated 24-06-2021. Thus, it is clear that this letter **1R7** has been written very much after the conclusion of granting the impugned pardon. Even in **1R7**, the Secretary to the President has neither divulged as to when the former President had granted the impugned pardon nor divulged the reasons upon which it was granted.

Leave alone reasons for granting the impugned pardon to its recipient, shouldn't the relevant Respondents have produced before this court, at least a minute in the relevant file (if there was any), for the perusal of the court, before making submissions to justify that it was for good reasons that the former President had made such a decision? Thus, it is the situation before us in the instant case that we have to start looking for the decision of granting the impugned pardon before we venture to consider the underlying reasons for such decision, both of which have not been produced before Court. In these circumstances, I have to hold that the relevant Respondents in the instant case have failed either to produce the decision of the former President of the country to grant the impugned pardon to the recipient or the underlying reasons attached to it.

We have already held that the grant of a pardon to an offender by the President is reviewable by this Court in terms of its jurisdiction under Article 126 of the Constitution. As has already been mentioned above, the President of the Republic is duty bound to ensure the compliance of the provision in Article 4 (d) when he exercises sovereign power of people provided for in Article 4 (b) as he is elected by the People. As Ranasinghe J stated in *Edirisuriya* Vs. *Navaratnam*,[40] 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. How can this Court safeguard the fundamental rights of the citizens of the Republic when neither the decisions nor reasons thereto, are produced before Court. The Nineteenth Amendment to the Constitution has deliberately brought in Article 14A specifically giving the citizens of the Republic the right to access to any information as provided for by law, being information that is required for the exercise or protection of citizens' rights held by the State authorities. According to Section 7(1) of the Right to Information Act No. 12 of 2016, it shall be the duty of every public authority to maintain all its records duly catalogued and indexed in such form as is consistent with its operational requirements which would facilitate the right of access to information as provided for in that Act. This right of the citizens of the

[40] Supra at page 106.

Republic to access to any information can be denied only if such information falls under such categories specified in Section 5 of the Act and neither the decisions nor reasons relating to the granting of the impugned pardon to its recipient falls under Section 5 of that Act. As per the above provisions of law, the President is obliged under law to maintain not only all the records, but also the reasons pertaining to granting of any pardon to any offender exercising the powers vested in him by the Constitution.

Hon. Attorney General in his letter (**1R5**) to the Hon. Minister of Justice, had also highlighted several salient features namely: the fact that the recipient of the pardon along with twelve others were charged before the High Court at Bar on seventeen counts on the information exhibited by the Attorney General; the fact that those counts included charges of being members of an unlawful assembly and allegations of committing offences of criminal intimidation; the fact that those counts included charges in relation to causing the murders of four persons, attempting to murder another person, possession of a T-56 automatic gun an offence punishable under the Fire Arms Ordinance whilst being members of the said unlawful assembly; the fact that at the trial, 47 witnesses had testified; the fact that the High Court-at-Bar had also received in evidence around 170 documents and productions etc. I have earlier adverted to the fact that the judgment of the High Court-at-Bar has indicated that it had spent tremendous number of judicial hours/resources to conduct and conclude the trial in that case. Thereafter, as has already been mentioned above, the five Judge bench of this court had considered the appeal relevant to that case throughout fifteen judicial days before it proceeded to pronounce the final judgment of the said Appeal which consisted of 51 pages. I need to emphasize here that it is in the exercise of the judicial power of the People of this country that these judgments have been pronounced by those Courts and that is how the people of this country have exercised their sovereignty (judicial power) which is inalienable. Having regard to the above circumstances, when neither the decision nor the reasons relating to the granting of the impugned pardon to its recipient is made available, how can the People of this country ascertain or be satisfied that the President has lawfully exercised the executive power of the people? Thus, such granting of a pardon without either the decision or the reasons thereto, cannot be identified as a lawful exercise of the executive power of the people. To say the least, such an action could only be identified as an arbitrary act on the part of its doer which would be an insult to the sovereignty of the people.

REASONS/JUSTIFICATIONS FOR THE PARDON GRANTED TO THE RECIPIENT

Let me nevertheless next consider whether there have been valid reasons for such a decision. The only Document produced before this Court by the Hon. Attorney General which has mentioned about a decision of the President, to grant the impugned pardon, is the letter **1R7** dated 05-07-2021 (written very much after the conclusion of the impugned granting process). I have already explained previously what this letter is all about. It has been written by the Secretary to the President and addressed to the President of the Bar Association of Sri Lanka (4th Respondent in SC FRA No. 221/ 2021 and SC FRA No. 225/2021, and 5th Respondent in SC FRA No. 228/2021). The said letter is brief enough so that I can reproduce it below:

"I refer to your letter dated 24th June 2021, on the above subject addressed to His Excellency the President.

I am instructed by His Excellency the President to inform you, that due process as per Article (34)1 of the Constitution of the Democratic Socialist Republic of Sri Lanka has been followed in granting pardon to Mr. Duminda Silva. Accordingly, reports from the Trial Judges, recommendation from Hon. Attorney General and the Minister of justice were called prior to granting of the pardon to Mr. Duminda Silva.

Mr. Silva's pardon was given due consideration following the appeal made by his mother Mrs. Romain Malkanthi Silva on 6 th December 2019."

Other than **1R7**, there is no other document before Court to enable the bench even to attempt to fish out any possible reason which had prompted the former President to decide the grant of the impugned pardon. The document **1R7** being the only document available, has only stated two things. The first is the fact that the due process as per Article 34 (1) of the Constitution has been followed in granting the impugned pardon. The second is that the impugned pardon was given upon the consideration of the appeal made on 6th December 2019 by its recipient's mother Mrs. Romain Malkanthi Silva.

Although **1R7** is the only document submitted by the Hon. Attorney General in regard to any decision/reason/justification for the granting of the impugned pardon, the former president has submitted his affidavit dated 03-02-2023 to this Court in these proceedings. The said affidavit is as follows:

"I, Nandasena Gotabaya Rajapaksa of No. 26A, Pangiriwatta Road, Mirihana being a Buddhist do hereby solemnly, sincerely and truly declare and affirm as follows,

1) *I am the affirmant above named.*

2) *I affirm to the matters set out herein below from my personal knowledge and upon perusal of documents and records available to me.*
3) *I state that I received notices in respect of the captioned matter before Your Lordships' Court.*
4) *I state that at all times material, I acted bona fides and in the interest of the country.*
5) *I specifically deny the insinuation that I granted the pardon due to personal or political affiliation.*
6) *I state that I caused a report to be made by the Judges who tried the case and forwarded the said reports to the Hon. Attorney General with instructions that, the Hon. Attorney General having advised thereon the reports together with the Hon. Attorney General's advice to be sent to the Minister in charge of the subject of Justice who shall intern forward the said reports, the advice of the Hon. Attorney General with his recommendations to the President.*
7) *I state that the due process was duly followed.*
8) *I state that in the said circumstances having considered the material placed before me, I duly and properly exercised powers in terms of Article 34 of the Constitution.*
9) *I state that I exercised my discretion correctly.*
10) *I further state that I have the highest respect for the Supreme Court and will abide by any decision given by Your Lordships' Court.*
11) *I state that the documents relevant to the captioned matter are not with me at present, but I do recall that there have been medical reports that were tendered to me which stated that his medical condition required him to be out of prison. I also recall there were several other representations that were made to me on various other grounds asking that he be pardoned. I also recall that there were several material that necessitated his pardon.*
12) *I state that, the said documents that were tendered to me should be at the Presidential Secretariat.*
13) *I emphasize that I have duly followed the process.*
14) *I state that I cannot be of any further assistance as I do not have access to any of the relevant files.*
15) *In the said circumstances, with respect I state that there is no necessity for me to participate any further in these proceedings.*

> 16) *In these circumstances I urge that I be excused from participating in these proceedings."*

I need to mention here that my endeavor at this stage, is to try and find reasons which may have prompted the former President to make the decision to grant the impugned pardon. Four such reasons can be gleaned from **1R7** and the above affidavit filed by the former president. They are as follows:

i. He had acted bona fide and in the interest of the country.
ii. He had followed the due process.
iii. He had considered the material placed before him.
iv. He had exercised his discretion correctly.

Let me now turn to the above mentioned first reason. When the former President decided to grant the pardon which is impugned in the instant case, what is the interest of the country he had taken into consideration? To my mind, two sources can reveal this to Court. Firstly, the former President himself because it is only he who knows as to what he himself has stated in his affidavit. Secondly, the documentation that the former President would have left in the Presidential Secretariat when he relinquished his office. Indeed, the former President in his affidavit, has stated that the documents that were tendered to him should be at the Presidential Secretariat. However, Pursuant to the interim order made by this Court on 31-05-2022, Hon. Attorney General had only submitted to this Court, the documents **1R1** to **1R7** which I have already set out above. Although the said interim order has directed the Hon. Attorney General to submit to this Court, the record pertaining to granting of the impugned pardon, other than the above documents, there is no such record submitted by the Hon. Attorney General for the perusal of this Court. Be that as it may, none of the documents submitted by the Hon. Attorney General has ever indicated that the granting of the impugned pardon was based on such a reason. Such basis is not discernible even as an underlying reason. Thus, this position taken up by the former President is not supported either by himself or by the other documentation before this Court. Therefore, I am unable to accept that the former President had acted in the interest of the country when he decided to grant the impugned pardon.

The second reason above mentioned is the fact that the former President had followed the due process. The former President has asserted this, both in paragraph 06 and 07 of his affidavit. While paragraph 07 is a straightforward sentence, formulation of paragraph 07 appears to have been carefully couched in the exact wordings found in the Proviso to Article

34(1) of the Constitution. It is true that the due process to be followed is set out in Article 34(1) of the Constitution. However, the issue is whether that procedure has been followed when the decision to grant the impugned pardon was made by the former President. This issue, I would proceed to discuss later in this judgment.

The third reason is the fact that the former President had considered the material placed before him before he exercised his discretion correctly in terms of Article 34 of the Constitution. According to paragraph 11 of the affidavit submitted by the former President, the material placed before him before he exercised his discretion are not with him at present. In paragraph 12 of his affidavit, the former President states that the documents tendered to him must be at the Presidential Secretariat. It was on that basis that the former President states in paragraph 14 of his affidavit that he cannot be of any further assistance in these proceedings as he does not have access to any of the relevant files. As has been mentioned above, Hon. Attorney General has forwarded to this Court, only the documents I have identified above. Apart from the reports of the judges who heard the case at the High Court at Bar, the advice of the Hon. Attorney General and the recommendation of the Hon. Minister of Justice, there are only two other documents submitted by the Hon. Attorney General which could be regarded as material placed before the President for his decision. Those two documents are **1R1** and **1R2**. The document **1R1** is the appeal made on 06-10-2019 by the recipient's mother Mrs. Romain Malkanthi Silva which is the appeal referred to in the letter (**1R7**) written by the Secretary to the President Mr. P.B. Jayasundara addressed to the President of the Bar Association. The letter **1R2** is also a request dated 19-10-2020 made to the President by 117 Members of Parliament requesting a grant of pardon to the recipient. I would be dealing with the documents submitted by the Hon. Attorney General later in this judgment when I deal with the issue whether the due process set out in Article 34 (1) of the Constitution has been followed when making the decision to grant the impugned pardon.

The fourth reason is the fact that the former President had exercised his discretion correctly. In paragraph 11 of the affidavit, the former President has stated that he recalls that there were several other representations that were made to him on various grounds asking that the recipient be pardoned and also recalls that there was several materials that necessitated his pardon. However, we do not find any such material other than **1R1** and **1R2** amongst the documents submitted by the Hon. Attorney General for the perusal of this court. The question whether the former President had exercised his discretion correctly is closely linked to the issue whether he had considered the material placed before him. Therefore, the question

whether the former President had exercised his discretion correctly is also a matter to be seen later in this judgment.

WHETHER THE FORMER PRESIDENT HAD FOLLOWED THE DUE PROCESS

It is the position of Mr. Manohara De Silva PC appearing for the 2nd Respondent in SC FRA No. 225/2021, Mr. Gamini Marapana PC appearing for the 2nd Respondent in SC FRA No. 221/2021, Mr. Anuja Premaratne PC appearing for the 4th Respondent in SC FRA No. 228/2021 and Mr. Nerin Pulle PC ASG appearing for the 1A, 1B & 3A Respondents in SC FRA 221/2021, for the 1st and 3A Respondents in SC FRA No. 225/2021 and for the 1A, 1B, 2nd and 6th Respondents in SC FRA No. 228/2021,, that this Court should not exercise its powers of review in the instant case as the due process in relation to the granting of the impugned pardon has been followed. The former President has also re-iterated that he had followed the due process when deciding to grant the impugned pardon. Although Article 33 has listed the duties powers and functions of the president, it has to be highlighted that the power of the President to grant pardon to any offender convicted of any offence by any Court within the Republic of Sri Lanka, has been dealt with in the constitution in a separate Article. The said Article being Article 34 has fully dedicated itself for that subject. Thus, the due process which should be followed by the President when deciding to grant a pardon to any offender who is under death sentence imposed by court, is set out in Article 34 of the Constitution which is self-explanatory on the matter. It is as follows:

Article 34

> *"(1) The President may in the case of any offender convicted of any offence in any court within the Republic of Sri Lanka—*
>
> *(a) grant a pardon, either free or subject to lawful conditions;*
>
> *(b) grant any respite, either indefinite or for such period as the President may think fit, of the execution of any sentence passed on such offender;*
>
> *(c) substitute a less severe form of punishment for any punishment imposed on such offender; or*
>
> *(d) remit the whole or any part of any punishment imposed or of any penalty or forfeiture otherwise due to the Republic on account of such offence;*

Provided that where any offender shall have been condemned to suffer death by the sentence of any court, the President shall cause a report to be made to him by the Judge who tried the case and shall forward such report to the Attorney-General with instructions that after the Attorney-General has advised thereon, the report shall be sent together with the Attorney-General's advice to the Minister in charge of the subject of Justice, who shall forward the report with his recommendation to the President.

(2) The President may in the case of any person who is or has become subject to any disqualification specified in paragraph (d), (e), (f), (g), or (h) of Article 89 or sub-paragraph (g) of paragraph (1) of Article 91-

(a) grant a pardon, either free or subject to lawful conditions, or

(b) reduce the period of such disqualification.

(3) When any offence has been committed for which the offender may be tried within the Republic of Sri Lanka, the President may grant a pardon to any accomplice in such offence who shall give such information as shall lead to the conviction of the principal offender or of any one of such principal offenders, if more than one."

There is no dispute that the Constitution has vested such power in the hands of the President to grant a pardon to an offender who is under death sentence imposed by court in terms of Article 34(1) of the Constitution. The complaint made before this Court by the Petitioners in these Petitions, is that there is a fetter on the said power vested in the President. The proviso to Article 34 (1) of the Constitution in unambiguous terms has made this position clear. Accordingly, the President is bound by the proviso to Article 34 of the constitution, to follow the steps mentioned therein, before he decides to grant a pardon to an offender who has been sentenced to death by a court. It is prudent to identify the said steps which I proceed to mention below.

i. President shall cause a report to be made to him by the Judge who tried the case.

ii. The President shall forward such report to the Attorney-General with instructions that after the Attorney-General has advised thereon, the report shall be sent together with the Attorney-General's advice to the Minister in charge of the subject of Justice.

iii. The Minister in charge of the subject of justice shall forward the report with his recommendation to the President.

The documents tendered by the Attorney General include, the reports tendered by the judges who heard the case before the High Court-at-Bar. It is relevant at this stage to quote the operative parts of the reports of the two learned High Court Judges, who by majority judgment convicted the recipient of the pardon. They are as follows,

Conclusion of the report by High Court Judge M. C. B. S. Morais on 04-05-2021.

> *"I understand that the prisoner was a politician. The role of a Politicians in a democratic society is to lead people and to set an example to the others by conduct. In this incident 4 persons were murdered and another was attempted to murder in addition to possessing an illegal firearm. In my view, any pardon considered for the prisoner, would not tally with the norms of a Democratic society.*
>
> *In the light of the above, I do not recommend any pardon being considered presently. However, as Your Excellency has a Constitutional discretion, I leave it at Your Excellency's hands."*

Conclusion of the report by (Retired) High Court Judge Padmini N. R. Gunatilake on 11-05-2021.

> *"In the aforesaid circumstances, it is my view that Mr. Duminda Silva was correctly and lawfully convicted and sentenced to death, and therefore, I cannot recommend that he be pardoned by Your Excellency."*

The learned High Court Judge who decided to acquit all the accused after the trial, for obvious reasons, in his report, had merely reiterated his decision to acquit all the accused and left it at that.

After the receipt of the reports by the three Judges who heard the case before the High Court-at-Bar, the Secretary to the President by letter dated 31-05-2021 (produced marked **1R3**), had forwarded the said reports to the Hon. Attorney General requesting him to provide his advice on the matter to the Hon. Minister of Justice.

The Hon. Attorney General by his letter dated 21-06-2021 (produced marked **1R5**), had advised the Hon. Minister of Justice. In doing so, Hon. Attorney General in **1R5**, had at the outset, highlighted the following salient features of the case:

1. *The recipient of the pardon along with twelve others were charged before the High Court at Bar on seventeen counts on the information exhibited by the Attorney General. Those counts included charges of being members of an unlawful assembly; commiting offences of criminal intimidation; murder of four persons; attempting to murder another person; possession of a T-56 automatic gun an offence punishable under the Fire Arms Ordinance whilst being members of the said unlawful assembly,*
2. *At the trial, 47 witnesses had testified. The High Court-at-Bar had also received in evidence around 170 documents and productions. The accused including the recipient of the pardon had also given evidence,*
3. *The counts upon which the recipient of the pardon was convicted included four charges of murder, one count of attempted murder and two charges of criminal intimidation,*
4. *The recipient of the pardon was sentenced inter alia to death in respect of each count of murder; and, to a term of 20 years' rigorous imprisonment on the count of attempted murder.*
5. *Both the convictions and sentences on the recipient of the pardon and three others were upheld by a five judge Bench of the Supreme Court on 11th October 2018, in SC/TAB/2A-D/2017.*

Having set out the above salient features of the case, Hon. Attorney General had then advised to the Hon. Minister of Justice on the issue of granting the pardon. The following can be extracted from **1R5**, as those pieces of advice.

1) *In the above context, it may be noted that the exercise of the said power of pardon by His Excellency the President under Article 34 of the Constitution, is the subject matter of several Fundamental Rights cases presently pending before the Supreme Court.*

6. *Therefore any exercise of the such power of pardon by His Excellency the President under Article 34 of the Constitution should be capable of withstanding the test of rationality, reasonableness, intelligible and objective criteria.*
7. *As enunciated by Justice Holmes of the United States Supreme Court in the case of* *Biddle v. Perovich*, *[71 L. Ed. 1161 at 1163]:*

> *" A pardon in our days is not a private act of grace from an individual happening to possess power. It is the part of the Constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."*

Further, the classic exposition of the law relating to pardon is to be found in Ex Parte Philip Grossman where Chief Justice Taft stated:

> *"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgements. [69 L. Ed. 527] "*

5. *Accordingly, from the forgoing it emerges that power of pardon, remission can be exercised upon discovery of an evident mistake in the judgment or undue harshness in the punishment imposed.*

After receipt of the Hon. Attorney General's advice, the Hon. Minister of Justice has sent the letter dated 23-06-2021 (produced marked **1R6**), to the President. The perusal of the said letter **1R6** reveals that the Hon. Minister of Justice also had not made any positive recommendation to grant the impugned pardon.

The above material show that two of the learned High Court Judges who convicted and sentenced the recipient of the pardon had not recommended to the former President to grant the impugned pardon in this instance. The report submitted by the learned High Court Judge who decided to acquit all the Accused in his judgment is not helpful with regard to the question of propriety of granting the impugned pardon. The letter produced marked **1R3** is only a letter presented by the Secretary to the President which had forwarded the reports submitted by the learned High Court Judges to the Hon. Attorney General. In the letter **1R5**, the Hon. Attorney General had clearly advised the Hon. Minister of Justice about the correct legal position with regard to the decision-making process relating to the granting of a pardon by the President. This is set out in no uncertain terms in paragraph 3 of that letter which reads as follows: *"As such, the exercise such power of pardon by His Excellency under Article 34 of*

the Constitution in the above circumstances should be capable of withstanding the test of rationality, reasonableness, intelligible and objective criteria."

As has already been mentioned above, Hon. Attorney General has gone to the extent of citing the two dicta taken from the judgments cited in his letter. Contents of those dicta (which I have previously reproduced in this judgment) indicate that Hon. Attorney General had deliberately drawn the attention of the Hon. Minister of Justice to those two dicta with a view to highlight the fact that it is not open under our law for the President to make a subjective decision to grant the impugned pardon particularly when it does not pass the test of rationality, reasonableness, intelligible and objective criteria.

Finally, the Hon. Attorney General in his letter has advised the Hon. Minister of Justice that the *"power of pardon, remission can be exercised upon discovery of an evident mistake in the judgment or undue harshness in the punishment imposed."*

Next question is whether the Hon. Minister of Justice had considered and acted on the advice of the Hon. Attorney General. The only place where there is a reference to the advice of the Hon. Attorney General in the report submitted by the Hon. Minister of justice to the former President is the last paragraph of that letter. The report of the Hon. Minister of justice submitted to the President produced marked **1R6** is as follows:

> *"His Excellency Gotabaya Rajapaksa,*
>
> *President of Sri Lanka,*
>
> *Presidential Secretariat,*
>
> *Colombo 01.*
>
> *Your Excellency,*
>
> ***Grant of Pardon to Arumadura Lawrence Romelo Duminda Silva***
>
> ***High Court Case No. HC/7781/2015***
>
> *A.L.R.D. Silva along with twelve others was charged with being members of an unlawful assembly, criminal intimidation, murder of 04 persons, attempted murder of one person and possession of T56 automatic gun.*

After trial, the High Court at Bar, acquitted eight accused and convicted the said A.L.R.D. Silva and four others. A.L.R.D. Silva was convicted on four charges of murder, one count of attempted murder and two charges of criminal intimidation. He was sentenced to death in respect of each count of murder and to a term of 20 years rigorous imprisonment on the count of attempted murder. The conviction and sentence were by a majority decision of 03 trial Judges of the High Court at Bar.

The presiding Judge wrote a dissenting judgment disagreeing with the majority decision and expressed the view that the testimonial trustworthiness of all eye witnesses of the prosecution was in issue.

Conviction and sentences on Silva and three others were upheld by a five Judge Bench of the Supreme Court. Hon. Justice Shiran Gooneratne in a communication to the Secretary to the President has expressed the view that all accused in this case should be acquitted of all counts on the indictment.

Hon. M.C.B.S. Morias, High Court Judge, in his report submitted under Article 34 of the Constitution with regard to the prisoner opined that in considering a pardon, H.E the President may consider whether the objectives of giving a pardon were achieved and the extent of such achievement. He noted that if the sentence is converted to years of imprisonment, it would be equivalent to 132 years of imprisonment and the prisoner has so far served only 4 years and 8 months approximately.

I have been advised by the Hon. Attorney General by his letter dated 21st June 2021 (copy annexed) to take the following factors into consideration when recommending to your excellency a pardon under Article 34 of the Constitution on the above-mentioned prisoner.

- *(a) Interest of the society and the convict;*
- *(b) The period of imprisonment undergone and the remaining period;*
- *(c) Seriousness and relative recentness of the offence;*
- *(d) The age of the prisoner and the reasonable expectation of his longevity;*
- *(e) The health of the prisoner especially and serious illness from which he may be suffering;*

(f) Good prison record;

(g) Post-conviction conduct, character and reputation;

(h) Remorse and atonement;

(i) Deference to public opinion. ……

Accordingly, it is a matter for Your Excellency to exercise the discretion vested with Your Excellency under Article 34 of the Constitution. "

Mr. Sumanthiran PC referring to the 3rd paragraph in that letter submitted to court that the assertion by the Hon. Minister of Justice that *"Hon. Justice Shiran Gooneratne in a communication to the Secretary to the President has expressed the view that all accused in this case should be acquitted of all counts on the indictment"* is false. The report [**1R4(a)**] submitted by the presiding Judge of the Trial-at-Bar Hon. Justice Shiran Gooneratne is a short report. It is as follows:

මරණීය දඬුවම් නියම වී බන්ධනාගාරගතව සිටින අයට ජනාධිපති සමාව ලබා දීම.

නම : අරමාදුර ලෝරන්ස් රෙමෙලෝ දුමින්ද සිල්වා

මහාධිකරණ නඩු අංකය : HC/7781/2015 මහාධිකරණය, කොළඹ 12

උක්ත කරුණට අදාළව ඔබගේ PS/CSA/00/9/3/115 අංක දරණ හා 2021 අප්‍රේල් මස 21 දිනැති ලිපිය හා බැඳේ.

ඉහත සඳහන් නඩුවෙහි ගරු පද්මිණී රණවක සහ ගරු චමත් මොරායස් යන විනිසුරුවරුන් සමග මම සභාපති විනිසුරු වශයෙන් කටයුතු කළ බව සනාථ කරමි. එකී නඩු විභාගය අවසානයේදී ගරු පද්මිණී රණවක සහ ගරු චමත් මොරායස් යන විනිසුරුවරුන් විසින් බහුතර තීන්දුවක් ප්‍රකාශයට පත් කරමින් ඉහත සඳහන් ඒ.එල්.ආර්. දුමින්ද සිල්වාට විරුද්ධව නාග ඇති චෝදනාවන්ට වරදකරු කරමින් දඬුවම් නියම කර ඇති අතර, මා විසින් ප්‍රකාශිත නඩු තීන්දුවේ සඳහන් හේතූන් මත සියලු චූදිතයන් නිදොස් කොට නිදහස් කර ඇත.

මෙයට- විශ්වාසී,

ඒ.එල්. ශිරාන් ගුණරත්න

ශ්‍රේෂ්ඨාධිකරණ විනිසුරු

Thus, I observe that Hon. Justice Shiran Gooneratne in his report **1R4(a)**, had not expressed the view that all accused in this case should be acquitted of all counts on the indictment. All His Lordship had stated in his communication to the Secretary to the President is the fact that he had acquitted all the accused from all counts in the indictment for the reasons he had set out in his judgment. Therefore, other than repeating the effect of his judgment which was by that time well known to everyone concerned, Hon. Justice Shiran Gooneratne had not expressed any fresh view on the matter. He is also silent about any recommendation with regard to granting or not granting of the impugned pardon. Therefore, on a strict interpretation, the statement by the Hon. Minister of Justice that *"Hon. Justice Shiran Gooneratne in a communication to the Secretary to the President has expressed the view that all accused in this case should be acquitted of all counts on the indictment"* contained in his recommendation [**1R4(a)**] to the President is not supported by the contents of the report made by Hon. Justice Shiran Gooneratne. I observe that a similar statement is found in **1R5** whereby the Hon. Attorney General had advised the Hon. Minister of Justice. Thus, it appears that the Hon. Minister of Justice had adopted this statement from **1R5**.

Although the Hon. Attorney General by **1R5** had advised the Hon. Minister of Justice to take into consideration the factors set out in (a) to (i) therein when making a recommendation to the President in relation to a pardon under Article 34 of the Constitution, I observe that the Hon. Minister of Justice had failed to make his own recommendations to the President on any of those factors set out in items (a) to (i) mentioned in the last page of **1R5**. The Hon. Minister of Justice had merely reproduced those factors in verbatim in the same form they are listed in the letter he had received from the Hon. Attorney General. However, the Hon. Minister of Justice had clearly recognized in his report as advised by the Hon. Attorney General, that those factors set out in his report must be taken into consideration when the President makes the decision to grant a pardon under Article 34 of the Constitution. Neither the Hon. Minister of justice nor the Hon. Attorney General has placed any material to convince us that either the Hon. Minister of justice or the former President had complied with this advice provided by the Hon. Attorney General.

The question arises as to which official (the stakeholders referred to in Article 34 of the Constitution) had recommended to the former President that the impugned pardon should be granted. The answer clearly is that no such stakeholder had ever recommended to the President that this offender must be granted a pardon.

What is the effect of the non-compliance of the Hon. Attorney General's advice to the Hon. Minster of Justice? The effect of such non-compliance has been mentioned by the Hon. Attorney General himself in **1R5**. The most important feature highlighted by the Hon. Attorney General in **1R5** is that in order to grant a pardon, the former President must have reasons which must be capable of being assessed objectively and those grounds should be capable of withstanding the test of rationality, reasonableness, intelligible and objective criteria. The question then is whether the exercise of power by the former President under Article 34 of the Constitution in the instant case is capable of withstanding the test of rationality, reasonableness, intelligible and objective criterion as pointed out by the Hon. Attorney General. The Hon. Attorney General has made it clear that the pardon is not a private act of grace from an individual possessing power but is a part of the Constitutional scheme. The Hon. Attorney General is right. The Hon. Minister of justice had merely reproduced only a part of the advice provided to him by the Hon. Attorney General. Be that as it may, in the absence of any material I have to conclude that the former President for the reasons best known to him had opted not to take into consideration, at least any of those factors set out in (a) to (i) in **1R5**. Is this following due process? By any yard stick it is not.

The former President has not followed due process when making the decision to grant the impugned pardon; the former President had opted not to adhere to the Hon. Attorney General's advice; the former President had not at all considered what the law has required him to consider. Thus, I am unable to hold that the former President had exercised his discretion correctly.

SECTION 3 (q) OF THE ACT NO. 04 OF 2015.

Another Complaint made by the Petitioners is that the former president has completely ignored the legal provisions in Section 3 (q) of the Assistance to and Protection of Victims of Crime and Witnesses Act No. 04 of 2015 as amended. The said section reads as follows:

"***3.*** *A victim of crime shall have the right :-*

a) ....
b) ....
c) ..

....

(q) in the event of any person in authority considering the grant of a pardon or remission of sentence imposed on any person convicted of having committed an offence, to receive notice thereof and submit through the Authority to the person granting such pardon or remission, the manner in which the offence committed had impacted on his life including his body, state of mind, employment, profession or occupation, income, quality of life, property and any other aspects concerning his life."

One of the four charges of murder upon which the recipient of the pardon was convicted and sentenced was in relation to the death of Bharatha Lakshman Premachandra. The Petitioner in SC FRA No. 221/2021 is the daughter of said Bharatha Lakshman Premachandra. The Petitioner in SC FRA No. 225/2021 is the wife of the said Bharatha Lakshman Premachandra. Section 46 of the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 04 of 2015 has defined the term 'victim of crime' appearing in section 3 of the Act. The said definition is as follows:

"46. In this Act, unless the context otherwise requires-

....

"victim of crime" means a person including a child victim who has suffered any injury, harm, impairment or disability whether physical or mental, emotional, economic or other loss, as a result of an act or omission which constitutes an alleged-

(a) Offence under any law ; or

(b) infringement of a fundamental right guaranteed under Articles 13(1) or (2) of the Constitution, and includes a person who suffers harm as a result of intervening to assist such a person or to prevent the commission of an offence, and the parent or guardian of a child victim of crime and any member of the family and next of kin of such person, dependents and any other person of significant importance to that person ;"

Thus, in terms of the relationship the Petitioners in SC FRA No. 221/2021 and SC FRA No. 225/2021 have towards one of the deceased of the case, they must be considered as victims of that crime. Therefore, by virtue of the above provisions of law, those Petitioners are entitled to receive a notice by any person in authority considering the grant of the person convicted in respect of the crime in which they are victims.

Nether the learned President's Counsel who appeared for the recipient of the pardon in the instant cases nor Mr. Nerin Pulle PC ASG appearing for the 1A, 1B & 3A Respondents in SC FRA 221/2021, for the 1st and 3A Respondents in SC FRA No. 225/2021 and for the 1A, 1B,

2nd and 6th Respondents in SC FRA No. 228/2021 took up a position that the former President had in fact complied with Section 3 (q) of the Assistance to and Protection of Victims of Crime and Witnesses Act No. 04 of 2015. Their argument in respect of this complaint is that the provisions in the Constitution, namely Article 34 must prevail over Section 3 (q) of the Assistance to and Protection of Victims of Crime and Witnesses Act No. 04 of 2015 which is an ordinary law. They cited certain judgments in support of the proposition that the Constitutional provisions must prevail over the provisions in ordinary law.

I agree that the provisions of the Constitution must prevail over the provisions of any general law. The question as to which prevails, whether the provisions in the Constitution or the provisions in general law, would arise only when they are in conflict with each other. In this situation I see no conflict between the provisions in Article 34 and Section 3 (q) of the Assistance to and Protection of Victims of Crime and Witnesses Act. I see no impossibility; no impediment; no contradiction between those two provisions. They certainly can co-exist together. Thus, I am unable to accept the above argument as a justification for the former president's non-compliance/complete ignorance of the provisions in Section 3 (q) of the Assistance to and Protection of Victims of Crime.

Moreover, the complaint made to this Court by the Petitioners in the instant case, is that their Fundamental Rights guaranteed under Article 12 (1) of the Constitution for equal protection of law has been infringed by the acts of the President done in his official capacity. The Fundamental Right of equal protection of law, guaranteed to the people of this country by Article 12 (1) of Constitution necessarily means, that the citizens must be protected not only by the provisions of the Constitution but by the provisions of all general laws as well.
This Court has consistently held that the President is not only bound by law, but it is also the duty of the President to uphold the law. The law here not only means the Constitution but every other law also. Section 3 (q) of the Assistance to and Protection of Victims of Crime and Witnesses Act is yet another law passed by Parliament. Therefore, no one, including the President can ignore it. Why? Because the Parliament has exercised the legislative power of the people in as much as the President also exercises the executive power of the people. The sovereignty is vested in the people of this country and not in the President of the country.

The President of the country is bound, and it is his duty to uphold the law of the country. This is set out in Article 33(h) of the Constitution. Indeed, that Article calls upon the President not to do acts and things which would be inconsistent with the provisions of not only the Constitution or written law, but also international customs or usage.

Article 33(h) requires the President to do all acts and things in accordance with the provisions of the Constitution or written law. (The wordings used in that sub-article "*to do all such acts and things*"). Then the question arises as to what is meant by the wordings used in that sub-article "all such acts and things". The answer to this could be found at the beginning of Article 33(2) which states thus, "*in addition to the powers, duties and functions expressly conferred or imposed on, or assigned to the President by the Constitution or other written law, the President shall have the power"* to do the things set out in items (a) to (g). Thus, above phrase in Article 33 shows clearly that it is not only the Constitution but the written law also has set out *the powers, duties and functions* of the President. The provisions in section 3(q) of the Assistance to and Protection of Victims of Crime and Witnesses Act therefore does not violate or is contrary to the provisions of the Constitution.

On the other hand, the Constitution itself by Article 33 (h) has placed a fetter on the President not to do any act or thing which is inconsistent either with the provisions of the Constitution or the provisions in the written law. It is therefore not open to interpret Article 34 of the Constitution as giving an unrestricted power exercise of which can be done in violation of other laws. Thus, it would not be lawful for the President to exercise the power vested in him by Article 34 in a manner that is violative of any provision of the written law.

I also observe that this court in *R. Sampanthan's* case has adopted the above principle and held that the President has to comply with Article 33(h) even when exercising the power vested in him by Article 70 of the Constitution. The point I make here is that this court had held that this principle is applicable even when the President exercises the power under Article 70 which is not a power listed under Article 33. Thus, I conclude that Article 33(h) must apply not only to the items listed in Article 33 but also to all the powers exercisable by the President under the Constitution or any written law. To hold otherwise would be to erode and undermine the sovereignty of the people of this country and the rule of law in the country.

This was aptly demonstrated by this Court in the case of, *Sugathapala Mendis and Another Vs. Chandrika Kumaratunga and others (water's edge case),*[41] in which Shiranee Tilakawardane, J held as follows:

> *"The principle that those charged with upholding the Constitution – be it a police officer of the lowest rank or the President – are to do so in a way that does not "violate the Doctrine of Public Trust" by state action/inaction is a basic tenet of*

[41] 2008 2 SLR 338 at page 352.

the Constitution which upholds the legitimacy of Government and the Sovereignty of the People. The "Public Trust Doctrine" is based on the concept that the powers held by organs of government are, in fact, powers that originate with the People, and are entrusted to the Legislature, the Executive and the Judiciary only as a means of exercising governance and with the sole objective that such powers will be exercised in good faith for the benefit of the People of Sri Lanka. Public power is not for personal gain or favour, but always to be used to optimize the benefit of the People. To do otherwise would be to betray the trust reposed by the People within whom, in terms of the Constitution, the Sovereignty reposes. Power exercised contrary to the Public Trust Doctrine would be an abuse of such power and in contravention of the Rule of Law. This Court has long recognized and applied the Public Trust Doctrine, establishing that the exercise of such powers is subject to judicial review (Vide De Silva v Atukorale;[42] Jayawardene v Wijaya tilake.[43])"

Shiranee Tilakawardane, J in the above case, went on to cite with approval, a paragraph from the judgment of *Sarath N. Silva CJ* in*Senerath Vs. Kumaratunga,*[44]which could be more fully seen in the following quotation taken from Shiranee Tilakawardane, J's judgment in <u>*Sugathapala Mendis's*</u> case.

> *"..His Lordship, Sarath N. Silva in Senerath v Kumaratunga, espoused in the context of inappropriate action by the 1st respondent, that:*
>
> > *"The case of the petitioners is that the 1st respondent and the Cabinet of Ministers of which she was the head, being the custodian of executive power should exercise that power in trust for the People and where in the purported exercise of such power a benefit or advantage is wrongfully secured there is an entitlement in the public interest to seek a declaration from this Court as to the infringement of the fundamental right to equality before the law".*[45]
>
> *"I am in full agreement with the spirit of His Lordship's characterization of the 1st respondent's responsibility. The expectation of the 1st respondent as a custodian of executive power places upon the 1st respondent a burden of the highest level to act in a way that evinces propriety of all her actions. Furthermore, although no*

[42] 1993 (1) Sri L. R. 283, 296-297.
[43] 2001 (1) Sri L. R. 132, 149, 159.
[44] 2007 (1) Sri L. R. 59.
[45] At page 380.

attempt was made by the 1st respondent to argue such point, we take opportunity to emphatically note that the constitutional immunity preventing actions being instituted against an incumbent President cannot indefinitely shield those who serve as President from punishment for violations made while in office, and as such, should not be a motivating factor for Presidents - present and future - to engage in corrupt practices or in abuse of their legitimate powers. That the President, like all other members of the citizenry, is subject to the Rule of Law, and consequently subject to the jurisdiction of the courts, is made crystal clear by a plain reading of the Constitution, a point conclusively established in Karunathilaka v Dissanayake by Justice Fernando:..".[46]

Thereafter, having cited the dicta of Fernando J in *Karunathilaka* Vs. *Dayananda Dissanayake*, which I have previously cited in this judgment (Foot Note 19), Her Ladyship Shiranee Tilakawardane, J went on to observe the following as well:

"Such a conclusion is unequivocal. To hold otherwise would suggest that the President is, in essence, above the law and beyond the reach of its restrictions. Such a monarchical/dictatorial position is at variance with (1) the Democratic Socialist Republic that the preamble of the Constitution defines Sri Lanka to be, and (ii) the spirit implicit in the Constitution that sovereignty reposes in the People and not in any single person".[47]

It is apt at this stage to show how in *Senarath and others Vs. Chandrika Bandranayake Kumaratunga and others*,[48] Sarath N. Silva (CJ), had highlighted the fact that the executive power should not be identified with the President and personalized but should be identified at all times as the power of the People. The relevant portion from that judgment is as follows:

"In the context of this submission it is relevant to cite from the Determination of a Divisional Bench of seven Judges of this Court in regard to the 19th Amendment to the Constitution.[49] The Court there laid down the basic premise of the Constitution as enunciated in Articles 3 and 4, that the respective organs of government are reposed power as custodians for the time being to be exercised for the People. At 96 the Court has made the following determination in regard to sovereignty of the People and the exercise of power.

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[46] At page 380.
[47] At page 381 and 382.
[48] 2007 (1) Sri L. R. 59 at 73 and 74.
[49] 2002 (3) Sri L. R. 85.

