SRI LANKA SUPREME COURT **Judgement Delivered (2012)**

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

S.C. Reference No.04/2011
NCP/HCCA/ARP Writ No.04/2008

Rajapakshalage Prema Jayantha,
Yaya 15, Rajanganaya,
Pahala Maragahawewa.

Petitioner

Vs.

Divisional Secretary,
Divisional Secretariat,
Rajanganaya.

Respondent

BEFORE : Dr. Shirani A. Bandaranayake, CJ.
P. A. Ratnayake, PC, J. &
S. Hettige, PC, J.

COUNSEL : Mahinda Ralapanawa with Chandima Gamage, Ms. C. Herath and Nilupul Kumari Jayasundara for the Petitioner.

Y.J.W. Wijayathilaka PC, ASG, with Bimba Thilakarathne, PC, ASG, A. Navaratne, DSG, Sobhitha Rajakaruna, SSC, Yuresha de Silva, SC and Bhagya Herath, SC for the Attorney General.

ARGUED ON : 05.10.2011.

WRITTEN SUBMISSIONS
TENDERED ON : Petitioner : 04.11.2011.

Respondent : 01.11.2011.

DECIDED ON : 16.01.2012.

Dr. Shirani A. Bandaranayake, CJ.

Learned Judge of the Civil Appellate High Court of the North Central Province sitting at Anuradhapura acting under Article 125 of the Constitution, sought a clarification on the jurisdiction of the Civil Appellate High Court (hereinafter referred to as the High Court) in terms of Article 154 P (4) (b) and whether the said High Court is competent to grant relief prayed for in the petition to issue a writ of certiorari against the Divisional Secretary.

The petitioner before the High Court is a permit holder, which had been issued in terms of Section 19(2) of the Land Development Ordinance (as amended). The petitioner had stated before the High Court that the Divisional Secretary, who is the respondent in that application, had taken steps to alter the boundaries of the land allocated under the permit. The petitioner therefore claimed that the conduct of the respondent is illegal and is a violation of the Rules of Natural

Justice and therefore the decision of the Divisional Secretary to alter the boundaries of the said land should be quashed by way of a writ of certiorari.

The respondent before the High Court had taken the objection that the subject matter of the application of the petitioner is a State land and therefore the High Court does not have the jurisdiction to hear and determine that application.

Learned Judge of the High Court after hearing the submissions of both learned Counsel had decided to refer the said matter to the Supreme Court in terms of Article 125 of the Constitution in order to obtain an interpretation of Article 154 P of the Constitution.

When this matter was taken for consideration by the Supreme Court, learned Additional Solicitor General for the respondent, took up a preliminary objection stating that this is not a matter that could be referred to the Supreme Court, as it does not come within the ambit of Article 125 of the Constitution.

It was accordingly decided first to consider the said preliminary objection and submissions made by both parties on the preliminary objection were so heard.

Article 125 of the Constitution deals with the Constitutional jurisdiction in the interpretation of the Constitution and Article 125(1) reads as follows:

> "The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution, and accordingly, whenever any such question arises in the course of any proceedings in any other Court or tribunal or other institution empowered by law to administer justice or to exercise judicial or quasi –

> judicial functions, such question shall forthwith be referred to the Supreme Court for determination. The Supreme Court may direct that further proceedings be stayed pending the determination of such question."

Article 125 of the Constitution therefore clearly stipulates that whenever there arises a question in the course of any proceeding relating to the interpretation of the Constitution such question shall forthwith be referred to the Supreme Court for interpretation.

For a Court or a tribunal or any other institution empowered by law to administer justice, to refer such a question to the Supreme Court in terms of Article 125 of the Constitution, it is necessary that there should be a question relating to the interpretation of the Constitution. A mere matter dealing with a Constitutional provision would not come within the category referred to in Article 125 of the Constitution and only a question relating to the interpretation of the Constitution would come within the ambit of Article 125 of the Constitution.

This position was considered in **Bilimoria v Minister of Lands and Land Development and Mahaweli Development and 2 Others** ((1978-79-80) 1 Sri LR 10) where Samarakoon, CJ, had clearly stated that, what is contemplated in Article 125 of the Constitution is any question relating to the interpretation of the Constitution arising in the course of legal proceedings. It was clearly stated that,

> "Article 125 of the Constitution requires any dispute on the interpretation of the Constitution to be referred to this Court. What is contemplated in Article 125 is "any question relating to the interpretation of the Constitution" arising in the course of legal

> proceedings. This presupposes that in the determination of a real issue or controversy between the parties, in any adversary proceedings between them, there must arise the need for an interpretation of the provisions of the Constitution. The mere reliance on a Constitutional provision by a party need not necessarily involve the question of the interpretation of the Constitution. There must be a dispute on interpretation between contending parties."

It is therefore evident that, although in terms of Article 125 of the Constitution the Supreme Court has the sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution, if such a reference is made only on the basis of a mere question of a Constitutional provision, where the interpretation of the Constitution is not in dispute such a question cannot come within the ambit of Article 125 of the Constitution. It is also to be noted that the reliance by one party on a Constitutional provision would not fall into the category of interpretation of the Constitution in terms of the said Article 125 of the Constitution.

The question before the High Court was in relation to a State land where a permit had been issued in terms of the Land Development Ordinance (as amended).

High Courts were established for each province, along with the introduction of the 13th Amendment to the Constitution in terms of Article 154 P of the Constitution. The powers and functions of the High Courts are stipulated in Articles 154 P (3) and 154 P (4). The latter Article states that,

"Every such High Court shall have jurisdiction to issue, according to law –

a) Orders in the nature of *habeas corpus*, in respect of persons illegally detained within the Province, and

b) Order in the nature of writs of *certiorari,* prohibition, *procedendo, mandamus* and *quo warranto* against any person exercising, within the Province, any power under –
   i any law; or
   ii any Statutes made by the Provincial Council established for that Province.

in respect of any matter set out in the Provincial Council List."

The Provincial Council List, which is also known as List I, deals with the subject of Land. Item 18 of the said List states as follows:

"Land – Land, that is to say, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in Appendix II."

Appendix II is only on land and land settlement. This refers to State land, inter – provincial irrigation and land development projects and the national land commission. The said provisions dealing with land and land settlement are as follows:

"State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33 (d) and written law governing the matter.

Subject as aforesaid, land shall be a Provincial Council Subject, subject to the following special Provisions:-

1. State land –

1.1 State land required for the purposes of the Government in a Province, in respect of a reserved or concurrent subject may be utilised by the Government in accordance with the laws governing the matter. The Government shall consult the relevant Provincial Council with regard to the utilisation of such land in respect of such subject.

1.2 Government shall make available to every Provincial Council State land within the province required by such Council for a Provincial Council subject. The Provincial Council shall administer, control and utilise such State land, in accordance with the laws and statutes governing the matter.

1.3 Alienation or disposition of the State land within a Province to any citizen or to any organisation shall be by the President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter."

List II of the Ninth Schedule to the Constitution, which is commonly known as the Reserved List, also contains an item dealing with State land. This is as follows:

> "Rivers and Waterways; Shipping and Navigation; Maritime Zones including Historical Waters, Territorial Waters, Exclusive Economic Zone and Continental Shelf and Internal Waters; State Lands and Foreshore, Except to the Extent Specified in Item 18 of List I."

All the aforementioned provisions were carefully examined in the Supreme Court Determination on the Bill Titled 'Land Ownership' (SC SD 26/2003 of 10.12.2003). On a consideration of the provisions laid down in the Constitution including the three Lists, it was observed in the Determination on Land Ownership (Supra) that,

> "This re-affirms the position that State Land shall continue to vest in the Republic while the subject of land being a matter for the Provincial Council.
>
> . . . .
>
> In effect, even after the establishment of Provincial Councils in 1987, State land continued to be vested in the Republic and disposition could be carried out only in accordance with Article 33 (d) of the Constitution read with 1:3 of Appendix II to the Ninth Schedule to the Constitution."

It is therefore evident that the Constitutional Provisions pertaining to the subject of land are quite clear and had been considered and interpreted earlier by the Supreme Court. When those decisions are examined it is clearly seen that

there cannot be any ambiguity with regard to the provisions in question. As clearly stated earlier, in terms of Article 125 of the Constitution, only a question relating to the interpretation of the Constitution should be directed to the Supreme Court. The question that had been referred to the Supreme Court is not a question which deals with the interpretation of the Constitution, as the said question had been clearly dealt with previously by the Supreme Court and there are no ambiguities pertaining to the relevant Article of the Constitution.

Learned Judge of the High Court therefore should have considered the question before him without referring it to the Supreme Court in terms of Article 125 of the Constitution.

For the reasons aforesaid I hold that there is merit in the preliminary objection raised by the learned Additional Solicitor General for the respondent and I accordingly uphold the said preliminary objection so raised. Since the said question does not warrant an interpretation of any Article of the Constitution, learned Judge of the High Court is directed to consider the matter before him and make an appropriate order according to law.

Chief Justice

P.A. Ratnayake, PC, J.

I agree.

Judge of the Supreme Court

S.Hettige, PC, J.

I agree.

Judge of the Supreme Court

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

In the matter of an Application for Leave to Appeal to the Supreme Court from an Order of the Provincial High Court under and in terms of Section 31 DD(1) the Industrial Disputes (as amended)

SC. Appeal No:54/2010

SC.HC.LA No.13/2010

HCALT No: 141/2007

L.T. Case No: 08/1075/2001

Kotagala Plantations Limited
Elakanda, Horana

(Also at 53 1/1/, Sir Baron Jayatilleke Mawatha, Colombo 01)

RESPONDENT-RESPONDENT-PETITIONER

Vs.

M.R. Ranasinghe
No.14, Uyana Road,
Moratuwa.

APPLICANT-APPELLANT-RESPONDENT

BEFORE : **TILAKAWARDANE J,**
MARSOOF J, &
SURESH CHANDRA J.

COUNSEL : Gomin Dayasiri with Ms. Manoli Jinadasa for Appellant
J. Joseph with Nimal Ranamuthuarachchi for Applicant-Respondent-Respondent

ARGUED ON : 21/06/2011

DECIDED ON : 03.02.2012

Shiranee Tilakawardane J.

The Applicant-Appellant-Respondent (hereinafter referred to as the Respondent) was originally an employee of the Sri Lanka State Plantations Corporation from October 1975 .Consequent to the privatization of the plantations from 22nd June 1992 the Respondent's contract of employment was vested with the Respondent -Respondent-Petitioner (hereinafter referred to as the Petitioner). As specified in the terms and conditions of the gazette notification, bearing No. 720/2 and dated 22nd of June 1992 the Respondent continued to be in the service of the petitioner without a break in service. His past service under the Sri Lanka State Plantation Corporation was counted for his service period under the Petitioner.

On or about 9th January 1995, the petitioner served a charge sheet on the Respondent which consisted of 16 charges, all relating to serious acts of misconduct. Thereupon, after a domestic inquiry and upon being found guilty of charges 5, 8(c), 8(d), 9, 10(a), 10(b), 14 and 15 of the charge sheet the Respondent's services were terminated with effect from 21st January 1994 by letter dated 16th May

1996. Shortly afterwards, the Respondent filed an application in the Labour Tribunal seeking reinstatement , with all salary and benefits enjoyed by him prior to his termination.