> *"Sovereignty, which ordinarily means power or more specifically power of the State as proclaimed in Article 1 is given another dimension in Article 3 from the point of the People to include -*
>
> *(1) the powers of Government.*
>
> *(2) the fundamental rights; and*
>
> *(3) the franchise.*
>
> *Fundamental rights and the franchise are exercised and enjoyed directly by the People and the organs of government are required to recognize, respect, secure and advance these rights.*
>
> *The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Articles 4(a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that sub-paragraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament, executive power is exercised by the President and judicial power by Parliament through Courts, but also specifically state in each sub paragraph that the legislative power "of the People" shall be exercised by Parliament, the executive power "of the People"' shall be exercised by the President and the judicial power "of the People" shall be exercised by Parliament through the Courts. This specific reference to the power of the People in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People (at page 98). Therefore, executive power should not be identified with the President and personalized and should be identified at all times as the power of the People".*

The above legal literature makes it crystal clear that the President of the country is bound, and it is his duty to uphold the law of the country. As set out in Article 33(h) of the Constitution, it has only empowered the President to do acts and things which would not be inconsistent with the provisions of the Constitution or written law. Thus, in this instance I hold that the former President has clearly violated the provisions in Section 3 (q) of the Assistance to and Protection of Victims of Crime and Witnesses Act No. 04 of 2015. This violation must be viewed

as a yet another violation which has happened in the course of the pardon-granting process relevant to the instant case where the former President had failed to comply with the due process in granting the said impugned pardon. This too would be another reason to reject the assertion by the former President that he had exercised his discretion correctly and he had followed the due process in granting the impugned pardon in the instant case.

When the granting of the impugned pardon is not capable of withstanding the test of rationality, reasonableness, intelligible and objective criteria as highlighted by the Hon. Attorney General in **1R5**; when the pardon is not a private act of grace from an individual possessing power but is a part of the Constitutional scheme as advised by the Hon. Attorney General in **1R5**; when taking into consideration the resources used by the State to administer justice in this case as demonstrated above; when there is neither a decision nor any reason for the granting of the impugned pardon; I have to accept the Petitioners argument that the instant grant of pardon to the recipient of the pardon, by the former President of the Country, has totally eroded the confidence the public has reposed in the criminal justice system of the country.

REASONS/JUSTIFICATION SUBMITTED BY COUNSEL.

Amongst the document the Hon. Attorney General has submitted to this Court pursuant to the interim order made by this Court, there are only two requests received by the President requesting that a pardon be granted to the recipient. They are the request made by the mother of the recipient of the pardon (**1R1**) and the request signed by 117 Members of Parliament (**1R2**). Although the learned President's Counsel who appeared for the recipient of the pardon referred to some other requests also, the Hon. Attorney General has not submitted any of such requests as those having received by the President. Therefore, I have to proceed on the basis that it was only those two requests which were placed before the President. On the other hand, the grounds upon which whoever may have made such requests are more or less similar and therefore no prejudice would be caused to the recipient of the pardon by such conclusion. This can be seen by the copies of some of such requests produced by the recipient of the pardon with his pleadings.

The grounds upon which the writers of those letters had requested that a pardon be granted to the recipient are as follows:

i. the fact that the recipient of the pardon had suffered head injuries due to gun shot injuries,

ii. the fact that the judgment of the High Court at Bar is partisan due to collusion between one of the judges giving the majority judgment and an interested politician as revealed by some telephone recordings,

iii. the fact that the Court had not arrived at a correct conclusion in view of the affidavit submitted by the driver of Bharatha Lakshman Premachandra referred to as "Bole" in 2012 to the Attorney General's Department,

iv. the fact that one of the judges delivering the majority judgment, Hon. M. C. B. S. Morais had simply agreed with the judgment of Hon. Padmini Ranawaka without analysing as to why he arrived at such a decision,

v. the fact that the verdict was divided.

It was on those grounds that the learned President's Counsel who appeared for the recipient of the pardon submitted that there was enough material before the former President to decide to grant the impugned pardon. They submitted that the Court cannot review that decision on the merits and substitute its decision on the matter with the decision of the President of the republic.

Mr. Anuja Premaratne PC, appearing for the 4th Respondent in SC FRA No. 228/ 2021 referring to the telephone recordings he had relied upon, sought to argue that such accusations of bias on the part of a judge giving the majority judgment could be a factor which the former President could have considered when granting the impugned pardon.

As has been mentioned at the outset in this judgement, the apex court had affirmed the conviction and the sentences imposed on the recipient of the pardon in the instant case. That is after carefully going through the evidence adduced in the case and after hearing the submissions of the learned Counsel including the learned Counsel who had appeared for the Accused-Appellants in that case. Thus, it is not open for the convicted accused to re-agitate such a final decision by Court. Moreover, what is alleged to have not considered is an affidavit submitted by the driver of Bharatha Lakshman Premachandra in 2012 to the Attorney General's Department. Therefore, I am unable to consider the argument that the Court had not arrived at a correct conclusion when it convicted the recipient of the pardon in the instant case.

The grounds of bias on the part of one of the learned High Court Judges is only a ground put forward by the learned President's Counsel who appeared for the recipient of the pardon. The former President in his affidavit has not stated that he had decided to grant the impugned pardon on that basis. In the absence of any material to that effect, I am unable to conclude

that the former President had indeed decided to grant the impugned pardon on that basis. In any case, I have held before that the Respondents have failed even to produce the decision of the President of the country to grant the impugned pardon to the recipient. I also have not been able to fish out a single reason as the basis on which the former President had decided to grant the impugned pardon to the recipient. In such a scenario, I find it impossible if not difficult to accept the reasons/justifications submitted by the learned President's Counsel who appeared for the recipient of the pardon as the reasons/justifications the former President may have had for his decision to grant the impugned pardon.

I have to hold the same in regard to the argument that the former President had decided to grant the impugned pardon to the recipient as he had suffered head injuries. It is relevant to note here that it is the Hon. Minister of Justice who would have been in a better position to ascertain the correct position regarding the health/treatment conditions of the recipient of the pardon since the Prisons come under the direct purview of his Ministry. However, the Hon. Minister of Justice in his report had not recommended that a pardon be granted to the recipient on such basis.

Since this Court had granted Leave to Proceed in the instant case for the complaint by the Petitioners that their Fundamental Rights guaranteed under Article 12 (1) of the Constitution for equal protection of law has been infringed by the acts of the President, it is relevant for me to mention about the presence of the other convicted accused in this case. If the recipient of the pardon stands wrongly convicted as claimed by him because one of the High Court Judges in the Trial at Bar was bias, it is needless to say, that all the other accused in this case also stand on similar circumstances. The question then arises as to why the former President picked on just one accused, namely the recipient of the pardon in the instant case out of many accused to grant a pardon on that basis. Does such a move stand the test of rationality, reasonableness, intelligibility and objectivity. The answer clearly is no. Such a move adopted by the former President would be more indicative of an arbitrary action rather than an objective decision. This is more so in the absence of any reason either for the decision to grant the impugned pardon or for picking on the recipient of the pardon in the instant case from amongst other accused of the case.

I do not think I have to deal in detail, the fact that one of the judges delivering the majority judgment Hon. M. C. B. S. Morais had simply agreed with the judgment of Hon. Padmini Ranawaka without analysing as to why he arrived at such a decision and the fact that the verdict was divided as they are common occurrences in our judicial system. Suffice to say that there is nothing unusual or wrong in them as that is the way they happen.

CONCLUSION

For the foregoing reasons, I have no legal basis or even a factual basis to uphold the decision made by the former President to grant a pardon to the recipient in the instant case. I hold that the said decision is arbitrary, irrational and has been made for the reasons best known to the former President who appears to have not even made any written decision and has not given any reason thereto. Futher, no reason can be discerned from any document submitted by Hon. Attorney General as forming part of the record pertaining to the impugned grant of pardon. The Petitioners are therefore entitled to succeed with their petitions.

I proceed to grant the following relief to the Petitioners in SC FRA No. 221/ 2021, SC FRA No. 225/ 2021 and SC FRA No. 228/ 2021:

a) declaration that the Fundamental Rights guaranteed to the Petitioners by Article 12(1) of the Constitution have been infringed by the act of granting the afore-stated pardon to Arumadura Lawrence Romello Duminda Silva who stands as the 2nd Respondent in SC FRA No. 221/2021 and SC FRA No. 225/2021 and the 4th Respondent in SC FRA No. 228/2021 by the President of the country (former President) acting in his official capacity;
b) declaration that the decision to grant the pardon to Arumadura Lawrence Romello Duminda Silva who stands as the 2nd Respondent in SC FRA No. 221/2021 and SC FRA No. 225/2021 and the 4th Respondent in SC FRA No. 228/2021 by the President of the country (former President) is null and void and of no force or avail or any effect in law;
c) declaration that the pardon granted to Arumadura Lawrence Romello Duminda Silva who stands as the 2nd Respondent in SC FRA No. 221/2021 and SC FRA No. 225/2021 and the 4th Respondent in SC FRA No. 228/2021 by the President of the country (former President) is null and void and of no force or avail or any effect in law;

I proceed to quash the decision to grant the pardon to Arumadura Lawrence Romello Duminda Silva who stands as the 2nd Respondent in SC FRA No. 221/2021 and SC FRA No. 225/2021 and the 4th Respondent in SC FRA No. 228/2021 by the President of the country (former President).

I direct the Commissioner General of Prisons to take necessary steps in terms of law with regard to the implementation of the sentences imposed on Arumadura Lawrence Romello Duminda Silva (the 2nd Respondent in SC FRA No. 221/2021 and SC FRA No. 225/2021 and the 4th Respondent in SC FRA No. 228/2021) as per the judgments of Court (the judgment of

High Court of Colombo Case No. 7781/2015 read with the judgment of Supreme Court in case No. SC/TAB/2A-D/2017).

I make no order in relation to costs.

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 SOCIALST REPUBLIC OF SRI LANKA

In the matter of an application under and in terms of Articles 17 & 126 of the Constitution of the Republic.

K. G. I. Krishantha Kapugama
No. 94/4, Kobbekaduwa, Yahlathanna

Petitioner

SC (FR) Application No. 264/2015

Vs.

1. **I. P. Anura Krishantha,**
   Officer-in-Charge, Police Station,
   Irrataperiyakulam
2. **CI. Channa Abeyratne,**
   Head Quarters Inspector,
3. **SI. Wanninayake**
4. **SI Somaratne**
5. **Sergeant Seneviratne** (31978)
6. **PC J.M.S. Jayawardene** (5786)

   The 2nd to 6th Respondents, of Police Station, Vauniya.

7. **Inspector General of Police;** Sri Lanka Police Department, Police Headquarters, Colombo 01

8. **Hon. The Attorney General**, Attorney General's Department, Hulftsdorp Colombo 12

Respondents

Before: Priyantha Jayawardena, PC, J
Murdu N. B. Fernando, PC, J
E. A. G. R. Amarasekara, J

Counsel: Ms. Pulasthi Hewamanna with Ms. Harini Jayawardhana with Ms. Githmi Wijenarayana instructed by Mrs. Niluka Dissanayake for the Petitioner

Ms. Induni Punchihewa, SC for the Respondents

Argued on: 22nd of January, 2024

Decided on: 29th of February, 2024

Priyantha Jayawardena PC, J

The petitioner filed the instant application alleging that his Fundamental Rights guaranteed by the Constitution were infringed by the 1st to 7th respondents. After considering the said application, the Supreme Court granted leave to proceed for the alleged infringement of Article 13(1) and 13(5) of the Constitution.

Facts of the Application

The petitioner stated that he went to Vauniya on the 15th of November, 2014 in his car, along with Sergeant Buddhika Karunasinghe, to meet with Squadron Leader Sumedha Ritigala. Further, he reached Vauniya at or around 10.00 p.m. on that day and met with his friends. At or around 1.00 a.m. on the 16th of November, 2014, the petitioner had gone to Vauniya town in his car to purchase foods and drinks for his friends and he had lost his way on returning to his friends.

The petitioner further stated that at around 1.30 a.m. he was stopped on the road by individuals dressed in civilian clothes who were armed with T56 weapons. Moreover, the 1st respondent, the Officer In Charge who was in civilian clothes made inquiries as to who the petitioner was and what he was doing in that area at that time. Hence, the petitioner produced his identity card and identified himself as an officer of the Sri Lanka Air Force. He further stated that the said 1st respondent then made disparaging remarks about the Sri Lanka Air Force and its senior officers, deeply offending the petitioner who then told him to refrain from making such remarks. Thereafter, the 1st respondent threatened to kill the petitioner and throw his body into the forest. The 1st respondent then instructed the other officers present at the scene to conduct a search of the petitioner's car.

At or around 2.00 a.m. of the same day, the 2nd Respondent Head Quarters Inspector (hereinafter referred to as the "2nd respondent") arrived at the scene with approximately 15 officers and verbally abused the petitioner and the Sri Lanka Air Force in derogatory and profane language Thereafter, the petitioner was taken to the Irrataperiyakulam Police Station and was instructed to sit in a room.

The petitioner stated that the 3rd respondent entered the room with a document and forced the petitioner to sign the said document but the petitioner refused to sign it. He was then threatened with legal action by the said 3rd respondent and the other officers present at the police station. The petitioner further stated that his request to call his family and/or an Attorney-at-Law was denied and he was not informed of the reason for his arrest and detention. Further, the petitioner stated that he was harassed by the officers of the Irrataperiyakulam Police Station during that night.

Further, it was stated that at around 11.30 a.m. on the 16th of November, 2014, the petitioner was permitted to speak to his wife *via* telephone, immediately after which he was transferred to the Vauniya Police Station and detained in a police cell. At the said police station, the petitioner stated that he was verbally abused by the 2nd respondent who also demanded the petitioner to accept that

he had committed some minor offence in order to release him. The petitioner stated that he refused to admit that he committed an offence, and once again requested for the reasons for his arrest and detention. Angered by the responses of the petitioner, the 2nd respondent threatened to take legal action against the petitioner. The petitioner further stated that his wife came to the said police station, but was only permitted to speak with him very briefly.

Furthermore, the petitioner stated that on the evening of the 16th of November, 2014, around 6.30 p.m., he was produced before the learned Magistrate of Vauniya in Chambers, but was not permitted to speak with the Magistrate. After they came out of the said chamber, he was informed that the learned Magistrate remanded him for a week.

The petitioner was then taken to the Vauniya remand prison and detained therein until the 21st of November, 2014. The petitioner stated that the Vauniya Prison housed several L.T.T.E. cadres and that the petitioner was later made aware of the fact that the Vauniya Police Station had released a media statement giving details of the petitioner and his arrest, and it resulted in several inmates harassing him due to his involvement in the war as a pilot of a fighter jet.

Thereafter, the petitioner was produced before the Vauniya Magistrate's Court on the 21st of November, 2014 and enlarged on bail by the court. Further, on the 30th of January, 2015, the petitioner was discharged by the learned Magistrate of Vauniya.

In the circumstances, the petitioner stated that the course of conduct culminating in his arrest and detention and remanding him amounted to torture or cruel, inhuman, or degrading treatment or punishment and are an infringement of the Fundamental Rights guaranteed to the petitioner by the Constitution.

Objections filed by the 1st Respondent

The 1st respondent filed objections stating that on the 16th of November 2014, he received information from a private informant about a car that was said to be roaming in the Galnattakulam area in a suspicious manner in the early hours of the morning. Hence, he along with a team of police officers proceeded to the said area and stopped the car which was driven by the petitioner. Further, when asked about his name, address, where he was travelling and the reasons for

travelling, the 1st respondent stated that the petitioner gave varying and inconsistent responses, thereby failing to reveal his identity properly.

The 1st respondent further stated that, taking into consideration the suspicious conduct of the petitioner, his inability to disclose his identity and co-operate with law enforcement officials, and that suspicion that the petitioner was involved in the commission of a cognizable offence, he arrested the petitioner on the 16th of November, 2014 at 3.05 a.m.

The 1st respondent further stated that thereafter, an 'A report' was filed in the Magistrate's Court of Vauniya and reported the facts pertaining to the matter and the need to conduct further investigations into the matter and produced the petitioner before the learned Magistrate of Vauniya, who remanded the petitioner.

Thereafter, the Police had sought the advice of the Attorney General in respect of the said investigations and having considered all matters, the Attorney General had advised the Police to discharge the suspect from the case by letter dated 30th June, 2016.

Analysis

Article 13(5) of the Constitution states, *inter alia,* that every person shall be presumed innocent until he is proved guilty. Further, Article 13(1) of the Constitution states;

> *"No person shall be arrested* ***except according to procedure established by law****. Any person arrested shall be informed of the reason for his arrest."*

[emphasis added]

The procedure applicable for arrest are set out in several laws including section 32 of the Code of Criminal Procedure Act No. 15 of 1979, as amended. Section 32 of the Code of Criminal Procedure Act reads as follows:

> *"****Any peace officer may*** *without an order from a Magistrate and* ***without a warrant arrest any person who has been concerned in any cognizable offence*** *or against whom a reasonable complaint*

has been made ***or credible information has been received or a reasonable suspicion exists of his having been so concerned****; a suspicion is proved to be reasonable if the facts disclose that it was founded on matters within the police officer's knowledge or on the statement made by the other persons in a way which justify him giving them credit."*

In the objections filed by the 1st respondent, he stated that he received a credible information that a car was roaming in his police area in a suspicious manner. Therefore, he along with a team of police officers proceeded to the area and stopped the car that the petitioner was driving and questioned the petitioner with a view to obtain information and identify the petitioner. At that time, as the petitioner behaved in a suspicious manner and gave contradictory answers to his questions, he arrested the petitioner.

Though it is possible to arrest an individual without a warrant, such arrest must be based on probable cause for the police to believe that a person has committed cognizable offence. Moreover, the arrest of the petitioner merely because his behaviour was suspicious, is not a ground for arrest under section 32 of the Code of Criminal Procedure Act. Further, if a person is arrested for committing an offence, he should be informed of the reasons for the arrest at the time of the arrest.

After the petitioner was arrested, he was taken to the police station. Thereafter, the 2nd respondent filed an 'A Report' in the Magistrate's Court of Vauniya and moved court to remand the petitioner in order to carry out further investigations to ascertain whether he was involved in committing a crime. The said 'A report' states that;

> *"අපරාධයක් සිදුකර හෝ අපරාධයක් සිදු කිරීමේ කාර්ය සඳහා සංවිධානාත්මකව පැමිණි අයකු සැකපිට අත් අඩංගුවට ගත් බව..."*
>
> *"...මෙම තැනැත්තා සහ කාර් රථයේ තිබී සොයා ගෙන ඇති දේපල සම්බන්ධවත්, ඔහු විසින් ඉදිරිපත් කර ඇති තොරතුරු සම්බන්ධවත් ඇති වූ සැකය මත මෙම තැනැත්තා කිසියම් අපරාධයක් සිදුකර පලා යන හෝ කිසියම් අපරාධයක් සිදු කිරීමට*

තවත් අය සමග පැමිණ පුර්වෝපාය යොදමින් සංවිධාන වන අයකුද යන්න ගැන ඇති වූ සැකයමත ඉහත කී තොරතුරු සම්බන්ධව තව දුරටත් විමර්ශන සිදිකිරිම සුදුසු යයි පොලිස් නිලධාරින්හට හැගියාම මත සැකකරු හා දේපල අත් අඩංගුවට ගෙන් ස්ථානයට ඉදිරිපත් කර ඇත.''

"...මෙම සැකකරු දිවයිනේ වාර්ථා ගත වෙනත් අපරාධ ගත සීඩීන්ට අවශ්‍ය කරන සැකකරුවකුද යන්න සැක කිරීම සඳහා දිවයිනේ සෑම පොලිස් ස්ථානයකටම සැකකරු සම්බන්ධව තොරතුරු ලබා දීමටත් සැකකරුගේ බාරයේ තිබී අත් අඩංගුවට ගත් කාර් රථය වෙනත් අපරාධ සඳහා උපයෝගී කරගත් කාර් රථයක්ද යන් සොයා බැලීමටත් එවැන් අපරාධ සඳහා කාර් රථයේ තිබී පොලිස් භාරයට ගෙන ඇති ජංගම දුර කථන සහ අනෙකුත් උපකරන බාවිතා කර තිබේද යන්න පිලිබඳවත් වැඩිදුර විමර්ශන සිදු කිරිමට කටයුතු කරගෙන යමි. අත් අඩංගුවට ගන්නා ලද සැකකරු වන කපුගම ගීගනගේ ලලිත් ක්‍රිශාන්ත කපුගම යන සැකකරු අද දින ගරු අධිකරණය වෙත ඉදිරිපත් කරමින් මෙම සැකකරු 2014.11.28 වන දින දක්වා රක්ෂිත බන්ධනාගතා ගත කර එදිනට ගරු අධිකරණය වෙත ඉදිරිපත් කිරීමට බන්ධනාගාර අධිකාරී තැනට නියෝගයක් කරමින් ගරු අධිකරණයෙන් ගෞරවයෙන් අයද සිටිමි."

Subsequently 2nd respondent filed a 'B Report' in the said Magistrate's Court stating that the petitioner refused to make a statement in terms of section 109 of the Code of Criminal Procedure Act. The said 'B' report was titled;

"පොලිස් නිළධාරින් කණ්ඩායමකී විසින් සිදුකරන ලද විමර්ශනයක් සඳහා කරන ලද ප්‍රශ්න වලට පිළිතුරුසීම ප්‍රතික්ෂේප

කරමින් ප්‍රකාශයක්ද ලබා නොදීම පිලිබඳව ගරු අධිකරනය වෙත කරුණු වාර්ථා කරමින් එකී අයට අධිකරනයේ පෙනී සිටීමට, නොතිසියක් නිකුත් කිරීමට කරනු ලබන ඉල්ලීම."

A careful consideration of the aforementioned 'A report' and 'B report' filed in the Magistrate's Court show that the petitioner was not interrogated in connection with any cognizable offence.

Further, there was no credible complaint, credible information or material to show that the petitioner had committed or had conspired to commit or abetted the commission of such an offence. Moreover, the materials field in court did not show that there were grounds to form a reasonable suspicion that the petitioner had committed or abetted the commission of such an offence.

Further, even though the 2nd respondent filed a 'B report' stating that the petitioner committed the offence under the Code of Criminal Procedure Act, the learned Magistrate was subsequently informed that the Police would not proceed against the petitioner consequent to the advice given by the Attorney General.

Conclusion

I have considered the materials filed in the instant application and I am of the opinion that the 1st, 2nd and 3rd respondents failed to produce any materials that could justify forming a reasonable suspicion that the petitioner was responsible for committing any cognizable offence or any other offence.

Therefore, the arrest is contrary to the provisions of section 32(1)(b) of the Code of Code of Criminal Procedure Act and was not in accordance with the applicable procedure established by law. Further, the 1st, 2nd and 3rd respondents failed to produce materials that there were sufficient grounds to produce the petitioner in the Magistrate's Court and to make an application to the learned Magistrate to remand him. Moreover, there were no materials to file a 'B report' stating that the petitioner refused to make a statement to the Police in terms of section 109 of the Code of Criminal Procedure Act No. 15 of 1979.

Hence, I hold that the 1st, 2nd and 3rd respondents have violated Article 13(1) of the Constitution. Accordingly, I order the 1st, 2nd and 3rd respondents to pay a sum of Rs. 100,000/- to the petitioner.

Judge of the Supreme Court

Murdu N. B. Fernando PC, J
I agree

Judge of the Supreme Court

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

Judge of the Supreme Court

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

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

Shreemath Muthukumara Algawatte,
No.154/1, Anagiyawatte,
Gabadagoda,
Payagala

Petitioner

S.C.(F.R.) Application No. 325/2013.

Vs.

1. Chamika Kulasiri,
Inspector of Police,
Officer-in-Charge,
Payagala Police Station.

2. Wijepala,
Sub-Inspector of Police
Payagala Police Station.

3. Gunasiri,
Police Sergeant 25317,
Payagala Police Station.

4. Subasinghe,
Police Constable 13429,
Payagala Police Station

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5. Chamara,
Police Constable 81658,
Payagala Police Station.

6. Dhammika,
Sub-Inspector of Police
Payagala Police Station.

7. N.K. Illangakoon,
Inspector General of Police,
Police Headquarters,
Colombo 01.

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

Respondents

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BEFORE : **PRIYANTHA JAYAWARDENA, PC** J.
YASANTHA KODAGODA, PC., J.
ACHALA WENGAPPULI, J.

COUNSEL : Hirannya Damunupola for the Petitioner.
Ms. I Punchihewa SC for the 1st, 3rd, 4th, 6th and 8th Respondents.

ARGUED ON : 16th September, 2022

DECIDED ON : 22nd February, 2024

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ACHALA WENGAPPULI, J.

The Petitioner invoked the jurisdiction conferred on this Court under Article 17 and 126 of the Constitution seeking *inter alia* a declaration that the 1st to 6th Respondents, have acted in infringement of his fundamental rights

guaranteed under Articles 12(1), 13(1) and 13(2). When this matter was supported on 29.03.2016 by the learned Counsel for the Petitioner, this Court granted leave to proceed against the 1st, 3rd, 4th and 6th Respondents, as prayed for by the Petitioner.

The allegation of the Petitioner on infringement of his fundamental rights stems from the arrest made by the 3rd Respondent on 13.08.2013 and his detention at *Payagala* Police Station. The Petitioner claims that his arrest and detention were conducted in a manner contrary to the procedure laid down in Section 32(1) of the Code of Criminal Procedure Act No. 15 of 1979 (as amended). He alleged that his arrest was illegal as it was made even without a complaint being entertained against him. Thus, the Petitioner alleged that, in the absence of any credible information on which the police officers could have entertained a reasonable suspicion to form the opinion that his arrest was necessary or expedient, the arrest made by the 3rd Respondent becomes illegal which then rendered his detention too to an illegal detention.

The Petitioner specifically alleged that his arrest was made out of malice and over the "*animosity*" harboured against him particularly by the 1st Respondent, the Officer in Charge of the *Payagala* Police Station. The Petitioner attributed the cause for harbouring such an '*animosity*' to his act of making a complaint against the 1st Respondent to the Senior Deputy Inspector General of Police. The Petitioner made that complaint against the 1st Respondent over the latter's failure to apprehend a suspect, who had physically assaulted his sister. In addition, the Petitioner further alleged that the close relationship that existed between the 1st Respondent and a relative of one of his neighbours, who had initiated legal proceedings against his father, claiming him to be a lunatic, also contributed for that animosity. He relied on

several factual assertions and documents marked P1 to P4 in support of said allegations.

The 1st, 3rd, 4th, 6th and 8th Respondents have resisted the application of the Petitioner and sought its dismissal. Only the 1st Respondent tendered a Statement of Objections setting out the circumstances that led to the arrest and detention of the Petitioner. In the said Statement of Objections, the 1st Respondent admitted that the Petitioner was in fact been arrested and detained at his station. He further averred that the arrest of the Petitioner was made based on a complaint received by the Police Station, implicating him to an incident of physical assault and acted on the statement of *Gabadage Udaya Wasudewa.* The 1st Respondent further denied the allegation of malice or of any animosity. The 1st Respondent relied on relevant information book extracts, medical reports, and copies of Court proceedings (marked as R1 to R10) in support of his position, while moving for the dismissal of the application. In his counter affidavit, the Petitioner made a general denial of the averments made by the 1st Respondent.

At the hearing of this application, the learned Counsel for the Petitioner made an allegation of fabrication of information book notes, a position taken up by the Petitioner in his counter affidavit. He submitted to Court that the reference to the Petitioner in the entry regarding the complaint made to *Payagala* Police on 13.08.2013, by the wife of *Udaya Wasudeva,* is a part that had deliberately been inserted into the said entry, after the instant application was filed. Moreover, the learned Counsel for the Petitioner submitted that *Udaya Wasudeva,* during an inquiry held at the Police Station at a subsequent point of time, had admitted to the Petitioner that he never made any complaint. Placing reliance on the strength of that assertion, learned Counsel

for the Petitioner contended that there was no credible information available to the Respondents at the time of his arrest, on which they could have entertained a reasonable suspicion to form an opinion that his arrest was necessary or expedient.

Learned Counsel relied on the *dicta* of this Court in the judgments of ***Dissanayaka v Superintendent, Mahara Prison and Others*** (1991) 2 Sri L.R. 247, ***Gamlath v Neville Silva and Others*** (1991) 2 Sri L.R. 267 and ***Channa Peiris v Attorney General*** (1994) 1 Sri L.R. 1, to impress upon this Court that the fundamental rights of the Petitioner were infringed by the 1st, 3rd, 4th and 6th Respondents.

In her reply submissions, learned State Counsel who represented the 1st, 3rd, 4th, 6th and 8th Respondents, submitted to Court that none of the Respondents had any personal animosity towards the Petitioner and his arrest was made only after having followed the procedure laid down by law. She relied on the judgment of ***Landage Ishara Anjali (Minor), Wijesinghe Chulangani v Waruni Bogahawatta, Matara Police Station and Others*** (SC(FR) Application No. 677/2012 – decided on 12.06.2019) where this Court made certain pronouncements in relation to the proper exercise of powers conferred on peace officer in making an arrest without a warrant, in terms of Section 32(1) of the Code of Criminal Procedure Act No. 15 of 1979 (hereinafter referred to as the Code of Criminal Procedure Act). She further submitted that the circumstances as revealed in the pleadings before Court would clearly satisfy the said requirements were fulfilled by the Respondents.

The complaint presented to this Court by the Petitioner over the allegation of infringement of his fundamental rights is twofold. First, the Petitioner alleged that his arrest and detention were violative of the fundamental rights guaranteed to him under Articles 13(1) and 13(2).

Secondly, he alleged that he was denied of his right to equal protection of law, when he was arrested and detained due to a personal animosity harboured against him by the 1st Respondent, which occasioned a violation of his fundamental rights guaranteed under Article 12(1).

Of the two contentions referred to above, I shall consider the first at the very outset of this judgment.

It is evident from the several averments contained in the petition of the Petitioner that his allegation of infringement of fundamental rights was primarily directed at the 1st Respondent, who functioned as the Officer-in-Charge of the *Payagala* Police Station, during the relevant period of time. The 3rd Respondent, PS 25317 *Gunasiri,* is the officer who investigated into a complaint made by *Ayoma Janaki* alleging of an attack on her husband *Gabadage Udaya Wasudeva* using a stone, and arrested the Petitioner. However, perusal of the information book extracts marked as R1, R2, R3, R4 and R7 by the 1st Respondent, did not reveal any involvement of the 4th and 6th Respondents in the arrest of the Petitioner or for his detention. The Petitioner, in his petition, did not attribute any specific act or omission, by which the 4th and 6th Respondents had contributed to any of the alleged infringements of his fundamental rights.

Article 13(1) guarantees that no person shall be arrested except according to law, while the said Article further offers a guarantee that a person so arrested shall be informed of the reason for his arrest. The term "*according to law*", as appears in Article 13(1), is referable to the statutory provision which govern the arrests and detention of persons. Section 5 of the Code of Criminal Procedure Act specifies that all offences under the Penal Code or any other law " *… shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of this Code.*" This provision ensures that

the police officers, being officers of the executive and who are empowered to make arrests, should carry out their official functions strictly according to the procedure laid down by the said law.

In the context of powers of investigation that are invested on the agencies of the executive, Prof *Peiris,* in his work titled *Criminal Procedure in Sri Lanka Under the Administration of Justice Law* (1st Ed, p. 35) stated that " *[T]he primary objectives of the rules applicable to criminal procedure in this area involve a compromise between efficiency and restraint. The public interest demands the discovery and punishment of crime with greater energy and expedition, but not at the expense of rights which, in fairness to the accused, are guaranteed from the outset.* ***It is the aim of the law of procedure to ensure that the liberty of the individual is not eroded by actions taken during the course of the preliminary investigation"*** (emphasis added).

Thus, the arrest and detention of a person (except in the instances where the Prevention of Terrorism (Temporary Provisions) Act provisions are applicable) must necessarily be carried out according to the procedure laid down in the Code of Criminal Procedure Act.

Section 32 of the Code of Criminal Procedure Act specifically provides for as to how and when a peace officer may arrest a person without a warrant. Admittedly the Petitioner was arrested without a warrant and therefore his arrest should be in compliance with the procedure as laid down in that Section. The applicable part of the statutory provisions in Section 32(1)(b) in relation to arrests, states that any peace officer may, without an order from a Magistrate and without a warrant, arrest any person ;

> *"who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been*

> *received or a reasonable suspicion exists of his having been concerned; …"*

The 1st Respondent stated that the Petitioner was arrested after receiving a complaint which revealed his complicity to an offence. Thus, the relevant part of Section 32(1)(b) in relation to the instant application is denoted by the phrase "*against whom a reasonable complaint has been made*". The scope of this particular segment in the said Section was already considered by this Court in ***Ven. Dharmaratana Thero and Another v Sanjeewa Mahanama and Others*** (2013) 1 Sri L.R. 81. In the said judgment, *Dep* J (as he then was) made the following pronouncement (at p. 89);

> *"[I]n order to arrest a person under this subsection there should be a reasonable complaint, credible information or a reasonable suspicion. Mere fact of receiving a complaint or information does not permit a peace officer to arrest a person. Police Officer upon receipt of a complaint or information is required to commence investigations and ascertain whether the complaint is a reasonable complaint, the information is credible, or the suspicion is reasonable before proceeding to arrest a person."*

In view of the statutory provisions contained in Section 32(1)(b), the questions that must be decided by this Court in relation to the instant application are; whether the 3rd Respondent had a "*reasonable compliant*" against the Petitioner before he made the arrest and whether the 3rd Respondent made an attempt to ascertain the reasonableness of the complaint he received, before proceeding to arrest him on that complaint. The assessment of the reasonableness of a complaint too was considered by this Court in the judgment of ***Seneviratne v Rajakaruna and Others*** (2003) 1 Sri L.R. 410. The Court, having observed (at p. 419) that the "*… wording in section*

32 of the Code of Criminal Procedure Act refers to a 'reasonable complaint' or 'credible information' or a 'reasonable suspicion'. Therefore, the legislature has been emphatic that a mere suspicion alone would not be sufficient to arrest a person in terms of section 32 of the Code", thereafter proceeded to quote the following segment from *Shoni* on *Indian Criminal Procedure Code* (18th edition, Volume 1, pg.240);

> *"[A] general definition of what constitutes reasonableness in a complaint or suspicion and credibility of information cannot be given. But both must depend upon the existence of tangible legal evidence within the cognizance of the police officer and he must judge whether the evidence is sufficient to establish the reasonableness and credibility of the charge, information or suspicion. What is a reasonable complaint or suspicion must depend on the circumstances of each particular case, but it must be at least founded on some definite fact tending to throw suspicion on the person arrested and not on mere surmise or information."*

This had been the view consistently taken by the superior Courts for a long time, in dealing with the legality of arrests of individuals and of their detention. Citing an English judgment, of ***Mc Ardle v Egan*** (1933) 30 Cox C. C. 67, *Gratiaen* J, stated in ***Muttusami et al v Kannangara, Inspector of Police*** (1951) 52 NLR 324 (at p. 327) "*A suspicion is proved to be reasonable if the facts disclose that it was founded on matters within the police officer's own knowledge or on statements by other persons in a way which justify him in giving them credit*." It is important to note that this pronouncement was made by *Gratiaen* J, in relation to the scope of the Section 32(1) of the Criminal Procedure Code, long before this Country even recognised the freedom of a person from arbitrary arrest as a justiciable fundamental right.

The judicial precedents thus far quoted in this judgment, indicate the position that if an arrest of a person is to be made upon a complaint of committing a cognizable offence, the arresting officer is expected to satisfy himself as to the reasonableness of that complaint by assessing whether that complaint is a credible one or, placed at its lowest in the scale, it "… *must be at least founded on some definite fact tending to throw suspicion on the person arrested and, not on mere surmise or information"* per ***Seneviratne v Rajakaruna and Others*** (supra). *Mark Fernando* J, in ***Dhanapala Fernando v Attanayaka, officer in charge, Kandana police station and others*** (2003) 1 Sri L.R. 196, insisted that (at p. 203) *"[U]nder Section 32(1)(b) a mere suspicion is not enough. A reasonable suspicion or credible information is required".*

The reason for the insistence of credible information could be understood from the pronouncement made in ***Piyasiri and Others v Nimal Fernando, ASP and Others*** (1988) 1 Sri L.R. 173 (at p.184) that "*[N]o Police-Officer has the right to arrest a person on vague general suspicion, not knowing the precise crime suspected but hoping to obtain evidence of the commission of some crime for which they have the power to arrest".*

The question, whether there was a *"reasonable complaint*" at the time of the arrest of the Petitioner, should be determined by this Court by examining whether there was a complaint made to Police providing a credible information against him. Whether the complaint of *Wasudeva* qualifies to be taken as a "*reasonable complaint*" for the arresting officer to make the arrest would in turn depends on the reliability or credibility of that complaint. Reasonableness of a complaint must be decided by application of an objective test, as this Court, in ***Gamlath v Neville Silva and Others*** (1991) 2 Sri L.R. 267, held (at p. 274) "*[A]n arrest based purely on the subjective satisfaction of the police officer would be arbitrary and violative of Article 13(1)". Amerasinghe* J described

the applicable test, in the judgment of ***Senaratne v Punya de Silva and Others*** (1995) 1 Sri L.R. 272, as follows(at p. 284);

> *"[W]ere there circumstances, objectively regarded the subjective satisfaction of the officer making the arrest is not enough that should have induced the First respondent to suspect that the petitioner was concerned in the commission of those offences?"*

Thus, the legality of the arrest of the Petitioner made by the 3rd Respondent, would have to be determined this Court by objectively assessing whether the material available at the time of arrest was sufficient to induce the officer to act on that complaint, by treating same as a "*reasonable complaint*".

In determining this question, the extracts from the relevant Information Book of *Payagala* Police Station provides a clear insight into the attendant circumstances that existed at the time of the Petitioner's arrest. The Petitioner does not challenge the accuracy of the notes of the multiple investigations that were carried out by the Respondents, except to state that implication of him in R7 is a fabrication.

Returning to the Petitioner's complaint of illegal arrest in violation of Articles 13(1) and (2), in order to impress upon this Court that there was no reasonable complaint against him at the time of arrest, he totally relies on his own factual assertion of there was no complaint made by *Wasudeva,* at the time of his arrest, implicating him of any form of assault.

In paragraph 12 and 13 of his Petition, the Petitioner asserts that during an inquiry conducted by the 1st Respondent on 24.08.2013, he confronted the complainant *Wasudeva* over the allegation of assault, and indicated that he would institute legal action for making false accusations. According to the Petitioner, it is at that point of time, *Wasudeva* had denied of making any

complaint against him and maintained he was not aware of the former's arrest. The Petitioner however did not support this important assertion, either by way of an affidavit of *Wasudeva* or by production of a statement made by the 1st informant of the said assault, in order to counter the fact of *Wasudeva,* making a statement implicating him.

The information book extracts contain two specific references to the Petitioner, in relation to the complaint of the assault on *Wasudewa*. The contention of the Petitioner to the first reference to him in the entry (R7) made by PC 81657 *Chamara* at 8.30 p.m. on 13.08.2013 contained in the Information Book, which read " **පැටීගෙ මස්සිනා වන මුතුකුමාර යන අයත් බිම දාගෙන පහර දුන් බව පවසා සිටියා**" is a sentence that had been inserted into the information book entry at a subsequent stage, in order to justify the otherwise illegal arrest.

On behalf of the 1st, 3rd, 4th, 6th and 8th Respondents, learned State Counsel contended that it was consequent upon a complaint made by *Wasudeva* implicating the Petitioner, his sister and brother-in-law, only they were arrested by the Respondents and therefore the arrest of the Petitioner was made "*according to the procedure established by law*" in terms of Section 32(1)(a) of the Code of Criminal Procedure Act.

In view of the pronouncements made by this Court, referred to earlier on in this judgment, which laid specific emphasis on the existence of a reasonable and credible complaint against a suspect, that should exist prior to making an arrest without a warrant, it is important to consider whether there was any such credible complaint made relating to the incident, during which *Wasudeva* had sustained injuries, for the Respondents to form a reasonable suspicion.

Before I proceed to consider the question of reasonableness of the complaint, it is helpful if a brief reference is made particularly to the sequence of events that culminated with the arrest of the Petitioner.

The incident of assault, over which the arrest of the Petitioner was made, had taken place at about 7.30 p.m. on 13.08.2013. *Srimath Namasri Algawatte,* a brother of the Petitioner and a three-wheeler driver by profession, entered the public road driving his three-wheeler from a by-lane that led to his house. The public road was in a decrepit state. In order to avoid a heavily washed-out part of the road, *Namasri* had turned his vehicle to a side of the road and, in the process, had brushed against a child, who walked along the road with his father *Gabadage Udaya Wasudeva. Wasudeva* had taken the act of *Namasri* as a deliberate act of swerving the vehicle to his child and was offended. This incident ensued an exchange of words between the two men which then escalated into a brawl. Hearing the commotion, *Kalapuge Padmalatha,* who lived in a nearby house, had informed *Namasri's* sister *Shreemali Algawatte* of the brawl. *Shreemali* and her husband *"Pattie"* (*Ranasinhage Indika Wasnatha),* rushed to the scene and had started attacking *Wasudeva*. The Petitioner too had joined his family members after a while and dealt several blows with his fists and kicked repeatedly on *Wasudewa*.

At about 8.30 p.m. in the same evening, PC 81657 *Chamara* of *Payagala* Police Station made a note in the information book that one *Anoma Janaki* had arrived at the Station with a person bleeding from his nose. She introduced the injured person as her husband (*Gabadage Udaya Wasudeva)*. It was claimed that the injured was hit on his head with a stone by one *"Pattie"* while his wife, *Shreemali Algawatte,* hit him with a pole. She further accused that the Petitioner too had joined in the attack on her husband. The persons referred to in this incident as *"Pattie"* and *Shreemali Algawatte* are the brother-in-law of

the Petitioner and his sister, respectively. This is the first reference made to the Petitioner, according to the information book extracts.

As the injured was bleeding from his nose, he was issued with a MLE form No. 141/13 by the officer and directed them to proceed to hospital. The 3rd Respondent, who was patrolling in *Maggona* town area during that time, was directed by the 1st Respondent to conduct investigations into this complaint. The 3rd Respondent had therefore proceeded to the hospital and recorded a statement of the injured *Gabadage Udaya Wasudeva* at 10.00 p.m. The injured had already been treated by the medical staff. He had a plaster on his nose. In his statement, *Wasudeva* had accused *"Pattie"* for jabbing him with a stone on his face. He also accused the Petitioner's sister for attacking his head with a pole. The injured further alleged that the Petitioner, who joined the scuffle after he was hit with a stone, had repeatedly assaulted him with hands and legs, even after he fell (ඒ පාර මුතුකුමාර මම බිම වැටිල ඉන්න කොට අතින් පයින් උඩ පැන පැන මට ගැහුවා, මූණ දිහාට ගැහුවා). This is the second reference made to the Petitioner regarding the said complaint of assault.

It appears from the contention advanced by the Petitioner that he strongly relied on the fact that the only information available to the Respondents connecting him to the alleged act of assault on *Wasudeva,* at the time of his arrest, was the entry R7. Understandably, the Petitioner therefore seeks to assail the genuineness of the said entry R7 by making the allegation that it is due to an act of fabrication by the Respondents, consequent to the filing of the instant application. The Petitioner invited attention of Court to the place where the reference to him appeared in R7. He pointed out that it is the last sentence in the said entry and therefore that very fact strongly supports his contention that it an insertion made at a subsequent point of time .

Perusal of the said entry (R7), revealed that the penultimate sentence of that entry did indicate that PC 81657 *Chamara,* having already issued MLEF No. 141/13 to the injured, had directed them to proceed to hospital. This entry is followed by a sentence in which the Petitioner's name too was implicated for the attack (" පැවීගෙ මස්සිනා වන මුතු කුමාර යන අයත් බිම දාගෙන පහර දුන් බව පවසා සිටියා."). The entry R7, which described the officer's own observations and the actions he had taken upon the verbal complaint, had ended with the said sentence implicating the Petitioner. As pointed out by the Petitioner, that the penultimate sentence refers to the issuance of MLEF by the officer with the direction to the parties to proceed to hospital. The Petitioner contends that with the act of issuance of MLEF, it is logical to infer the entry regarding the attack had ended and, in the circumstances, the appearance of the said last sentence, is obviously due to an act of fabrication. It is already noted that the said contention was advanced by the Petitioner to substantiate his claim that there was no reasonable complaint before the Respondent to justify making his arrest, particularly in view of the denial made by *Wasudeva* of implicating him.

When *Wasudeva* and his wife arrived at the Police Station on their way to hospital, no statement was recorded from either of the two. The entry R7 is only an entry made by PC 81657 *Chamara* in the Information Book. The officer, in making the entry R7, had merely noted down the gist of the nature of the complaint, who was implicated for causing the injuries, his observations on the injured person and what steps he had taken in relation to the complaint. The appearance of the said last sentence in R7 could be due to an act of insertion of that statement into the entry at a subsequent stage, as the Petitioner's contend. However, it is not the only possible explanation, in view of the contents of the statement recorded off the injured at the hospital.

The Respondents, in seeking to justify the arrest and detention of the Petitioner, relied on the fact that the injured, *Wasudeva,* in his detailed statement made to the 3rd Respondent, made a specific allegation that the Petitioner had repeatedly struck him in the face, even after he fell down (ඒ පාර මුතුකුමාර මම බිම වැටිල ඉන්න කොට අතින් පයින් උඩ පැන පැන මට ගැහුවා, මූණ දිහාට ගැහුවා.). This sentence immediately follows the sentence by which *Wasudeva* implicates the Petitioner's sister and brother-in-law for assault. This statement of *Wasudeva*, which contained a direct accusation against the Petitioner of a physical assault, was recorded by the 3rd Respondent after visiting the hospital at 10.00 p.m. a few minutes after R7 was made. Thus, it seems that the last sentence in R7, though entered by the officer after he completed the entry, is not a fabrication as the Petitioner contends.

The 3rd Respondent, having recorded *Wasudeva's* statement at the hospital thereafter proceeded to record a statement from *Ayoma Janaki* (*Wasudeva's* wife) at 11.30 p.m. In her statement *Janaki* stated that, upon hearing of the attack on *Wasudeva* through her son, she had rushed to the place of the incident. She states that on rushing there, she saw her husband was seated on the ground while the Petitioner and his brother-in-law stood near him. She also saw *Shreemalee* had a pole in her hand. After making the statement at 11.55 p.m., *Janaki* proceeded to the place of the incident with the 3rd Respondent to point out to the officer of the place of attack, which enabled him to make observations and to verify whether there were any other witnesses to the incident. The Petitioner does not challenge the existence of this statement.

The Petitioner was arrested by the 3rd Respondent at his residence around 12.10 a.m. on 14.08.2013, after about 15 minutes since his visit to the place of the incident to conduct investigations. The Information Book extracts

indicate that the Petitioner was informed of the reason for his arrest by the 3rd Respondent in making the arrest and the Petitioner does not deny that fact either.

Returning to the question, whether there was a reasonable and credible complaint against the Petitioner at the time of his arrest, I would apply the test adopted by *Amerasinghe* J in the determination of the same. *Amerasinghe* J (per ***Senaratne v Punya de Silva and Others*** (supra) formulated the test as follows; *"[W]ere there circumstances, objectively regarded the subjective satisfaction of the officer making the arrest is not enough that should have induced the first respondent to suspect that the petitioner was concerned in the commission of those offences?"* in the determination of the reasonableness of a complaint on which the impugned arrest was made.

The 3rd Respondent, who made the arrest of the Petitioner, was directed by the 1st Respondent to investigate into the complaint of assault of *Wasudeva.* When the 3rd Respondent received orders from the 1st Respondent to investigate, he was patrolling around *Maggona* area. There was no allegation that he too had an animosity against the Petitioner. At the time of receiving orders to investigate, it is very unlikely that the 3rd Respondent knew nothing of any involvement of the Petitioner. Upon receiving orders from his superior through radio communications, the 3rd Respondent had thereupon proceeded to the hospital where the injured was receiving treatment. A statement of the injured, which contained a direct accusation against the Petitioner implicating him of assault, was recorded. During the said interview, the officer noted that the injury of the injured was already treated by the medical staff. He then proceeded to locate the witness, who accompanied the injured to the Police and then to Hospital. Her statement was also recorded. *Ayoma Janaki* confirmed that the Petitioner was present near the injured, when she rushed

to the place of the incident upon being informed of the commotion by her son. The BHT of *Wasudeva* (page 2 of R8) also indicated that the injured was admitted with a history of being assaulted by " *a known group of people with hands and a wooden pole*" which made him bled from his nose. The X ray of the injured indicated an "*undisplaced (sic) fracture*" of his skull.

Clearly the medical records as well as the statement of the injured provided unambiguous and definitive information to the 3rd Respondent as to the manner in which *Wasudewa* had sustained his injuries and the persons who are responsible for causing them. These factors made the accusation by *Wasudewa* a well substantiated one. Nonetheless, the 3rd Respondent had taken the additional step of recording the statement of *Wasudeva's* wife that very night and also visited the scene before arresting the Petitioner. When these multiple factors that contributed to the decision to arrest of the Petitioner are considered objectively, it is my considered view that there was a reasonable complaint made to the 3rd Respondent by *Wasudeva,* alleging physical assault by the Petitioner and others, an allegation which is supported with sufficient material for the 3rd Respondent to determine that there was a reasonable complaint made against the Petitioner, that empowered him to make a lawful arrest.

The factual assertion of the Petitioner that *Wasudeva,* making an admission that he did not accuse him of assault, is an important factor in support of his allegation of illegal arrest. The 1st Respondent tendered a statement made by *Wasudeva* containing a direct allegation against the Petitioner and the Petitioner does not challenge its existence. In these circumstances, the admission attributed to *Wasudeva,* should have been substantiated either by tendering an affidavit or a statement from *Wasudeva* or even from a third party, who heard *Wasudeva* making the said admission. In

the absence of such material, the said assertion made by the Petitioner remains a mere, unsubstantiated and a self-serving assertion. When the 1st Respondent, tendered the statement of *Wasudeva*, the Petitioner conveniently ignored to challenge that fact in his counter affidavit and was content with repeating his contention that there was no reasonable complaint of assault made against him.

Even if *Wasudeva* did formally retract his accusation against the Petitioner, which said to have happened during an inquiry held on 24.08.2013, that factor would not have any effect on the legality of the arrest, since what is material to the determination of the legality of the arrest are the circumstances that existed prior to the making of arrest and not the subsequent events that may have occurred.

This reasoning also applies to the contents of the affidavit dated 14.10.2014, made by witness *Kalapuge Padmalatha*, who, in her statement to the 3rd Respondent on 14.08.2014, as well as in the affidavit tendered along with the petition of the Petitioner (P4), claims to have seen the incident of assault on *Srimath Namasri Algawatta. Padmalatha* now retracts the contents of her affidavit while asserting that *Namasri* obtained her signature to an affidavit after promising her of Rs. 50,000.00 to implicate *Wasudeva.* She, in her second affidavit, claims that she now wants to rectify the "injustice" that caused to *Wasudeva* by her actions.

The Petitioner, in his petition concedes that he was informed prior to his arrest by the 3rd Respondent that the injured "*Udaya Kumara*" (*Wasudeva)* had implicated him, his sister and brother-in-law for the assault and accordingly all three of them needed to be arrested. Petitioner's sister and brother-in-law could not be arrested along with him, as they were not at home. In view of these factors, the allegation of the Petitioner that the reference to him in the

entry R7, is a fabrication made by the Respondents after he complained of his arrest to this Court, does not support his allegation of illegal arrest. In these circumstances, I hold that the arrest of the Petitioner was made according to procedure established by law and there was no infringement of the fundamental rights guaranteed to him in terms of Article 13(1).

The allegation that the 1st and 3rd Respondents have acted in violation of Article 13(2) shall be considered next.

The gravamen of the allegation of the Petitioner in this regard seems to be that after his arrest he was kept in the "*cell overnight without any legally valid reason*" and the 1st Respondent had taken no action on his continued detention, until his mother intervened in the following morning and "… *beseeched him to release the Petitioner, his sister and brother-in-law*". The Petitioner contends only then the three detainees were released by the 1st Respondent on surety bail. The Petitioner is of the firm belief that the 1st Respondent had intentionally kept him in detention "overnight" because of his complaint made to a Senior DIG.

The relevant notes contained in the Information Book extracts reveal that the Petitioner was handed over to the reservist by the 3rd Respondent after his arrest and detained him at the Station awaiting orders from the 1st Respondent. The 3rd Respondent thereafter returned to his patrolling duties by leaving the station at 12.50 a.m. on 14.08.2013. At 8.10 a.m. on the same day the Petitioner's sister and brother-in-law too were arrested by PC 88152 *Kanchana* and detained at the Station awaiting orders of the 1st Respondent. Statements of *Ranasinghege Indika Wasantha* (brother-in-law of the Petitioner) and *Shreemalee Algawatta* (sister of the Petitioner) were recorded at 8.40 a.m. soon after their arrests. The 1st Respondent had averred that the Petitioner, his

sister and brother-in-law too were released on bail, at 9.55 on the same day. The Petitioner confirms that position.

In view of these considerations, the assertion of the 1st Respondent that the Petitioner and his relatives were released on bail after their arrest on the same day (14.08.2013) by 9.55 a.m., remains an uncontradicted and unassailed fact. In effect, the Petitioner was kept in detention for a total period of less than ten hours since his arrest at 12.10 a.m.

Sections 36 and 37 of the Code of Criminal Procedure Act governs how a person arrested is to be dealt with and the duration within which such a person could lawfully be detained by a peace officer. Section 37 imposes a mandatory duty on peace officers not to detain suspects in custody or confine them for a period not exceeding twenty-four hours, leaving out only a narrow margin of time, in view of the practicalities involved with actual production of suspects before a judicial officer.

Returning to the consideration of the complaint of the Petitioner on illegal detention, it is observed that the Petitioner was released on surety bail by the 1st Respondent, without producing him before a Magistrate. Since the release was made within a period of less than twelve hours since his arrest, the only factor that should be considered in relation to the allegation of illegal detention is whether there was sufficient compliance of the statutory provisions contained in Section 37 of the said Act by the 1st Respondent.

Section 37 imposes a duty on a peace officer not to detain individuals unreasonably as it states that such an officer " *… shall not detain in custody or otherwise confine a person arrested without a warrant for longer period than under all the circumstances of the case is reasonable*" and it further insisted that the total

period of detention should not exceed the twenty-four-hour period, except for certain limited situations qualifying under Section 43A.

In applying the test whether the Petitioner was released by the 1st Respondent without keeping him in detention *"for longer period than under all the circumstances of the case is reasonable"* to the totality of the circumstances as revealed from the pleadings, I find that the Respondents have released him on a surety bond well within a reasonable time period, after having sufficiently complied with the applicable legal provisions contained in Sections 36 and 39. The contention of the Petitioner that the Respondents acted in breach of the statutory provisions of Section 65 of the Police Ordinance, in their failure to produce the Petitioner before a Magistrate, despite being enlarged on a surety bond, was made on a clear mis-interpretation of the proviso to the said Section and therefore does not require any further consideration here. Similarly, the Petitioner's contention that the Respondents were in breach of Departmental Orders which made it obligatory for the Officer-in-Charge of the Station to report of the arrest made by the Police, too is based on a similar misapprehension of the factual and legal position.

It is evident that the Petitioner's complaint of violation of his fundamental rights was primarily made against the 1st Respondent, the Officer-in-Charge of *Payagala* Police Station, although he cited several other officers attached to the said Station as Respondents. In the preceding part of this judgment, the legality of the arrest and detention was considered in the backdrop of the material presented before this Court, which includes the pleadings of the parties and the annexures along with the certified extracts of the notes of multiple investigations carried out by the officers of *Payagala* Police.

Since the Petitioner made direct references to the violation of the statute law in claiming of illegal arrest contrary to procedure established by law, consideration was more focussed into the relevant provisions in the Code of Criminal Procedure Act. In addition to urging illegality of the arrest in terms of the applicable law, it was also alleged that the arrest and detention of the Petitioner was also due to an animosity harboured against him by the 1st Respondent. The Petitioner therefore challenges the decision to arrest and to detain are violative of his rights as they were decisions that are "*tainted with malice*". In view of these repeated accusations made against the 1st Respondent of acting in *malice* to the detriment of the Petitioner, it is important to consider whether any of his actions, taken or not taken on a series of complaints, were motivated by the said animosity, as alleged by the Petitioner.

Why this becomes an important consideration is, as it has been said" *[A]lthough a law is fair on its face and impartial in appearance, yet if it is applied and administered with an evil eye and an unequal hand, so as to make unjust and illegal discrimination it would constitute a denial of equal protection of the laws*" (vide *Fundamental Rights in Sri Lanka, S. Sharvananda, 1993,* p.124).

Of these multiple references to the actions or inactions that were attributed to the 1st Respondent, there are four incidents that stand out clearly from the rest in relation to this very aspect and therefore are considered in this part of the judgment. It is for the purpose of clarity and easy presentation, a re-arrangement of these several instances was made by referring to them in a chronological order.

It is stated in the petition by the Petitioner that, prior to the series of interactions that were referred to in the instant application, he has had no interaction with the Police at all, thereby implying this was his first. That being the case there cannot be any pre-existing animosity between the

Petitioner and the 1st Respondent and if at all, such an animosity did actually exist, it should be a result of one or more incidents referred to in the pleadings. The Petitioner's perception of the reason for harbouring an animosity, as stated in paragraph 13 of his petition, is directly referable to his complaint to the Senior DIG regarding the failure of the 1st Respondent to take action on a complaint lodged by his mother over an incident of assault on his sister. The Petitioner's position is that due to the said animosity only he was arrested by the Respondent, without even a complaint being lodged against him. However, the Petitioner also alleged in his petition of remanding his father, pending medical examination, too motivated by the same animosity.

In view of the fact that the strong correlation that seem to exist between the series of complaints and counter complaints made to *Payagala* Police. All of them either directly or indirectly had some relevance to the arrest of the Petitioner. This factor needed to be examined closely and in the proper context, in order to assess the justifiability of the Petitioner's complaint of personal animosity on the part of the 1st Respondent, which allegedly occasioned a violation of a fundamental right.

There are four such specific instances where the Petitioner attributes malice on the part of the 1st Respondent, which shall be examined hereinafter under separate sections.

The origin of the series of incidents that led to the arrest of the Petitioner could be traceable to a complaint relates to the Petitioner's father, *Algawattage Maithreepala*. *Maithreepala,* is a retired medical attendant who lived with his wife, two sons, a daughter and her husband. The starting point of all the subsequent events began with a complaint made by *Karunakalage Deepa Krishanthi* to *Payagala* Police Station at 3.00 p.m. on 21.04.2013. In that complaint, *Krishanthi* accused *Maithreepala* for regularly harassing her and

family by uttering obscenities that are directed to them. She further alleged *Maithreepala,* whilst being under the influence of liquor, regularly made derogatory references to her caste and also to her religious beliefs in those utterances. She suspects that it could be due to a mental illness and if it is so, requests the Police to compel him to obtain medical help. She further claims that informing *Maithreepala's* daughter, *Shreemalee Algawatte* (a sister of the Petitioner) of her father's abusive behaviour did not help and *Maithreepala's* acts of harassment continued unabated. Not only *Krishanthi* was disturbed by the conduct of *Maithreepala.* There were others who had similar complaints and the officer thereupon proceeded to record statements of *Wittahachchige Don Janaka Prabath, Wittahachchige Don Keerthisiri* and *Jayanetti Koralalage Samitha Samanmalie,* all of whom are neighbours of *Maithreepala.* They confirmed the complaint of *Krishanthi* on the abusive behaviour of their elderly neighbour.

On 22.04.2013, PC 31307 *Padmasekara* of *Payagala* Police Station visited the house of *Maithreepala* to investigate into the complaint and found that he was still under the influence of liquor and making incoherent utterances. Due to his state of intoxication, no statement could be recorded off *Maithreepala* at that point of time.

The Police directed the family to produce *Maithreepala* before the 1st Respondent on 22.04.2013 but did not do so due to his ill-health. Several opportunities were given to facilitate an inquiry but *Maithreepala* was presented to Police by the Petitioner only on 28.04.2013. They were then re-directed to appear before the Magistrate on 29.04.2013.

Interestingly, the Petitioner, also made a complaint to the Police on 28.04.2013, alleging that *Karunakalage Deepa Krishanthi* is of unsound mind and regularly harasses his family by verbally abusing them. It is relevant to note

here that the complaint against the Petitioner's father alleging harassment was initiated by the same *Karunakalage Deepa Krishanthi.*

The 3rd Respondent made reports of facts to the Magistrate's Court of *Kalutara* on 29.04.2013, regarding both complaints of abusive behaviour under case Nos. AR 4724/13 and 4725/13(R6) seeking orders of Court enabling psychiatric assessment of *Algawattage Maithreepala* as well as *Karunakalage Deepa Krishanthi.* The 3rd Respondent further states in his report to Court that the complaints made against *Algawattage Maithreepala* by several individuals were independently verified by him after obtaining confirmation by the *Grama Niladhari* of the area and the Chairman of Civil Defence Committee.

When the case No. AR 4724/13 was taken up before the Magistrate's Court on 29.04.2013, the Court itself made order remanding the Petitioner's father and referred both *Maithreepala* and *Krishanthi* for psychological assessment. When case No. AR 4724/13 was called on 15.05.2013, the report issued by the Consultant Psychiatrist was tendered to Court. The report indicated that *Algawattage Maithreepala* was suffering from Bipolar Effective Disorder and also from alcohol dependency. The report further recommended his treatment to be continued with proper medication coupled with follow up visits to Mental Health Unit of *Kalutara* Hospital.

Thereupon, the Court made order handing the custody of *Maithreepala* over to the Petitioner and directed him to ensure continued medical treatment. Apparently, *Krishanthi* was cleared of any mental impairment.

The 1st Respondent denied making any application to remand *Algawattage Maithreepala* and, states that after verifying the complaint of *Karunakalage Deepa Krishanthi,* he merely reported facts to Court. This appears to be so, since the copy of the report filed in Court or the proceeding of Court

does not indicate any such application made by the 1st Respondent to commit Petitioner's father to judicial custody pending psychological evaluation. It was the Court, after observing the demeanour of the person, made the order *ex mere motu*. In the circumstances, I am more inclined to accept the explanation of the 1st Respondent on this allegation. This is because, if the 1st Respondent was determined to act on any animosity, he had ample opportunity to do so after receiving many complaints by the neighbours of the nuisance created by *Algawattage Maithreepala.* The 1st complaint was made to *Payagala* Police on 21.04.2013 by *Krishanthi* but the facts were reported to Court only on 29.04.2013. During this time interval, the 1st Respondent repeatedly directed the Petitioner to produce his father to the Police Station, to inquire into the said complaints. The Petitioner, claiming his father was unwell, managed to avoid that inquiry. He eventually produced his father before the Magistrate's Court on 29.04.2013, the day on which the remand order was made. The manner in which the 1st Respondent reacted to the repeated acts of disobedience to his directions, is an indication that the Petitioner's claim of acting with malice on this issue is only a perception created in the latter's mind, rather than being an actual fact that exists in reality.

Moreover, when *Krishanthi* lodged a complaint against *Maithrepala,* suggestive of latter's mental impairment, the 1st Respondent did not take any action until he verified that claim from many different sources of information. However, when the Petitioner made a counter allegation that *Krishanthi* of having a mental disorder, in the evening of the day prior to the date for production of his father before Court, the 1st Respondent had promptly acted on that information and moved Court for *Krishanthi's* mental assessment, without waiting for any verification of that allegation and disregarding the fact that she is the complainant against the Petitioner's father and that she operates a grocery in the area for some time without any problems as it is

unlikely that a person with such an impairment, would conduct her affairs in that manner.

The second incident relates to an allegation of assault on the Petitioner's sister. This is the incident that made the Petitioner to make a verbal complaint to the Senior DIG against the 1st Respondent and therefore the starting point of the alleged animosity. At about 8.50 a.m., on 26.04.2013, *Sandage Pushpakanthi* complained to *Payagala* Police Station of an incident of physical assault on her daughter *Shreemali Algawatte* by one "*Manju Prabath*". She was told by *Shreemali* that *Manju Prabath* had hit her after grabbing her by hair. He also said to have bragged to *Shreemali* that somehow her father would be sent to mental asylum soon. The complainant informed the Police that her daughter was already admitted to *Nagoda* Hospital due to this assault. She also added that their neighbours are harassing them by making repeated complaints to police against her husband, who suffers from a mental illness.

The individual referred to in the said complaint as *Manju Prabath* is one and the same person, who supported *Krishanthi's* complaint against the Petitioner's father, *Wittahachchige Don Janaka Prabath*. After he complained about the nuisance created by *Shreemalie's* father on 23.04.2013, after three days and in the morning of 26.04.2013, at 8.49 a.m., *Pushpakanthi* made a complaint against him alleging assault. The complainant *Sandage Pushpakanthi* is the Petitioner's mother and *Shreemali Algawatte* is his own sister.

PS 3844 *Tillakaratne* recorded a statement of *Shreemali Algawatte* at about 4.50 p.m. on the same day at *Nagoda* Hospital where she accused *Manju Prabath* for assaulting her. PS 3844 *Tillakaratne* visited the place, where the alleged assault had taken place, at 5.30 p.m. and noted his observations. SI *Gamini Silva* thereafter arrested *Wittahachchige Don Janaka Prabath* and produced him at the police station on that evening at 6.05 p.m. his statement

was recorded at 6.30 p.m. on the same day. Page 118 of the same MCIB, in paragraph 318, SI *Gamini* left the Police Station at 5.00 p.m. on 26.04.2013, to make scene observations regarding the said complaint of assault, on the instructions of Personal Assistant to Senior DIG. This entry confirms that the Petitioner did make a complaint to the Senior DIG, on the alleged inaction on the part of the 1st Respondent over his mother's complaint which he attributes to personal animosity. But, by then PS 3844 *Tillakaratne* already recorded a statement of *Shreemali Algawatte* on the incident.

According to *Shreemali's* statement, she was cleaning her pots and pans in her backyard in the morning. She was alone. Suddenly, *Manju Prabath* came near her, asked where her husband was and then kicked her twice. She attributes that attack to an incident that had taken place between her husband and *Prabath* on the previous day. She admits there were no witnesses to the assault. Interestingly, the Petitioner, despite the fact that not being a witness to the said incident, provides his own version to it in his petition to this Court. In paragraph 4(g) of his petition, the Petitioner states as follows;

> *"On 26th April 2013, around 7.30 a.m. the Petitioner's sister had seen another first cousin of the said W.D. Ratnapala named W.D. Janaka Prabath (who is also a first cousin of W.D.Keerthi), who lives in a house adjoining her house, going from house to house asking people to sign a public petition to be handed over to the Payagala Police, which petition stated that the Petitioner's father is insane and a danger and a nuisance to the public. The Petitioner's sister had objected vehemently to the activities of the said W.D. Janaka Prabath in attempting to obtain a public petition against her father and told the said W.D. Janaka Prabath not to be a busy body and meddle in other people's affairs. The Petitioner states that incensed by his sister's words, W.D. Janaka Prabath*

assaulted his sister, necessitating her admission to the Nagoda Hospital."

The version presented to Court by the Petitioner not only differs from what his sister told the Police but also connects to an incident not spoken to by any of the others. What *Shrimalee* said in her statement in relation to the attack was " **[මංජු මට පහර දීමට හේතුව 2013.04.25 වන දින මගේ පුරුෂයා ඉන්දික වසන්ත මංජුට පහර දීම නිසාය. වෙන අමනාපයක් නැත.**" The addition of the fact of collection of signatures to a public petition is obviously a concoction on the part of the Petitioner in making an attempt to attach more weightage to his sister's complaint of assault against *Janaka Prabath* by coupling it with the complaint against his father.

The reason that the Police did not immediately proceed to arrest *Wittahachchige Don Janaka Prabath* after the complaint of *Pushpakanthi* could be inferred upon perusal of the contents of her first complaint. It was stated by *Pushpakanthi* that she did not witness the incident and she only learnt of it from her daughter. Thus, *Pushpakanthi* not being a witness to the incident, who merely repeated what she learnt from her daughter to Police was clearly insufficient for the Police to arrest *Janaka Prabath* since no reasonable suspicion could be formed solely on that statement, particularly in the absence of any such information forthcoming from the alleged victim *Shreemalie,* who by then got herself admitted to Hospital bypassing the Police, despite the fact that she had no injuries. No MLE form was issued as a result. *Shreemalie's* statement was recorded later on at 4.50 p.m. on the same day and, within a period of little over an hour, the Police arrested *Janaka Prabath* as a suspect over her complaint. He too was detained by the Police after arrest. It could well be that the intervention of the Senior DIG contributed to the arrest of *Janaka Prabath*. It must also be observed that only after recording *Shreemalie's* statement, which

contained a direct accusation of assault for the first time, the Police had a reasonable complaint to arrest *Janaka Prabath*.

Similarly, the reasons for the delay in the arrest of *Wasudeva,* against whom a complaint was made by *Namasri,* are evident when the sequence and the chronology of the relevant events are lined up in proper context. The incident of assault on *Wasudeva*, which referred to as the core incident in this judgment earlier on is a one immediately followed to the incident of assault, as complained by *Namasri.* The incident involving the three-wheeler driven by *Namasri* and *Wasudeva's* son occurred at about 7.30 or 8.00 p.m. and then only the Petitioner, his sister and brother-in-law joined in the attack. *Wasudevea's* wife had taken her husband to Police by 8.30 p.m. and while they were on their way to hospital, *Namasri* came to Police to make a complaint at 9.40 p.m. Unlike *Wasudeva, Namasiri* had no visible injuries and he only complained of headache after his head hit the ground as he fell down. He too was issued MLE Form No. 142/13.

After visiting the scene in the following morning, PS 3844 *Tilakaratne* recorded a statement of *Kalapuge Pathmalatha*, who witnessed the incident, at 9.20 a.m. On 21.08.2013, PS 3844 *Tilakaratne* proceeded to arrest *Wasudeva* who, by then, had been discharged from the hospital after three days of inhouse treatment. He was not at home. The officer directed *Namasri* to come to Police Station for an inquiry into his complaint on 24.08.2013. The officer also directed *Wasudeva's* wife to inform her husband, to be present at the Police Station for that inquiry. *Wasudeva* was arrested on 24.08.2013, when he presented himself to the Police. He was detained after his arrest and had his statement recorded. On the instructions of the 1st Respondent, *Wasudeva* was released on surety bail and the complaint of *Namasri* against *Wasudeva* for assault was referred to the Mediation Board along with that of *Wasudeva*

made against the Petitioner and others. In these circumstances, I am unable to find any material which indicate the 1st Respondent acted with *malice* in dealing with the Petitioner or any other member of his family.

This factor leads to the consideration of the fourth factor cited by the Petitioner in support of his allegation of animosity entertained by the 1st Respondent against him. The Petitioner alleges that, for nearly seven months, the 1st Respondent did not take any action over the complaints of assault made by his family members.

The document marked R10, indicates that the 1st Respondent filed three plaints before the Magistrate's Court of *Kalutara* on 13.12.2013. Two the plaints carried the Petitioner's name, as an accused in relation to offences of causing hurt and issuing death threats on *Wasudeva.* It appears that the incidents of physical assault on *Wasudeva* and the incident of physical assault on *Namasri* were treated by the Police as an instance where both parties made complaints against each other over the same incident. The information book extract marked R7, indicate that the 1st Respondent had referred both the incidents for mediation in terms of Section of 7(1)(c) of the Mediation Boards Act No. 72 of 1988 as amended, a requirement to be fulfilled before the institution of proceedings before the relevant Magistrate's Court.

This was the case, in relation to the complaint by the Petitioner's sister , *Shrimalee* against *Janaka Prabath,* as well. The Petitioner himself stated in his petition that the complaint had been referred to for mediation, and *Janaka Prabath* was warned by the board to keep good behaviour. However, the Petitioner, either in his petition nor in the counter affidavit, does not make any averment to the reference of the incident to the Mediation Board. In view of the said entry in the information book, the delay in the institution of proceedings is sufficiently explained. The delay of seven months is

accordingly attributable to the time taken to the mediation process, which obviously failed, as indicative by the fact that plaints were filed in Court.

In relation to the consideration of the allegation of animosity on the part of the 1st Respondent, the conduct of the Petitioner and members of his family should also be considered. It was the Petitioner who made an unsubstantiated complaint of insanity against *Krishanthi* for complaining against his father. His sister, *Shrimalie,* too made an accusation against the other complainant who joined hands with *Krishanthi* to complain against their father, for assault. He also complained against the 1st Respondent over perceived inaction for not investigating into his mother's complaint over the allegation of assault on his sister expeditiously, simply because no one from the Police visited their house. He complained to the Senior DIG without even enquiring from his sister whether she, being the alleged victim, made a statement implicating *Prabath*. He further alleges that he was illegally arrested without a complaint, when in fact, as notes of investigation indicate, there was a direct accusation levelled against him by *Wasudeva* in his statement. Then he adds a twist to the complaint by his sister of assault, in his petition to this Court. Contrary to the claim of the Petitioner that the 1st Respondent had acted with malice in arresting him, it appears from the conduct of the Petitioner that it was he who had a distinct trait of vindictiveness and acted with vengeance on whoever opted to cross his path.

When the totality of the circumstances relating to the interconnected series of incidents referred to earlier on in judgment are considered, it is evident that these incidents occurred primarily due to the acrimonious relationship that exists between the Petitioner and his family members with many of their neighbours. Although the starting point of the gradual

deterioration of their relationship could be traceable to *Maithripala's* actions, it is the continued display of total disregard to the concerns raised by the neighbours over *Maithreepala's* actions by the Petitioner and his family had singularly contributed to the conversion of their relationship into a toxic one. *Maithreepala* is clearly having a psychological issue, which is now confirmed medically. In addition, he had another problem due to his alcohol dependency, which undoubtedly exacerbated his mental impairment. Of course, his family was aware of that even before these incidents. *Pushpakanthi* in her statement to Police on 26.04.2013 admits her husband *Maithreepala* had a psychological illness, but admittedly did nothing about it.

The Petitioner too concedes in his petition that he had taken steps to admit his father to *Mental Hospital, Angoda* only after the Court had ordered him to do so. The Petitioner is silent about any previous attempts he made to help his father with his mental condition. Even after several complaints, the Petitioner or any other member of his family did not think it is necessary for them to seek medical advice on behalf of their father until they were compelled to do so by an order of Court. There was no empathy on the part of the Petitioner or other members of his family towards their neighbours who had to undergo repeated bouts of nuisance created by *Maithripala* on a regular basis. Obviously, the tolerance level of his neighbours, who suffered over the repeated acts of verbal abuse hurled at them by *Maithripala,* which had continued unabated due to the unrelenting stubbornness of the Petitioner and his family, had apparently reached its limits, as indicative from their act of making complaints to *Payagala* Police.

The Statement of Objections of the 1st Respondent indicate the position that, after the initial report filed before the Magistrate's Court, the proceedings relating to *Maithripala* were transferred to the District Court. The District

Court is conferred with powers to deal with such instances, in terms of Section 2 of the Mental Deceases Ordinance No. 1 of 1873 (as amended). When produced before the District Court, learned District Judge had observed that *Maithreepala* harbouring a deep-seated hatred towards his neighbours (as per proceedings of the District Court in Case No. "උමතු 4598" on 15.05.2013) and thereby affording validity to the complaints made by the neighbours.

It must be borne in mind that *Maithreepala,* may not be responsible for all or, at least, some of his actions, due to his psychological impairment, but certainly it was for the Petitioner and his family, to help out their own father by securing him of proper medical attention he urgently needed. In addition, the Petitioner and his family are under a duty to prevent *Maithreepala* from being a nuisance to their neighbours due to his mental impairment. Unfortunately, the Petitioner and his family, instead of securing medical attention and giving compassionate care to *Maithreepala*, have apparently diverted their combined energies to take punitive action against their neighbours for making complaints. The neighbours, who sought freedom from the continued acts of nuisance of *Maithripala,* have resorted to a legally permissible course of action by involving the Police, rather than trying to address the problem all by themselves.

This Court, being invested with the Constitutional mandate to protect fundamental rights that are guaranteed by the Constitution in terms of Article 118(b), should consider each complaint of violation of such rights with equal seriousness, in order to protect the applicants from any transgressions made by the State functionaries in the exercise of its executive and administrative functions. In this context, the Petitioner's act of making complaint of a violation of his fundamental rights is a right he should legitimately exercise. If he could establish the alleged infringement, he is entitled to reliefs that are

just and equitable. However, in view of the factors referred to in the preceding paragraph, it is appropriate here to make a brief reference to Article 28, which states thus;

> *"[T]he exercise and enjoyment of rights and freedoms are inseparable from the performance of duties and obligations and accordingly it is the duty of every person in Sri Lanka –*
>
> *(a) …*
> *(b) …*
> *(c) …*
> *(d) …*
> *(e) to respect the rights and freedoms of others; and*
> *(f) …"*

The several neighbours of the Petitioner, some of whom were accused of having mental issues and of committing acts of violence against his family, too are entitled to all the rights and freedoms he himself enjoys. The Petitioner is undoubtedly under a Constitutional duty to respect the rights and freedoms of others and should have conducted himself reasonably in the discharge of that civic duty. This he owed to his own father, who urgently needed medical attention, and then to his neighbours, who too are entitled to have a peaceful life. The Petitioner had miserably failed in both these aspects.

In view of the multiple considerations referred to in the preceding paragraphs of this judgment, it is my considered view that the alleged illegality of the arrest and detention of the Petitioner cannot be taken as a valid complaint against any of the Respondents. The Petitioner had therefore failed to establish that any of the Respondents have by their executive actions, have violated his fundamental rights guaranteed under Articles 12(1), 13(1) and 13(2) of the Constitution.

The application is accordingly dismissed without costs.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, 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 Articles 17, 35 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Centre for Policy Alternatives (Guarantee) Limited,
   No. 6/5, Layards Road,
   Colombo 5.

2. Dr. Paikiasothy Saravananmuttu
   No. 3, Ascot Avenue,
   Colombo 5.

SC FR Application No. 449/2019

Petitioners

Vs

1. Hon. Attorney General
   (in terms of the requirements of Article 35 of the Constitution)

1A. Maithripala Sirisena
   (former President of the Democratic Socialist Republic of Sri Lanka)
   No. 61, Mahagama Sekara Mawatha,
   Colombo 7.

2. Hon. Attorney General
   (in terms of the requirements of Articles 126(2) and 134 of the Constitution read with Supreme Court Rule 44(3))

Attorney General's Department, Hulftsdorp,
Colombo 12.

3. Ranil Wickramasinghe
(Former) Prime Minister & Minister of National Policies, Economic Affairs, Resettlement & Rehabilitation, Northern Province Development and Youth Affairs

Formerly at –
Prime Minister's Office,
No. 58, Sir Earnest de Silva Mawatha,
Colombo 07.

Now at –
No. 117, 5th Lane,
Colombo 03.

4. John Amarathunga,
(Former) Minister of Tourism Development, Wildlife and Christian Religious Affairs

Formerly at –
Ministry of Tourism Development, Wildlife and Christian Religious Affairs
6th Floor, Rakshana Mandiriya,
No. 21, Vauxhall Street,
Colombo 02.

Now at –
No. 88, Negombo Road,
Kandana.

5. Gamini Jayawickrema Perera
   (Former) Minister of Buddhasasana & Wayamba Development

   Formerly at –
   Ministry of Buddhasasana & Wayamba Development
   No. 135, Sreemath Anagarika Dharmapala Mawatha,
   Colombo 07.

   Now at –
   No. 80, Kuruppu Road,
   Borella, Colombo 08.

6. Mangala Samaraweera
   (Former) Minister of Finance,
   Ministry of Finance

   Formerly at –
   The Secretariat,
   Lotus Road, Colombo 01.

   Now at –
   No. 141/5, Galkanuwa Road,
   Gorakana, Moratuwa.