In the result, the President of the Labour Tribunal in his order held the following:-

a) The Respondent was irresponsible, failed to comply with the instructions specified to him and grossly negligent therefore he was guilty of Charges 5, 8(c), 9, 10 (a), (b) , 14 and 15.
b) Due to Respondent's failure to perform his duties adequately the Petitioner had incurred losses.
c) The Respondent had carried out irregular cutting and disposing of trees in the Petitioner's estate.
d) It was further revealed and admitted by the Respondent that he had signed blank vouchers although such wrongdoing was not included in the charge sheet.
e) Therefore, the Respondent's application was dismissed on the basis that his termination was just and equitable.

The Respondent aggrieved by the decision of the President of the Labour Tribunal appealed to the Provincial High Court of the Western Province. The learned High Court Judge finding the Respondent had committed serious misconduct affirmed the order of the Tribunal but nevertheless under the principles of Saleem v Hatton National Bank [1994] 3 S.L.R 409, awarded the Respondent two years salary as compensation.

The Petitioner has sought Leave to Appeal from the decision of the Provincial High Court of the Western Province dated 11th February 2010 whereby the High Court upheld the Judgment of the Labour Tribunal yet nevertheless awarded two years salary as Compensation to then Respondent. This Court granted Leave to Appeal on the following three questions of law.

1) Did the learned Judge of the High Court err in law by awarding compensation to the Respondent?
2) Did the learned Judge of the High Court err in law by applying the principles of the case of Saleem v Hatton National Bank?
3) Did the learned Judge of the High Court have jurisdiction to allow the relief awarded when the questions of law raised by the Respondent in the appeal was rejected?

In light of the aforementioned questions of law, this Court granted permission for the parties to tender written submissions and oral submissions. Having received and reassessed such submissions, this Court has examined and analyzed the above questions of law.

In regard to the first question of law, the Petitioner asserts that the learned Judge of the High Court made an error in law by awarding compensation to the Respondent. Section 31B (1) of the Industrial Dispute Act sets out when an employee can seek compensation, and states the following;

> *'A workman..., may make an application in writing to a Labour Tribunal for relief or redress in respect of any of the following matters:-*
>
> *(a) The termination of his service by his employer;*
> *(b) The question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits;*
> *(c) Such other matters relating to the terms of employment, or the conditions of Labour, of a workman as may be prescribed.'*

It is clear from the language of Section 31 B (1) of the Industrial Dispute Act that an employee is entitled to seek remedies for unfair dismissal and redundancy, in other words when an employer has acted unjustly, but what happens when the employee has directly contributed to his own dismissal? The provisions of the Industrial

Dispute Act have not spelt out a guideline for the Labour Tribunal and the Courts to follow in the event such situations arise.

As equity must operate with regard to both parties in a contract of employment, it is important to note that contribution to one's own dismissal in the form of misconduct could justify the termination of his services by the employer. This however does not detract from the fact that a constructive dismissal did take place.

Therefore, this Court would like to consider English law, merely to acquire an understanding of the grounds a Tribunal must take in to consideration when adjusting compensatory awards. Section 123 (6) of the Employment Rights Act 1996 states the following;

> *'Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding'*.

In the English case W.Devis & Sons Ltd v Atkins [1977] AC 931 it was established that:

> '*a tribunal can make a finding of 100% contributory fault of the employee and if it does there is no compensatory award'.*

Furthermore, the Northern Ireland Court of Appeal held in the case of Morrison v Amalgamated TGWU [1989] IRLR 361:

> *'The tribunal should take a broad commonsense view of the situation; that view should not be confined to the moment of dismissal; the employee's conduct must have contributed to the dismissal and it must*

have been culpable blameworthy or unreasonable.'

It is clear from the mentioned English Law that the concept followed in these cases was that an employee who has brought the dismissal upon himself might be precluded of any right to compensation.

In dismissal cases such as the present case, the Labour Tribunal must ensure to carry out the correct approach to determine as to whether the employer's decision to dismiss fell within a 'band of reasonableness' as held by the Court of Appeal of England and Wales in HSBC Bank Plc v Maden [2000] ICR 1283.The burden is on the employer to show the reasons of dismissal and the Labour Tribunal must be astute in ascertaining that the reason is genuine and just and equitable.

The Petitioner has provided sufficient evidence such as the Respondent's charge sheet, other documentary evidence and witnesses to the Labour Tribunal and the Provincial High Court to establish the Respondent's failure to carry out his duties in a satisfactory manner as reflected in the several findings of the Labour Tribunal referred to above. The facts clearly disclose a reasonable deduction that the Respondent was irresponsible and grossly negligent. As a result, the Labour Tribunal logically concluded that the Petitioner had suffered numerous losses.

The Respondent functioned as the Superintendent of the estate and was required to comply with the orders of the management to ensure smooth and efficient management of an organization which he had grossly neglected to do. It was further brought to light from the Petitioner's evidence that the Respondent, after the termination of his services continued to use the bungalow and the car causing further loss and harm to the employer depriving his successor of a bungalow and a supervisory vehicle and compelling such a successor to manage an estate whilst living outside it. Prior to the dismissal, the Petitioner had issued the Respondent

with 13 letters of 'warnings' and 'last warnings'

This Court is of the opinion that the Petitioner as the employer has provided the Respondent with sufficient warnings prior to the dismissal and has established genuine reasons for the Respondent's dismissal. As held by his Lordship H. N.G Fernando in the case of Municipal Council of Colombo V. Munasinghe 71 NLR at page 225;

> '*When the Industrial Disputes Act confers on an Arbitrator the discretion to make an award which is 'just and equitable', the Legislature did not intend to confer on an Arbitrator the freedom of a wild ass. An award must be 'just and equitable' as between the parties to a dispute; and the fact that one party might have encountered 'hard times' because of personal circumstances for which the other party is in no way responsible is not a ground on which justice or equity requires the other party to make undue concessions...The mandate, which the Arbitrator in an industrial dispute holds under the law, requires him to make an award, which is just and equitable, and not necessarily an award which favours an employee. An Arbitrator holds no license from the Legislature to make any such award as he may please, for nothing is just and equitable which is decided by whim or caprice or by the toss of a double headed coin*.'

This Court accepts the reasoning of the President of the Labour Tribunal and the learned Judge of the High Court and holds that the Respondent's dismissal was just and equitable as the Respondent has none other than himself to blame for his dismissal. The employee has contributed by acting unreasonable, by committing intentional and deliberate wrongdoings.

The learned High Court Judge awarded the Respondent two years salary as compensation on the principle established in the Saleem v Hatton National Bank, such principle states;

'Compensation will be ordered if there are special circumstances which would make it just and equitable to order such relief even whether the termination of service is justified'.

The question that must also be determined in this present case is whether there are 'special circumstances' to order relief to the Respondent? The Respondent has committed misconduct, has blatantly neglected and abandoned his duties and disregarded warnings of the Petitioner, and has brought about grave losses to the Petitioner and had put the Petitioner's reputation in great jeopardy. For that reason, the Respondent's circumstances will not fall in to the category of 'special circumstances' and the principle held in the Saleem v Hatton National Bank case has no relevance to the present case. If such an employee as the Respondent is granted compensation, what would be the use of our legal system if it encourages the wrongdoer with monetary rewards while punishing the innocent party? The following cases established contrary views to the Learned High Court Judge's award;

In Caledonian (Ceylon) Tea and Rubber Estates Limited V. Hillman 79 (1) NLR 421 Justice Sharvananda held;

'If the employee's conduct had induced the termination, he cannot in justice and equity have a just claim to compensation for loss of career as he has only himself to blame for the predicament in which he finds himself'.

His Lordship Justice J A N de Silva in Kotagala Plantations Limited V. Ceylon Planters Society S C Appl. No: 144/2009 decided on 15.12.2010 established;

'An allegation involving misconduct or moral turpitude is a determining factor in the proceedings before a Labour Tribunal in order to decide whether the workman is a fit and proper person to be continued in employment in an establishment. If the conduct of the workman has

induced the termination, he cannot in justice and equity claim compensation for loss of career. On the other hand, if the termination was not within the control of a workman but solely by the act and will of an employer, a Tribunal exercising just and equitable jurisdiction is well entitled to grant relief in the nature of compensation to a discharged workman. The jurisdiction of a Labour Tribunal is intended to produce in a reasonable measure a sense of security in a workman so long as he performs his duties, efficiently, faithfully and for the betterment of his establishment and not otherwise. No workman should be permitted to suffer for no fault of his, but unwanted, dishonest, troublesome workman maybe discharged without compensation for loss of his employment. The workman in those circumstances has to blame himself for the unpleasant and embarrassing situation in which he finds himself.'

Accordingly, this Court is unable to understand the learned High Court Judge's reasoning for awarding compensation to the Respondent; the High Court did not find the Respondent's termination of service unjustified, rather the High Court accepted the Respondent's dismissal as just and equitable. Where a dismissal is justified it is incumbent upon the court to seek special reasons for the granting of compensation, such as that the employer had not acted in a rational way, or that the employer had not communicated the manner in which a task had to be carried out or did not give the necessary utilities for the task, or that the employer had acted *mala fides* etc. As stated the burden of proving this is upon the employee, especially where he had contributed one hundred percent to the dismissal and caused loss to the employer.

The High Court is in a position to award compensation in the interest of justice, in the event the Court finds after careful analysis and after taking in to due consideration aspects of discipline and work ethics relating to both the employer and employee that the dismissal was not reasonable. But this case is not such a case. The Respondent's actions have caused 100% contribution to his dismissal as his own misconduct has contributed to his termination.

The losses incurred by the Petitioner are neither negligible nor minimal. This court has considered the period of 17 years that was served by the employee but does not award any compensation on the basis that for at least a considererable part of that time loss was caused to the Petitioner by the several acts committed over a long period by the Respondent.

For these reasons the appeal of Petitioner is allowed, the judgment of the High Court is set aside and the order of the Labour Tribunal dated 15th October 2007, is affirmed. No costs.

JUDGE OF THE SUPREME COURT

MARSOOF J.

I agree.

JUDGE OF THE SUPREME COURT

SURESH CHANDRA J.

I agree.

JUDGE OF THE SUPREME COURT

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

S.C. (FR) Application No.317/2010

Damayanthi Namalee Haupe Liyanage
Madawalagama,
206/6, Moratuhena Road,
Athurugiriya.

Petitioner

Vs.

1. H.P.S. Somasiri,
   Director General of Irrigation,
   Department of Irrigation,
   Colombo 07.

2. K.M.P.S. Bandara,
   Director,
   Engineering Service Board,
   Ministry of Public Administration & Home Affairs,
   Colombo 07.

3. D. Dissanayaka,
   Secretary,
   Ministry of Public Administration & Home Affairs,
   Colombo 07.

4. Dr. G.G.A. Godaliyadde,
Director of Irrigation,
Department of Irrigation,
Colombo 07.

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

Respondents

BEFORE : Dr. Shirani A. Bandaranayake, CJ.
Chandra Ekanayake J. &
R.K.S. Suresh Chandra, J.