7. Lakshman Kiriella
   (Former) Minister of Public Enterprise, Kandyan Heritage and Kandy Development

   Formerly at –
   Ministry of Public Enterprise, Kandyan Heritage and Kandy Development

Level 7, West Tower
World Trade Centre, Colombo 01.

Now at –
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Palawatta, Battaramulla.

8. Rauff Hakeem
(Former) Minister of City Planning, Water Supply and Higher Education

Formerly at –
Ministry of City Planning, Water Supply and Higher Education,
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Now at –
No. 263, Galle Road,
Colombo 03.

9. Thilak Marapana
(Former) Minister of Foreign Affairs

Formerly at –
Ministry of Foreign Affairs,
Republic Building, Sir Baron Jayathilaka Mawatha, Colombo 01.

Now at –
No. 13, Pelawatta Road,
Nugegoda.

10. Dr. Rajitha Senaratne

(Former) Minister of Health, Nutrition and Indigenous Medicine

Formerly at –
Ministry of Health, Nutrition and Indigenous Medicine "Suwasiripaya"
385, Ven. Baddegama Wimalawansa Thero Mawatha, Colombo 01.

Now at –
No. 22B, Stanmore Crescent,
Colombo 07.

11. Ravi Karunanayake
    (Former) Minister of Power, Energy and Business Development

    Formerly at –
    Ministry of Power, Energy and Business Development
    No. 72, Ananda Coomaraswam Mawatha,
    Colombo 07.

    Now at –
    No. 1291/6, Rajamalwatta Road,
    Battaramulla.

12. Vajira Abeywardena
    (Former) Minister of Internal & Home Affairs and Provincial Councils & Local Government

    Formerly at –

Ministry of Internal & Home Affairs and Provincial Councils & Local Government
No. 330, Dr Colvin R. de Silva Mawatha,
Union Palace, Colombo 02.

Now at –
No. 3, 34th Lane, Queens Road,
Colombo 03.

13. Rishad Bathiudeen
(Former) Minister of Industry & Commerce, Resettlement of Protracted Displaced Persons, Co-operative Development and Vocational Training & Skills Development

Formerly at –
Ministry of Industry & Commerce, Resettlement of Protracted Displaced Persons, Co-operative Development and Vocational Training & Skills Development
73/1, Galle Road, Colombo 03.

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37C, Stanmore Crescent,
Colombo 07.

14. Patali Champika Ranawaka
(Former) Minister of Megapolis & Western Development

Formerly at –
Ministry of Megapolis & Western Development,
17th and 18th Floors, "SUHURUPAYA",

Subhuthipura Road, Battaramulla.

Now at –

No. 88/1, Jayanthipura Road,

Battaramulla.

15. Navin Dissanayake

(Former) Minister of Plantation Industries

Formerly at –

Ministry of Plantation Industries

8th Floor, Stage II, Sethsiripaya,

Battaramulla.

Now at –

No. 09, Philip Gunawardana Mawatha,

Colombo 07.

16. P. Harison

(Former) Minister of Agriculture, Rural Economic Affairs, Irrigation and Fisheries & Aquatic Resources Development

Formerly at –

Ministry of Agriculture, Rural Economic Affairs, Irrigation and Fisheries & Aquatic Resources Development

No. 288, Sri Jayawardhanepura Mawatha,

Rajagiriya.

Now at –

Main Street,

Maradankadawala.

17. Kabir Hashim
(Former) Minister of Highways & Road Development and Petroleum Resources Development

Formerly at –
Ministry of Highways & Road Development and Petroleum Resources Development
9th Floor, Maganeduma Mahamedura,
Denszil Kobbekaduwa Mawatha,
Koswatta, Battaramulla.

Now at –
No. 156, Lake Drive,
Colombo 08.

18. Ranjith Madduma Bandara
(Former) Minister of Public Administration, Disaster Management and Livestock Development

Formerly at –
Ministry of Public Administration, Disaster Management and Livestock Development
Independence Square,
Colombo 07.

Now at –
31/3, Kandawatte Terrace,
Nugegoda.

19. Gayantha Karunathilaka
(Former) Minister of Lands and Parliamentary Reforms

Formerly at –

Ministry of Lands and Parliamentary Reforms

"Mihikatha Medura",

Land Secretariat, 1200/6, Rajamalwatta Avenue, Battaramulla.

Now at –

No.119, Wijerama Mawatha,

Colombo 07.

20. Sajith Premadasa

(Former) Minister of Housing, Construction and Cultural Affairs

Formerly at –

Ministry of Housing, Construction and Cultural Affairs

2nd Floor, Sethsiripaya,

Battaramulla.

Now at –

No. 11/01, Tower B, Royal Park Apartment, Lake Drive, Rajagiriya.

21. Arjuna Ranatunga

(Former) Minister of Transport & Civil Aviation

Formerly at –

Ministry of Transport & Civil Aviation

7th Floor, Stage II, Sethsiripaya,

Battaramulla.

Now at –

No. 50/9, Pelawatta Road,

Nugegoda.

22. U. Palani Digambaram

    (Former) Minister of Hill Country New Villages, Infrastructure and Community Development

    Formerly at –

    Ministry of Hill Country New Villages, Infrastructure and Community Development

    No. 45, St. Michaels Road,

    Colombo 03.

    Now at –

    No. 1/7B, Sri Saranankara Road,

    Dehiwala.

23. Chandrani Bandara

    (Former) Minister of Women & Child Affairs and Dry Zone Development

    Formerly at –

    Ministry of Women & Child Affairs and Dry Zone Development

    5th Floor, Sethsiripaya Stage II,

    Battaramulla.

    Now at –

    C. 49, Keppetipola Mawatha,

    Colombo 05.

24. Thalatha Atukorala
    (Former) Minister of Justice & Prison Reforms

    Formerly at –
    Ministry of Justice & Prison Reforms
    Superior Court Complex,
    Colombo 12.

    Now at –
    231/1, Stanly Thilakeratne Mawatha,
    Nugegoda.

25. Akila Viraj Kariyawasam
    (Former) Minister of Education

    Formerly at –
    Ministry of Education
    Isurupaya, Pelawatta,
    Battaramulla.

    Now at –
    No. 306, (D.02)
    Bauddhaloka Mawatha,
    Colombo 07.

26. M.H.A. Haleem
    (Former) Minister of Postal Services & Muslim Religious Affairs

    Formerly at –
    Ministry of Postal Services & Muslim Religious Affairs

6th & 7th Floors, Postal Headquarters Building, 310,
D.R. Wijewardana Road, Colombo 01.

Now at –
No.16/2B, Fowziya Garden,
Mawilmada Road,
Kandy.

27. Sagala Ratnayake
(Former) Minister of Ports & Shipping & Southern Development

Formerly at –
Ministry of Ports & Shipping & Southern Development
No. 19, Chaithya Road,
Colombo 01.

Now at –
No. 06/01, 28th Lane, Off Flower Road,
Colombo 07.

28. Harin Fernando
(Former) Minister of Telecommunication, Foreign Employment and Sports

Formerly at –
Ministry of Telecommunication, Foreign Employment and Sports
No. 09, Philip Gunawardena Mawatha,
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No. 276/4, Negombo Road,
Wattala.

29. Mano Ganesan
(Former) Minister of National Integration, Official Languages, Social Progress and Hindu Religious Affairs

Formerly at –
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40, Buthgamuwa Road,
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    Now at –
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32. Dr. R.H.S. Samaratunga
    (Former) Secretary to the Treasury / Ministry of Finance
    Ministry of Finance
    The Secretariat
    Lotus Road, Colombo 01.

32A. S.R. Attygalle
    Secretary to the Ministry of Finance
    Ministry of Finance
    The Secretariat
    Lotus Road, Colombo 01.

33. J.J. Rathnasiri
    (Former) Secretary
    Ministry of Public Administration and Management
    Independence Square, Colombo 07.

34. Sumith Abeysinghe
    (Former) Secretary to the Cabinet of Ministers,
    Office of the Cabinet of Ministers Republic Building,
    Sir Baron Jayathilaka Mawatha,
    Colombo 01.

34A. W.M.D.J. Fernando
    Secretary to the Cabinet of Ministers

35. Udaya Ranjith Seneviratne
    (Former) Secretary to the President,
    Presidential Secretariat,
    Galle Face,
    Colombo 01.

35A. Dr. P.B. Jayasundera
    Secretary to the President,
    Presidential Secretariat,
    Galle Face,
    Colombo 01.

36. Mahinda Rajapaksa
    Prime Minister and Minister of Finance
    Minister of Buddhasasana, Religious & Cultural Affairs
    Minister of Urban Development & Housing
    Prime Minister's Office,
    No. 58, Sir Earnest de Silva Mawatha.
    Colombo 07.

37. Nimal Siripala De Silva
    Minister of Labour

6th Floor, “Mehewara Piyesa”,
Narahenpita, Colombo 05.

38. G.L. Peiris
Minister of Education
Isurupaya, Battaramulla.

39. Pavithra Devi Vanniarachchi
Minister of Health
“Suwasiripaya”
No. 385, Rev. Baddegama Wimalawansa
Thero Mawatha, Colombo 01.

40. Dinesh Gunawardena
Minister of Foreign Relations
Republic Building,
Sir Baron Jayathilake Mawatha, Colombo 01

41. Douglas Devananda
Minister of Fisheries
New Secretariat, Jayathilaka Mawatha,
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42. Gamini Lokuge
Minister of Transport
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Battaramulla.

43. Bandula Gunawardena
Minister of Trade
7th Floor, CWE Secretariat, No. 27,
Vauxhall Street, Colombo 02

44. R.M.C.B. Rathnayake
Minister of Wildlife & Forest Conservation
No. 1090, Sri Jayawardhanapura Mawatha,
Rajagiriya.

45. Janaka Bandara Thennakoon
Minister of Public Services, Provincial Councils & Local Government
Independence Square,
Colombo 07.

46. Keheliya Rambukwella
Minister of Mass Media
163, "Asi Disi Medura",
Kirulapone Mawatha, Polhengoda,
Colombo 05.

47. Chamal Rajapaksa
Minister of Irrigation
No. 11, Jawatte Road,
Colombo 05.

48. Dalas Alahapperuma
Minister of Power
72, Ananda Coomarswamy Mw.,
Colombo 07.

49. Johnston Fernando
Minister of Highways
"Maganeguma Mahamedura", 9th Floor,
216, Denzil Kobbekaduwa Mawatha,
Battaramulla.

50. Wimal Weerawansha
    Minister of Industries
    No. 73/1, Galle Road,
    Colombo 03.

51. Mahinda Amaraweera
    Minister of Environment
    "Sobadam Piyasa", 416/C/1,
    Robert Gunawardana Mawatha,
    Battaramulla.

52. S.M. Chandrasena
    Minister of Lands
    "Mihikatha Medura", Land Secretariat,
    No. 1200/6, Rajamalwatta Road,
    Battaramulla.

53. Mahindananda Aluthgamage
    Minister of Agriculture
    80/5, "Govijana mandiraya",
    Rajamalwatta Lane, Battaramulla.

54. Vasudeva Nanayakkara
    Minister of Water Supply
    No. 35, New Parliament Road Pelawatta,
    Battaramulla.

55. Udaya Prabhath Gammanpila
    Minister of Energy
    No. 80, Sir Earnest de Silva Mawatha,
    Colombo 07.

56. Ramesh Pathirana
    Minister of Plantation

11th Floor, Sethsiripaya Stage II,
Battaramulla.

57. Prasanna Ranathunga
Minister of Tourism
6th Floor, Rakshana Mandiraya,
No. 21, Vauxhall Street, Colombo 02.

58. Rohitha Abegunawardhana
Minister of Ports & Shipping
No. 19, Chaithya Road,
Colombo 01.

59. Namal Rajapaksa
Minister of Youth & Sports
No. 09, Phillip Gunawardana Mawatha,
Colombo 07.

Respondents

Before : Priyantha Jayawardena, PC, J
E.A.G.R. Amarasekara, J
Kumudini Wickremasinghe, J

Counsel : Suren Fernando with Luwie Ganeshathasan and Khyati Wickramanayake for the Petitioners.

Faisz Mustapha, PC with Faiszer Mustapha, PC, Pulasthi Rupasinghe, Keerthi Tillekaratne and Ashan Bandara for the 1A Respondent.

Dr. Avanti Perera, DSG for the 2nd, 32B and 33B Respondents.

Argued on : 14th September, 2022

Decided on : 29th February, 2024

Priyantha Jayawardena PC, J

The petitioners filed the instant application challenging the decision of the Cabinet of Ministers to grant the former President, the 1A respondent, to occupy his official residence after his retirement under the Presidents Entitlements Act No. 4 of 1986.

Facts of the case

The instant application was initially filed against the Attorney General in terms of Article 35(1) of the Constitution, alleging the infringement of Fundamental Rights of the petitioners and citizens of Sri Lanka. Upon the retirement of the former President, he was added as the 1A respondent to the application.

The petitioners stated that the Minister of Finance, by a Cabinet Memorandum dated 11th of October, 2019 recommended, *inter alia,* to allocate the residence that he was occupying as the President, which is situated at Mahagama Sekara Mawatha (Paget Road), Colombo 7 to be given to the 1A respondent after his retirement in terms of section 2 of the Presidents Entitlements Act No. 4 of 1986.

The petitioners further stated that in terms of Article 43(2) of the Constitution, when the Cabinet Memorandum regarding his retirement benefits was discussed and decided, the 1A respondent as the head of the Cabinet of Ministers presided over the said meeting. Hence, it was stated that the participation of the 1A respondent in the said Cabinet meeting is a violation of the principle of *nemo judex in causa sua* / conflict of interest and is demonstrative of the *mala fides* of the 1A respondent.

Moreover, the petitioners stated that though the former President is entitled to certain benefits under and in terms of the Presidents Entitlements Act No. 4 of 1986, the said power should be exercised according to the law and in a reasonable manner.

The petitioners further stated that the aforementioned residence occupied by the 1A respondent is of great financial value and is an asset of the country. Moreover, in October 2015, approximately Rs. 180 million was allocated from State funds for the renovation of the said residence and to merge two houses stating "*to bring into proper condition which is suitable for the use of the President*". Hence, the petitioners stated that an allocation of a public asset used

by the President, which is of a high financial value, for the personal use of a former President is irrational, unreasonable, arbitrary, *ultra vires* and illegal.

It was further stated that the decision made by the Cabinet of Ministers goes beyond the scope of the said Act and violates the right to equality and equal protection of the law guaranteed to the citizens of this country by Article 12(1) of the Constitution.

After hearing the parties, the Supreme Court granted Special Leave to proceed with the instant application and an interim Order was made suspending the operation of the said Cabinet decision dated 15th of October, 2019. Hence, the 1A respondent vacated the premises in compliance with said interim Order.

Submissions of the petitioners

The learned counsel for the petitioners submitted that the 1A respondent was the former President and the head of the Cabinet of Ministers in terms of Article 43(2) of the Constitution at the time the Cabinet made the impugned decision with regard to his retirement benefits. Further, at the time the said decision was taken, the 1A respondent had participated in the said meeting of the Cabinet of Ministers as the head of the Cabinet of Ministers.

The learned counsel for the petitioners cited ***Senarath and others v. Chandrika Bandaranayake Kumaratunga and others*** **(2007) 1 SLR 59** and submitted that according to the principle of *nemo judex in causa sua,* a person should refrain from participating in taking decisions in respect of himself.

In the circumstances, the learned counsel further submitted that the 1A respondent chaired the meeting in which it was decided to grant him retirement benefits and hence, the said decision is a violation of the principle of *nemo judex in causa sua.* Moreover, the said Act does not provide for the granting of a residence fit for a President to be given to a former President.

Further, the Cabinet of Ministers cannot decide the entitlements that should be granted to the President upon retirement when he is holding office. Moreover, the President is constitutionally vested with the power to remove any Cabinet Minister or their functions and thus, exercises full control over the Ministers. Hence, the learned counsel for the petitioners submitted that

taking such a decision while the President is holding office would lead to a conflict of interest, which would result in an abuse of power.

It was further submitted that granting retirement benefits above and beyond the scope of Presidents Entitlements Act No. 4 of 1986 is a violation of the doctrine of equality enshrined in Article 12(1) of the Constitution.

The learned counsel for the petitioners further submitted that the decisions to grant entitlements to former Presidents are not policy decisions, but are decisions taken during the normal course of the business of the Cabinet of Ministers.

Submissions of the 1A respondent

The learned President's Counsel for the 1A respondent submitted that the 1A respondent is the former President of Sri Lanka and is entitled to certain benefits under Presidents Entitlements Act No. 4 of 1986. Accordingly, the former President is entitled to receive a residence under the said Act. As such, the Minister of Finance submitted a Cabinet Memorandum recommending, *inter alia*, to allocate the residence situated at Paget Road, used by the 1A respondent as his official residence, to be used as his residence after the cessation of his tenure. The said Memorandum was unanimously approved by the Cabinet of Ministers headed by the 1A respondent.

The learned President's Counsel further submitted that the instant application does not come within the jurisdiction vested in the Supreme Court in terms of Article 17 read with Article 126 of the Constitution as the Cabinet of Ministers are collectively responsible and are directly answerable to the Parliament. Accordingly, the legality of any Cabinet decision shall be reviewed and corrected only by Parliament and not by court. Therefore, the court cannot review the impugned decision of the Cabinet of Ministers dated 15th of October, 2019.

In this regard, he cited Article 43(1) of the Constitution which states;

> *"There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament."*

In support of the above submissions, the learned President's Counsel cited the judgment delivered in ***Tilwin Silva v. Ranil Wickremasinge and others*** **(2007) 2 SLR 15,** where it was held;

> *"The Cabinet which consists of the President - Head of the Cabinet, the Prime Minister and the Cabinet of Ministers is in charge of the direction and control of the Government and they are collectively responsible to Parliament (Article 43 (1)). When these provisions are considered, in the light of the concept of collective responsibility of the Cabinet the President and the Cabinet are part of one unit that is collectively responsible.*
>
> *The deliberation within the Cabinet amongst its members including the President, is a matter for the concern of the Cabinet and not of this Court."*

It was further submitted that section 2 of the Presidents Entitlements Act No. 4 of 1986 states;

> *"There shall be provided for every Former President and the widow of a Former President, during his or her lifetime, the use of an appropriate residence free of rent."*

Accordingly, the learned President's Counsel submitted that in terms of the said section, the former President is entitled to receive a suitable residence upon ceasing to hold office as the President of Sri Lanka. Thus, the decision made on the 15th of October, 2019 by the Cabinet of Ministers were done in conformity with the provisions of the said Act. Hence, it was submitted that the allocation of the residence at Mahagama Sekara Mawatha to the 1A respondent is in conformity with the provisions of the said Act and lawful.

Moreover, it was submitted that the said Act does not provide for a procedure for the allocation of retirement benefits, and, in particular, does not specify details in relation to the allocation of a residence to a former President.

Furthermore, the learned President's Counsel submitted that the said residence should be considered as an "appropriate residence" for the 1A respondent to reside upon ceasing his office as the 1A respondent occupied the said residence as his official residence during his entire tenure.

The learned President's Counsel further submitted that the 1A respondent is the head of the Cabinet of Ministers and as such, any meeting of the Cabinet of Ministers has to be headed by the President. Thus, a Cabinet decision cannot be taken without the participation of the head of the Cabinet. In the circumstances, the petitioner's statement that the 1A respondent has acted in violation of the principle of *nemo judex in causa sua* is baseless. Additionally, as the former President was acting in terms of the Constitution, it is not possible to state that he acted *ultra vires*.

In this regard, the attention of court was drawn to Article 43(2) of the Constitution which reads;

> *"The President shall be a member of the Cabinet of Ministers and shall be the Head of the Cabinet of Ministers."*

Moreover, the learned President's Counsel submitted that the petitioners relied on the decision of the Supreme Court judgment in ***Senarath and others v. Chandrika Bandaranayake Kumaratunga and others*** *(supra)* to show that the petitioners' rights guaranteed under Article 12(1) of the Constitution have been infringed. However, the facts of the two cases were different as in the case of Chandrika Bandaranayake, the ex-President was using her residence as an office after retirement, together with a large staff, whereas the Act does not provide for a grant of an office to a former President.

The learned President's Counsel also pointed out that the sum of monies allocated as retirement benefits for the former President Mahinda Rajapaksa and 1A respondent are in identical amounts.

Furthermore, it was submitted that the house under reference is not in a good condition and the petitioners were overstating its value. Moreover, Parliament had approved the allocation for the said house to be used by the 1A respondent. In this regard, the attention of court was drawn to the budget extracts from the Ministry of Finance website depicting the allocation of finances approved for the upkeep of the said residence.

Hence, it was submitted that the Presidents Entitlements Act No. 4 of 1986 is an exception to the concept of equality before the law and therefore, the Cabinet decision dated 15th of October, 2019 does not amount to a violation of the petitioners' Fundamental Rights guaranteed by Article 12(1) of the Constitution and accordingly, the application should be dismissed.

Does the Supreme Court have jurisdiction to entertain the petitioners' application?

The 1A respondent was residing at the home under consideration situated at Mahagama Sekera Mawatha, Colombo 7 since 2015, after he was elected as the President. Further, he carried out his official duties as President from the said residence. On the 11th of October, 2019, a Cabinet Memorandum titled "Facilities for former Presidents" was presented by the Minister of Finance to the Cabinet of Ministers to grant retirement benefits to the 1A respondent.

The said Cabinet Memorandum (marked and produced as 'P11') stated;

> "
>
> *1.0 Introduction*
>
> *1.1 As His Excellency Maithripala Sirisena intends to retire as the Sixth Executive President of Sri Lanka following the forthcoming Presidential Elections, **this Cabinet Memorandum is presented for the purpose of providing His Excellency with entitlements of Former Presidents, as well as special facilities granted to Former Presidents by the Government taking into consideration special circumstances.***
>
> *1.2 The Presidential Entitlements Act No 4 of 1986 and Supreme Court Application No. 503/2005 (FR) mentions the facilities provided to Former Presidents. Notwithstanding these facts, **Government has taken measures to provide special facilities to Former Presidents owing to special situations that have occurred during the tenure of presidency.***
>
> *1.3 The island-wide drug eradication campaign launched by His Excellency the President to bring drug smugglers, who are subjecting Sri Lanka to a grave danger, before the law has resulted in a situation where **drug dealers with powerful national and international links pose a threat to the life of His Excellency.** This threat has widened with the action taken by His Excellency as the Minister of Defence to combat terrorist and extremist activities.*

2.0 <u>Proposal</u>

I propose the following facilities to be provided to His Excellency the President upon his retirement:

- *i. Provide the **services of the Special Task Force** for the protection of His Excellency the President in view of matters mentioned at 1.3 above.*
- ***ii. Take measures for the continuous use of His Excellency the President's official residence at No. 61 Mahagamasekera Mawatha, Colombo 7, after his retirement.***
- *iii. Provide facilities provided at present to retired presidents, i.e official and other vehicles and commensurate fuel.*
- *iv. Payment of water, electricity and telephone bills for the official residence and other facilities related to the official residence.*
- *v. Provide two KKS to facilitate the work of His Excellency the President."*

[emphasis added]

The said Cabinet Memorandum was approved by the Cabinet of Ministers headed by the 1A respondent on the 15th of October, 2019, to grant the residence situated at Mahagama Sekera Mawatha, Colombo 7 to the 1A respondent after his retirement as the President in terms of section 2 of the Presidents Entitlements Act No. 4 of 1986.

The decision made by the Cabinet of Ministers regarding the aforementioned Cabinet Memorandum (marked and produced as 'P12') stated;

> *"Cabinet Paper No.19/2946/108/239, a Memorandum dated 2019-10-11 by the Minister of Finance on "Facilities for former Presidents" the above Memorandum was considered by the Cabinet along with the further clarifications made by the Minister of Finance at this meeting. After discussion, it was decided to grant approval to the proposals in paragraph 2.0 of the Memorandum.*

> *It was also decided to treat this decision as confirmed and to authorize the Secretary to the Cabinet of Ministers to convey the same to the relevant authorities for necessary action accordingly."*

A careful consideration of the said decision and the provisions of the said Act shows that it was not a policy decision of the Cabinet of Ministers but a decision to provide benefits under the said Act to the 1A respondent, made by the Cabinet of Ministers in their ordinary course of business.

Nevertheless, even if the impugned decision was to be considered as a policy decision, the courts have the power to consider such a decision if the decision is arbitrary and *ultra vires.*

A similar view was expressed in ***Sidheswar Sahakari Sakhar Karkhana Ltd. v. Union of India*** **(2005) 3 SCC 369** where it was held**;**

> *"Normally the Court should not interfere in policy matter which is within the purview of the government unless it is shown to be contrary to law or inconsistent with the provisions of the Constitution."*

Further, in ***Ugar Sugar Works Ltd. v. Delhi Administration and others*** **(2001) 3 SCC 635**, the Indian Supreme Court observed;

> *"It is well settled that the* ***Courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the Executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness*** *etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional. However, if the policy cannot be faulted on any of these grounds, the mere fact that it would hurt business interests of a party, does not justify invalidating the policy."*
>
> [emphasis added]

However, as stated above, the decision taken by the Cabinet of Ministers is not a policy decision and this court has the jurisdiction to consider the instant application.

Moreover, in ***Priyangani v. Nanayakkara and others*** **(1996) 1 SLR 399** at **404-405,** Fernando, J. reiterated the interrelationship between the Right to Equality guaranteed by Article 12 of the Constitution and Rule of Law. Furthermore, the Court held;

> *"We are not concerned with contractual duties, but with the **safeguards based on the Rule of Law which Article 12 provides against the arbitrary and unreasonable exercise of discretionary powers**. **Discretionary powers can never be treated as absolute and unfettered** unless there is compelling language; when reposed in public functionaries, such powers are held in trust, to be used for the benefit of the public, and for the purpose for which they have been conferred - not at the whim and fancy of officials for political advantage or personal gain."*
>
> [emphasis added]

Further, as stated above, given the facts and circumstances of the instant application, Article 43(1) of the Constitution cannot be construed as an ouster clause which can oust the jurisdiction of the court to entertain the instant application.

When do retirement entitlements become due?

The Long Title of the Presidents Entitlements Act No. 4 of 1986, states;

> *"**AN ACT** to provide for the grant official residence and other allowances and facilities to **Former Presidents** and to the **widows of Former Presidents;** to provide for the payments of pensions to such widows; and for matters connected with or incidental thereto."*
>
> [emphasis added]

Further, sections 2 and 3 of the Presidents Entitlements Act No. 4 of 1986 states;

> *"**2. Provision of residences.***
>
> *There shall be **provided to every Former President** and the widow of a Former President, during his or her life time, the use of an **appropriate residence free of rent**:*

Provided that where for any reason, an appropriate residence is not provided for the use of such Former President for the widow of such Former President, there shall be paid to such Former President or the widow of such Former President, a monthly allowance equivalent to one-third of the monthly pension payable to such Former President or the widow of such Former President, as the case may be.

3. Payment of secretarial allowances and provision of official transport and other facilities.

(1) There shall be paid to -

(a) ***every Former President****, a monthly secretarial allowance equivalent to the monthly salary for the time being payable to the person holding the office of Private Secretary to the President; and*

(b) to the widow of such Former President, a monthly secretarial allowance equivalent to the monthly salary for the being payable to the person holding the office of Private Secretary to a Minister of the Cabinet of Ministers.

(2) There shall be provided to every Former President and the widow of such Former President, official transport and all such other facilities as are for the time being provided to a Minister of the Cabinet of Ministers."

[emphasis added]

Accordingly, the word 'former' used in the Long Title and in sections 2 and 3 of the said Act shows that the provisions of the said Act are only applicable to former Presidents and widows of former Presidents. Hence, the entitlements provided in the said Act become due only after a President retires from office. Thus, no decision can be made to grant benefits under the said Act prior to a President retiring from his office. However, the decision of the Cabinet of Ministers under reference had been taken when the 1A respondent was functioning as the President of the Republic.

A similar view was expressed by this court in ***Senarath and others v. Chandrika Bandaranayake Kumaratunga and others*** *(supra)* **at 71***,* where it was held;

> *"The petitioners made a further submission that in any event the entitlements in Act No.4 of 1986 are to "every former President and widow of a former President". This is clearly seen in sections 2 and 3. Therefore it was submitted that the* ***entitlement becomes effective only after a President ceases to hold office and acquires the status of former President.*** *The entitlement cannot be granted whilst the person is holding the office of President.*
>
> *In my view* ***the provisions have been advisedly worded in this manner to avoid a situation*** *as has happened in relation to the 1st respondent of the President himself or herself partaking in decisions as to the entitlements to be given after ceasing to hold office.*
>
> [emphasis added]

Furthermore, in the determination of ***Re the Nineteenth Amendment to the Constitution*** **(2002) 3 SLR 85**, a Divisional Bench of seven judges of the Supreme Court laid down the basic premise of the Constitution as enunciated in Articles 3 and 4, that the respective *"organs of the government are only custodians for the time being, that exercise the power for the People".* Therefore, *"executive power should not be identified with the President and personalised and should be identified at all times as the power of the People".* Thus, the granting of public property and public funds for personalised usage for oneself after retirement would be considered an arbitrary and irrational abuse of the power bestowed upon the executive by the People.

Is the decision made by the Cabinet of Ministers *ultra vires*?

As stated above, the Cabinet Memorandum contained the retirement benefits to be given to the 1A respondent. Further, the said Memorandum stated that due to special circumstances that took place during the term of the 1A respondent, it was necessary to provide special facilities for him.

The special facilities proposed to be provided were to allow the President the continued occupation of his official residence after retirement and to provide the protection of the Special Task Force.

Moreover, the said Memorandum stated that the *"services of the Special Task Force"* were to be provided for the protection of the President's life which is endangered *"by local and international groups affiliated to the drug trade due to the programs he has put in place to bring to book those involved in the illegal drug trade while such threats have widened further due to actions he has taken against terrorism and extremism in his capacity as the Minister of Defense."* This was implied to be the special circumstances during his tenure that necessitated the granting of special facilities.

However, other than the said mere statement in the Memorandum, no materials were submitted to the Cabinet of Ministers to substantiate the said assertion of the then Minister of Finance. Accordingly, there was no material before the Cabinet of Ministers to support the contents of the said Cabinet Memorandum at the time the impugned decision was made by the Cabinet of Ministers.

In 2015, the media reported that a supplementary estimate of Rs. 180 million was allocated to renovate and refurbish the official residence of the President. In response, on the 7th of October, 2015, the Media Division of the 1A respondent issued a press statement where the Secretary to the President stated that the "*government had to rehabilitate and improve the residence of the President by joining two old houses to bring it to proper condition which is suitable for the use of the President"*. Thus, this residence consists of **two houses merged in central Colombo.** Additionally, he stated that this residence was considered appropriate as the "*government had to provide security to the official residence of the President and to provide accommodation facilities for the security personnel of the President"*.

Furthermore, in the Counter Objections, the petitioners annexed two supplementary allocations (marked as 'P13' and 'P14') provided by the Department of National Budget. The said documents depict large amounts of State resources totalling Rs. 96,391,000, spent in 2015 for the renovation of the said residence of the President, and an additional amount of Rs. 84,297,000 allocated to construct a new building within the compound. These allocations were made when the 1A respondent was occupying the said premises as the President of the

Republic. Thus, there is no rational basis for affording a former President with a residence that was built to be used by the head of State.

A similar view was expressed in the case of ***Senarath and others v. Chandrika Bandaranayake Kumaratunga and others*** *(supra)*, where it was held that the Memorandum submitted to obtain the decision to grant the residence stated that the *"the value of land requested is insignificant when compared with the entitlements she has given up and also proposes to forego in the future"*. However, the land was *"originally intended for the construction of the Presidential Palace and a sum of Rs. 800 million has already been spent by the State to develop the land for the purpose of such construction."* Thus, it was held that a fully developed land near the Parliament cannot be considered "insignificant". Furthermore, it was held that the residence cannot be considered "appropriate" according to section 2 of the said Act as it was a land developed for a different purpose.

Section 2 of the Presidents Entitlements Act No. 4 of 1986 provides a former President with *"the use of an* ***appropriate residence*** *free of rent"*. However, this residence is situated in a prime location and has used around Rs. 180 million State funds for renovation and amalgamation for the purpose of being used by the President to carry out his official activities. Thus, this specified residence cannot be considered as one singular house appropriate for a President retired from office. Hence, a high financial value public asset constructed to occupy a President of the Republic cannot be allocated to a former President who is no longer serving as the Head of the State.

The Presidents Entitlements Act No. 4 of 1986 bestows the Cabinet of Ministers with powers to decide the benefits a former President is entitled to. However, such a decision should be taken according to the provisions of the said Act. Any decision taken in violation of the powers conferred by the provisions of the Act or outside the scope of the said Act are *ultra vires* of the powers conferred by the said Act.

A similar view was expressed in De Smith's Judicial Review of Administrative Action, 4th Edition at page 96 which states;

> *"Substantive* ***ultra vires may relate to*** *matters of law and fact or to* ***matters of discretion. Discretionary powers must be exercised for the purposes for which they were granted****; relevant considerations must be taken into account and irrelevant considerations disregarded; they* ***must be exercised in good faith and***

not arbitrarily or capriciously. *If the repository of the power fails to comply with these requirements it acts ultra vires."*

[emphasis added]

Further, in Administrative Law, 10th Edition at page 30, H.W.R. Wade & C.F. Forsyth states;

"*... the court will hold the order to be ultra vires if the minister acted in bad faith or unreasonably or on no proper evidence."*

As such, the retirement benefits that were granted without proper materials to substantiate the decision of the Cabinet of Ministers are beyond the powers granted by the said Act and are irrational, unreasonable, arbitrary, *ultra vires* and illegal.

Is there a violation of the principles of Natural Justice?

It is pertinent to note that the Presidents Entitlements Act No. 4 of 1986 grants entitlements only to former Presidents and their widows, which is contrary to Article 12 of the Constitution which enshrines the concept of equality before the law. No other holder of public office is granted such benefits. As such, in ***Senarath and others v. Chandrika Bandaranayake Kumaratunga and others*** *(supra)* **at 77**, the Supreme Court, held;

"It has to be noted that the Presidents Entitlements Act No. 4 of 1986 is a unique piece of legislation which grants entitlements only to former Presidents and their widows. Intrinsically it is an exception to the concept of equality before the law, since no other holder of public office is granted such benefits. It appears that there is no similar legal provision in any other country.

The provisions of this Act being an exception in itself to equality before the law, have to be strictly interpreted and applied."

[emphasis added]

Article 43(2) of the Constitution states that the President is the head of the Cabinet. Administrative law is founded on the two basic principles of natural justice, i.e.;

"*a man may not be a judge in his own cause"/ "Nemo judex in causa sua" and "listen to the other side" / "Audi alteram partem"*

Hence, if the President participates and/or sits as the head of the Cabinet of Ministers when a matter in which he has a personal interest is discussed and approved, such a decision is in violation of the principle of n*emo judex in causa sua.*

Moreover, in ***Senarath and others v. Chandrika Bandaranayake Kumaratunga and others*** *(supra)* **at 71***,* Sarath N. Silva, CJ., held;

> *"In official matters the general rule is that a person would refrain from participating in any process where the decision relates to his entitlement or in a matter where he has a personal interest.* ***"Nemo judex in causa sua" is a principle of natural justice*** *which has now permeated the area of corporate governance as well.* ***This salient aspect of good governance has been thrown to the winds by the 1st respondent in initiating several Cabinet Memoranda during her tenure of office and securing for herself purported entitlements that would if at all ensure only after she lays down the reigns of office*** *and acquire the eligible status of a former President."*
>
> [emphasis added]

In ***S.P. Guptha v. Union of India*** **(1982) AIR (SC) at 149**, Bhagawathi, J. observed;

> *"If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armoury of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse of abuse of power by the State or its officers."*

Moreover, though Article 43(2) of the Constitution states that the President is the head of the Cabinet of Ministers, he can refrain from the decision making process if a matter related to him comes up before him or such matters can be taken up at the Cabinet of Ministers when an Acting President is functioning in place of the President in terms of the Constitution.

The concept of *"Quis custodiet ipsos custodes*?" ("*Who will guard the guards themselves?"),* would apply where the executive who acts as the custodian of the People's power would abuse that power for personal benefits and not face any repercussions by the other branches of governance. Accordingly, the securing of personal benefits and advantages for himself by presiding over the Cabinet while still in power as the sitting President is a breach of the provisions of the Presidents Entitlements Act No. 4 of 1986, as it is intended for **former** Presidents.

Moreover, as stated prior, the aforementioned impugned decision of the Cabinet of Ministers violates the general principle of natural justice.

In the circumstances, I hold that the decision taken by the Cabinet of Ministers dated 15th of October, 2019, provided the 1A respondent with entitlements beyond the scope offered by the Presidents Entitlements Act No. 4 of 1986. Further, the said decision is arbitrary, unreasonable, *ultra vires,* illegal and amounts to a violation of the Rule of Law and the Fundamental Rights guaranteed to the petitioners and citizens of Sri Lanka under Article 12(1) of the Constitution.

Accordingly, the application is allowed, and I quash the aforementioned decision of the Cabinet of Ministers dated 15th of October, 2019 (marked and produced as 'P12').

No costs.

Judge of the Supreme Court

E.A.G.R. Amarasekara, 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 Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No: 457/2011

Priyankara Kamalanath Kodithuwakku,
'Wanniarachchi Janaudanagama,'
Borala, Pelmadulla.

PETITIONER

vs.

1. B.V. Wijeratne,
Assistant Superintendent of Police (Retired),
Isuru Place, Paradise, Kuruwita.

2. E. Dhanapala,
Assistant Superintendent of Police,
Office of the Assistant Superintendent of Police, Ratnapura.

3. Senior Superintendent of Police,
Office of the Senior Superintendent of Police,
Ratnapura.

4. Director (Personnel),
Police Headquarters, Colombo 1.

5. Director,
Discipline and Conduct Division,
Police Headquarters, Colombo 1.

6. Inspector General of Police,
Police Headquarters, Colombo 1.

7. Secretary,
Ministry of Defence, Colombo 1.

7A. Secretary,
Ministry of Law and Order,
Floor – 13, 'Sethsiripaya' (Stage II),
Battaramulla.

7B. Secretary,
Ministry of Defence,
15/5, Baladaksha Mawatha, Colombo 3.

7C. Secretary,
Ministry of Law & Order and Southern Development, No. 25, Whiteaways Building,
Sir Baron Jayathilake Mawatha, Colombo 1.

7D. Secretary,
Ministry of Public Security,
14th Floor, 'Suhurupaya,' Battaramulla.

8. Vidyajothi Dr. Dayasiri Fernando,
Chairman, Public Service Commission.

8A. Justice Sathya Hettige, PC,
Chairman, Public Service Commission.

9. Palitha M. Kumarasinghe, PC

9A. S.C. Mannapperuma

9B. Indrani Sugathadasa

10. Sirimavo A. Wijeratne

10A. Ananda Seneviratne

10B. Dr. T R C Ruberu

11. S.C. Mannapperuma

11A. N.H. Pathirana

11B. Ahamed Lebbe Mohammed Saleem

12. Ananda Seneviratne

12A. S. Thillanadarajah

12B. Leelasena Liyanagama

13. N.H. Pathirana

13A. A. Mohamed Nahiya

13B. Dian Gomes

14. S. Thillainadarajah

14A. Kanthi Wijetunge

14B. Dilith Jayaweera

15. M.D.W.Ariyawansa

15A. Sunil S. Sirisena

15B. W.H. Piyadasa

16. A. Mohamed Nahiya

16A. Dr. I.M. Zoysa Gunasekera

9th, 9A, 9B, 10th, 10A, 10B, 11th, 11A, 11B, 12th, 12A, 12B, 13th, 13A, 13B, 14th, 14A, 14B, 15th, 15A, 15B, 16th, 16A are members of the Public Service Commission.

17. Secretary, Public Service Commission.

8th, 8A, 9th, 9A, 9B, 10th, 10A, 10B, 11th, 11A, 11B, 12th, 12A, 12B, 13th, 13A, 13B, 14th, 14A, 14B, 15th, 15A, 15B, 16th, 16A and 17th Respondents at No. 177, Nawala Road, Narahenpita, Colombo 5.