COUNSEL : Anil Silva, PC., with W. Madawalagama for Petitioner

Shaheeda Barrie, SC., for the Respondents

ARGUED ON : 26.01.2011.

WRITTNE SUBMISSIONS TENDERED ON : Petitioner : 21.03.2011

Respondents : 21.04.2011

DECIDED ON : 26.03.2012.

Dr. Shirani A. Bandaranayake, CJ.

The petitioner, who is a chief Irrigation Engineer attached to the Department of Irrigation, complained that her fundamental right guaranteed in terms of Article 12(1) of the Constitution was violated by the 1st – 4th respondents by the decision taken by them, which was communicated to her by letter dated 29-06-2009 issued by the 4th respondent on behalf of the 1st respondent.

Leave to proceed was granted by this Court for the said alleged infringement.
The petitioner's grievance, as stated by her is as follows:

The petitioner had joined the Sri Lanka Engineering Service (hereinafter referred to as SLES) as a Civil Engineer, Class II / Grade II on 02-12-1996, which was subjected to a 3 year probationary period (P1). She was confirmed in the said position on 10-05-2000 to be with effect from 02-12-1996 (P2). In terms of Section 8 of the Minute of the SLES, if the necessary requirements were fulfilled, the said officer could be promoted to Class II / Grade I. Since the petitioner had fulfilled the necessary requirements, she was confirmed in the position of Class II Grade II of SLES on 10-05-2000 to be with effect from 02-12-1996. Thereafter the petitioner was promoted to Class II / Grade I with effect from 02-12-2006 (P7).

The Service Minute of the SLES was amended by Engineering Service Circular No.25 dated 03-03-1993 (P9). In terms of the said amendment, when an officer appointed to a relevant All-island service had passed two Efficiency Bar Examinations with the second language requirement either being completed or exempted with a six years satisfactory service, such an officer would be placed on the salary step of Rs.48,000/- from 07-06-1988.

The Petitioner had been placed on the corresponding salary step of Rs.124,500/- with effect from 02-12-2002 and had been drawing the said salary until June 2009. The petitioner had received a letter on 29-06-2009 signed by the 4th respondent, on behalf of the 1st respondent stating that the salary scale on which she was placed on 02-12-2002 has been cancelled and that with effect from 24-07-2004 she has been placed on the salary scale of Rs.139,500/- (P11). She was also informed that due to the changes of the date of operation of the salary scale, she has to refund the amounts that had been overpaid.

The petitioner therefore had stated that the cancellation of the decision made on 10-03-2003 and placing her on a different scale with effect from 24-07-2004 and the consequent deduction of her salary, are decisions which are arbitrary, unreasonable, illegal and in violation of her fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

The petitioner's grievance is based on the revision of her salary scale by letter dated 29-06-2009 (P11).

It is not disputed that, by his letter dated, 10-03-2003 (P10 b), the then Director General of Irrigation, had informed the petitioner that in terms of the Minute of SLES approval had been granted for her to be placed on the annual salary step of Rs.124,500/- with effect from 02-12-2002. Thereafter a letter was issued to the petitioner dated 29-06-2009 informing her of the change of the said salary scale. This letter is as follows:

> " ශ්‍රී ලංකා ඉංජිනේරු සේවා ව්‍යවස්ථා සංග්‍රහයේ 2 වන වගන්තිය යටතේ නියමිත වැටුප් තලයේ පිහිටුවීම.

ඉංජිනේරු සේවා ව්‍යවස්ථා සංග්‍රහයේ 02 වන ජේදයේ II වන වගන්තිය යටතේ 2002-12-02 වන දින සිට ඔබ රු.124,500.00 වාර්ෂික වැටුප් තලයේ පිහිටුවීමට රාජ්‍ය පරිපාලන හා ස්වදේශ කටයුතු අමාත්‍යාංශයේ අතිරේක ලේකම් මගින් ලබා දී තිබූ අනුමැතියට අනුව මාගේ සමාංක හා 2003-03-10 දිනැති ලිපියෙන් කරන ලද වැටුප් සංශෝධනය මින් අවලංගු කරන අතරල ඔබ 2004-07-24 දින සිට රු.139,500.00 වැටුප් තලයේ පිහිටුවීමට ඉංජිනේරු සේවා අධ්‍යක්ෂකගේ අංක ES/5/3406 හා 2007-08-02 දිනැති ලිපියෙන් අනුමැතිය ලබා දී ඇති බව කාරුණිකව දන්වමි. "

Learned President's Counsel for the petitioner contended that the letter referred to above should be set aside since the petitioner had completed the 1st and 2nd Efficiency Bar Examinations within 6 years of her joining the SLES, that she was placed on the 11th salary step with effect from 02-12-2002 (P10) by letter dated 10-03-2003, and that by 02-12-2002, she had completed six years in the said service.

Learned President's Counsel for the petitioner relied on the amendment to the Minute of SLES dated 03-03-1993, which stated thus:

> " When an officer appointed to a relevant All-island Service has passed two Efficiency Bars and second language test or exempted from that requirement after having completed six (06) years satisfactory

service, he will be placed on the salary step of Rs.48,000/- from 07-06-1988."

The contention of the learned President's Counsel for the petitioner is that in terms of the said provision, for a public officer to be placed on the salary step of Rs.48,000/- the necessary requirements would be,

a) to have completed 6 years of service;
b) to have passed two Efficiency Bar Examinations; and
c) to have passed the second language test.

It was also strenuously contended on behalf of the petitioner, that, there is no necessity for the said Efficiency Bar Examinations to be completed within a stipulated time period, since that has not been categorically stated in the said amendment to the Minute of 1993.

Accordingly, it was contended on behalf of the petitioner that she had fulfilled all the necessary requirements stipulated in the said Amendments to the Minute of SLES and therefore she should be placed on the relevant salary scale. It was further submitted that the requirement of satisfactory service in terms of the Gazette Notification No.1589/30 dated 20-02-2009 would not be applicable where the petitioner is concerned, as it should be applicable only to promotions granted to public officers after the said Gazette Notification came into effect.

It is not disputed that the petitioner was appointed with effect from 02-12-1996 (P1) as an officer in Class II Grade II of the SLES. Clause 14 of the said letter of appointment states as follows:-

" ශ්‍රී ලංකා ඉංජිනේරු සේවයේ II වන පංතියේ II වන ශ්‍රේණියට හිමි නව වැටුප් පරිමාණය වර්ෂයකට රු.53,880 - 15 x 1560 - 77,280/- වේ. රු.60,120 ට පෙර පළමුවන කාර්යක්ෂමතා කඩ ඉමද රු.74,160/- ට පෙර දෙවන කාර්යක්ෂමතා කඩ ඉමද (පූර්ණ වෘත්තීය සුදුසුකම්) ඇත.

අ) ඔබ නව වැටුප් පරිමාණයේ ආරම්භක වැටුප මත සේවයෙහි පිහිටවනු ලැබේ.

ආ) සම්පූර්ණ වෘත්තීය සුදුසුකම් ලබා ගත් විට ඔබ රු.61,680/- ක වාර්ෂික වැටුප මත පිහිටවනු ලැබේ."

The said Clause 14 therefore clearly had stated that before reaching stipulated salary steps, the petitioner has to face the first and the second Efficiency Bar Examinations.

In fact the said requirement was referred to in the original Minute of the SLES published in the Gazette Notification dated 07-06-1988. Clause 2 of the said Minute and the Note to the said Clause refer to the time period in which the Efficiency Bar Examinations should be completed. The said Clause is as follows:-

" The Sri Lanka Engineering Service shall consist of Public Officers appointed to any of the Classes and Grades of the Service enumerated below:

New consolidated salary scales and salary steps given should be computed as per Appendix IV of Public Administration Circular No.387 with regard to the year 1988.

Class	**Cadre**	**New Consolidated Salary Scale Per Annum (with effect from 01-01-1989)**
Class I	105	Rs.72,000 – 10 x 3,600 – Rs.108,000
Class II Grade I (Grades I & II Combined)	837	Rs.55,200 – 7 x 2,400 – Rs.72,000
Class II Grade II	-	Rs.36,000 – 15 x 1,200 – Rs.54,000

Note - (1) 1st Efficiency Bar before reaching the salary step of Rs.40,800 and 2nd Efficiency Bar (full professional qualifications) before reaching the salary step of Rs.51,600."

According to the said Minute the salary scale for Class II Grade II started at Rs.36,000 with 15 annual increments of Rs.1200. The salary steps based on the said Minute would therefore be as follows:

TABLE I

Salary steps	Amount
1	Rs.36,000
2	Rs.37,200
3	Rs.38,400
4	Rs.39,600
5	**Rs.40,800**
6	Rs.42,000
7	Rs.43,200
8	Rs.44,400
9	Rs.45,600
10	Rs.46,800
11	Rs.48,000
12	Rs.49,200
13	Rs.50,400
14	**Rs.51,600**
15	Rs.52,800
16	Rs.54,000

This clearly indicates that in terms of the Note on Clause 2 of the Minute of SLES the petitioner had to complete the first Efficiency Bar Examination before reaching the 5th salary step and the second Efficiency Bar Examination before

reaching the 14th salary step. In other words, the petitioner had to complete the first Efficiency Bar Examination within 4 years of joining the service and the second Efficiency Bar Examination within 13 years in the service.

The promotions of officers in Class II/ Grade II is referred to in Clause 8 of the Minute of SLES. The said Clause states that an officer in Class II / Grade II is required to pass the first Efficiency Bar Examination and to have full professional qualifications and a maximum of 10 years' service in a post enumerated in the Schedule before he becomes eligible for promotion to Class II Grade I.

Learned State Counsel brought to our notice that by implementing the said scheme, an officer who is promoted to Class II Grade I after 10 years on the basis of fulfilment of all necessary requirements, will have to forego five (5) remaining salary increments in Class II Grade I, as the said salary increments for Class II Grade I had been formulated for a 15 years period of service.

Since this had created an anomalous situation, an amendment was brought into in 1993 and by Engineering Services Circular No.25 of 03-03-1993 the Minute of SLES was amended. The said amendment stated that,

> " When an officer appointed to a relevant All-island Service has passed two Efficiency Bars and second language test or exempted from that requirement after having completed six (06) years Satisfactory Service, he will be placed on the salary step of Rs.48,000/- from 07-06-1988 (The date on which the Minutes of Sri Lanka Administrative Service and Sri Lanka Accountants' Service published in the Gazette (Extra Ordinary) of the Democratic Socialist Republic of Sri Lanka)."

Table I referred to earlier, clearly shows that Rs.48,000/- is the 11th salary step in Class II Grade II and therefore an officer who has completed the necessary requirement after the completion of both Efficiency Bar Examinations could immediately be placed at the 11th salary step.

Learned State Counsel for the respondents submitted that when an officer is permitted to reach the 11th salary step at the completion of 6 years, such officer is able to earn further salary increments available to him in Class II Grade II within the 4 years, before he becomes eligible for promotion to Class II Grade I after the completion of 10 years of service.