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

19. Prof. Siri Hettige,
    Chairman, National Police Commission

20. P.H. Manatunga

21. Savithree Wijesekara

22. Y.L.M. Zawahir

23. Anton Jeyanandan

24. Tilak Collure

25. Frank de Silva

    20th – 25th Respondents are members of the National Police Commission.

26. Secretary,
    National Police Commission.

    19th – 26th Respondents are at
    Block No. 9, B.M.I.C.H. Premises,
    Bauddhaloka Mawatha, Colombo 7.

RESPONDENTS

Before:	**Priyantha Jayawardena, PC, J** **Achala Wengappuli, J** **Arjuna Obeyesekere, J**
Counsel:	Saliya Peiris, PC, with Anjana Ratnasiri for the Petitioner Rajiv Goonetilleke, Deputy Solicitor General for the Respondents
Argued on:	25th October 2021
Written Submissions:	Tendered on behalf of the Petitioner on 15th July 2022 Tendered on behalf of the Respondents on 15th November 2021
Decided on:	21st February 2024

Obeyesekere, J

In this application, the Petitioner is impugning the decision of the Inspector General of Police not to promote him as an Inspector of Police for the reason that he did not possess five years of unblemished service as at 8th February 2010. The issue that needs to be determined by this Court is whether the said decision of the Inspector General of Police is justifiable in terms of the criteria for promotion.

Institution of proceedings against the Petitioner

The Petitioner joined the **Reserve Force of the Sri Lanka Police Department** as a Sub-Inspector on 30th August 1992. In 1998, he was assigned to the Opanayake Police Station, and assumed duties at the Kahawatte Police Station in October 2002. The Petitioner states that while serving at Opanayake, he had apprehended a large number of persons on charges of brewing illicit liquor, and instituted proceedings in the Magistrate's Court against such persons in respect thereof. On 29th May 2002, one of the persons so apprehended had lodged a belated complaint with the Superintendent of Police, Ratnapura alleging that on 12th May 2001, the Petitioner had solicited and accepted from him a gratification in a sum of Rs. 1000. The said person had also lodged a complaint with

the Commission to Investigate Allegations of Bribery or Corruption [*the Commission*] in respect of the same matter.

Having recorded a statement from the Petitioner, the Commission had initiated proceedings against him in the Magistrate's Court of Colombo under the provisions of the Bribery Act. As a result of the institution of the above action, the Petitioner had been interdicted from service with effect from 20th September 2004, as required by Section 31:1:4 of Chapter XLVIII of the Establishments Code [*the Code*].

The trial in the Magistrate's Court had commenced on 26th May 2005. While the prosecution had led the evidence of three witnesses, the Petitioner had given evidence on his own behalf. By judgment delivered on 30th June 2005, the learned Magistrate had acquitted the Petitioner of all charges levelled against him.

<u>Reinstatement in service</u>

Pursuant to his acquittal, the Petitioner had sought to be reinstated in service.

Section 28:6 of Chapter XLVIII of the Code provides that the acquittal of an officer by a Court of Law is not a bar to disciplinary proceedings being taken against such officer under the Code for the same offence, provided there is sufficient material to do so. However, by his letter dated 21st December 2005, the Superintendent of Police, Ratnapura had confirmed that further disciplinary proceedings would not be taken against the Petitioner in respect of the above incident. The inference that can be drawn from the said decision of the Superintendent of Police is that the material that was available was insufficient for the Police Department to initiate such disciplinary proceedings against the Petitioner.

While noting that the Petitioner had been acquitted by the Magistrate's Court, the Police message issued by the Inspector General of Police reinstating the Petitioner in service on 7th April 2006, contained *inter alia* the following conditions:

> **"මේ හේතුව මත ජ්‍යෙෂ්ඨ පොලිස් අධිකාරි රත්නපුර හා ජ්‍යෙෂ්ඨ නියෝජ්‍ය පොලිස්පති සහායක සේවා විසින් මොහුව නැවත සේවයේ පිහිටුවීමට නිර්දේශ කර ඇති බැවින් මෙම නිලධාරියා වහාම නැවත**

සේවයේ පිහිටුවා පොලිස් ක්ෂේත්‍ර බලකා මූලස්ථානයට අනුයුක්ත කිරීමට නියෝග කර නිලධාරියා දිගු කලක් සේවයේ නොසිටි බැවින් පොලිස් විද්‍යාලයේ පුහුණුව සඳහා යොමු කිරීමටත් පොලිස් විද්‍යාලයේ පුහුණුවෙන් පසුව පොලිස් ක්ෂේත්‍ර බලකා මූලස්ථානයට අනුයුක්ත කිරීමටත් නිලධාරියා සේවයේ නොසිටි කාලය වැටුප් රහිත කාලයක් සේ සැලකීමටත් වර්ෂ 02 ක කාලයක් සඳහා වැඩ හා හැසිරීමේ ගොනුවක් පවත්වා ගෙන යාමටත් පොලිස්පති විසින් නියෝග කර ඇත."

By way of a further message dated 25th April 2006, the Senior Superintendent of Police, Ratnapura, had informed the Officer-in-Charge of the Kahawatte Police that the Petitioner has been reinstated in service, subject to the following conditions specified in the above message of the Inspector General of Police:

(a) The period the Petitioner was not in service to be considered as a period of no-pay leave;

(b) The Petitioner to undergo training at the Police Training Institute and to be attached to the Police Field Force Headquarters after the said training;

(c) A file to be maintained relating to the work and conduct of the Petitioner for a period of two years.

Fundamental Rights Application No. 188/2016

The above three conditions had thereafter been entered in the Bad Conduct Register relating to the Petitioner. Aggrieved by the decision to reinstate him without back wages and the decision to make the above endorsements on the Bad Conduct Register, the Petitioner invoked the jurisdiction conferred on this Court by Article 126 of the Constitution by way of a petition dated 26th May 2006 in SC (FR) Application No. 188/2006.

The Petitioner had specifically pleaded therein that he possessed an unblemished service record, that no disciplinary proceedings had been initiated against him, and that he had not been punished for any offence during his period of service. The gravamen of the Petitioner's complaint to this Court was that the insertion of the above conditions in the

Bad Conduct Register amounts to a punishment, which had been imposed without any disciplinary proceedings being held against him.

On 22nd June 2006, prior to the said Fundamental Rights application being considered by this Court, the learned Deputy Solicitor General who appeared for the Attorney General had undertaken to obtain instructions on whether the above entries could be removed from the Bad Conduct Register. Having done so, this Court had been informed by the Attorney General on 21st August 2006 that, "*he has received instructions from the Respondents that the notation in P32 would be expunged, subject to the condition that the petitioner would not be entitled to back wages for the period under interdiction.*" On this basis, proceedings in the above application had been terminated.

The effect of the above undertaking is that the interdiction of the Petitioner from service did not result in any adverse findings against the Petitioner and the period under interdiction was not considered as a period of no-pay leave, even though the Petitioner was not paid any wages for that period. The distinction between no-pay leave and non-payment of back wages has been considered by this Court in **<u>Tuan Ishan Raban and Others v The Police Commission</u>** [(2007) 2 Sri LR 351], to which I shall advert, later in this judgment.

<u>Expunging the entries in the Bad Conduct Register</u>

By the time the above undertaking was given to this Court, the Police Department had already initiated steps to expunge the above entries from the Bad Conduct Register of the Petitioner. The following two paragraphs of the internal communication dated 27th June 2006 sent by the Director (Discipline and Enforcement) to the Commandant of the Field Force Headquarters soon after proceedings were terminated, clearly reflects the understanding of the Police Department on the relief that was sought by, and granted to the Petitioner:

> **"නිලධාරියා විසින් ඔහු සේවයේ නොසිටි කාලයට වැටුප් ලබාදෙන ලෙසත් මෙම සේවයේ පිහිටුවේමේදී ලබාදී ඇති කොන්දේසි ඔහුගේ සේවා ලේඛණයේ අයහපත් හැසිරීම් යටතේ ලේඛණ ගත කිරීම ඉවත් කර දෙන ලෙසත් ශ්‍රේෂ්ඨාධිකරණය අංක** 188/2006 **යටතේ කොළඹ ශ්‍රේෂ්ඨාධිකරණය වෙත**

ඉල්ලුම්පතක් ඉදිරිපත් කර ඇත. ශ්‍රේෂ්ඨාධිකරණය මගින් සේවයේ නොසිටි කාලයට වේතන ගෙවීමට නොහැකි බවත් මෙම කොන්දේසි නිලධාරියාගේ සේවා ලේඛණයේ අයහපත් හැසිරීම් වශයෙන් ඇතුලත් කර තිබීම ඉවත් කරන ලෙසටත් උපදෙස් ලබාදී ඇත.

මේ අනුව නිලධාරියාගේ සේවා ලේඛණයේ පිටු අංක 110 හා 111 හි ඇතුලත් කර ඇති නිලධාරියා නැවත සේවයේ පිහිටුහීමේදී යටත් කරන ලද කොන්දේසි ඉවත් කරන ලෙසට ඔබ වෙත දන්වන මෙන් පොලිස්පති විසින් මා වෙත උපදෙස් ලබා දී ඇත. ඒ අනුව කටයුතු කර වාර්තා කරන්න."

The above communication had been acted upon by the deletion of the impugned entries from the Bad Conduct Register on 14th July 2006. It should perhaps be reiterated that the deletion of the said entries clearly meant that the institution of proceedings in the Magistrate's Court and the subsequent interdiction did not result in any adverse findings against the conduct of the Petitioner.

Absorption of Officers of the Reserve Force to the Regular Force

In early 2006, during which time the Petitioner was still under interdiction, the Cabinet of Ministers had taken a decision to absorb all those serving in the Reserve Force of the Police Department to the Regular Force, with effect from 24th February 2006. Although the Cabinet Memorandum and the decision of the Cabinet of Ministers have not been made available to this Court, the memorandum circulated within the Police Department in this regard stipulated that those in the Reserve Force must have *inter alia* the following qualifications:

(a) Basic academic qualifications applicable to the Regular Force or eight years of active service;

(b) **An unblemished period of service for a period of five years preceding 31st December 2005**;

(c) While only the active period of service will be counted, any period under suspension or demobilization will be deducted when calculating the number of years in active service.

The said memorandum also stipulated that:

(a) An officer who had been ordered by Court to pay compensation in a fundamental rights application or awarded punishment in a disciplinary proceeding during the five-year period preceding 31st December 2005 will be treated as having a blemished record;

(b) Reservists who are suspended from service will be considered for absorption provided *inter alia* their absorption is recommended by the Commandant of the Police Reserve;

(c) Those who are not eligible due to pending cases in Courts and disciplinary inquiries will be kept in a reserve list until such time the inquiries are completed and will be absorbed depending on the outcome of the inquiry.

It is therefore clear that:

(a) An unblemished service meant that no punishment had been imposed pursuant to the findings of a disciplinary inquiry or has not been ordered to pay compensation in a fundamental rights application;

(b) Any period under suspension or de-mobilisation would only affect the period of active service that was required for absorption; and

(c) Any period under suspension had no nexus to the requirement to have an unblemished record of service.

It is admitted that the Petitioner was absorbed to the Regular Force of the Sri Lanka Police on 13th July 2007, which means that the Petitioner possessed the aforementioned qualifications **including an unblemished period of service for a period of five years preceding 31st December 2005**. More importantly, his absorption demonstrates that the interdiction of the Petitioner and the fact that he was not in active service as a result thereof during the period of five years immediately preceding the operative date, were not considered a blemish on his service for the purposes of absorption.

Promotion of all Sub-Inspectors of Police

The issue that culminated in this application arose in February 2010, when the President ordered that all Sub-Inspectors of Police who had completed eight years of service as at 8th February 2010 in the rank of Sub-Inspector be promoted to the rank of Inspector of Police with effect from the said date. Similar to what was stipulated at the time of the aforementioned absorption, promotion was subject to each officer having eight years of active service and an unblemished record during the five-year period immediately before the date of promotion.

By a message dated 17th February 2010, the Senior Superintendent of Police (Operations) had called for a report from the Officer-in-Charge of the Kahawatte Police relating to the disciplinary records of six Officers including the Petitioner. By a further message sent on 18th February 2010, which appears to be based on a facsimile message sent the same day by the Inspector General of Police, the following instructions had been issued with regard to the calculation of the period of eight years of service:

> "**වසර 08 ක සේවා කාලය ගනන් ගැනීමේදි** පහත පරිදි ක්‍රියා කල යුතුය
>
> 01. උප පොලිස් පරික්ෂක තනතුරට පත් කිරිමෙන් පසු සේවය අතහැර ගොස් ඇත්නම් එම කාලය උප පොලිස් පරික්ෂක තනතුරේ මුලු සේවා කාලයෙන් අඩු කල යුතුයි.
>
> 02. උප පොලිස් පරික්ෂක තනතුරට පත් කිරිමෙන් පසු **වැටුප් රහිත නිවාඩු** ලබා ඇත්නම් එම කාලය උප පොලිස් පරික්ෂක තනතුරේ මුලු සේවා කාලයෙන් අඩු කල යුතුයි.
>
> සේවා කඩවීම් ඇත්නම් එම කාල පරිච්ජේද සදහන් කල යුතු අතර සනාථ කිරිමට අදාල ලේඛන තිබේනම් එයද ඉදිරිපත් කිරිමට කටයුතු කල යුතුයි"

Thus, it is clear that the Inspector General of Police was of the view that any period of no-pay leave would be relevant only in respect of the calculation of the eight years of active service that was required for promotion.

In response, the Senior Superintendent of Police, Ratnapura, by letter dated 29th June 2010 had confirmed that the Petitioner has not had any disciplinary issues during the preceding five-year period and that his promotion was being recommended.

Petitioner is not granted his promotion

On 31st December 2010, the Inspector General of Police had issued a list containing the names of those Sub-Inspectors of Police who had been promoted to the rank of Inspector of Police pursuant to the aforementioned order of the President. Aggrieved by the decision not to include his name on the said list of promotees, the Petitioner had lodged a complaint with the Human Rights Commission on 26th January 2011.

In his response to the Human Rights Commission, the Director (Legal) of Sri Lanka Police had stated as follows:

> "ඉහත කොන්දේසින් අභියෝගයට පත් කරමින් නිළධාරියා විසින් අංක 188/2006 යටතේ ශ්‍රේෂ්ඨාධිකරණයේ අභියාචනයක් ගොණුකර ඇත. එම නඩුව අනුව සේවයට පත් කිරිමේදි පැනවු කොන්දේසි නිළධාරියාගේ සේවා ලේඛනයේ අයහපත් හැසිරීම් යටතේ ඇතුලත් කර තිබීම ඉවත් කරන ලෙසට තීන්දුවක් ලබා දී ඇති අතර සේවයේ නොසිටි කාලයට වැටුප් ගෙවීමට නියෝග කල නොහැකි බවට දැනුම් දී ඇත.
>
> ඒ අනුව **නිළධාරියාගේ සේවා ලේඛනයේ අයහපත් හැසිරීම් යටතේ ඇතුලත් කර ඇති ඉහත කොන්දේසින් ඉවත් කිරීමට පියවර ගෙන ඇති අතර** සේවයේ නොසිටි කාලය සඳහා වැටුප් ගෙවීමක් සිදුකර නොමැති නිසා එම කාලය සක්‍රිය සේවා කාලයක් සේ ගනනය කල නොහැකි බව සඳහන් කරමි.
>
> පැමිණිලිකාර නිළධාරියා නැවත සේවයට පත්කර ඇත්තේ 2006.04.07 වන දින වන අතර සේවයට පත්කිරිමේදි ලබා දෙන කොන්දේසියක් වන **සේවයේ නොසිටි කාලය වැටුප් රහිත කාලයක් සේ සැලකිම මත උසස් වීම ලබාදුන් දින සිට පෙර වසර පහක නොකැළැල් සේවා කාලයක් පැමිණිලිකරුට නොමැති බව සඳහන් කරමි**."

Thus, the contention of the Police Department was that the Petitioner did not possess five years of unblemished service prior to 8th February 2010, **for the reason that he was on *no-pay leave* during the period he was under interdiction** [i.e., 20th September 2004 – 7th April 2006]. I must state that this position was factually incorrect as the Inspector General of Police represented by the Attorney General had agreed before this Court in the previous Fundamental Rights application not to treat the said period as a period of no-pay leave, despite the Petitioner agreeing that he would not be entitled to the payment of back wages.

Alleged infringement of Article 12(1)

Pursuant to the above response to the Human Rights Commission, the Petitioner filed this application on 3rd October 2011 complaining that the decision not to grant him his promotion is an infringement of his fundamental rights guaranteed by Article 12(1) of the Constitution. On 12th January 2012, this Court had granted leave to proceed for the alleged violation of Article 12(1).

In **Karunathilaka and Another v Jayalath de Silva and Others** [(2003) 1 Sri LR 35 at pages 41-42] it 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 become 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 have a reasonable basis for the decision and this Court has not been hesitant to accept those as purely valid decisions*."

The concept of equality therefore forbids action which is arbitrary and capricious. A determination by this Court that the right to equality guaranteed to the Petitioner by Article 12(1) has been violated would therefore have to be preceded by a finding that the aforementioned decision of the Inspector General of Police is unreasonable and unfair and is therefore arbitrary.

Does the Petitioner have eight years of service?

There were only two requirements that had to be satisfied by a Sub-Inspector of Police who was in service on 8th February 2010 to be entitled for promotion to the rank of Inspector of Police. The first was that the Officer should have completed eight years of service in the rank of Sub-Inspector as at that date. It was the position of the Respondents, as borne out by the affidavit filed before this Court by the Inspector General of Police and the written submissions filed on their behalf, that:

(a) The National Police Commission has decided that the period of service in the Reserve Force could be aggregated with the period of service in the Regular Force after absorption;

(b) Therefore, the eight years of service need not be after absorption to the Regular Force;

(c) The requirement of eight years of service need not be eight years of continuous service;

(d) Even after discounting the break in service due to his interdiction, the Petitioner had almost sixteen years of service and had satisfied the requirement of having eight years of service required for promotion.

Thus, there is no dispute between the parties with regard to the first requirement. The position taken up by the Respondents is consistent with the judgment of this Court in **R.A.S.R Kulatunga v Pujitha Jayasundera, Inspector General of Police and Others** [SC (FR) Application No. 132/2014; SC Minutes of 18th March 2021] where it was held that, "*giving due regard to the period of active service in the Reserve Force in the rank of Inspector of Police in deciding whether an applicant had completed eight years of active service in the rank of Inspector of Police is neither arbitrary nor irrational*."

Does the Petitioner have an unblemished period of service of five years?

The second requirement that must be satisfied in order to be promoted as an Inspector of Police is that the Petitioner should have an unblemished record of service during the five-year period immediately prior to the date of promotion of 8th February 2010, with the Inspector General of Police claiming that the Petitioner did not possess the said requirement, and hence is not eligible for promotion.

It was submitted by the learned Deputy Solicitor General that the Code does not contain a definition of *unblemished* service. The plain and simple dictionary meaning of the word *blemish* appropriate to the present circumstances is, to impair morally or to cast a slur on the honour and reputation of an individual. This Court would therefore have to consider

the attendant circumstances in determining whether the Petitioner possessed an *unblemished service*.

The Code contains detailed provisions relating to the taking of disciplinary proceedings against public officers. Section 1:2 of Chapter XLVIII of the Code stipulates that, "*All acts of misconduct or lapse by officers calling for punishment in any form* ***should be dealt with, under these rules****, as soon as possible, by the Disciplinary Authorities, Heads of Departments and other relevant Heads of Institutions…*". The step-by-step procedure that should be followed in order to impose a punishment provided in the Code is contained in Chapter XLVIII. The major punishments set out in Section 24:3 of Chapter XLVIII could be imposed by the Disciplinary Authority only upon the findings of a formal disciplinary inquiry that has been conducted pursuant to the issuance of a charge sheet. This extends to the decision with regard to the payment of arrears of salary for the period an officer was under interdiction – vide Section 31:14.

I shall now consider the position of the Respondents. In his affidavit to this Court, the Inspector General of Police has stated the following as being the reasons why the Petitioner was not entitled to be promoted in 2010:

"*(a) The period the petitioner was out of service cannot be considered as active service and no salary has been paid to the Petitioner for the said period;*

(b) ***It is not possible to deem that the Petitioner's service was unblemished during the period he was not in service as it is necessary to be in active service in order to determine whether the relevant period was unblemished or not****;*

(c) A period a person is out of service cannot be construed as a period of unblemished service as there had been no opportunity to assess his service;

(d) The Petitioner was not entitled to back wages for the period he was out of service and that too is indicative of the fact that the said period is not an unblemished period of service;

(e) *Therefore, the Petitioner did not possess an unblemished record during the five-year period immediately before the date of promotion*." [emphasis added]

Payment of wages to an Officer of the Reserve Force

As noted earlier, the Petitioner did not receive any wages for the period that he was under interdiction, with the Petitioner conceding in the Fundamental Rights application filed by him that he is not entitled to the payment of back wages. The position of the Respondents, as I understand, is that as the Petitioner did not receive a salary for the period under interdiction, the said period cannot be considered as being a period of active service, and that the period the Petitioner was not in active service cannot be construed as a period of unblemished service as there had been no opportunity to assess his service.

In **Tuan Ishan Raban and Others v The Police Commission** [supra], this Court observed that it is apparent from Section 26B(1) of the Police Ordinance that Officers of the Reserve Force were paid on a daily basis for the reason that such Officers could be mobilised and de-mobilised from time to time, and therefore such Officers were not in continuous service. Although provision was made in 1992 for Officers of the Reserve Force to be paid a monthly salary, this was subject to the period of their mobilised service being not less than 26 days for a calendar month. The fact remained therefore that an officer in the Reserve Force was entitled to wages only if he was in active service, and therefore the question of placing an Officer of the Reserve Force such as the Petitioner in this case on no-pay leave while he was not in active service simply does not arise. The fact that wages were not paid during such period an Officer of the Reserve Force was not mobilised certainly does not mean that the said period is of blemished service.

Thus, the Petitioner being an Officer of the Reserve Force, and not having been on active service during the period of 20th September 2004 – 7th April 2006, was not entitled to the payment of wages for the said period. This was perhaps the logic behind the Petitioner agreeing before this Court in the previous application that he was not entitled to the payment of back wages. Furthermore, the Petitioner not having been on active service during the above period is not sufficient by itself for the Respondents to claim that the said period is of blemished service.

Distinction between active service and an unblemished period of service

I must state at this point that an unblemished period of service must not be confused with the first requirement of eight years of active service. The Inspector General of Police appears to have done just that, contrary to the instructions given by his facsimile message of 18th February 2010 that the period of no-pay leave would apply only with regard to the calculation of the eight years of active service. Therefore, the period for which the Petitioner did not receive his wages as a result of being under interdiction would only apply with regard to the first requirement of active service and cannot be applied to the second requirement of unblemished service, unless of course the reason for the non-payment of wages arises out of a disciplinary order, which is not the situation in this case.

Under the Code as well as the Procedural Rules of the Public Service Commission, the entitlement to promotion is conditional upon the criteria in the relevant service minute being satisfied and the public officer earning his salary increments. The learned Deputy Solicitor General has drawn the attention of this Court to the requirement in Rule 186 of the Procedural Rules of the Public Service Commission, which reads as follows:

> "*A Public Officer must earn his promotion by a satisfactory service and fulfilment of all the required qualifications prescribed in the Service Minute or the Scheme of Recruitment.*
>
> *(i) Satisfactory service means a period of service, during which period an officer had earned all annual salary increments that fall due, by efficient and diligent discharge of duties, by passing over efficiency bars that fall due, by qualifying for confirmation in service that fall and during which period he has not committed a punishable offence.*
>
> *(ii) Where an officer has not been granted his due annual salary increments for legitimate reason the period during which the increment had stand suspended, reduced, stopped or deferred and where an officer had committed a punishable offence falling under Schedule I of offences, a period of three years from the*

date of commission of the offences and where an officer had committed a punishable offence falling under the Schedule II of offences a period of one year from the date of commission of the offence, shall be excluded in computing his period of satisfactory service."

The above rule makes it clear that a public officer must earn his promotion *inter alia* by satisfactory service which once again means a period of active service during which all salary increments are earned by the efficient and diligent discharge of his duties. The fact that a public officer fails to earn such increments may be due to a variety of reasons and even though it may affect the period of years in active service, given the circumstances of this case, such failure does not mean that such officer's service is blemished. Nor can it be applied to a situation where the increments have not been earned for no fault of the public officer concerned, as in this application.

Furthermore, no fault can be attributed to the Petitioner for him not having five years of consecutive service from 8th February 2005. Therefore, if as the Inspector General of Police claims, a period of five years' service had to be assessed in order to determine if the services of the Petitioner were unblemished, the Respondents could very well have considered the five years of active service that the Petitioner possessed immediately prior to 8th February 2010, leaving out the period under interdiction. Taking into consideration all of the above circumstances, I am of the view that the explanation offered to this Court by the Inspector General of Police is irrational and the decision of the Inspector General of Police is arbitrary and violative of the fundamental rights of the Petitioner guaranteed by Article (12). I therefore reject the said explanation.

<u>No formal disciplinary proceedings</u>

The learned President's Counsel for the Petitioner submitted that even though the Petitioner was under interdiction as at 8th February 2005 – which under normal circumstances should have been the commencement date in calculating the five-year period for the purpose of unblemished service – the Petitioner was subsequently acquitted of all charges levelled against him and the Police Department had taken a conscious decision not to proceed with any disciplinary action, although such a course of

action was available to the Police Department under the provisions of the Code. He therefore submitted that, having decided not to proceed with disciplinary action, the Police Department cannot claim that the service of the Petitioner is nonetheless blemished as a result of the said incident and subsequent interdiction by drawing a nexus to the non-payment of wages for that period. I am in agreement with this submission and take the view that not having pursued disciplinary action as provided for by the Code, the Police Department has no basis to claim that the Petitioner's service is blemished, or in other words, that the said incident has cast a slur on the honour and reputation of the Petitioner.

Deletion of entries from the Bad Conduct Register

The second argument of the learned President's Counsel for the Petitioner was that the decision of the Police Department to record the three conditions in the Bad Conduct Register, including the condition that the period under interdiction must be treated as a period of no-pay leave, was challenged by the Petitioner in the aforementioned Fundamental Rights application and that the Police Department had agreed to revoke that decision and remove the said entries from the Bad Conduct Register.

The consequence of this deletion is three-fold. The first is that there are no entries in the Bad Conduct Register and therefore it cannot be said that the Petitioner's service record is blemished. The second is that no adverse conclusion could be drawn by the fact that the Petitioner was under interdiction. The third is that the Police Department has agreed that the period the Petitioner was under interdiction was not a period of no-pay leave, even though the Petitioner had agreed that he will not be entitled for the payment of wages during that period. As I have observed earlier, as an Officer of the Reserve Force, the Petitioner had no entitlement for the payment of wages for the period that he was not in active service. I am of the view that having agreed in this Court to remove the three entries from the Bad Conduct Register of the Petitioner, it smacks of bad faith on the part of the Inspector General of Police to thereafter claim that the Petitioner does not have an unblemished service record.

Identical requirement for absorption

The third argument of the learned President's Counsel for the Petitioner was that the requirement of five years of unblemished service was applicable even for absorption from the Reserve Force to the Regular Force, and the fact that the Petitioner was absorbed to the Regular Force on 13th July 2007, in spite of being under interdiction for a period of little over one and half years preceding the said absorption, demonstrates that the Police Department did not consider the period under interdiction as a blemish on the service record of the Petitioner. The argument simply put is that the Inspector General of Police is *estopped* from claiming that the services of the Petitioner are blemished.

As the Inspector General of Police now claims, if the Petitioner cannot have an unblemished period of service as a result of not being able to assess his performance during the period under interdiction, he owed a duty to this Court to explain the reason for the non-consideration of the period of interdiction when the Petitioner was absorbed to the Regular Force. Neither the Inspector General of Police nor the other Respondents have done that nor have they sought to draw a distinction in the requirement for an unblemished service between the absorption and the promotion. I am therefore in agreement with the said argument of the learned President's Counsel for the Petitioner and take the view that the impugned decision of the Inspector General of Police is irrational and arbitrary and is violative of the fundamental rights of the Petitioner guaranteed by Article 12(1).

Conclusion

Taking into consideration all of the above circumstances, I hold that the impugned decision of the Inspector General of Police to deny the Petitioner his promotion to Inspector of Police on 8th February 2010 is irrational and arbitrary and that the Inspector General of Police has infringed the fundamental rights of the Petitioner guaranteed by Article 12(1).

At the hearing of this application, the learned President's Counsel for the Petitioner informed this Court that, (a) the Petitioner has been promoted as an Inspector of Police on 1st July 2019, and (b) if this Court were to hold with the Petitioner, the Petitioner is agreeable to be placed at the end of the list of those promoted to the rank of Inspector of Police on 8th February 2010.

I accordingly direct the Respondents [i.e., the Inspector General of Police and the National Police Commission] to back date the promotion of the Petitioner to the rank of Inspector of Police to 8th February 2010 and to place the Petitioner at the end of the list of those who were promoted as Inspectors of Police on 8th February 2010. The Petitioner shall be entitled to the payment of back wages in the rank of Inspector of Police and to all other entitlements of an Inspector of Police from 8th February 2010, in accordance with the law and other applicable Rules and Circulars.

I make no order with regard to costs.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena, PC, J

I agree

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Application under Article 12(1), 126 of the Constitution of the Democratic socialist Republic of Sri Lanka.

SC (FR) Application No. 498/2012

Punchi Hewage Ajithsena Silva,
Kutukende Estate
Nikadalupotha, Kurunegala.
Presently,
No. 22/A Mahaviara Road,
Lakshapathiya, Moratuwa.

Petitioner

Vs.

1. Bank of Ceylon,
   No 4, Lanka Banku Mawatha, Colombo 01.

2. Chief legal officer,
   Bank of Ceylon,
   No 4, Lanka Banku Mawatha, Colombo 01.

3. P.A.G Weerakoon Banda
   Chief Manager Properties,
   Bank of Ceylon,
   No 4, Lanka Banku Mawatha, Colombo 01.

4. D.N.J Costa,
   Assistant General Manager
   Bank of Ceylon, Colombo 01.

5. S Liyanawala
   No. 1 No 4, Lanka Banku Mawatha,
   Colombo.

6. Hon. Attorney- General,
   Attorney General's Office,
   Colombo 12.

Respondents

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

Counsel: Pradeep Kumarasinghe for the Petitioner

Ms. Yuresha de Silva SSC, for the Respondents

Argued on: 28th of January, 2019

Decided on: 29th of February, 2024

Priyantha Jayawardena PC, J

Facts of the application

The petitioner filed the instant application alleging that the respondents exercised powers contrary to the provisions of the Bank of Ceylon Ordinance, No. 53 of 1938 (as amended) (hereinafter referred to as the "Bank of Ceylon Ordinance") in refusing to refund the money after the property mortgaged to the bank was re-sold to a third party. Thus, it violated his Fundamental Rights guaranteed under Article 12(1) of the Constitution.

The petitioner stated that the Katukenda Trading Company Limited (hereinafter referred to as the "borrowing company"), obtained a sum of Rs. 1,000,000 as a loan from the Wellawatte branch of Bank of Ceylon (hereinafter referred to as the "bank"). As a security for the said loan, the petitioner, being a director of the said borrowing company, mortgaged his personal property (hereinafter referred to as the "mortgaged property") under a Mortgage Bond No. 2636 dated 3rd of January, 2000 which was attested by Chandani Mathew, Notary Public. The petitioner stated that he paid a sum of Rs.1,128,000/- in settlement of the loan. However, despite the said payments, the bank exercised the powers under the said Ordinance and auctioned the said property. However, as there were no bidders at the said public auction, the bank purchased the mortgaged property that was worth about Rs.17,500,000/- for only a sum of Rs.1000/-.

Furthermore, the petitioner stated that upon hearing that the bank was opting for a resale, he introduced one of his relations to the bank in order to purchase the property under reference for a sum of Rs. 12,500,000/- and to settle the mortgage. However, the former Assistant General Manager of the Bank refused to sell the property to his relative and stated that being the new owner of the mortgaged property, the Bank would decide to whom the property would be sold. Subsequently, the respondent bank is alleged to have sold the said property to a third-party on the 2nd of October, 2009.

The petitioner further stated that since the mortgaged property is worth about Rs.17,500,000/- and the loan was obtained only for Rs. 1,000,000/-, he had requested the Chairman of the bank to give him the details of the outstanding sum, the interests and other dues on the loan granted to him.

Furthermore, the petitioner stated that the respondents by letters dated 22nd of May, 2012 and 18th of June, 2012 informed him that they would respond to the petitioner's letters in due course. However, by letter dated 27th of July, 2012 the bank informed that it was unable to disclose the details requested by the petitioner as the said bank is the present owner of the said property.

In the meantime, the bank had instituted case Nos. 5333/M and 5334/M at the District Court of Mount Lavinia for the recovery of Rs.900,000/- due from the said borrowing company in respect of two different loans granted to the said company.

In these circumstances, the petitioner stated that he was entitled to know the total amount for which his mortgaged property was resold and the outstanding total of the said loan at the time the property was re-sold in order to recover the balance from the proceeds of the said sale in terms of section 27 of the Bank of Ceylon Ordinance.

After the application was supported, the court granted the petitioner leave to proceed for the alleged violation of the petitioner's Fundamental Rights enshrined in Article 12(1) of the Constitution.

Objections of the 3rd respondent

The 3rd respondent who is the Chief Manager of Properties of the bank filed objections and stated that borrowing company applied for the said loan on the 17th of January, 2000 at an interest rate of 17% per annum. Further, the petitioner who was a director of the said borrowing company furnished the guarantee to secure the loan. Thereafter, the said loan was granted by the bank. However, the petitioner failed to settle the said loan. Further, he denied that the petitioner paid a sum of Rs.1,128,000/- in settlement of the loan. Accordingly, the bank auctioned the said mortgaged property to recover the money due to the bank on the said loan. However, as no one bought the said property, the bank purchased the said mortgaged property at the public auction in terms of section 30(1) of the Bank of Ceylon Ordinance for a sum of Rs.1,000/-.

Thereafter, the bank made an application to the District Court of Colombo to eject the petitioner from the said property and for the delivery of possession of the mortgaged property in terms of section 29 of the Bank of Ceylon Ordinance. Thereafter, the bank obtained an Order to take possession of the said property through courts. However, as the petitioner failed to vacate the

premises in question, the bank made an application in terms of section 325 of the Civil Procedure Code to the District Court and the court made Order dated 2nd of June, 2008, directing the petitioner to vacate the premises in question, on or before the 3rd of August, 2008.

Moreover, while the mortgaged property remained as a property of the bank following the purchase of the same at the public auction, the petitioner failed to pay the money due to the bank in respect of the said loan in terms of section 30 of the said Ordinance. Thus, the bank took steps to resell the property in terms of section 31 of the Bank of Ceylon Ordinance and the property was resold on the 2nd of October, 2009.

The 3rd respondent further stated that the proceeds of the resale of the said property is a private transaction between the bank and the new buyer of the said property as the bank was the owner of the said mortgaged property at the time of the resale. In the circumstances, the 3rd respondent stated that neither the bank nor any of the respondents had violated the Fundamental Rights of the petitioner.

Submissions on behalf of the petitioner

The counsel for the petitioner submitted that even though the petitioner's mortgaged property was resold in the year 2009 by the bank, he was not informed of the sale price and whether there was any excess money after the loan was recovered from the bank. Further, it was submitted that the petitioner filed the instant application as the bank refused to provide any details pertaining to the sale of the property in question. Moreover, the powers bestowed upon the bank under the Bank of Ceylon Ordinance only provide for a speedy recovery of dues from debtors and not to unjustly enrich by refusing to pay the excess money after reselling a mortgaged property.

Submissions on behalf of the respondents

The learned Senior State Counsel for the respondents submitted that the petitioner is not entitled to receive the balance of the proceeds from the transactions pertaining to the property in question, as there is no statutory or legal requirement to pay the excess money of the proceeds of the resale to the original borrower. Further, the requirement to pay the excess money from proceeds of the sale of the property is applicable only for the sale of the property at the public

auction in terms of section 27 of the Bank of Ceylon Ordinance. Further, due to the absence of a third party at the public auction, the mortgaged property was purchased by the bank in terms of section 30(1) of the Bank of Ceylon Ordinance.

However, as the property in question had not been purchased by a third party at the public auction, the bank purchased the said property at a nominal value of Rs. 1,000/- in terms of section 30(1) of the Bank of Ceylon Ordinance. Thus, the petitioner in the instant application cannot claim the balance of the proceeds from the sale of the property under section 27 of the Bank of Ceylon Ordinance. It was further submitted that sections 27 and 31 of the Bank of Ceylon Ordinance enable the bank to re-sell the property purchased by the bank to a third party.

Furthermore, it was contended that in any event the bank is not under any obligation to pay the balance of the proceeds to the petitioner, as at the time the property was sold the owner of the said property was the bank and not the petitioner. Hence, the petitioner is not entitled to receive the balance of the proceeds of the sale of the property in question, as there is no statutory or legal requirement to pay the balance of the proceeds of the sale to the original borrower.

Is the petitioner entitled to obtain the balance of proceeds from the resale of the mortgaged property?

In terms of section 16 read with sections 17 and 19 of the Bank of Ceylon Ordinance, when a loan is granted by the bank and is defaulted, the board of directors may, by resolution, authorise to take possession of the mortgaged property given as security for the loan, to recover the monies due to the bank. Further, the board may resolve to sell the mortgaged property to recover the monies due to the bank under section 19 of the said Ordinance which states as follows;

> *"Subject to the provisions of section 20* ***the board may by resolution to be recorded in writing authorize any person specified in the resolution to <u>sell</u> by public auction any movable or immovable property mortgaged to the bank as security for any loan, overdraft, advance or other accommodation in respect of which default has been made in order to recover the whole of the unpaid portion of such loan, overdraft, advance or other accommodation, and the interest due thereon up to the date of the sale, together with the moneys and***

costs recoverable under section 26*, and thereafter it shall not be competent for the borrower or any person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to and in the property made or registered subsequent to the date of the mortgage to the bank, in any court to move to invalidate the said resolution or the subsequent sale for any cause whatsoever, and no court shall entertain any such application".*

[emphasis added]

Furthermore, section 27 of the said Ordinance states that any excess money left over from <u>the sale</u> of the mortgaged property must be returned to the borrower. It states;

*"**If the mortgaged property <u>is sold</u>, the board shall, after deducting from the proceeds of the sale the amount due on the mortgage and the money and costs recoverable under section 26, pay the balance remaining, if any, either to the borrower or any person legally entitled to accept the payments due to the borrower**, or where the board is in doubt as to whom the money should be paid, into the District Court of the district in which the mortgaged property is situate or kept:*

Provided however that where the borrower has made default in respect of any other loan, overdraft, advance or accommodation granted to him by the bank, the board shall, in lieu of paying of such balance to the borrower or any person legally entitled to accept the payments due to the borrower or depositing in court, as aforesaid, deposit such balance in the District Court of the district in which the property mortgaged as security for such other loan, overdraft, advance or accommodation is kept or situate."

However, if the property is not purchased at the public auction, the bank will purchase the said property for a nominal amount and <u>resell</u> it to recover the money due to the bank in terms of section 31 of the Bank of Ceylon Ordinance which reads as follows;

*"(1) If the property sold has been **purchased on behalf of the bank** and the sale is not cancelled under section 30, the board may, at any time, **<u>resell</u>** the*

property and transfer to the purchaser by endorsement on a certified copy of the certificate referred to in subsection (3) of section 28, all the right, title and interest which would have been acquired by the purchaser at the original sale.

(2) An endorsement made under this section shall be liable to the same stamp duty and charges as a certificate to a purchaser at the original sale and shall –

(a) in the case of movable property, immediately on the endorsement being made, and

(b) in the case of immovable property, upon registration in the office of the Registrar of Lands, have the effect of vesting the property in the purchaser as though the sale under this Ordinance had not taken place."