Learned State Counsel for the respondents contended that the amendment to the Minute of SLES, by Circular No.25, was only an attempt to redress the anomalous situation that the officers in Class II Grade II had to face when promoted to the next Grade, after 10 years of service.

Accordingly, it is evident that under the category to which the petitioner belonged to, the first Efficiency Bar Examination had to be completed within 4 years. As stated earlier the petitioner was appointed on 02-12-1996. She had to pass the first Efficiency Bar Examination by 02-12-2000.

In terms of Engineering Service Circular 23 of 24-11-1992, the First Efficiency Bar Examination consisted of the following subjects:

1. Establishment
2. Finance
3. Second Language (oral test) and
4. Departmental Procedure

It is not disputed that the petitioner failed to complete the 1st Efficiency Bar Examination on 02-12-2000. The 1st respondent in his affidavit had given the dates on which the petitioner had passed the said Examination, which is as follows:

TABLE II

Efficiency Bar- 1st Examination- Subjects	**Stipulated Date**	**Date actually Passed**	**Delay (if any)**
Establishment	02-12-2000	02-10-1998	No
Finance	02-12-2000	10-08-2001	08 Months 02 Days
Departmental Procedure	02-12-2000	28-11-1998	No
2nd Language (oral test)	02-12-2000	24-07-2002	01 Year 07 Months 22 Days

This clearly indicates that there had been a delay of 1 year 7 months and 22 days in the petitioner completing the first Efficiency Bar Examination. The question that would arise at this point is as to the provisions that could apply in instances where there is a delay in passing such Examinations.

The Establishment Code provides for such situations.

Section 10:1 of Chapter VII of the Establishment Code, which deals with increments is as follows:

> " An officer is not entitled to draw an increment as of right. He is required to earn it by the efficient and diligent discharge of his duties and by serving the incremental period in full."

It is therefore mandatory for an officer to pass the Efficiency Bar Examinations within the stipulated time frame. The Establishment Code, accordingly, contains provisions, which state that, where an increment is deferred for failure to pass an Efficiency Bar, the period of deferment will be the period taken in excess of the normal time allowed for such purpose.

Accordingly, as the petitioner had completed her first Efficiency Bar Examination 1 year 7 months and 22 days after the period that was stipulated, the petitioner's 5th increment had to be deferred by an equal period of time. Due to this, every increment thereafter had to be deferred by 1 year 7 months and 22 days.

Contention of the petitioner was that since she has completed her 2nd Efficiency Bar within 6 years of joining the service on 07-06-2002, and that by that time she had completed her first Efficiency Bar Examination, the provisions of the Minute of SLES should apply regardless of the provisions of the Establishment Code.

The question that arises at this juncture is that in terms of the provisions laid down under the Minute of SLES, whether the conditions stipulated by the Establishment Code could be disregarded.

As stated earlier, by Engineering Service Circular No.25, the SLES Minute was amended to substitute the paragraphs which brought in the concept of placing an officer in All-island Parallel Service on the salary step of Rs.48,000/- from 07-06-1988. For this it was necessary for such an officer to have passed two

Efficiency Bar Examinations and the Second Language Test or be exempted from that requirement. It was also necessary for such an officer to have completed six (6) years of satisfactory service.

It is therefore apparent that the requirement of six years cannot be purely the number of years, but should be carried out to the satisfaction of the authorities.

'Satisfactory service' is clarified in the Gazette Notification No.1589/30, dated 20-02-2009. Section 186 of the aforementioned Gazette Notification 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 fell due by efficient and diligent discharge of duties, by passing over Efficiency Bars fell due, by qualifying for confirmation in service fell due and during which period he has not committed a punishable offence.
>
> ii When 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 . . . . shall be excluded in computing his period of satisfactory service."

In terms of the said provisions, it is quite clear that for the purpose of satisfactory service, it is necessary for an officer to have earned his salary increments and if the increment/s had been suspended, reduced, stopped or deferred, that period should be excluded in computing his period of satisfactory service.

Therefore when calculating the satisfactory service of the petitioner, it is necessary to exclude the period of 1 year 7 months and 22 days, which had been the delay in completing the first Efficiency Bar Examination by the petitioner.

The petitioner had complained that her fundamental rights guaranteed in terms of Article 12(1) had been violated by the respondents.

Article 12(1) of the Constitution deals with the right to equality and reads as follows:-

> "All persons are equal before the law and are entitled to the equal protection of the law."

Equality does not mean that identical rules of law should be applicable to all persons. What it postulates is that equals should be treated equally and that equality of treatment be given in equal circumstances. This means that the Legislature is entitled to make reasonable classification for purposes of legislation and thereafter treat all those who belong to one group equally on the basis that the said group falls into one separate class.

In **Kedar Nath Bajoria v The State of West Bengal** (A.I.R. 1953 S.C. 404), the Indian Supreme Court had reiterated the recognition given to reasonable classification under the right to equality and had stated thus:

> " The equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all the laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation."

As stated earlier, the petitioner had complained that by letter dated 29-06-2009 she was informed by the 4th respondent on behalf of the 1st respondent that the salary scale on which she was placed on 02-12-2002 had been cancelled. The petitioner had then stated that the said cancellation is arbitrary, unreasonable, illegal and violative of her fundamental right guaranteed in terms of Article 12(1) of the Constitution.

The 1st respondent in his affidavit had averred that by letter dated 29-06-2009, the petitioner was informed of the rectification of her salary scale. This had to be carried out since there had been an error when the petitioner's salary scale was decided as the period 1 year 7 months and 22 days as explained earlier had to be excluded when computing her satisfactory service.