The respondent submitted that the petitioner is not entitled to the balance of proceeds from the **resale** of the mortgaged property as section 27 of the Bank of Ceylon Ordinance only stipulates the procedure to be followed during the sale of the property at the public auction. Thus, it was argued that since the mortgaged property was purchased by the bank at a nominal price of Rs. 1,000/-, there is no balance to be refunded to the petitioner in terms of section 27 of the Bank of Ceylon Ordinance.

As stated above, once a loan is defaulted the board may pass a resolution to sell the property mortgaged to the bank in order to recover the money sue to the bank. Thereafter, in terms of section 19 of the Ordinance, a public auction should be held to sell the mortgaged property. Contingent upon the absence of bidders to purchase the said property, the bank will proceed to purchase the property for a nominal sum of Rs. 1,000/- under sections 30 and 31 of the said Ordinance. However, the bank must re-sell the property to recover the money that is due to the bank.

Sections 18(3), 23 and 30 of the Bank of Ceylon Ordinance facilitates a borrower to pay the money due to the bank and redeem the mortgaged property. It is pertinent to note that even after a property was purchased by the bank at the public auction, the bank should hand over the property to the borrower upon the settling of the sums due to the bank. Thus, it is apparent that

the bank cannot recover more than what is due to the bank by selling a mortgaged property. In fact, the bank cannot recover more than what is stated in the resolution passed by the board.

Further, ***Stroud's Judicial Dictionary of Words and Phrases (3rd edition)*,** Volume 3 at page 262 defines the word 'sale' as "undoubtably, in general, implies an exchange for money…". Further, Black's Law Dictionary (11th Edition) at page 1603 defines 'sale' as "the transfer or property or title for a price." Furthermore, ***Webster's Third New International Dictionary of the English Language Unabridged*** defines the word 'resale' as "1. the act of selling again usually to the next link in a chain of distribution, 2. a sale at second hand, 3.an additional sale to the same buyer." A careful analysis of the interpretations given to the words 'sale' and 'resale' show that the transfer of a property for consideration to a buyer.

Section 20 of the said Ordinance has used the word 'sell'. Further, in section 31 of the said Ordinance, the legislature has used the word 'resell'. However, section 27 of the Ordinance has used the word 'sold'. Therefore, a careful analysis of the words 'sell' and 'resell' used in sections 19 and 31 respectively in the Bank of Ceylon Ordinance shows that a different meaning is not given to the word 'sold' in section 27 of the said Ordinance. Therefore, section 27 is applicable to both sections 20 and 31 of the Bank of Ceylon Ordinance.

A careful consideration of the provisions of the Bank of Ceylon Ordinance shows that the bank is not authorised by the said Ordinance to make a profit by selling the mortgaged property purchased at a nominal price at a public auction. Further, it would result in unjust enrichment to the bank as the market value of the mortgaged property is often much higher than the amount of the loan obtained by mortgagors.

In the aforementioned circumstance, I am of the view that the restrictive interpretation given to section 27 of the Bank of Ceylon Ordinance by the learned Senior State Counsel for the respondent, based on the words "sale" and "resale", is untenable. Thus, the bank retaining the excess money of the proceeds from a resale of the mortgaged property to a third party contravenes the provisions of the said Ordinance. Particularly section 27 of the said Ordinance.

Conclusion

In the foregoing circumstances, I hold that the petitioner is entitled to the excess money from the resale of the mortgaged property, if any. Further, the petitioner is entitled to have the details of the amount the property was sold for, and the money due from him to the bank at the time

the property was sold to the third party. Hence, the refusal to furnish such information was a violation of the petitioner's fundamental rights enshrined in Article 12(1) of the Constitution by the 1st respondent.

Hence, I direct the bank to disclose the full amount derived from the resale of the property to the third party, the total sum of money that was owed by the borrower and to pay the excess amount from the said transaction, if any, with interest to the petitioner.

No costs.

Judge of the Supreme Court

P. Padman Surasena, J
I agree

Judge of the Supreme Court

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

Judge of the Supreme Court

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

In the matter of an application under the Articles 11, 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Nanayakkara Gamage Don Kashyapa Sathyapriya De Silva
No. 6B, Silvan Lane,
Panadura.

Petitioner

SC/FR Application No. 502/12

Vs.

1. Manoj,
   Police Constable (P.C. 5778),
   Traffic Police,
   Mt. Lavinia Traffic Division,
   Mount Lavinia.

2. J.P.D. Jayasinghe
   Sub Inspector of Police/Traffic,
   Mt. Lavinia Traffic Division,
   Mount Lavinia.

3. Officer in Charge,
   Mt. Lavinia Traffic Division,
   Mount Lavinia.

4. Inspector General of Police
   Police Headquarters,
   Colombo 01.

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

Respondents

Before : Priyantha Jayawardena PC, J
Murdu N. B. Fernando PC, J
P. Padman Surasena, J

Counsel : Chandimal Mendis with S. Paranamanna for the Petitioner.

Upul Kumarapperuma with Radha Kuruwitabandara and Shellomy Gunaratna for the 1st Respondent.

Induni Punchihewa, SC for the 5th and 6th Respondents.

Argued on : 13th October, 2021

Decided on : 29th February, 2024

Priyantha Jayawardena PC, J

The petitioner filed the instant application alleging that his Fundamental Rights guaranteed by the Constitution were infringed by the 1st to 4th respondents. After considering the said application, the Supreme Court granted leave to proceed for the alleged infringement of Article 11 of the Constitution of Sri Lanka.

Facts of the Application

The petitioner stated that when he was returning home with his two sons on the 28th of July, 2012, at around 11:30 p.m. after watching the Indo-Lanka limited overs day-night cricket match held at the R. Premadasa Cricket Stadium, the three-wheeler in which they were travelling came to a halt when it was on the Dehiwala flyover. Upon inquiry, the three-wheeler driver had informed the petitioner that the front tyre was punctured, and it was not possible to push the three-wheeler as it would damage the rim of the wheel.

The petitioner further stated that the 1st respondent who was a Police Constable attached to the Traffic Police of the Mt. Lavinia Traffic Police Division (hereinafter referred to as the "1st respondent"), along with two other police officers, came and made inquiries as to why the three-wheeler was stopped on the flyover as it was causing a traffic congestion. Thereafter, they asked them to move the vehicle from the flyover. At that stage, the petitioner responded by saying that pushing the three-wheeler would damage the rim of the wheel which was punctured. Later, with the help of the said policemen, they started to push the vehicle to the main road.

The 1st respondent accused the petitioner stating that he was not helping to push the vehicle and it led to a verbal altercation between the two. The petitioner further stated that he requested the 1st respondent to be mindful of his language as his two children aged 10 and 13 were inside the three-wheeler. At that stage, the 1st respondent accused the petitioner of being drunk. The petitioner had informed him that he was not drunk, nor was it relevant as he was not driving.

The petitioner further stated that he told the 1st respondent that he had no sympathy towards the three-wheeler driver. Furthermore, the petitioner stated that he informed the 1st respondent that he was not taking another three-wheeler as he felt sympathetic towards the driver being alone at that time of the night with a tyre puncture and was helping the driver to change the tyre.

Moreover, after the three-wheeler was taken to the road, the tyre was changed. Thereafter, the policeman told the petitioner to get into the vehicle, but he refused to get into the vehicle as he was waiting till the driver started the vehicle. The 1st respondent then threatened him and held him by his collar, squeezed his neck and slapped him on the face.

Further, the petitioner stated that his sons, aged 10 and 13, were terrified after witnessing the assault and were in a state of shock. Moreover, his older son and the three-wheeler driver pleaded with the police officers not to assault him. The petitioner stated that due to the assault, he sustained injuries to his face, mouth, the right side of his neck and was bleeding from his ear.

Furthermore, the petitioner stated that he was not aware of the names or numbers of the other police officers who were involved in the incident. Hence, it was not possible to make them as parties to the instant application.

The petitioner further stated that after the assault, he went to the Mount Lavinia Police Station in the same three-wheeler in order to lodge a complaint. However, one of the police officers who was on duty at the Police Station informed him that since the incident took place in the jurisdiction of the Dehiwala Police area, he should make the complaint to the Dehiwala Police Station. Nevertheless, the petitioner had requested for his complaint to be recorded due to the fact that his sons were in shock after the incident. Thereafter, the said complaint bearing CIB No. 73/483 dated 29th of July, 2012, was recorded at 12:05 a.m. at the Mount Lavinia Police Station.

The petitioner stated that once he made the said statement, he left the Police Station and dropped his children at his residence in Panadura. Thereafter, he went in the same three-wheeler to the Panadura hospital to obtain treatment for his injuries sustained in the said assault. The petitioner further stated that after the doctors examined the petitioner's wounds, he was admitted to the hospital. His bedhead ticket dated 29th of July, 2012 was produced marked as P2 along with the petition. Moreover, the Medico – Legal Examination Report, dated 29th July, 2012 produced in court described the injuries that he suffered at the said incident. He also stated that his sons did not attend school for a few days as they were traumatised after witnessing the assault and inhuman treatment of the petitioner.

Moreover, the petitioner stated that after receiving treatment for five days for his injuries at the hospital, he was discharged from the hospital. Thereafter, on the 3rd of August, 2012, he had complained to the 4th respondent, the Inspector General of Police, against the 1st respondent. Accordingly, the 2nd respondent, the Assistant Superintendent of Police, Traffic Division, Mt. Lavinia, by a letter dated 19th August, 2012, informed the petitioner that as per the investigation carried out by him, the police officer who had assaulted the petitioner was warned and

disciplinary action has been taken against him. Further, the petitioner stated that on the 14th of August, 2012, he made a complaint to both the Secretary of Defence and the Human Rights Commission of Sri Lanka.

Objections of the 1st respondent

The 1st respondent filed his objections denying the averments in the petition and stated that he joined the Sri Lanka Police Department as a Police Constable on the 5th of May, 1996 and is presently attached to the Mount Lavinia Traffic Police Division. He further stated that he has an unblemished service record in the Police Department.

It was stated by the 1st respondent that on the 28th of July 2012, he was on duty, attached to the Emergency Mobile Unit of the Mount Lavinia Traffic Police Division with two police constables. While on duty, at around 11:30 p.m. he received information regarding a traffic congestion on the Dehiwala flyover and came to know that a three-wheeler was stopped on the flyover due to a tyre puncture. Thereafter, he along with two other police constables went to the place where the three-wheeler was stopped and noticed that the said three-wheeler was on a hire at that time, and the petitioner and his two sons were in the three-wheeler.

The 1st respondent stated that he took steps to move the three-wheeler from the flyover. Accordingly, he requested the petitioner to get down from the three-wheeler and help them to move the three-wheeler from the flyover. However, the petitioner refused to get down from the three-wheeler and verbally abused him and the other two police constables. Nevertheless, the driver of the three-wheeler and two other persons who were in the vicinity helped them to move the three-wheeler from the flyover to the main road.

Furthermore, as the three-wheeler was being taken to the main road, the two children of the petitioner were allowed to be in the three-wheeler. The 1st respondent further stated that it was difficult to move the vehicle to the main road from the top of the flyover as the petitioner did not cooperate with them. However, once the three-wheeler was brought to the main road, the driver of the said three-wheeler changed the tyre.

The 1st respondent stated that while they were moving the three-wheeler to the main road, the petitioner was continuously verbally abusing them and stated that he was connected to the

government and that he was a close friend of a Minister. Moreover, the 1st respondent stated that the petitioner threatened them, stating that he would take action against them.

The 1st respondent further stated that the petitioner accused them of failing to give due respect to him even after disclosing his connections to the government and the Minister. Furthermore, it was stated the petitioner was under the influence of alcohol at the time of the said incident. Moreover, while the petitioner was verbally abusing them, one of the petitioner's sons got down from the three-wheeler and pushed the petitioner back into the three-wheeler.

The 1st respondent further stated that he never assaulted the petitioner. Furthermore, he is a right hander and the description given by the petitioner regarding the alleged assault is inconsistent with the injuries of the petitioner.

Moreover, the 1st respondent stated that he later came to know that the petitioner had lodged a complaint against him at the Mount Lavinia Police Station. Further, the officer who recorded the complaint observed that the petitioner had consumed alcohol. In fact, in his statement to the Police, the petitioner had admitted that he had consumed alcohol.

The 1st respondent further stated that as a complaint was made against him at the Police Headquarters, an inquiry was held against him by the 2nd respondent, the Assistant Superintendent of Police, Traffic Division, Mount Lavinia. After the inquiry, the 2nd respondent concluded in the report dated 18th of August, 2012, which was produced marked as '1R4', that there was no evidence to issue a charge sheet against the 1st respondent in respect of the alleged assault. Further, the petitioner was intoxicated at the time of the incident. However, the Assistant Superintendent made a 'bad entry' in the 1st respondents service record stating that he failed to take steps against the petitioner for his unlawful behaviour.

Hence, the 1st respondent stated that there was no violation of the Fundamental Rights of the petitioner. In any event, it was stated that the petitioner's application is misconceived in law and the application should be dismissed with costs.

Was the Fundamental Right guaranteed to the petitioner by Article 11 of the Constitution infringed?

After the alleged assault, the petitioner has made a statement to the Mount Lavinia Police. Thereafter, he was admitted to the hospital on the 29th of July, 2012 and was in hospital for 5 days. The bedhead ticket stated that the history given to the doctor by the petitioner was that he was assaulted by the Police "to face by hand", "manual strangulation", "right ear pain", "difficult to open the mouth" and "bleeding through mouth". Moreover, it stated that the examination revealed a soft tissue injury.

Further, the Medico – Legal Examination Report filled in the instant application, stated that the petitioner had abrasion, contusion, and laceration. These medical reports corroborate the petitioner's assertion that he suffered injuries as a result of the assault by the 1st respondent. Moreover, he had made prompt complaints to the Police and the Human Rights Commission regarding the said assault.

The objections filed by the 1st respondent stated that the petitioner's son pushed him to the three-wheeler and at that time he suffered the injuries. However, it is not possible to accept the said version as the petitioner's older son was only 13-years-old at the time of the incident. Moreover, the facts and the circumstances of the incident and does not reveal any reason for the son to use force against the petitioner.

Consequent to the complaints made by the petitioner to the Mount Lavinia Police and to the 4th respondent, the Inspector General of Police, an inquiry was held by the 2nd respondent, the Assistant Superintendent of Police Traffic Division, Mount Lavinia. The inquiry report dated 18th of August, 2012, stated concluded that there was no evidence to issue a charge sheet against the 1st respondent in respect of the alleged assault. Nevertheless, he recommended a 'bad entry' be recorded in the 1st respondent's service record as he had failed to take steps against the petitioner for his unlawful behaviour.

Contrary to the above recommendation in the inquiry report, by the letter dated 19th of August, 2012, marked and produced as 'P5', the 2nd respondent had informed the petitioner that, as per the inquiry carried out, disciplinary action was taken against the police officer (the 1st respondent) who assaulted the petitioner, and he had been warned not to cause an inconvenience to the public in the future. Thus, the findings in the inquiry report and the said

letter contradict each other. In view of the aforementioned vital contradiction, the 1st respondent's denial that he assaulted the petitioner cannot be accepted.

Taking into consideration all the materials filed in the instant application, I accept the version of the petitioner with regard to him being assaulted by the 1st respondent. Further, his assertion was corroborated by the prompt complaint made to the Mount Lavinia Police Station and by the medical evidence. Accordingly, I hold that the 1st respondent has violated the Fundamental Rights of the petitioner guaranteed by Article 11 of the Constitution by assaulting the petitioner.

In the circumstances, I order the 1st respondent to pay a sum of Rs. 50,000/- to the petitioner within 2 months from the date of this judgment. Further, the State is directed to pay a sum of Rs. 25,000/- to the petitioner.

Registrar of this court is directed to send a copy of this judgment to the 1st respondent and to the Director (legal) of Sri Lanka Police to act in terms of the law.

Judge of the Supreme Court

Murdu N. B. Fernando PC, J

I agree

Judge of the Supreme Court

P. Padman Surasena, J

I agree

Judge of the Supreme Court

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

In the matter of an application for Leave to Appeal under and in terms of Section 5C (1) of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 as amended by Act, No. 54 of 2006

Believers Church
No. 54, Jayasooriya Mawatha,
Kandana.

S.C. Case No: SC/HCCA/LA 184/2023
CP/HCCA/KANDY/67/2021(LA)
D.C. Nawalapitiya Case No. 80/16/SPL

Plaintiff

Vs.

Rev. Father Paneer Selvam
(Now Deceased)
Believers Church
No. 26, Dekinda Road,
Nawalapitiya.

Defendant

Paneer Selvam Jenita Enriya
No. 5B, Dekinda Road, Bawwagama,
Nawalapitiya.

Substituted Defendant

THEN BETWEEN

Believers Church
No. 54, Jayasooriya Mawatha,
Kandana.

Plaintiff – Petitioner

And

Paneer Selvam Jenita Enriya
No. 5B, Dekinda Road, Bawwagama,
Nawalapitiya.

Substituted Defendant – Respondent

NOW BETWEEN

Believers Church
No. 54, Jayasooriya Mawatha,
Kandana.

Plaintiff – Petitioner – Petitioner

Vs.

Paneer Selvam Jenita Enriya
No. 5B, Dekinda Road, Bawwagama,
Nawalapitiya.

Substituted Defendant -Respondent-Respondent

AND NOW BETWEEN

Believers Church
No. 54, Jayasooriya Mawatha,
Kandana.

Plaintiff – Petitioner – Petitioner – Petitioner

Vs.

Paneer Selvam Jenita Enriya
No. 5B, Dekinda Road, Bawwagama,
Nawalapitiya

Substituted Defendant – Respondent – Respondent – Respondent

Before: **Hon. Vijith K. Malalgoda, PC, J.**

Hon. A. L. Shiran Gooneratne, J.

Hon. Janak De Silva, J.

Counsel:

C. Sooriyaarachchi with G.C. Gunawardhena for the Plaintiff – Petitioner – Petitioner – Petitioner

Ishan Alawathurage for the Substituted Defendant – Respondent – Respondent – Respondent

Argued on: 12.01.2024

Decided on: 12.03.2024

Janak De Silva, J.

This is an application for leave to appeal from the judgment of the Civil Appellate High Court of the Central Province (Holden in Kandy) ("Civil Appellate High Court") dated 17.03.2023 by which leave to appeal against the order of the learned District Judge of Nawalapitiya dated 16.12.2021 was dismissed.

The Plaintiff-Petitioner-Petitioner-Petitioner ("Petitioner") instituted action against the Defendant-Respondent-Respondent-Respondent ("Respondent") seeking a declaration of title to the land more fully described in the schedule to the plaint, and an order of eviction against the Respondent and all persons claiming under him.

The Petitioner as well as his registered Attorney-at-Law were absent when the matter was taken up for further trial on 24.09.2020. Hence, the action was dismissed.

The Petitioner made an application in terms of Section 87(3) of the Civil Procedure Code to have the dismissal set aside. After inquiry, the learned District Judge refused to set aside the judgment entered upon the default of the Petitioner.

Aggrieved by the said order of the learned District Judge, the Petitioner filed a leave to appeal application in the Civil Appellate High Court. The Respondent raised a preliminary objection that the application was misconceived in law and that the Petitioner should have come by way of final appeal. This was upheld by the Civil Appellate High Court and the Petitioner has filed this leave to appeal application against the said judgment.

The question that arises for determination is whether a party aggrieved by a default judgment must come by way of appeal or leave to appeal.

The learned counsel for the Petitioner submitted that the proper application is a leave to appeal application and relied on the judgment of ***S.R. Chettiar and Others v. S.N. Chettiar*** **[(2011) BALR 25, (2011) 2 Sri.L.R. 70]** and ***Dona Padma Priyanthi Senanayake v. H.G. Chamika Jayantha*** **[(2017) BALR 74]**. There this Court held that an appeal could be filed in respect of judgments or orders which are final. In respect of other orders, leave to appeal should be first obtained. It was further held, that in order to decide whether an order is a final judgment or not, the proper approach is to apply the application approach test and not the order approach test which was applied earlier.

Relying on the above authorities, the learned Counsel for the Petitioner submitted that the proper application was a leave to appeal application which was challenged by the learned Counsel for the Respondent who relied on the decisions in ***Wijeyanayake v. Wijeyanayake*** **[III Srikantha's Law Reports 28]** and ***A.S. Sangarapillai & Bros. v. Kathiravelu*** **[II Sriskantha's Law Reports 99]** where it was held that the proper application was a final appeal.

Section 88(2) of the Civil Procedure Code reads as follows:

> *"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."*

This provision was examined by a fuller bench of this Court in ***Barbara Iranganie De Silva v. Hewa Waduge Indralatha*** **[(2017) BALR 68]** and it was held that the application approach test enunciated in ***S.R. Chettiar and Others v. S.N. Chettiar*** (supra.) and ***Dona Padma Priyanthi Senanayake v. H.G. Chamika Jayantha*** (supra.) have no application to an application made pursuant to Section 88(2) of the Civil Procedure Code. It was held that Section 88(2) provides for a special procedure and that Section 754(2) of the Civil Procedure Code has no application to such an application. Accordingly, Court concluded that a party aggrieved by a judgment entered upon default must file an appeal pursuant to Section 88(2) of the Civil Procedure Code.

I am in respectful agreement with the decision in ***Barbara Iranganie De Silva v. Hewa Waduge Indralatha*** (supra.). Hence, the leave to appeal application made by the Petitioner is misconceived in law. The Civil Appellate High Court was correct in dismissing the application on the preliminary objection raised by the Respondent. Accordingly, leave to appeal must be refused in this application.

Before parting, I must make reference to the fact that the learned Counsel for the Respondent assisted Court by drawing our attention to the amendment made to Section 88(2) of the Civil Procedure Code by Act No. 5 of 2022 which now reads as follows:

> *"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."

Accordingly, the position now is that a party aggrieved by a judgment entered upon default must file a leave to appeal application pursuant to Section 88(2) of the Civil Procedure Code.

The Petitioner filed the appeal before the Civil Appellate High Court on 03.01.2022. The Civil Procedure Code (Amendment) Act No. 17 of 2022 became law on 17.02.2022.

I am mindful that Parliament has power, pursuant to Article 75 of the Constitution, to make laws, including laws having retrospective effect. In fact, recently it passed the Civil Procedure Code (Amendment) Act No. 17 of 2022 where Section 3 provides for the retrospective application of the amendments by the use of the words *"case or appeal pending on the date of coming into operation of this Act"*. No such intention is reflected in the Civil Procedure Code (Amendment) Act No. 5 of 2022. Accordingly, the amendment does not have any retrospective application.

For all the foregoing reasons, I hold that leave to appeal must be refused. Application is dismissed. Parties shall bear their costs.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., J.

I agree.

Judge of the Supreme Court

A. L. Shiran Gooneratne, J.

I agree.

Judge of the Supreme Court

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

In an application for Leave to Appeal in terms of section 5 (c) (1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read together with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC/HCCA/LA/No. 351/2022

HC/CA (Kegalle) No. SP/HCCA/KEG/68/2020(F)

DC Kegalle Case No. 27490/P

Soma Weerasinghe
1/64, Polgahawela Road, Polgahawela.

PLAINTIFF

Vs.

1. Leela Edirisinghe
   1/64, Polgahawela Road, Polgahawela.

2. Karuna Edirisinghe
   "Somi Kalum", Egoda Kuleepitiya,
   Polgahawela.

3. Nelundeniyalage Godwin Samarasinghe
   Uraulla, Ambanpitiya.

4. Nelundeniyalage Kamalawathie
   Kaduradeniya, Gepalagedara.

5. Nelundeniyalage Lesli Amarasinghe

(**Deceased**)
Galigamuwa Town, Ambanpitiya,
Suwashakthigama.

6. Nelundeniyalage Nandawathie
Galigamuwa Town, Suwashakthigama
Ambanpitiya,

7. Nelundeniyalage Samarasinghe
Galigamuwa Town, Ambanpitiya.

8. Nelundeniyalage Chandra Padmini
Galigamuwa Town, Ambanpitiya,
Suwashakthigama.

9. Nelundeniyalage Pushpa Padmini,
Galigamuwa Town, Labugala,
Dammala.

10. Nelundeniyalage Kusuma Weerasinghe
Galigamuwa Town, Labugala,
Dammala.

11. Nelundeniyalage Amaris
853/3, Ambanpitiya, Uraulla.

12. Alankarage Somadasa alias
Aththanayakalage Dambullawatte
Sunil Somadasa
Galigamuwa Town, Ambanpitiya,
Weralugolla.

13. Nelundeniyalage Yasawathie Dissanayake
Makura, Abepussa.

DEFENDANTS

AND THEN BETWEEN

1. Nelundeniyalage Godwin Samarasinghe
   Uraulla, Ambanpitiya.

2. Nelundeniyalage Kamalawathie
   Kaduradeniya, Gepalagedara.

3. Nelundeniyalage Lesli Amarasinghe
   (deceased)
   Galigamuwa Town, Abanpitiya,
   Suwashakthigama.

4. Nelundeniyalage Chandra Padmini
   Galigamuwa Town, Abanpitiya,
   Suwashakthigama.

5. Nelundeniyalage Pushpa Padmini
   Galigamuwa Town, Labugala,
   Dammala.

6. Nelundeniyalage Kusuma Weerasinghe
   Galigamuwa Town, Labugala,
   Dammala.

7. Nelundeniyalage Amaris
   853/3, Ambanpitiya, Uraulla.

8. Alankarage Somadasa alias
   Aththanayakalage Dambullawatte Sunil
   Somadasa
   Galigamuwa Town, Ambanpitiya,
   Weralugolla

9. Nelundeniyalage Yasawathi Dissanyake
Makoora, Ambeypussa.

3rd,4th, 5th and 8th to 13th DEFENDANT-APPELLANTS

Vs.

Soma Weerasinghe
1/64, Polgahawela Road, Polgahawela.

PLAINTIFF-RESPONDENT

1. Leela Edirisinghe
1/64,
Polgahawela Road, Polgahawela.

2. Karuna Edirisinghe
"Somi Kalum", Egoda Kuleepitiya,
Polgahawela.

3. Nelundeniyalage Nandawathie
Galigamuwa Town, Suwashakthigama
Ambanpitiya.

4. Nelundeniyalage Samarasinghe
Galigamuwa Town, Ambanpitiya.

1st, 2nd, 6th and 7th DEFENDANT-RESPONDENTS

AND NOW BETWEEN

1. Nelundeniyalage Godwin Samarasinghe

Uraulla, Ambanpitiya.

3RD DEFENDANT-APPELLANT-PETITIONER

Vs.

Soma Weerasinghe
1/64, Polgahawela Road, Polgahawela.

PLAINTIFF-RESPONDENT-RESPONDENT

1. Nelundeniyalage Kamalawathie
   Kaduradeniya, Gepala Gedara.

2. Nelundeniyalage Lesly Samarasinghe
   (deceased)
   Galigamuwa Town, Ambanpitiya,
   Suwashakthigama.

3. Nelundeniyalage Chandra Padmini
   Galigamuwa Town, Abanpitiya,
   Suwashakthigama.

4. Nelundeniyalage Pushpa Padmini
   Galigamuwa Town, Labugala,
   Dammala.

5. Nelundeniyalage Kusuma Weerasinghe
   Galigamuwa Town, Labugala,
   Dammala.

6. Nelundeniyalage Amaris
   853/3, Ambanpitiya, Uraulla.

4th, 5th and 8th to 11th DEFENDANT-APPELLANT-RESPONDENTS

1. Leela Edirisinghe
   1/64, Polgahawela Road, Polgahawela.

2. Karuna Edirisinghe
   "Somi Kalum", Egoda Kuleepitiya,
   Polgahawela.

6. Nelundeniyalage Nandawathie
   Galigamuwa Town, Abanpitiya,
   Suwashakthigama.

7. Nelundeniyalage Samarasinghe
   Galigamuwa Town, Ambanpitiya.

1st, 2nd, 6th and 7th DEFENDANT-RESPONDENT-RESPONDENTS

BEFORE : **P. PADMAN SURASENA, J**
E. A. G. R. AMARASEKARA, J &
KUMUDINI WICKREMASINGHE, J

COUNSEL : Chrishmal Warnasuriya with Dushantha Kularatne and G.A.D. Ginigaddara and M. Fernando instructed by M.I.M. Iynullah for the 3rd Defendant-Appellant-Petitioner.

Ms. Sudarshani Cooray for the Plaintiff-Respondent-Respondent.

Akila Aluthwatte for the 2nd Defendant-Respondent-Respondent.

ARGUED & DECIDED ON : 30th January 2024

P. PADMAN SURASENA, J.

Court heard the submission of the learned Counsel for the 3rd Defendant-Appellant-Petitioner, the submission of the learned Counsel for the Plaintiff-Respondent-Respondent and also the submission of the learned Counsel for the 2nd Defendant-Respondent-Respondents.

Having considered the submissions, Court decided to grant Leave to Appeal in respect of the questions of law set out in paragraphs **11 (h)** and **11 (i)** of the Petition dated 22-11-2022. The said questions of law can be reproduced as follows:

> Whether the High Court of Civil Appeal, erred by concluding that the Notice of Appeal is defective simply because one of the Appellants named therein is deceased?
>
> Can the appeal be maintained by the other appellants when the name of one Appellant, who is deceased, has been mentioned in the caption of the Petition of Appeal and the Notice of Appeal?

With the concurrence of the learned Counsel for all the parties, Court decided to hear and determine the instant Appeal forthwith in terms of Rule 16 of the Supreme Court Rules. Submissions of Counsel were heard and the argument was concluded.

Being aggrieved by the Judgment of the District Court, the 3rd Defendant of this case, together with certain other Defendants (the 4th, 5th and 8th to 13th Defendants), have appealed to the Provincial High Court of Civil Appeals. When that Appeal came up before the Provincial High Court of Civil Appeals, it was revealed that the 5th Defendant had passed away long prior to the Judgment being delivered in the District Court and no steps had been taken to effect any suitable substitution with regard to the death of the 5th Defendant. It was on that basis that the learned Counsel for the 1st and 2nd Defendants had taken up a preliminary objection against the maintainability of that Appeal before the Provincial High Court of Civil Appeals.

Having considered the arguments, the learned Judges of the Provincial High Court of Civil Appeals by their Judgment dated 13-10-2022, had upheld the said preliminary objection and proceeded to dismiss the Appeal of the 3rd, 4th, 5th and 8th to 13th Defendants with costs.

We observe that the provision of law in this regard is clear in Section 81 (9) of the Partition Act which is as follows;

"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."

Thus, a person who has failed to file a memorandum under the provisions of this Section is also bound by any Judgment or order made by Court in such circumstances.

We also observe that Section 759 (2) of the Civil Procedure Code has empowered the Appellate Court to grant relief to the party in such situation where the Respondent has not been materially prejudiced. The said provision of law is as follows:

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

The learned Counsel for the 2nd Defendant and the learned Counsel for the Plaintiff were not able to counter this argument with any acceptable provision of law. This is because the above provision of law is clear in its meaning, requiring no more clarifications. In these circumstances, we proceed to answer the questions of law in respect of which we have granted Leave to Appeal as follows:

The High Court of Civil Appeal has erred in dismissing the Petition of Appeal of the 3rd, 4th, 5th and 8th to 13th Defendants as it had disregarded the provisions in Section 81 (9) of the Partition Act and Section 759 (2) of the Civil Procedure Code in coming to the said conclusion.

In view of the above conclusion, I would not proceed to answer the second question of law because answering the first question of law would be sufficient for the disposal of this Appeal.

In those circumstances, the dismissal of the aforesaid Appeal by the Provincial High Court of Civil Appeals is not justifiable.

For the aforesaid reasons, we proceed to set aside the order dated 13-10-2022, pronounced by the Provincial High Court of Civil Appeals. We direct the Provincial High Court of Civil Appeals to proceed to fix this case for argument; thereafter consider the merits of the case and then come to a final conclusion according to law.

The Registrar is directed to send the copy of this Judgment to the Provincial High Court of Civil Appeals ***forthwith.***

JUDGE OF THE SUPREME COURT

E. A. G. R. AMARASEKARA, J.
I agree.

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE, J.
I agree.

JUDGE OF THE SUPREME COURT

LB/-

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

1. Yoganathan Ranjithkumar
2. Wife Venitta
3. Selvarani widow of Sinnatty Christo

SC(HC)C.A.L.A.NO. 367/16
HCCA NO: 34/2015
DC/Jaffna Case No: Land/616

All of Maatha Kovilady,
Point Pedro Road,
Kopay South,
Kopay

PLAINTIFFS

Vs.

1. Kidinan Rajah
2. Wife Amalaranjini
3. Mary Vijitha daughter of Sinnathurai

All of Semmankundu,
Matha Kovil Lane,
Kopay South,
Kopay

DEFENDANTS

AND

In the matter of an appeal under Section 754(1) of the Civil Procedure Code read with Section 5A (1) of the Act No. 19 of 1990 as amended by Act No. 54 of 2006.

1. Yoganathan Ranjithkumar
2. Wife Venitta

3. Selvarani widow of Sinnatty Christo

All of Maatha Kovilady,

Point Pedro Road,

Kopay South,

Kopay

PLAINTIFFS - APPELLANTS

Vs.

1. Kidinan Rajah
2. Wife Amalaranjini
3. Mary Vijitha daughter of Sinnathurai

All of Semmankundu,

Matha Kovil Lane,

Kopay South,

Kopay

DEFENDANTS – RESPONDENTS

AND NOW

In the matter of an appeal for leave to Appeal to the Supreme Court under Section 54 of the Act No. 54 of 2006

1.Yoganathan Ranjithkumar

2.Wife Venitta

3.Selvarani widow of Sinnatty Christo

All of Maatha Kovilady,

Point Pedro Road,

Kopay South,

Kopay

PLAINTIFFS – APPELLANTS - PETITIONERS

Vs.

1. Kidinan Rajah (deceased)
2. Wife Amalaranjini
3. Mary Vijitha daughter of Sinnathurai

All of Semmankundu,
Matha Kovil Lane,
Kopay South,
Kopay

DEFENDANTS – RESPONDENTS - RESPONDENTS

BEFORE : **S. THURAIRAJA, PC, J**

JANAK DE SILVA, J

K. PRIYANTHA FERNANDO, J

COUNSEL : K.V.S. Ganesharajan with Mangala for the Petitioner.

Sachchindra De Zoysa with M.W. Selvananiam for the 1st to 3rd Defendant – Respondent – Respondent.

ARGUED & DECIDED ON: **09/01/2024**

JANAK DE SILVA, J

Court heard the submissions of both counsel and we are inclined to grant leave on the questions of law (g), (h), (i) of law at paragraph number 11 of the Petition dated 26/07/2016.

g) Did the High Court of Civil Appeal err in law in coming to the conclusion that the property was transferred to Vethanayagam by Deed No. 893 as a security for the said loan and that the said Vethanayaam was holding the property in constructive trust for the 2nd Defendant's father totally ignoring

the fact that the said Deed No. 893 is a Deed of Transfer for valuable consideration and not for a security?

h) Did the High Court of Civil Appeal err in law in coming to the conclusion that the said Vethanayagam transferred the property to his son and the said son transferred the property to the 3rd Plaintiff dishonestly and fraudulently totally ignoring the fact that as the lawful owners of the property they are entitled to transfer the property any person?

i) Did the High Court of Civil Appeal misdirect itself in not considering the fact that the District Court erred in law in setting aside the Deed of Transfer No. 6013 dated 29/04/2003 attested by S. Kanagaratnam, Notary Public which was not before the District Court and that the District Court erred in law in setting aside the Deed which was not before the court at the relevant time?

After careful consideration, with the consent of the parties, the Court acts under Rule 16 (1) of the Supreme Court Rules. The parties move that they are not filing written submissions and moves Court to take a decision. They made submissions on the substantive matter.

We have carefully considered the submission made by both counsel and we decide as follows.

The Plaintiffs – Appellants – Petitioners (Appellants) filed this action before the District Court of Jaffna seeking *inter alia* a declaration that the 2nd Appellant is entitled to the property more fully described to the schedule to the Plaint, a judgment and order to eject the Defendant -Respondent – Respondents (Respondents) from the property and damages.

The Respondents filed answers denying the claim of the Appellant and sought *inter alia* a judgment and order that the land in dispute was held in trust by Iyadurai Vethanayagam and thereafter his son for the sum of Rupees 10,000/= and interest thereon, a declaration that Deed No. 6013 and 7172 are null and void.

After trial, the learned District Judge dismissed the action of the Appellants and entered judgment in favour of the Respondents and granted the relief sought in prayers (a), (b,) (c) and (d) of the answer.

Aggrieved by the said Judgment, the Appellant appealed to the Civil Appellate High Court which affirmed the judgment of the District Court.

The case for the Respondent is that Iyadurai Vethanayagam held the property in issue in trust on behalf of the Respondents. They also rely on Deed No. 893 dated 22/10/1980. According to this Deed, Sinnattambi Christo transferred the property in issue to Iyadurai Vethanayagam. On a plain reading of this Deed, it is an absolute transfer.

There is no mention of any trust being created in favor of the Respondents or their predecessor in title. The position of the Respondentx is that their father Sinnathurai lent a sum of Rupees 30,000/= to Sinnaddy Christo. However, such a transaction does not enable the Respondent to set up a plea of constructive trust when Sinnattambi Christo has by Deed No. 893 made an absolute transfer in favor of Iyadurai Vethanayagam.

Moreover, Deed No. 6013 has not been tendered in evidence during the trial. In these circumstances, a declaration declaring the said Deed No.6013 to be null and void does not arise.

Upon an examination of the evidence led before the District Court, it is clear that the Appellants have failed to prove a constructive trust and accordingly, a declaration declaring Deed number 7172 to be null and void does not arise.

For the forgoing reasons, we are of the view, that the Learned District Judge as well as the Judges of the Civil Appellate High Court erred in law in upholding the judgment of the Learned District Judge.

For the forgoing reasons, we answer the questions of law (g), (h) and (i) in the affirmative.

For the forgoing reasons we, set aside the judgment of the learned Civil Appellate High Court in so far as granting the relief prayed for in prayers (b), (c) and (d) of the answer in favour of the Respondent is concerned.

Appeal partly allowed. Parties shall bear their costs.

JUDGE OF THE SUPREME COURT

S. THURAIRAJA, PC, J

I agree

JUDGE OF THE SUPREME COURT

K. PRIYANTHA FERNANDO, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of a Rule in terms of Section 42(2) of the Judicature Act No. 2 of 1978, against Mr. Nagananda Kodituwakku, Attorney-at-Law.

SC Rule 03/2017
SC/REG/CHA/MISC/08/2016
SC/WRIT/05/2015

Nagananda Kodituwakku
Attorney-at-Law
99, Subadrarama Road,
Nugegoda

Respondent

Before : Priyantha Jayawardena PC, J
P. Padman Surasena, J
S. Thurairaja PC, J

Counsel : The Respondent appeared in Person

Rajiv Goonetilleke, DSG with Hashini Opatha, SC for the Hon. Attorney General

Rohan Sahabandu, PC with Ms. Sachini Senanayake for the Bar Association of Sri Lanka

Decided on : 29th of February, 2024

The respondent was admitted and enrolled by the Supreme Court as an Attorney-at-Law in terms of section 40 of the Judicature Act No. 2 of 1978, as amended. He was issued with the Rule dated 27th February, 2018 in terms of section 42(2) of the Judicature Act No. 2 of 1978 to show cause why he should not be suspended from practice or removed from the office of Attorney-at-Law.

The impugned conduct of the respondent was set out in the Rule as follows;

> *"**WHEREAS** on 14th October 2015, you invoked the jurisdiction of this Court by filing SC. WRIT No. 05/2015 (hereinafter referred to as the 'said Application') wherein you appeared in person as the Petitioner and inter alia, sought the mater be heard before a full bench of this Court by way of a motion filed on the same day.*
>
> ***Whereas** upon a consideration of the matter, the motion for a fuller bench of this Court was refused on the basis that the said Application did not disclose any matters of general and public importance.*
>
> ***Whereas** consequent to the foregoing order of refusal, a further Petition and an affidavit dated 26th November 2015 was filed by you in the said Application.*
>
> ***Whereas** having considered the contents of the further affidavit dated 26th November 2015, especially the averments which appeared ex facie an affront to the dignity of this Court and the entire judiciary of this country. Their Lordships Court made order on 14.03.2016 to the effect whether you exceeded your privileges as an Attorney at Law by making unbecoming, deliberate aspersions on the judges of the Supreme Court that calls for suspension of practice.*

***AND WHEREAS** Their Lordships of the Supreme Court, having examined the contents of the said Application, more particularly the Petition and the affidavit dated 26th November 2015, have formed the view that the contents said Application, discloses, inter alia, that;*

(a) In paragraph 8 of the said affidavit and the corresponding averments in the said Petition, you have averred inter alia that; "......by the above ruling. Your Lordship has displayed abuse of discretion vested in the office of the Chief Justice, and Your Lordship's bias towards the Executive, despite credible evidence produced in the case that the impugned 'flawed clause' referred to above ……"

(b) In paragraph 25 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that "the Judges are expected to administer justice according to law, regardless of the consequences for their approval ratings, as the people expect Judges to attend to the task of administering justice and to leave politics to politicians".

(c) In paragraph 27 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that "...... the Judges are not permitted to be seen to have private agendas such as expectation of special treatment or perks after retirement".

(d) In paragraph 33 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that, "............ the people's trust and confidence in the Judiciary had been seriously undermined by de facto Chief Justice, Mohan Peiris who pleaded with the Prime Minister of the new administration not to remove him, assuring the Prime Minister that he would not give any judgment against the Government, and also appointing of judges according to wishes of the Executive, ..."

(e) In paragraph 34 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that, "...... the de facto Chief Justice, Mohan Peiris completely destroyed the trust and confidence in the Judiciary with improper appointments made to the Judiciary on his recommendations".

(f) In paragraph 35 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that, "I state that in this backdrop having lost my trust and confidence in the Judiciary I reported the state of Judiciary of Sri Lanka to the Commonwealth Nations of which Sri Lanka is a member, to ensure that Latimer House Principles which state that 'An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, endangering public confidence and dispensing justice' were implemented and judicial appointments were made on the basis of clearly defined criteria and by a public declared process".

(g) In paragraph 36 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that, "...... I state that however, the said desired intention of the Commonwealth of Nations had been ignored and yet to be fulfilled by the Judiciary under the new regime".

(h) In paragraph 39 of the said Affidavit and the corresponding averments of the said Petition, you have averred that, "I state that on 10th Nov 2014, having ruled that it was a matter of National and General Importance the Full Bench of all Judges of the Supreme Court, unanimously ruled in favour of the former president, Mahinda Rajapakshe with a determination that there was no impediment whatsoever to his being elected for a further term".

(i) In paragraph 42 of the said Affidavit and the corresponding averments of the said Petition, you have averred that, "I state that Your Lordship's impugned decision on my request made for a full Bench has effectively disqualified Your Lordship from hearing this case, and therefore I respectfully request that this matter be fixed for support before the Full Bench of the Supreme Court sans Your Lordship the Chief Justice, Justice Eva Wanasundara who had clearly shown bias towards the Executive and Justice Sarath De Arbrew presently indicted in the High Court".

(j) In paragraph 44 of the said Affidavit and the corresponding averments of the said Petition, you have averred that, "I state that in the event the request made herein, purely in the public interest, in terms of Article 133(3)(iii), cannot be acceded to, in view of Your Lordship's refusal to direct the hearing before a full Bench of the Supreme Court, I respectfully submit that it would further justify the claim made by the people that they have no trust and confidence in Sri Lanka's Judiciary, whose actions have attracted severe international criticism and compelled the UN System to intervene and call for an independent tribunals, with foreign judges, to hear cases, and respectfully request the Court to deem that I have withdrawn the case".

(k) The overall tenor and the effect of the matters so averred in the said papers are contemptuous, malicious, and derogatory and is a willful, deliberate, calculated and an intentional attempt to ridicule, embarrass, demean and defame this Court, question its integrity and lower its standing and estimation in the eyes of the public.

AND WHEREAS *the aforesaid examination by Their Lordships of the papers filed by you discloses that you have;*

(a) By reason of filing the aforesaid papers replete with derogatory and defamatory statements and other insinuations and innuendos, you have conducted yourself;

(i) in a manner which would reasonably be regarded as disgraceful or dishonourable of Attorneys-at-Law of good repute and competency, or

(ii) which would render you unfit to remain an Attorney-at-Law,

(iii) in a manner which is inexcusable and such as to be regarded as deplorable by your fellows in the profession,

and thereby you have committed a breach of Rule 60 of the Supreme Court Rules 1988 (Conduct of and Etiquette of Attorneys-at-Law) made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the said ales), and,

(b) by reason of the aforesaid acts and conduct, you have conducted yourself in a manner unworthy of an Attorney-At-Law and have thus committed a breach of Rule 61 of the said rules.

***AND WHEREAS** this Court is of the view that proceedings against you for suspension or removal from the office of Attorney-at-Law should be taken under Section 42(2) of the Judicature Act No. 2 of 1978 read with the Supreme Court Rules (Part VII) of 1978 made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka."*

Thereafter, the respondent sent his response dated 27th February, 2018 to the Registrar of the Supreme Court denying the allegations and charges in the said Rule.

As the respondent denied the charges leveled against him, it was decided to hold an inquiry in respect of the said charge sheet. At the inception of the inquiry, the charges were read out to the respondent, and he pleaded not guilty to the charges. The learned Deputy Solicitor General commenced the inquiry by leading the evidence of the Deputy Registrar of the Supreme Court.

In her evidence, she stated that the file relating to SC.Writ 5/15 was opened on the 14th of October, 2015 consequent to an application filed by the respondent. She produced the Petition and the affidavit dated 13th October, 2015 filed in the said application. She further stated that there was a motion had been filed by the respondent, seeking to constitute a full bench in terms of Article 132 (iii) of the Constitution to hear the application, stating that the matter involved in the said application contains matters of public and general importance.

She further stated that hence, the docket was forwarded to then Chief Justice for a ruling on the said application. Having considered the said motion, then Chief Justice had refused to constitute a full bench under Article 132(iii) of the Constitution and the application was taken up for support in court. On that day, the respondent had appeared in person, and the other respondents were represented by counsel. Having observed the contents of the affidavit filed by the respondent in the said application, court directed the Registrar of the Supreme Court to serve a certified copy of the motion dated 26th of November, 2015 together with the affidavit dated 26th of November, 2015 filed by the petitioner on the President of the Bar Association directing him to appear as amicus to assist court to decide whether the contents under the heading "Need for a full bench considering the national importance of the case" and the averments contained in paragraph 42 of the affidavit obstructs the cause of justice and amounts to an interference in the due administration of justice.

The original petition dated 14th October, 2015 filed by the respondent, the affidavit dated 13th October, 2015, the motion dated 13th October, 2015 were produced by the witness and marked as P1(A), P1(B) and P1(C) respectively. Further, the journal entries dated 15th October, 2015, and 8th December, 2015, the motion dated 26th November, 2015 and the affidavit attached to the said motion were produced and marked as P1(D), P1(E), P1(F) and P1(G) respectively.

It is pertinent to note that, at the inquiry, the respondent admitted filing the aforementioned documents in SC/WRIT No. 05/2015.

The affidavit dated 26th November, 2015 referred to the aforementioned Rule, *inter alia,* stated as follows;

"

1. *I, NAGANANDA KODITUWAKKU of 99, Subadrarama Road, Nugegoda do hereby solemnly and truly declare and affirm as follows:-*

2. *I am the affirmant above-named, Attorney-at-Law (Sri Lanka) & Solicitor in the UK and a citizen of both countries and being a Buddhist and Public Interest Litigation Activist and I state that I*

furnish this Affidavit to support the content of the Motion filed in Court today.
(26 Nov 2015)…

….

5. *I state that the Writ Application filed by me (SC/Writ/05/2015) on 13th Oct 2015, purely in the Public interest, supported by overwhelming evidence of abuse of the people's Legislative, Executive, and Judicial powers by all three organs of the government (Executive President, Parliament and Judiciary) to insert the clause "... being persons whose names are included in the list submitted to the Commissioner of Elections under this Article or in any nomination paper submitted in respect of any electoral district by such party or group at that election..." (hereinafter referred to as the 'flawed clause") to the* ***Article 99A*** *of the Constitution by deceitful means, as morefully set out below, thereby violating the sovereign rights of the People of Sri Lanka, which includes the power of Franchise enshrined in* ***Article 3*** *of the Constitution, which cannot be taken away or denied without a mandate obtained from the people at a referendum and upon a certificate by the Executive President being endorsed on the Bill (****Article 83****) and therefore the aforesaid 'flawed clause' inserted in the Article 99A of the Constitution is ab initio void in terms of Article* ***82(6)*** *of the Constitution.*

6. *I state that the request made by me by Motion filed in Court on 13th Oct 2015 in terms of Article 132(3)(iii) of the Constitution, for the hearing of this matter before a Full Bench of the Supreme Court, considering the fraudulent manner, the said 'flawed clause' had been inserted to the Article 99A of the Constitution, which is of a matter of National importance. Your Lordship has* ***ruled that it was not a matter of Public and General Importance*** *as follows.*

“ I am of the view that the matters involved in this case are not of general and public importance. Hence the request made in terms of Article 132(3)(iii) of the Constitution is refused.”

7. *I state that all judges are required to stand by their decisions which shall be, directed to the parties to the litigation and to the general public with reasons for their rulings given, which however has not been adhered to in Your Lordship's ruling, reducing it to mere nullity **(ref P30)**.*

8. *I state that by the above ruling, Your Lordship has displayed abuse of discretion vested in the office of the Chief Justice, and Your Lordship's bias towards the Executive, despite credible evidence produced in the case that the impugned 'flawed clause' referred to above has been fraudulently inserted to the Article 99A of the Constitution by then Executive President J R Jayawardene in 1988, by circumventing the procedure established by law and hence ab initio void.*

9. *I state that in 1988, 5 judges of the Supreme Court, despite the patent violation of the Article 3 (powers of government, fundamental rights and franchise) of the Constitution by the said 'flawed clause', had made a patently flawed determination on 18th April 1988 **(ref P39)** that the said 'flawed clause' was NOT inconsistent with the provision of Article 3 and therefore did not require the approval of the People at a referendum, which is mandated by Article 83 of the Constitution, a decision, which had apparently been made under moral duress **(P31)**.*

10. *I state that I observed that the said 5 - Judge Bench had denied the opportunity (**Ref P38**) for the citizens to make objections against the said "flawed clause and made the Court's determination as follows **(ref P39)***

*"We have considered the respective submissions made in regard to this matter, and **our determination is that Clause 3 and Clause 8** (Clause that permitted party Secretaries to appoint rejected candidates as MPs through the National List) of the Bill **are not inconsistent with the Provisions of Article 3**, read with Article 4(a) and 4(e) of the Constitution, and **therefore do not require the approval of the People at a Referendum**".*

11. *I state that the failure of the 5-Judge Bench to adduce reasons for their determination (in clear violation of Article 123 of the Constitution) reduced the said determination (**Ref P30**) a merely nullity and ab initio void.*

12. *I state that the Supreme Court's special determination Record (SC/SD/02/1988) clearly demonstrates that the process followed by the aforesaid 5-Judge bench had been absolutely flawed and in clear violation of the mandatory procedure provided in Chapter **XII** of the Constitution ...*

...

23. *I state that the said 'flawed clause', effectively nullifies the principle of 'Representative Democracy' duly recognized in the Preamble to the Constitution of the Republic of Sri Lanka.*

24. *I state that the Republic of Sri Lanka is a representative democracy (ref preamble to Constitution) and the citizens judicial power is exercised by the judiciary, wholly on trust, demand not only that judicial power be*

exercised independently and according to law, but also that judicial decision-making be demonstrably rational and fair and must also be seen to be rational and fair and the Court should be able to justify its actions as an exercise of public power which are always likely to called in question.

25. *I state that the judges are expected to administer justice according to law, regardless of the consequences for their approval ratings, as the people expect judges to attend to the task of administering justice and to leave politics to politicians.*

26. *I state that the judges have a different responsibility and are subject to a different form of accountability and the public expectation of judges is that they will not respond to political pressure.*

27. *I state that the judges are not permitted to be seen to have private agendas such as expectation of special treatment of perks after retirement.*

28. *I state that the Court is expected to resolve the matter presented in this case, strictly according to law, adhering to legal methodology, acting as the final interpreter of the Constitution, protector of fundamental rights of the citizens, their sovereign rights and as a guardian to keep necessary checks upon constitutional transgressions by itself or other organs of the State (**Union of India V Raghubir Singh (1989) 2 SCC 754**)….*

…

33. *I state that the people's trust and confidence in the judiciary had been seriously undermined by de facto Chief Justice, Mohan Peiris who pleaded with the Prime Minister of the new administration not to remove him, assuring the Prime Minister that he would not give any judgment*

against the Government, and also appointing judges according to wishes of the Executive, which the Prime Minister with contempt revealed in the Parliament.

*The relevant part of the Hansard dated 30th Jan 2015 is attached hereto marked **P40***

34. *I state that the de facto Chief Justice, Mohan Peiris completely destroyed the trust and confidence in the judiciary with improper appointments made to the judiciary on his recommendations.*

35. *I state that in this backdrop having lost my trust and confidence in the judiciary, reported the state of Judiciary of Sri Lanka to the Commonwealth of Nations of which Sri Lanka is a member, to ensure the Latimer House principles which state that 'An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, endangering public confidence and dispensing justice' were implemented and judicial appointments were made on the basis of clearly Define criteria and by a publicly declared process.*

*(A true copy of the communication seat to Commonwealth Secretariat marked **P41** is attached here too)*

36. *I state that the Commonwealth secretary in London had informed me that Commonwealth Secretariat had sent an observer group to Sri Lanka and believed that the newly elected government would address the issues raised by me in my communication sent to the office of the Commonwealth of Nations. I state that however, the said desired intentions of the Commonwealth of Nations had been ignored and yet to be fulfilled by the judiciary under the new regime.*

(True copy of the reply received from Commonwealth Secretariat marked ***P42*** *is attached here too)…*

…

39. *I state that on the 10th November 2014, having ruled that it was matter of National and General Importance the Full Bench of all judges of the Supreme Court, unanimously ruled in favor of the former President Mahinda Rajapakse with a determination that there was no impediment whatsoever to him being elected for a further term.*

(Relevant page of the Determination (SC Ref 01/2014) ratified by all judges marked ***P44*** *is attached hereto)…*

…

42. *I state that Your Lordship's impugned decision on my request made for a full bench has effectively disqualified Your Lordship from hearing this case, and therefore I respectfully requested that this matter be fixed for support before the Full bench of the Supreme Court sans Your Lordship the Chief Justice, Justice Eva Wanasundara who had clearly shown bias towards the Executive and Justice Sarath De Arbrew presently indicted in the High Court.*

43. *I state that I with due respect to Your Lordship, request that the obviously impugned per incuriam ruling given by Your Lordship that the 'matters involved in this case are NOT of general and public importance' be reviewed considering the general and public importance of this case, initiated purely in the public interest by me, which goes to the very root of the representative democracy of the Republic of Sri Lanka, and to a point a Bench of 7 judges of the Supreme Court in terms of Article 132 (3)(III) to hear and determine this case.*

44. I state that in the event the request made herein, purely in the public interest, in terms of Article 133(3)(III), cannot be acceded to, in view of Your Lordship's refusal to direct the hearing before a full bench of the Supreme Court, I respectfully submit that it would further justify the claim made by the people that they have no trust and confidence in Sri Lanka's judiciary, whose actions have attracted severe International criticism and compelled the UN system to intervene and call for independent tribunals, with foreign judges to hear cases and respectfully request the Court to deem that I have withdrawn the case."

The witness stated that according to the journal entry dated 16th of February, 2016 the respondent had submitted to court that he would tender an unqualified apology. Further, he had moved to file an appropriate affidavit withdrawing the motion dated 26th of November, 2015 and the affidavit dated 26th November, 2015. Hence, the respondent was given two weeks to file an apology or withdraw the motion.

Thereafter, the witness stated that, as per minute dated 23rd of February, 2016, the respondent had filed the motion dated 23rd February, 2016, together with the affidavit dated 23rd February, 2016. The said motion dated 23rd of February, 2016 and the affidavit annexed to that motion dated 23rd of February, 2016 were produced and marked as P1(J) and P1(K) respectively.

Moreover, the witness stated that the respondent had agreed unconditionally to withdraw certain averments in the said affidavit and the motion, on the advice of the President of the Bar Association and to tender a fresh affidavit to the court. However, according to the affidavit dated 23rd February, 2016 respondent had only withdrawn the averment 42 of the affidavit dated 26th November, 2015. The witness further stated that, according to the journal entry dated 14th March, 2016, then Chief Justice, had directed Registrar of the Supreme Court to submit the documents filed in the said application to the judges of the Supreme Court together with the proceedings to consider whether the petitioner as an Attorney-at-Law had exceeded his privilege and had made unbecoming and deliberate aspersions on the judges of the Supreme Court. Consequently, the Registrar of the Supreme Court had submitted the said documents to the learned judges of the Supreme Court.

Thereafter, based on the observations made by the learned judges of the Supreme Court, the Rule dated 23rd November, 2016 was issued on the respondent.

After the evidence in chief of the witness was concluded, the respondent was given an opportunity to cross examine the witness, and the respondent cross examined the witness. After the cross examination was concluded by the respondent, court informed the respondent that he is entitled to give evidence and the respondent was requested to commence his case. Thereafter, the respondent started giving evidence. Before his evidence was concluded the respondent informed court that his family, who were residing in the United Kingdom were leaving that night, and moved to adjourn court for the day. Hence, the proceedings were adjourned on sympathetic grounds. Further, the respondent was informed that the inquiry is specially fixed for the 18th of January, 2023 at 10.00 a.m. and also for the 24th and 25th of January, 2023.

When this matter was taken up for inquiry on the 18th of January, 2023 the respondent was absent and unrepresented. The learned President's Counsel appearing for the Bar Association of Sri Lanka, informed court that he met the respondent that morning in the premises of the Supreme Court. Hence, the inquiry was concluded and a date was fixed for correction of proceeding. When the matter was taken up in court for correction of proceedings, the respondent appeared in court and made an application to re-open the inquiry. However, the said application was refused by court and the respondent was allowed to file written submissions.

In his written submissions, the learned Deputy Solicitor General submitted that the respondent deliberately and intentionally prepared the affidavit dated 26th November, 2015 following the refusal to appoint a full bench, is a calculated effort to make derogatory statements and unfounded allegations in respect of the judiciary as a whole and specific judges mentioned by name.

Moreover, it was submitted that this is not the first time that the respondent has been engaging in such behavior unbecoming of an Attorney-at-Law but he had been doing so for a considerable period of time. It was submitted that the respondent had already been found guilty in Rule bearing No. 1/2016 served on the respondent due to having made spurious allegations against a sitting

Judge of the Court of Appeal which culminated in the respondent being suspended from practice as an Attorney-at-Law for a period of 3 years.

The learned President's Counsel appearing for the Bar Association of Sri Lanka submitted that the Rules framed under the Constitution are not exhaustive, specifically Rule 62. Further it was submitted that the Rules presupposes a lawyer's context, shaping the lawyer's role. It includes the provisions of the Constitution, provisions of law, Judicature Act No. 2 of 1978, decisions of the Supreme Court.

He further submitted that mere allegation without any proof, mere statements made in most reckless manner, statements been made that judges are charged with judicial corruption where no semblance of proof is tendered is not the conduct of a lawyer, and he cannot be a lawyer of good repute referred to in section 41 of the Judicature Act. Moreover, a lawyer who has been enrolled as a man of good repute has to maintain that 'good repute' throughout his professional life. He drew the attention of the court to Rule 61 which states that "an Attorney-at-law shall not conduct himself in any manner unworthy of an Attorney-at-law."

It is pertinent to note that, the respondent did not justify his conduct, or the statements made by him in his affidavit dated 26th November, 2015, either by giving evidence or in the written submissions filed by him. The allegations made against the independence and impartiality of judges sitting in the apex court of this country were not supported by any material.

A careful consideration of the allegations referred to in the Rule and the affidavit dated 23rd February, 2016 when taken as a whole, constitute an affront to the judiciary and the judicial system and that the respondent has not withdrawn the same nor made an unqualified apology. Further, the respondent at no stage expressed any remorse or apology for a making such statements in his affidavit of 26th November, 2015; namely paragraphs 8, 25, 27, 33, 34, 35, 36, 39, 42 and 44 referring to abuse of discretion, insinuating that judges engage in politics, that judges have private agendas, that the trust and confidence in the judiciary has been undermined.

Moreover, the evidence and the material produced at the inquiry shows that the conduct of the respondent is not only bad conduct but also amounts to contemptuous behaviour with total disregard of the authority and respect of the Supreme Court. Hence the evidence led at the inquiry proved that the actions taken by the respondent amounts to conduct which is dishonorable and unworthy of an Attorney-at-law.

Taking into consideration that this is the second instance that the respondent was found guilty of professional misconduct, and the nature of the grave misconduct of the respondent referred to in the Rule, the aforementioned Rule is affirmed. We hold that the respondent is guilty of malpractice. Hence the respondent is removed from the office of Attorney-at-Law. Further, the respondent is restrained from filing public interest litigation in his personal capacity as such conduct would nullify the said decision to remove the respondent from the office of Attorney-at-Law.

The Registrar of the Supreme Court is directed to take all necessary steps to implement this Order and to communicate this Order to the relevant institutions.

Priyantha Jayawardena PC, J

Judge of the Supreme Court

P. Padman Surasena, J

Judge of the Supreme Court

S. Thurairaja PC, J

Judge of the Supreme Court

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

In the matter of a Rule in terms of Section 42 of the Judicature Act No. 02 of 1978, against Aruna Deepada De Silva, Attorney-at-Law.

Nishan Chandima Abeywardena,
Acting Head of Air Navigation Services,
Airport and Aviation Services Sri Lanka (Pvt) Ltd.,
Bandaranaike International Airport,
Katunayake.

SC Rule No. 06/2023

Complainant

-Vs-

Aruna Deepada De Silva,
145/3A,
Park Road,
Colombo 05.

Respondent

Before: **P. PADMAN SURASENA J,**
ACHALA WENGAPPULI J,
MAHINDA SAMAYAWARDHENA J.

Counsel: Dr. Romesh de Silva PC for the Respondent,
Rohan Sahabandu PC with Ms. S. Senanayake for the Bar Association of Sri Lanka,
Dileepa Pieris SDSG with Ms. Sabrina Ahmed SC for the Attorney General.

Inquiry on: 22-01-2024

Decided on: 15-03-2024

P. Padman Surasena J

The Rule dated 14-07-2023 under the hand of the Registrar of this Court has been issued against the Respondent Attorney-at-Law. When the court took this matter up for inquiry, Dr. Romesh De Silva PC appearing for the Respondent Attorney-at-Law, Mr. Dileepa Pieris Senior Deputy Solicitor General appearing for the Attorney General and Mr. Rohan Sahabandu PC appearing for the Bar Association of Sri Lanka, concurred that the Court can proceed with this inquiry on the available material in the brief.

Moreover, the learned Senior Deputy Solicitor General Mr. Dileepa Pieris confirmed to us that it would not be necessary to lead oral evidence of any witness, as the basic facts pertaining to the background under which the instant Rule has been issued are not disputed by the parties.

Pursuant to this agreement, the court proceeded to hear the extensive submissions made by Dr. Romesh De Silva PC appearing for the Respondent Attorney-at-Law. Dr. Romesh De Silva PC made this submission in order to show cause (as directed in the Rule) as to why this Court should not affirm this Rule issued against the Respondent Attorney-at-Law. Subsequent to Dr. Romesh De Silva PC's submissions, Court proceeded to hear the submissions made by the learned Senior Deputy Solicitor General Mr. Dileepa Pieris who appeared for the Attorney General and the submissions made by Mr. Rohan Sahabandu PC who appeared for the Bar Association of Sri Lanka. Thereafter, the Court reserved the order and hence this order.

At the outset, it must be noted that when this case was taken up in Court on 14-07-2023, the learned counsel who appeared for the Complainant had informed Court that the Complainant named in this Rule has no objection to the application made on that day by Dr. Romesh De Silva PC (who appeared for the Respondent Attorney-at-Law), to have this proceeding terminated without holding the inquiry. The Court having decided that there was no legal basis to terminate this proceeding at that stage, had then read out the Rule against the Respondent Attorney at Law on that day subsequent to which the learned President's Counsel appearing for the

Respondent Attorney-at-Law had informed Court that the Respondent Attorney-at-Law has a cause to show as per the direction in the Rule issued against the Respondent Attorney-at-Law by this Court. It was thereafter that the Court had fixed the inquiry for 06-12-2023. As the bench was not properly constituted on 06-12-2023, the Court could not commence the inquiry on that date. Consequently, the Court had re-fixed the inquiry for 22-01-2024.

When the Court commenced the inquiry on 22-01-2024, the learned President's Counsel who appeared for the Respondent Attorney-at-Law addressing Court, adduced reasons as to why this Court should discharge the Rule issued against the Respondent Attorney-at-Law. I observe that the Rule issued against the Respondent Attorney-at-Law has alleged breaches of Rule 60 and Rule 61 of the Supreme Court (Conduct of and Etiquette for Attorneys at Law) Rules 1988. As per the Rule, there are several acts which the Respondent Attorney-at-Law has allegedly committed in this instance. According to the Rule, it is those acts committed by the Respondent Attorney-at-Law which have rendered the Respondent Attorney-at-Law unfit to remain as an Attorney-at-Law of the Supreme Court in terms of the Supreme Court (Conduct of and Etiquette for Attorneys at Law) Rules 1988. The Rule has enumerated the said acts in the following manner:

A. *He had entered the Bandaranaike International Airport ("BIA") premises on 02 June 2022 at or around 1215 hrs with a day pass to enter the Navigational Service Complex ("NSC") of the BIA,*

B. *He had thereafter proceeded to enter the office of the Complainant accompanying the Fiscal Officer of the Commercial High Court of the Western Province (Exercising Civil Jurisdiction) Holden in Colombo ("the Commercial High Court"),*

C. *He had, upon entering the office of the Complainant, proceeded to interrupt the telephone conversation that the Complainant was engaged in with the Director General of Civil Aviation ("DGCA"),*

D. *He had at that stage, upon the Fiscal Officer of the Commercial High Court serving the enjoining order dated 02 June 2022 of the case No. CHC/126/2022/MR on the Complainant, without giving the Complainant sufficient time to study the aforesaid enjoining order, drawn the Complainant's*

notice to the last two paragraphs of pages 2 and 3 of the enjoining order and misrepresented to the Complainant that the enjoining order was binding on the Complainant and further willfully suppressed the fact that the enjoining order was not issued against the Complainant,

E. He had thereafter informed and impressed upon the Complainant that if the Complainant delayed the immediate implementation of the aforesaid enjoining order, the Complainant would be in Contempt of Court.

I observe at the outset, that the conduct of the Respondent Attorney-at-Law which the Rule has alleged to be a conduct unworthy of an Attorney-at-Law, revolves around the act of serving an enjoining order on the Acting Head of Air Navigation Services of the Airport and Aviation Services of Bandaranaike International Airport, Katunayake. Thus, let me first examine the relevant enjoining order. The learned Judge of the Commercial High Court in his order dated 02-06-2022, had issued the enjoining order as prayed for in paragraphs **D** and **G** of the Plaint dated 31-05-2022. For the purpose of evaluating the submissions made by the learned Counsel for all the parties, it would be necessary to examine these two prayers of the Plaint dated 31-05-2022. They are as follows:

> *"D. An **Enjoining Order** until the determination of the application for interim injunction, restraining and preventing the 1st Defendant from and/or the 1st Defendant's servants, agents, assigns and/or those authorized to permit the 1st Defendant from permitting the 1st Defendant to, operate (whether commercially or otherwise), handle, use, take off ground and/or fly the Aircraft described in the Schedule hereto, pending the constitution of the Arbitral Tribunal pursuant to Request for Arbitration marked **"P24"** and an Award by the Arbitral Tribunal regarding the delivery and possession of the said aircraft,*
>
> *G. An **Enjoining Order** until the determination of the application for interim injunction, restraining and preventing the 1st Defendant and/or its servants, agents, assigns from removing any aircraft documentation (including certificates; aircraft log, records, books or manuals) or any parts, equipment components, systems or modules from the Aircraft described in the Schedule hereto, pending*

*the constitution of the Arbitral Tribunal pursuant to Request for Arbitration marked **"P24"** and an Award by the Arbitral Tribunal in that regard."*

As pointed out by Dr. Romesh De Silva PC, I observe that the Plaintiff has prayed for, the enjoining order as per prayer (D) of the Plaint dated 31-05-2022 against two categories of persons. The said two categories of persons are as follows:

1. *The 1st Defendant and/or the 1st Defendant's servants, agents, assigns and/or;*
2. *Those authorized to permit the 1st Defendant from permitting the 1st Defendant to, operate (whether commercially or otherwise), handle, use, take off ground and/or fly the Aircraft described in the Schedule.*

A close scrutiny of this prayer would show clearly that it is not correct to say that the enjoining order issued by the learned Commercial High Court Judge on 02-06-2022 has only been issued against the 1st Defendant of the case in the Commercial High Court. The said enjoining order has been prayed for against the 2nd Defendant of the case also because, it was the 2nd Defendant who was the Acting Head of Air Navigation Services of the Airport and Aviation Services Sri Lanka (Pvt) Ltd. of Bandaranaike International Airport, Katunayake who could have permitted the 1st Defendant's servants, agents or assigns to take off the ground and fly, the aircraft described in the schedule to the Plaint.

In addition to the above, I also observe that while there are only two Defendants named in the Plaint, the 1st Defendant is *Public Joint Stock Company "Aeroflot – Russian Airlines", Arbat Str., build 10, Moscow 119002, Russia.* Thus, as the address indicates, the 1st Defendant is an entity based in Moscow, Russia who could not have any authority over the affairs of the Air Navigation Services of Bandaranaike International Airport, Katunayake. This fact also indicates that it was the 2nd Defendant who was the Acting Head of Air Navigation Services of the Airport and Aviation Services Sri Lanka (Pvt) Ltd. of Bandaranaike International Airport, Katunayake who was responsible for implementing the said enjoining order by denying the permission for the aircraft described in the schedule to the Plaint to take off the ground and/or fly.

The above position that the enjoining order dated 02-06-2022 has been issued against the 2nd Defendant of the case as well, would in my view, render, the allegation in the Rule that the Respondent Attorney-at-Law had misrepresented to the Acting Head of Air Navigation Services

that the said enjoining order was binding on him as well, untenable. It also renders the position that the Respondent Attorney-at-Law had willfully suppressed that the enjoining order was not issued against the said Acting Head of Air Navigation Services, untenable.

When the Court took this case up for inquiry on 22-01-2024, Mr. Dileepa Pieris Senior Deputy Solicitor General appearing for the Attorney General brought to the notice of Court that Nishan Chandima Abeywardena (the Head of Air Navigation Services of the Airport and Aviation Services of Bandaranaike International Airport, Katunayake who stands as the Complainant in this Rule), has passed away on 12-12-2023. This has left only the affidavits filed by him before Court. While I do not intend to proceed to discuss about their admissibility in Court in his absence, I wish to advert only to the maximum impact that the said affidavits can have on the case against the Respondent Attorney-at-Law.

In doing so, let me observe that the Head of Air Navigation Services of the Airport and Aviation Services of Bandaranaike International Airport, Katunayake (the Complainant), in his affidavit dated 5th June 2022 submitted to the Commercial High Court, has declared and affirmed inter alia to the followings:

a. At or about 12 noon on the 2nd of June 2022 a person who identified himself as the Additional Registrar of the Commercial High Court of Colombo named K. A. C Perera called him and instructed him to stop the aircraft departing citing the enjoining order issued by the Commercial High Court Colombo;

b. He had informed the said caller that he would require a copy of the said enjoining order to bring the said enjoining order to the notice of the Director General of Civil Aviation (DGCA) who is the relevant regulating authority;

c. While he was on a telephone call with the DGCA, a Fiscal Officer who identified himself as from Commercial High Court and Attorney-at-Law Mr. Aruna De Silva entered the Bandaranaike International Airport (BIA) premises with a day pass to enter the Navigational Service Complex (NSC) area, around 1215 hrs on 2nd June 2022 and proceeded to enter his office;

d. The said aircraft was scheduled to take off at 12.50PM on 2nd June 2022;

e. The said Attorney-at-Law without providing him an opportunity to consult the appropriate regulatory authority who is the DGCA, also conveyed that if I delay the implementation of the Enjoining Order that he would be in Contempt of Court.

Thus, the complainant also in his affidavit has admitted that the Respondent Attorney-at-Law has entered the Bandaranaike International Airport premises with a day pass. Therefore, one cannot say that the Respondent Attorney-at-Law had entered the airport unlawfully. Moreover, the following two factors would shed more light on the purpose of Fiscal's visit to the Complainant's office. These two factors are: the fact that the Additional Registrar of the Commercial High Court of Colombo had called the Complainant and instructed him to stop the aircraft departing citing the enjoining order issued by the Commercial High Court Colombo; the fact the Complainant himself had required from the Additional Registrar of the Commercial High Court of Colombo, a copy of the said enjoining order. Thus, the Complainant could not have been surprised at all to see the Fiscal of the Commercial High Court Colombo at his office at the relevant time.

Even according to the afore-said affidavit of the Head of Air Navigation Services of the Airport and Aviation Services of Bandaranaike International Airport Katunayake: the relevant aircraft was scheduled to take off at 12.50 PM on 2nd June 2022; about 12 noon on the 2nd June 2022 an Additional Registrar of the Commercial High Court of Colombo had called him and instructed him to stop the aircraft departing citing the enjoining order issued by the Commercial High Court Colombo; the Respondent Attorney-at-Law had entered the Bandaranaike International Airport premises with a day pass around 1215 hrs. on 2nd June 2022. These facts clearly indicate that there was definitely a need for the immediate implementation of the relevant enjoining order which was to prevent the air craft taking off the Bandaranaike International Airport. This is so in view of the fact that there was no gainsaying that the Commercial High Court had by that time issued an enjoining order to that effect.

I also observe that a Partner of the Firm which stood as the instructing Attorney for the Plaintiff in the relevant case, in her affidavit dated 01st July 2022, has affirmed to the fact that the Respondent Attorney-at-Law was specifically directed by the Firm to accompany the Fiscal in a vehicle provided by the Firm to Bandaranaike International Airport Katunayake. The said Partner of the Firm has also affirmed to two more important things: the fact that the said step was taken

to ensure that the Fiscal serves the papers on the correct person; the fact that the Respondent Attorney-at-Law had acted in this instance on behalf of the Firm. Therefore, one cannot conclude that the acts attributed to the Respondent Attorney-at-Law are acts solely planned, designed and executed on the sole decision of the Respondent Attorney-at-Law by himself.

As pointed out by Mr. Rohan Sahabandu PC, the warning given by the Respondent Attorney-at-Law, to the said Acting Head of Air Navigation Services that if he delayed the immediate implementation of the relevant enjoining order, he would be in contempt of Court can also be viewed as a warning, the Respondent Attorney-at-Law has thought it fit to have given in good faith. Having regard to the factual circumstances of this case, I have no basis to disagree with the submissions made by Mr. Rohan Sahabandu PC that such warning may indeed have been in the best interest of the said Acting Head of Air Navigation Services. Thus, I am unable to hold that the act of the Respondent Attorney-at-Law to inform and impress upon the Acting Head of Air Navigation Services that he would be in Contempt of Court if he delayed the immediate implementation of the aforesaid enjoining order, as necessarily an act of interfering with the official functions and/or duties of the Complainant or a conduct the manner of which would necessarily render the Respondent unworthy of an Attorney-at-Law thereby rendering him unfit to remain as an Attorney-at-Law.

One has to also bear in mind that the Respondent Attorney-at-Law had not entered the Complainant's office alone but had gone there representing the Firm which stood as the instructing Attorney, to accompany the Fiscal in order to ensure that the Fiscal serves the papers on the correct person. Having regard to the above, and in view of the factual background of this case, the allegation that the Respondent Attorney-at-Law had entered the office of the Acting Head of Air Navigation Services, interrupting the telephone conversation the said Acting Head of Air Navigation Services was engaged in with the Director General of Civil Aviation, in my view would not amount to acts which would necessarily bring the Respondent Attorney-at-Law culpable under Rule 60 or Rule 61 of the Supreme court (Conduct of and Etiquette for Attorneys at Law) Rules 1988.

Moreover, I cannot forget the stance taken up by the learned President's Counsel who represented the Bar Association of Sri Lanka. It was his submission that the Bar Association of

Sri Lanka would not consider the conduct of the Respondent Attorney-at-Law in this instance, as a conduct unworthy of an Attorney-at-Law and hence the Bar Association of Sri Lanka would not accept that the Respondent Attorney-at-Law had committed a breach of the afore-said Rule 60 or Rule 61.

For the foregoing reasons, I accept the submissions made by Dr. Romesh De Silva PC who appeared for the Respondent Attorney-at-Law, as well as submissions made by Mr. Rohan Sahabandu PC who appeared for the Bar Association of Sri Lanka. I hold that the Respondent Attorney-at-Law has not committed any act of deceit, malpractice and/or offence as set out in Section 42(2) of the Judicature Act No. 02 of 1978 read with the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988. I also hold that the Respondent Attorney-at-Law has not committed any act which would amount to a conduct unworthy of an Attorney-at-Law which would render him unfit to remain as an Attorney-at-Law under any Rule of the Supreme court (Conduct of and Etiquette for Attorneys at Law) Rules 1988.

For the foregoing reasons, I decide to discharge the Rule dated 01-07-2023 issued against the Respondent Attorney-at-Law.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI J

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Special Leave to Appeal in terms of Article 128(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with paragraph 3(b) of Article 154(P) of the Constitution and Section 3 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990

SC Spl LA No: 38/2020
HC ALT (Colombo) Case No. 67/2017
LT Colombo Case Nos.
8/335/2010
8/338/2010 - 8/343/2010
8/345/2010 8/346/2010
8/348/2010 - 8/356/2010

1. K.R.A. Kusumsiri,
No. 54/4, Rukmale, Pannipitiya.

2. R.D.D. Sanath Priyantha,
No. 467/1, Korathota, Kaduwela.

3. P.M.A. Saminda Jayashantha Siriwardena,
No. 111/1, Kalapaluwawa, Kalagedihena.

4. K.K. Nimal Gunasiri,
No. 596/3, Jayanthi Road, Athurugiriya.

5. M.B.A. Gamini Ariyasinghe,
No. 49, Aranayaka Janapadaya, Aranayaka.

6. S.D.W.K.S. Gunasekera,
No. 131/10, Nidahas Uyana,
Madulawa North, Padukka.

7. M.S. Gunapala,
No. E/7/A, Hathgampola West, Aranayake.

8. W.A. Athula Indika Weerasuriya,
No. 21/148, 1/1, Dadagama East,
Veyangoda.

9. P.A.C. Sanath Kumara,
No. 1/50, Ellamulla. Pasyala.

10. L.G. Jeevendra Sanjeewa Danapala,
No. 201/2, Vihara Mawatha, Radawadunna.

11. H.P. Sirisena,
No. 80, Anandagama, Buruthagama,
Akaravita, Avissawella.

12. Vithanage Janaka Sampath Vithanage,
Panawattagama, Meegasthenna,
Yatiyanthota.

13. B.Lalantha Silva,
No. 19/D, Nurugala Mawatha,
Weliwathugoda, Balapitiya.

14. J. Nihal,
No. 418/G, Welivita), Kaduwela.

15. B.A. Amith Eranga Pandithasekera,
No. 418G, Welivita, Kaduwela.

16. P.K.D. Ayuwardana,
Anhettiwalawatta,
Goluwamulla, Ganegoda.

17. Rajapaksha Pathirage Ravindralal,
No. 616/1/1, Jayantha Road, Athurugiriya.

18. K.M. Wimal,
No. 112/1, Megoda Kolonnawa,
Wellamptiya.

Applicants

Vs.

Sunbee Ready-mix (Pvt.) Limited,
Suncity Mezzanine Floor,
No. 18, St. Anthony’s Road, Colombo 3.

Respondent

And between

1. K.R.A. Kusumsiri,
   No. 54/4, Rukmale, Pannipitiya.

2. R.D.D. Sanath Priyantha,
   No. 467/1, Korathota, Kaduwela.

3. P.M.A. Saminda Jayashantha Siriwardena,
   No. 111/1, Kalapaluwawa, Kalagedihena.

4. K.K. Nimal Gunasiri,
   No. 596/3, Jayanthi Road, Athurugiriya.

5. M.B.A. Gamini Ariyasinghe,
   No. 49, Aranayaka Janapadaya, Aranayaka.

6. S.D.W.K.S. Gunasekera,
   No. 131/10, Nidahas Uyana,
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8. W.A. Athula Indika Weerasuriya,
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   Veyangoda.

9. P.A.C. Sanath Kumara,
   No. 1/50, Ellamulla. Pasyala.

10. L.G. Jeevendra Sanjeewa Danapala,
    No. 201/2, Vihara Mawatha, Radawadunna.

11. H.P. Sirisena,
    No. 80, Anandagama, Buruthagama,
    Akaravita, Avissawella.

12. Vithanage Janaka Sampath Vithanage,
    Panawattagama, Meegasthenna,
    Yatiyanthota.

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    No. 19/D, Nurugala Mawatha,

Weliwathugoda, Balapitiya.

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No. 616/1/1, Jayantha Road, Athurugiriya.

18. K.M. Wimal,
No. 112/1, Megoda Kolonnawa,
Wellamptiya.

Applicants - Appellants

Vs.

Sunbee Ready-mix (Pvt.) Limited,
Suncity Mezzanine Floor,
No. 18, St. Anthony's Road, Colombo 3.

Respondent – Respondent

And now between

Sunbee Ready-mix (Pvt.) Limited,
Suncity Mezzanine Floor,
No. 18, St. Anthony's Road, Colombo 3.

Respondent – Respondent - Petitioner

1. K.R.A. Kusumsiri,
No. 54/4, Rukmale, Pannipitiya.

2. R.D.D. Sanath Priyantha,
No. 467/1, Korathota, Kaduwela.

3. P.M.A. Saminda Jayashantha Siriwardena,
No. 111/1, Kalapaluwawa, Kalagedihena.

4. K.K. Nimal Gunasiri,
   No. 596/3, Jayanthi Road, Athurugiriya.

5. M.B.A. Gamini Ariyasinghe,
   No. 49, Aranayaka Janapadaya, Aranayaka.

6. S.D.W.K.S. Gunasekera,
   No. 131/10, Nidahas Uyana,
   Madulawa North, Padukka.

7. M.S. Gunapala,
   No. E/7/A, Hathgampola West, Aranayake.

8. W.A. Athula Indika Weerasuriya,
   No. 21/148, 1/1, Dadagama East,
   Veyangoda.

9. P.A.C. Sanath Kumara,
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10. L.G. Jeevendra Sanjeewa Danapala,
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    Akaravita, Avissawella.

12. Vithanage Janaka Sampath Vithanage,
    Panawattagama, Meegasthenna,
    Yatiyanthota.

13. B.Lalantha Silva,
    No. 19/D, Nurugala Mawatha,
    Weliwathugoda, Balapitiya.

14. J. Nihal,
    No. 418/G, Welivita), Kaduwela.

15. B.A. Amith Eranga Pandithasekera,
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17. Rajapaksha Pathirage Ravindralal,
    No. 616/1/1, Jayantha Road, Athurugiriya.

18. K.M. Wimal,
    No. 112/1, Megoda Kolonnawa, Wellamptiya.

Applicants – Appellants – Respondents

Before: **Vijith K. Malalgoda, PC, J**
E.A.G.R. Amarasekara, J
Arjuna Obeyesekere, J

Counsel: P K Prince Perera with Madushi Pitiyawatta and Ishani Herath for the Respondent – Respondent – Petitioner

P A D Kumarawickrema for the 1st – 4th and 6th – 16th Applicants – Appellants – Respondents

Supported on: 11th December 2023

Written Submissions: Tendered by the 1st – 4th and 6th – 16th Applicants – Appellants – Respondents on 2nd January 2024

Tendered by the Respondent – Respondent – Petitioner on 8th February 2024

Decided on: 15th February 2024

Obeyesekere, J

The 1st – 4th and 6th – 16th Applicants – Appellants – Respondents [the Respondents] who were employees of the Respondent – Respondent – Petitioner [the Petitioner] invoked the jurisdiction of the Labour of Tribunal of Colombo in terms of Section 31B(1) of the Industrial Disputes Act as amended [the Act] claiming that their services have been unjustifiably terminated by the Petitioner on 3rd May 2010, and seeking compensation for loss of employment. With the agreement of the parties, all applications, sixteen in number, had been consolidated.

By its Order delivered on 24th August 2017, the Labour Tribunal had dismissed all sixteen applications. Aggrieved by the said Order, the Respondents had filed an appeal in the Provincial High Court of the Western Province holden in Colombo [the High Court], in terms of Section 31D(3) of the Act. The said appeal had been allowed by the High Court by its judgment delivered on 13th December 2019.

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*."

Dissatisfied with the said judgment of the High Court, the Petitioner filed this application on 5th February 2020. When this matter was taken up for support on 11th December 2023, the learned Counsel for the Respondents raised a preliminary objection with regard to the maintainability of this application on the basis that the petition of appeal has been filed out of time. The learned Counsel for the Respondents, referring to Rule 7 of the Supreme Court Rules (1990) made under Article 136 of the Constitution [the Rules] submitted that (a) the time period allowed to file a petition of appeal against a judgment of the High Court arising from an order of the Labour Tribunal is six weeks; (b) the said time period of six weeks is mandatory; and (c) failure to file a petition of appeal within the said time period of six weeks would render this application liable to be dismissed *in limine*.

In **Priyanthi Chandrika Jinadasa v Pathma Hemamali and Others** [(2011) 1 Sri LR 337] Chief Justice Bandaranayake, having considered the provisions of Rule 7 of the Supreme Court Rules (1990), 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 position of the learned Counsel for the Petitioner was twofold. Whilst admitting that this application has been filed 54 days after the delivery of the judgment of the High Court, his first submission was that the delay was due to circumstances beyond the control of the Petitioner, namely (a) the judgment of the High Court was not available until 20th January 2020 and the Petitioner was able to obtain a copy of the said judgment '*with the greatest difficulty*', and (b) due to the appeal brief consisting of over 1200 pages. It must however be noted that the Petitioner has paid the money to obtain a certified copy of the brief only on 17th January 2020, which means that the request for a copy of the judgment was made only on that date and which thereby gives lie to the position of the Petitioner that it obtained a copy of the said judgment '*with the greatest difficulty*'. It must however be noted that even if it was so, neither the non-availability of the judgment nor the fact that the appeal brief consisted over 1200 pages would have served as an excuse for the delay, as the time periods allowed for the filing of appeals is mandatory and any breach would render the application to be dismissed *in limine*. Be that as it may, the Petitioner was not without a remedy for it could very well have pleaded its difficulty, if such a difficulty existed at all, and sought permission of Court to tender such documents on a later date, which the Petitioner failed to do.

The second submission of the learned Counsel for the Petitioner was that even though Rule 7 is mandatory, the said Rule has no application to this petition and that the Rules of this Court does not stipulate a mandatory time period to file an appeal against the judgment of a High Court arising from an order of a Labour Tribunal. It was therefore his

position that the preliminary objection that the petition of appeal should have been filed within six weeks is misconceived in law.

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 Rules, 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, provides that, "*Every such application shall be made within six weeks of the order, judgment, decree or sentence of the Court of Appeal in respect of which special leave to appeal is sought.*" 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 petition of appeal against the judgment of 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*."

The above judgment has been cited with approval in **D.H. Waruna Priyanka v Commercial Bank of Ceylon PLC** [SC Spl L/A No. 86/2020; SC minutes of 12th December 2022].

It was therefore the position of the learned Counsel for the Respondents that any application seeking leave to appeal from an order of the Labour Tribunal 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 13th December 2019, this application ought to have been filed in the Registry of this Court on or before 24th January 2020. As I have noted earlier, this application had been filed only on 5th February 2020, which, *on the face of it*, is clearly outside the six-week time period stipulated in Rule 7 of the Supreme Court Rules.

In the above circumstances, I uphold the preliminary objection raised by the learned Counsel for the Respondents. Leave to appeal is accordingly refused and this application is dismissed. 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

E.A.G.R. Amarasekara, J

I agree

JUDGE OF THE SUPREME COURT

In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

In the matter of an application for Special Leave to Appeal under Article 128 (2) of the Constitution of Sri Lanka, against the Order of the Court of Appeal dated 16th August 2022.

SC/SPL/L A NO:246/2022
CA/WRT/299/2022

Ms Kayleigh Frazer
972/4, Kekunagahawatta Road,
Akuregoda
Battaramulla

Petitioner

1. Controller General of Immigration
   Department of Immigration and Emigration
   Suhurupaya, Sri Subhuthipura,
   Battaramulla

2. The Attorney General
   The Attorney General's Office

Respondents

And Now Between:

Ms Kayleigh Frazer
972/4, Kekunagahawatta Road,
Akuregoda
Battaramulla

Petitioner – Petitioner

1. Controller General of Immigration
   Department of Immigration and Emigration
   Suhurupaya, Sri Subhuthipura,
   Battaramulla

2. The Attorney General
   The Attorney General's Office
   Colombo 12

Respondent-Respondents

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

A. L. Shiran Gooneratne, J.

Mahinda Samayawardhena, J.

Counsels**:** Nagananda Kodituwakku for the Petitioner- Petitioner

Kanishka de Silva Balapatbendi, DSG for the Respondent- Respondents

Argued on: 07.06.2023

Decided on: 16.02.2024

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

The Petitioner-Petitioner (hereinafter referred to as 'Petitioner') is a British citizen residing in Sri Lanka. She filed the Writ Application No.CA/WRIT/299/2022 in the Court of Appeal against the Controller General of Immigration and Emigration (1st Respondent) and the Attorney-General (2nd Respondent). The Petitioner inter alia sought an interim relief staying the operation of alleged deportation order marked X4 with the said application along with the final reliefs of Writ of Certiorari quashing the said alleged decision of deportation marked X4 and a Writ of Mandamus compelling the 1st Respondent to restore the Petitioner's resident visa status. In fact, the said document marked X4 appears to be a letter informing the cancellation of her visa while advising her to leave the country on or before 15th August 2022- vide X4 annexed to the Petition. The

learned Judge of the Court of Appeal refused to grant the interim relief and issuing notices of this Writ application on the Respondents as prayed for, and dismissed the application for Writ of Certiorari and Mandamus by order dated 16.08.2022. As per the said order marked as X12 with the Petition, the learned Judge of the Court of Appeal has observed as follows;

- That no reasons had been mentioned or averred by the Petitioner to establish her rights to continue to stay in Sri Lanka.
- That even though, the Petitioner had filed a motion annexing a document which refers to an alleged offence of rape, her Counsel categorically indicated that the Petitioner had given instructions to Sri Lanka Police not to proceed with the complaint made by her in that regard.
- That the Petitioner had not alleged any grounds such as legitimate expectation, necessity to take medical treatment or legal requirement of giving evidence or appearing in a pending case before a Court of law.

Even though, the learned Judge of the Court of Appeal has referred to the absolute discretion of the prescribed authority mentioned in the relevant regulations and some case laws that refer to the sole discretion of the Controller, in refusing the application has mentioned as follows;

"*Anyhow, I am of the view that in the absence of any reasons establishing the rights of the Petitioner to continue to stay in the country, I should not use my discretion to review the decision of the Controller of Department of Immigration and Emigration. Further, it is observed that the Petitioner has failed to submit sufficient grounds to invoke the writ jurisdiction of this Court*."

The aforementioned observations by the Judge of the Court of Appeal and afore quoted part of the said judgment indicate that the Court of Appeal did not refuse the application as it accepted the fact that the 1st Respondent Controller had an unquestionable absolute discretion in this matter as alleged by the Petitioner, but due to the fact that no sufficient reasons were placed before the said Court by the Petitioner to show that her substantial rights were affected.

However, as mentioned before, the Petitioner had misleadingly stated in the application to the Court of Appeal that there was a deportation order and has also misleadingly stated the same in the Petition to this Court- vide paragraph 3(m) of the Petition tendered to this Court. This cannot be considered as a misconception of the letter marked P4 by the Petitioner as she has filed both

these applications with legal advice as appeared from the said Petitions itself. It is true, that if she does not act as per the advice in P4, the next step could have been towards an issuance of deportation order. However, when there was no deportation order but a cancellation of visa and an advice to leave the country within the given time, there was no threat of immediate arrest and deportation until she acts contrary to the advice. Thus, when she says that there is a deportation order referring to X4, it gives a different misleading character to the application.

However, being dissatisfied by the decision of the Court of Appeal dated 16.08.2022, the Petitioner has preferred this leave to appeal application to this Court inter alia to set aside the said decision and for interim relief staying the directive of the 1st Respondent (ref; X4) until the final determination of this appeal. When this matter was taken up to support for granting of leave on 07.06.2023, the learned DSG appearing for the Respondents raised preliminary objections based on the following grounds;

1. This Court has no jurisdiction to hear and determine this application as the Petitioner has exhausted her right of appeal.
2. The Petitioner has suppressed material relevant to the application before this Court and thereby attempted to mislead Court.
3. This application is vexatious and is unnecessary encumbrance of Court amounting to an abuse of due process by the Petitioner.
4. The application of the Petitioner is defective due to the lack of a proper affidavit.

After making oral submissions on the above preliminary objections, parties were allowed to file synopsis of their submissions. Thus, the learned DSG has tendered her synopsis of submissions along with the motion dated 15.06.2023 and the Counsel for the Petitioner has filed his written submissions with a motion dated 21.06.2023.

1. Whether this Court has no jurisdiction to hear and determine this application as the Petitioner has exhausted her right of appeal;

In this regard, the Respondents have brought this Court's attention to the Leave to Appeal Application No.SC SPL LA 218/2022 filed by the same Petitioner against the Respondents and its prayers which are identical to the prayers in the present Leave to Appeal Application No. SC SPL LA 246/2022. However, on 02.09.2022, this Court has dismissed the said application filed in SC

SPL LA 218/2022 based on the reason that when it was taken up for support, it was found that the application was not in compliance with the Supreme Court Rules; Particularly a certified copy of the impugned Judgment and a certified copy of Court of Appeal brief had not been tendered with the Petition- (see order marked F dated 02.09.2022 made in said SC SPL LA 218/2022 and Paragraphs 9 and 10 of the Petitioner's own petition referring to the said order). The Respondents contend that the right to file a Leave to Appeal application in terms of Article 128(2) of the Constitution has been duly exercised and due to its dismissal by this Court, the Petitioner's right to appeal has been exhausted. The Petitioner has not shown that when her previous application was dismissed, this Court reserved her right to file a fresh application and the said order does not indicate such right was reserved.

Article 118(c) of the Constitution provides 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 final appellate jurisdiction*." Further, Article 127 (1) of the Constitution states, "*The Supreme Court shall, subject to the Constitution, be the final Court of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution and the judgments and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.*" Thus, reading of Article 118 (c) and 127 (1) clearly indicate that the decision made by this Court in a final appeal is final and conclusive.

As per Article 128(1) and (2), an appeal is available against a decision of the Court of Appeal either with the leave granted by the Court of Appeal or when special leave is granted by the Supreme Court. If such special leave is not granted by this Court, there is no provision that makes a party empowered to file another or several applications praying for special leave over the same decision of the Court of Appeal against the refusal made by this Court even though a Special Leave to Appeal application can be filed when leave is refused by the Court of Appeal [see S C Rule 20(3) and Article 128(2)]. A right of appeal must be statutorily given. If that right is given with leave that is to be obtained first from this Court, and if such leave is refused, the right of appeal extinguishes with the said leave being refused. If such a right is considered as available to a party to file Special Leave to Appeal one after another even after the leave being refused by this Court,

there will not be any finality to proceedings and it may also pave the way for multiplicity of actions and conflicting decisions. To establish the finality of final appeal and that a party should not be given an opportunity to have *a second bite of the same cherry*, the Respondents have cited the cases; ***Panadura Acharige Don Thomas Edward Perera v Don Jayaweera Perera and Four others*** **(CA/ RI/18/2018, CA Minutes of 09.11.2018;** ***Welisarage Laksman Nishantha Fernando v The Hon. Attorney General and others*** **(C. A. /MC. /Re Application No.04/2017 CA Minutes of 08.06.2018; and** ***Ensen Trading & Industry (Pvt.) Limited v Minister of Finance and Mass Media and others*** **(CA Writ Application No. 41/2019 of 01.04.2019).** Respondents additionally has pointed out that in the aforesaid case of ***Panadura Acharige Don Thomas Edward Perera,*** the application had failed at the leave to appeal stage and the merits of the said case were not canvassed but the principle of finality applied. In a recent case of ***Electroteks Network Services Private Limited v Dialog Broadband Network (Private) Limited SC/MISC/03/2019*,** bench of five Judges of this Court reaffirmed the finality of the Supreme Court's decision and the absence of supervisory jurisdiction over its own judgments.

It must be noted that while the order refusing leave in the previous application is still valid, without making any application in that case, the Petitioner has resorted to file a fresh application for leave by filing this application. In other words, the Petitioner is trying to get leave through another application after the first one was refused. If leave is granted in this application, it will in fact set aside or alter or vary the effect of the order of the previous application. Effect of this application is very much similar to an appeal or revision against the previous order made by this Court when there is no right to file an appeal or revision against an order made by this Court.

It is true that in ***Jeyaraj Fernandopulle v Premachandra De Silva and Others (1996) 1 Sri L R 70***, this Court while affirming that, as a general rule, no Court has the power to rehear, review, alter or vary any judgment or order after it has been entered, identified certain exceptions where a Court can revisit an order already made using its inherent powers. The exceptions, though not exhaustive, identified in the said case are set out below;

1. Orders made *per incuriam* (Present application is not made on this basis stating that decision in SC SPL LA 218/2022 was made *per incuriam*)
2. Presence of clerical mistake or error from an accidental slip or omission- (Also see ***Marambe Kumarihamy v Perera (1919) VI C W R 325, Padma Fernando v T. S.***

Fernando (1956) 58 N L R 262. However, the present application is not based on an accidental slip or omission occurred in SC SPL LA 218/2022).

3. Where a need arises to vary or clarify the order to carry out its own meaning and where the language used is doubtful to make it plain. (Also see ***Lawree v Lees (1881) 7 App.Cas 19,34, Re Swire (1895) 30 CH. D 239, Paul E De Costa & Sons v S. Gunaratne 71 N L R 214, Hatton v Harris (1892) A C 547***. However, present application is not made for such purposes in relation to the order in SC SPL LA 218/2022.)
4. Where a party has been wrongly named or described or where the judgment is a nullity owing to the fact that it was delivered against a person who is dead or a non-existing company- (However, present application does not relate to such circumstances occurred in the previous Leave to Appeal application.)
5. Where the order or judgment has been delivered in default or *ex parte*. (Present application is not made on such grounds stating that SC SPL LA 218/2022 was made in default or *ex parte*.)
6. Where there is a serious irregularity in procedure that makes the judgment a nullity- for e.g., not serving summons or not following a mandatory provision of law. (Present application is not based on such grounds relating to the previous refusal to grant leave but a fresh Leave to Appeal application against the Court of Appeal Judgment.)
7. To repair an injury caused by an act of Court done without jurisdiction (by an invalid order). - for e.g., executing a decree to evict a party without a decree for possession. (Present application is not similar to the said situation. This Court had the Jurisdiction when it decided the Leave to Appeal Application No. SC SPL LA 218/2022).
8. Dismissal of an FR application on a misunderstanding of facts placed by the opposite party that the petitioner has been or due to be released from detention. (In this regard said ***Jeyaraj Fernandopulle*** case has referred to ***Palitha v O. I. C Police Station, Polonnaruwa and Others (1993) 1 Sri L R 161.*** Present application is a fresh Leave to Appeal application against the Court of Appeal judgment and not to get the previous refusal of leave rectified based on facts similar to above.)
9. An order made on wrong facts given to the prejudice of the Petitioner (In this regard ***Jeyaraj Fernandopulle*** case has referred to ***Wijeyesinghe et al v Uluwita (1933) 34 N***

L R 362. Present application differs from this as this is a fresh application of Leave against the Court of Appeal Judgment and not an application to rectify the order made on the previous application.)

10. An action to rescind a judgment which has been obtained by fraud. –(See **Halsbury vol 26, paragraph 560, page 285**. In the present application, there is no allegation that the Court was deceived by fraud when this Court refused leave in Leave to Appeal Application No. SC SPL LA 218/2022.)

11. An action to rescind a judgment on the discovery of new evidence which were not available before. (In this regard, ***Jeyaraj Fernandopulle*** case has referred to ***Halsbury vol 26 paragraph 561, Loku Banda v Assen (1897) 2 N L R 311.*** Present application does not fall into this category.)

The present application does not fall within such exceptions as identified by ***Jeyaraj Fernandopulle*** case and it is not so pleaded in the present application other than tendering it as a fresh application for leave against the Court of Appeal judgment. The said exceptions identified in the ***Jeyaraj Fernandopulle*** case indicate that the scope to revisit or reconsider an order already made, is limited for instances such as *per incuriam* orders and obvious errors where inherent powers may be used to rectify the situation. On the other hand, as expressed in the said ***Jeyaraj Fernandopulle*** case, inherent powers of a Court are adjuncts to the existing jurisdiction. Thus, inherent powers may not be used to entertain a fresh action to revise or revisit an order made previously in a different application. New action may arise if there is a new cause of action. If there is any error, mistake in an order or judgment where inherent powers may be used to rectify it, it has to be brought to the notice of the Court in the same application or action. The Petitioner has not moved in the same application No. SC SPL LA/218/2022 stating such grounds to indicate that inherent powers of Court should be used to rectify the order made in SC SPL LA 218 /2022. This application is a peculiar application moving to grant special leave while there is an existing valid refusal to grant special leave by this Court in SC SPL LA/218/2022, over the same decision of the Court of Appeal in CA/WRIT/299/2022. Hence, the Respondents' preliminary objection challenging the jurisdiction of this Court with regard to the second Leave to Appeal application is well supported by the facts and circumstances relating to this application.

It is pertinent to note the stance taken by the Petitioner in relation to the application No.SC SPL LA 218/2022. As per paragraphs 9 and 10 of the Petition, it has been dismissed since the copy filed in Court has not been duly certified by the Registrar of the Court of Appeal. Apparently, what those paragraphs indicate is that there was no fault on the part of the Petitioner but the copy tendered was without the certification by the Registrar of Court of Appeal as to its authenticity. However, now both parties have tendered a copy of the said order in SC SPL LA 218/ 2022 with their submissions- vide documents marked K1 and F. The said order is quoted below.

"*This application was taken up for support and Mr. Nagananda Kodituwakku commenced supporting the application. However, this application is not in conformity with the Rules of the Supreme Court particularly a certified copy of the judgment which is been impugned in these proceedings and a certified copy of Court of Appeal briefs has not been filed along with the Petition. In view of the above, this application is dismissed for noncompliance of the Supreme Court Rules*."

Thus, it is clear that when the previous application was taken up for support for leave, there was no acceptable copy of the Judgment and proceedings of the Court below produced before this Court by the Petitioner. When a matter is fixed for support on an application of a Petitioner, it is the duty of such Petitioner and his or her lawyers to be ready for support on the given date. If they are not ready for some reasons, they must take steps prior to the date given for support to take it out from the support list, so that the Court could allocate that time for another litigant. The Petitioner in her written submissions attempts to say that she reserved her right to file certified copy of the record of the Court of Appeal as soon as the same was made available to her. To prove such reservation of right, Petition of the said application or any motion filed in that application in that regard or any journal entry proving such reservation of right has not been tendered by the Petitioner. On the other hand, even such reservation was prayed or granted, those documents which were necessary to support the leave application should have been obtained prior to the support date and, for some reasons beyond the control of the Petitioner, if the Petitioner failed to obtain necessary documents from the Court below, the Petitioner or her lawyer should have filed a motion and informed the Court to take it out of the support list enabling the Court to allocate that time for another case. The order quoted above clearly indicates that the Counsel for the Petitioner commenced supporting the application and then the Court found that no acceptable documents

have been tendered to support the application. Thus, it appears that the dismissal of the previous application was due to the fault of the Petitioner and her Lawyer to submit the necessary documents for support of her application.

On the other hand, if the order made was done by mistake when the certified or uncertified photo copy was available in the brief as prescribed by the Rule 2 of the Supreme Court Rules (1990), that has to be moved in the same case by filing a motion and bringing the error or mistake of the Court to the attention of the Court, for the Court to consider whether the order was made *per incuriam* or by obvious mistake. (However, the Petition or the attached documents of the previous application for leave have not been tendered before this Court to see whether there was a possible mistake.) If the order was given by mistake or by an error it will not give rise to another opportunity to file a fresh application when the said order still exists as a valid order.

However, what was discussed above clearly shows that the Petitioner has no right to file a second Leave to Appeal application and to have a second bite of the same cherry and that she is guilty of misrepresentation as there is no deportation order as such but a cancellation of visa and advise to leave the Country before a given date. Further, she has not revealed sufficient material in the Petition to show that the refusal was not due to her or her lawyer's fault.

As elaborated above, this Court has no jurisdiction to entertain the 2nd appeal on the same matter. Hence, this Court has to uphold the first ground of objection referred to above and it is sufficient to dismiss this application.

Since what is elaborated above is sufficient to dismiss this application, this Court does not intend to go deep into the other grounds of objections. However, it is worthwhile to make certain observations in that regard too.

2. **Whether the Petitioner has suppressed material relevant to the application before this Court and thereby attempted to mislead Court;**

The learned Deputy Solicitor General for Respondents with regard to the aforementioned 2nd ground of objection has brought this Court's attention to the matters mentioned below;

- That as per Rule 3 of the Supreme Court Rules (1990), a Special Leave to Appeal application shall contain a plain and concise statement of **all such facts and matters**

necessary to enable the Supreme Court to determine whether the Special Leave to Appeal should be granted (emphasis added.).

- That when a litigant makes an application to this court seeking relief, he enters into a contractual obligation with the Court which requires him to disclose all material facts correctly and frankly. Thus, a party seeking relief must maintain *uberrima fide* towards the Court - (Referring to ***Jayasinghe v The National Institute of Fisheries and Nautical Engineering (Nifne) and others (2002) 1 Sri L R 277 at 286.***)
- That in this application the Petitioner seeks for a Leave to Appeal in respect of a decision made in a Writ application and Writ is a discretionary remedy which requires the highest level of disclosure and frankness. Further, if there is suppression of material facts and breach of *uberrima fide* the Court needs not go into the merits of the case. In supporting these contentions, ***Atula Ratnayake v G.R. Jayasinghe 78 NLR 35*** at pg 39-40 and ***Jayasinghe v The National Institute of Fisheries and Nautical Engineering (Nifne) and Others (2002) 1 Sri LR 277, W.S. Alphonso Appuhamy L. Hettiarachchige and another 77 NLR 131; Hettiarachige Jayasooriya v N. M. Gunawathie C. A.(Writ) Application 63/2015 C A Minutes of 26.09.2019; Dahanayake and Others v Sri Lanka Insurance Corporation Ltd. and others [2005] 1 Sri LR 67; Fonseka v Lt. General Jagath Jayasuriya and Five others [2011] 2 Sri LR 372; and Lt. Commander Ruwan Pathirana v Commodore Dharmasiriwardene & others [2007] 1 Sri LR 24*** *have* been cited by the learned DSG.

In the case of ***Borella Private Hospital v Bandaranayake and Two Others [2005] (1) Appellate Law Recorder 27*****,** K. Sripavan J, noted that, the Writs of Certiorari and Mandamus being discretionary remedies will not be granted where the party applying lacks *uberrima fides* and fails to disclose material facts to Court.

While referring to the aforesaid legal position with regard to suppression of material facts, the learned DSG has taken up the position that subsequent to the CA WRIT 299/2022, the Petitioner has invoked the Jurisdiction of this Court on multiple occasions through applications such as SC SPL LA 218/2022, SC SPL LA 246/2022(Instant Application), SC FR 299/2022 and SC FR 399/2022 and however, the Petitioner failed to disclose in the present application that the identical issue had been canvassed by her in SC FR 299/2022 which was pending at the time the present

application was filed. The Petitioner now takes up the position that SC FR 299/2022 had been filed without her consent or authorization. Even if it is assumed that the Petitioner's version that SC FR 299/2022 was filed without her consent or authorization, she could have revealed that such an action has been filed in her name but without her consent or authorization. This Court does not intend to make any comment on whether her said version can be accepted at this juncture since there seems to be certain complaints made against the relevant lawyers by the Petitioner and such allegations would have to be considered and decided if such allegations are allowed to be proceeded with- vide K3, K4, K5, K6. However, it appears that the lawyer for the Petitioner, on 30.09.2022 has asked time to obtain instruction with regard to the FR application and thereafter has filed a motion dated 13.10.2022 along with an affidavit dated 04.10.2022 purportedly sworn by the Petitioner- vide documents marked K8. In that motion or in the said affidavit, the Petitioner or her lawyer had not said that institution of SC FR 299/2022 was not an act of the Petitioner. In fact, the said motion by her lawyer admits that said FR action was filed and, in the affidavit, it is stated why the said FR application was dismissed without resorting to say that filing of it was not her act. Whatever it is, tendering of that motion dated 13.10.2022, was an act of her own lawyer in this case.

On the other hand, if the Petitioner's present stance is correct, it is questionable without giving instructions by the Petitioner about the facts, how the lawyers in SC FR 299/2022 drafted the petition in that fundamental right case. As per the written submissions tendered, the Petitioner now states that she has never met and gave instructions to the lawyers involved in filing of SC FR 299/2022. Anyhow, the same lawyer, namely Mr. Nagananda Kodituwakku, who tendered the said motion dated 13.10.2022 along with the affidavit dated 04.10.2022 now tries to submit that said affidavit is a forged affidavit- vide penultimate paragraph of page 4 of his written submission. In that regard, he has now tendered an unsigned and unsworn "oral statement" and a soft copy of an "oral submission" purportedly made by the Petitioner- marked as K9 and K10 with the written submission. It appears that they were not tendered with the Petition for other parties to respond.

After observing the change of stance, when queried by the Court, Mr. Nagananda Kodituwakku, while making his oral submissions stated that SC FR No.299/2022 was filed without the consent and knowledge of the Petitioner and she is not in a position to sign proxy. Therefore, he filed this application as per the Rules as an Attorney-at-law and he takes the full responsibility of what is

averred and presented before this Court- vide Journal Entry dated 07.06.2023. Therefore, Mr. Nagananda Kodituwakku exceeding the limits of an officer of Court presenting facts on the instruction of his client, took full responsibility of what is averred and presented before this Court. One cannot take full responsibility unless he has personal knowledge of what he has presented. In fact, this Leave to Appeal application has been filed by the Petitioner through her Lawyer, Mr. Nagananda Kodituwakku after giving a proxy to him and the said proxy is filed of record- vide Journal Entry dated 15.09.2022 and the proxy filed along with the Petition. The backdrop explained above raises a serious concern about the conduct of Mr. Nagananda Kodituwakku as an Attorney-at-Law. Once an Attorney-at-Law marks his appearance, he becomes an officer of Court to represent the case of his client. This Court is always willing to give due regard to the noble profession and allow them to present the case for their client but at the same time a Court cannot allow them to take the Court for a ride. If the affidavit dated 04.10.2022 tendered with the motion dated 13.10.2022 is a forged document as the Petitioner and her lawyer Mr. Naganada Kodituwakku now claim, it is not incorrect to presume that it had been tendered without the instruction of the Petitioner. He being the lawyer of the Petitioner, cannot tender documents as documents sworn by the Petitioner on behalf of the Petitioner without instructions from the Petitioner in that regard. If it is a forged document, it must be within the knowledge of Mr. Naganada Kodituwakku as it is he who tendered it to Court as an affidavit of the Petitioner. As said before he has already undertaken full responsibility with regard to what is presented to Court, and on the other hand, as the Registered Attorney, he has to take the responsibility of what he has tendered to Court. It appears either the Petitioner along with her lawyer, Mr. Nagananda Kodituwakku, have been lying and misleading Court or Mr. Nagananda Kodituwakku has acted without instruction of his client and has tendered an affidavit as one made by his client which, now, as per him and his client ,is a forged document. This situation warrants to initiate disciplinary proceedings against the lawyer, Mr. Nagananda Kodituwakku.

It must be also noted that K9 (appears to be a transcript of K10), has been tendered by Mr. Nagananda Kodituwakku, lawyer for the Petitioner, to support the stance that SC FR 299/2022 was filed without the Petitioner's consent and approval. However, this stance clearly contradicts the first two paragraphs of the motion dated 13.10.2022 filed in this application by Mr. Nagananda Kodituwakku as the lawyer of the Petitioner as those paragraphs clearly admit the filing of the said SC FR 299/2022. The affidavit dated 04.10.2022 tendered along with the said motion, purportedly

sworn by the Petitioner, but which now they claimed as a forged affidavit, also admits the filing of the said FR application and attempts to give reasons relating to the dismissal of the said FR application without stating that it was filed without her consent and approval. Mr. Nagananda Kodituwakku has not stated that the said motion dated 13.10.2022 is a fake motion. In fact, what the Petitioner and her Lawyer, Mr. Nagananda Kodituwakku now allege is that SC FR 299/2022 was filed by two other lawyers without instruction of the Petitioner- vide written submissions referring to K3 to K6. However, it must be noted that the said motion dated 13.10.2022 and the affidavit dated 04.10.2022 have been filed after obtaining time to get instructions from the Petitioner- vide journal entry dated 30.09.2022.

Above explained situation demonstrates that there is a high possibility that the Petitioner and/or her lawyer have misled this Court which is the basis of the second ground of objection.

However, the facts revealed before this Court, makes it impossible to keep a blind eye on certain allegations and acts that, if proved, indicate attempts to misuse the authority of the apex Court and to take this Court for a ride. Hence, the following directions are made in that regard;

1. The Registrar of this Court, if any steps have not yet been taken on the complaints marked K4 and K6 along with K3 and K5, is directed to bring those matters to the attention of His Lordship the Chief Justice and take steps accordingly. If any inquiry commences or already have commenced and if it is found that the allegations are false, take necessary steps to proceed disciplinary or contempt proceedings against the Petitioner and her lawyer in this application as their submissions to this Court amount to false and misleading representation before this Court. Had the Petitioner left the Country by the time such finding is made, the Lawyer, Mr. Naganada Kodituwakku has taken full responsibility on what has been presented to this Court.

2. With regard to the motion dated 13.10.2022 filed by Mr. Nagananda Kodituwakku and the affidavit dated 04.10.2022 tendered by him as one purportedly sworn by the Petitioner, now it is clear that they were either presented to Court without the instruction of his client, the Petitioner or the Petitioner and Mr. Kodituwakku in collusion tried to mislead the Court by tendering an affidavit now they called as a fraudulent one. If it is a bogus affidavit, if it is not an act of the Petitioner, Mr.

Nagananda Kodituwakku must take the responsibility as the Registered Attorney or the Lawyer for the Petitioner for tendering it to Court as one sworn by the Petitioner. A responsible lawyer cannot be allowed to say that what he tendered to Court as an affidavit of his client is a forged one without proper explanation. It is his duty to get instructions and get the authenticity of the affidavit verified by his client before it was presented to Court. Therefore, Registrar of this Court is directed to bring this to the notice of his Lordship the Chief Justice and to take appropriate steps accordingly.

3. Honourable Attorney General is directed to look into the above matters and advice and assist the Registrar with regard to the possible measures that can be taken in relation to the above matters and also to see whether any criminality is involved in preparing and tendering forged affidavit to the apex Court and take necessary steps accordingly.

Other than what is observed above, during the discussion relating to the 1st ground of objection, I have already referred to certain instances of misleading statements or misrepresentation that may be attributed to the Petitioner.

3. Whether this application is vexatious and is an unnecessary encumbrance of Court amounting to an abuse of due process by the Petitioner

As explained above this is the second Leave to Appeal application against the decision of the CA Writ 299/2022 by the Petitioner, where she has exhausted her right to file Leave to Appeal application with the rejection of the first application. As stated above this Court has no jurisdiction to entertain such second Leave to Appeal application against the same decision. It is already explained above that the rejection of the first Leave to Appeal was based on the non-availability of the necessary document on the date given for support and the fault might have been with the Petitioner and her Lawyer for not having the necessary documents ready before the date for support. If she exercised due diligence and she could not get the documents from the Court of Appeal before the date given for support, she could have filed a motion beforehand and take the matter out of the support list so that the Court could allocate that time for another litigant. No material has been placed before this Court to show that she exercised due diligence and asked for certified copies with sufficient time before the said date given for support of the first Leave to Appeal application. A person who was asked to leave the country should have placed sufficient

material to show that he/she exercised due diligence in obtaining the documents and non-availability of document was beyond his/her control. Otherwise, one could use this type of delaying tactics to get the case postponed and delay the leaving of the country.

This second Leave to Appeal application without a right for a second Leave to Appeal naturally had wasted the valuable time of the Court and the Respondents that can be allocated for other matters. Further, this type of action also causes annoyance to the Respondents. Therefore, this Court can fully agree with that this second Leave to Appeal application is vexatious and is an unnecessary encumbrance of Court amounting to an abuse of due process by the Petitioner. In this regard, the learned DSG has cited ***Ensen Trading & Industry (Pvt.) Limited v Minister of Finance and Mass Media and Others (CA (Writ) Application No. 41/2019, 01.04.2019)*** where it was held that one circumstance in which abuse of process applied is where the litigation before Court is found to be in essence an attempt to re-litigate a claim which the Court has already determined [Also see **Spring Gardens Ltd. V Walte (1990) 3 WLR 347]**. In the instant case, this Court has once decided to refuse leave and the Petitioner has no right to re-agitate it.

4. **Whether the application of the Petitioner is defective due to the lack of a proper affidavit**

The Respondents submitted that the Petitioner in a hand written note filed along with a motion dated 23.01.2023 in SC FR 399/22 has claimed as follows:

> *"This affidavit SC SPL LA No. 246/2022 document I am seeing for the first time and I note that it contains a signature which is clearly not my own. I completely reject this signature that has been put on this document and also the content of the affidavit."- vide K11 or B and X18 or K12*

It should be noted that the said note does not mention the date of the affidavit filed in the instant case No.SC SPL LA No.246//2022 referred to therein and there are two affidavits tendered dated 06.09.2022 (one accompanied by the Original Petition) and another one dated 04.10.2022 (one the Petitioner and her lawyer now states as a forged affidavit). As per K11 or B (motion filed in the SC FR 399/2022 along with the said note), it appears that the said note refers to the affidavit dated 04.10.2022. Therefore, this Court at this juncture need not hold that the Affidavit filed along with the original petition in this application is not a proper affidavit. However, it is observed that both

affidavits have been affirmed before the same Justice of Peace and one, now they state as a forged one was tendered to the Court by the lawyer of the Petitioner as one made by the Petitioner after obtaining time to get instructions from the Petitioner with regard to the Fundamental Rights Application -vide Journal Entry dated 30.09.2022. In that backdrop, reliability of the present application including the contents of the affidavit accompanying the Petition as well as with regard to the maker of it itself is questionable. However, as mentioned before the first ground of objection is sufficient to dismiss this application. Thus, it is not necessary to make a finding with regard to the authenticity of the affidavit filed along with the original petition at this juncture. As per the reasons discussed above, the order refusing Leave to Appeal in SC/SPLA/ 218/ 2022 is final with regard to the leave being granted. Hence, we dismiss this Leave to Appeal application subject to costs fixed at Rs. 250,000/=.

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Judge of the Supreme Court

A. L. Shiran Gooneratne, J

I agree.

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Judge of the Supreme Court

Mahinda Samayawardhena, J.

I agree.

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Judge of the Supreme Court