In fact the petitioner had not been the only person who had been treated as not having a satisfactory service. For instance in 2005 the Secretary to the Ministry of Public Administration and Home Affairs had sought the opinion of the Public Service Commission on the same matter and the Assistant Secretary to the Public Service Commission, by letter dated 18-07-2005 had informed that the

delay in completing the Tamil Oral Test cannot be considered as a satisfactory service period (R6).

Considering all the aforementioned, it is evident that there is a clear distinction between the officers who have a satisfactory service and who have not got that record. The Engineering Services Circular No.25, dated 03-03-1993, would be applicable, as has been clearly stated, only to officers appointed to a relevant All-island service who had obtained the necessary requirements and who had completed six years **satisfactory** service. Therefore in order to apply the said Circular it is necessary that the relevant officer should have six years satisfactory service. The classification therefore would be on the basis of satisfactory service, since there is uniformity in its application. Such classification has been recognised as valid which would satisfy the requirements of equal treatment. Considering classifications and its validity, in **The Anant Mills Co. Ltd. v The State of Gujarat** (A.I.R.1975 S.C. 1234) it was stated thus:

> " Articles 14 forbids class legislation but does not forbid classification. Permissible classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and the differentia must have a rational relation to the effect sought to be achieved by the Statute in question.
>
> In permissible classification mathematical nicety and perfect equality are not required. Similarly identity of treatment is not essential. If there is equality and uniformity within each group, the law will not be condemned as discriminatory, though due to some fortuitous circumstances arising out of a peculiar

situation some included in a class get an advantage over others, so long as they are not singled out for special treatment."

Therefore it is clearly evident that when an officer does not complete the relevant Efficiency Bar Examination within the given time frame, the next increment would be deferred by the period of time corresponding to the period of delay. This action cannot be regarded as a violation of petitioner's fundamental right guaranteed in terms of Article 12(1) of the Constitution.

For the reasons aforesaid I hold that the petitioner had not been successful in establishing that her fundamental right guaranteed in terms of Article 12(1) had been violated by the respondents. This application is accordingly dismissed.

I make no order as to costs.

Chief Justice

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court

R.K.S. Suresh Chandra, J.

I agree.

Judge of the Supreme Court

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

SC Appeal No. 107/2008
SC HC(CA) LA 127/08
WP/HCCA/Col/57/08 (LA)
DC/Mt.Lavinia No.687/02/RE

Ms Deepthi Fernando
No.176, Galle Road,
Colombo 6
Plaintiff

Vs

D. A. Mayadunne
No.166/20
Pangiriwatte Road,
Mirihana
Nugegoda
Defendant (Deceased)
And

Ms Deepthi Fernando No.
No.176, Galle Road,
Colombo 6
Plaintiff - Petitioner

Vs

Thilak Padmakumara
Arambewela
No.323
Galle Road, Colombo 6
Respondent
And Between
Thilak Padmakumara
Arambewela
No.323
Galle Road, Colombo 6
Respondent – Petitioner
Vs
Ms Deepthi Fernando No.
No.176, Galle Road,
Colombo 6
Plaintiff – Petitioner – Respondent
And Now Between
Ms Deepthi Fernando No.
No.176, Galle Road,
Colombo 6

Plaintiff – Petitioner –
Respondent – Petitioner
-Appellant
Vs
Thilak Padmakumara
Arambewela
No.323
Galle Road, Colombo 6
Respondent – Petitioner
– Respondent

Before: Amaratunga J.
Imam J.
Suresh Chandra J.

Counsel:
Romesh De Silva PC with Rohan Sahabandu and Iraj De Silva for the Plaintiff – Petitioner – Respondent – Petitioner -Appellant
V. Puvitharan with M.J.B Balachandran for the Respondent – Petitioner – Respondent

Argued on : 25.03.2011
Decided on : 27.03.2012

Suresh Chandra, J
This is an appeal against the judgment of the Civil Appellate High Court of Colombo regarding the dismissal of the Appellant's application to substitute the Respondent in a Rent and ejectment case.
The Appellant filed an action in the District Court of Mount Lavinia against the Defendant (Mrs.Mayadunne) to eject her from premises bearing Assessment No.323, Galle Road, Colombo 06, for arrears of rent and for damages. The case went ex-parte against the said Defendant and after entering decree the Appellant took steps to have the decree executed. The Fiscal reported that the said defendant had died and thereupon the Appellant moved to have the respondent substituted in order to serve the exparte decree by making an application in terms of S.839 of the civil Procedure code, on the basis that the defendant had died without children and without leaving an administrable estate, that the defendant's husband had predeceased her, the Respondent was the next of kin of the defendant and was a son of the defendant's sister. The Respondent filed objections against the said application on the ground that he was not the legal representative of the deceased defendant, that he had not inherited the estate of the deceased defendant, that the right to sue did not survive and that he was not doing any business at the premises in suit.

The District Court allowed the application for substitution. The Respondent appealed against the said order of the District Court to the Civil Appellate High Court of Colombo, which appeal was allowed. This court granted leave to appeal against the said judgment on the following questions of law:

28(i) – Did the learned High court Judge err in law when he held that the applicable section was S.341 (1) and the plaintiff could not have moved under S.839?

(vi) Has the plaintiff a right to appoint the respondent as the substituted defendant for the purpose of serving the decree entered in the case?

(vii) Is the plaintiff in the circumstances pleaded, entitled to make the application under S.839 of the civil procedure code?

(viii) In the circumstances pleaded, is the judgment of the High Court according to law?

It would be necessary to examine the nature of the action filed by the Appellant initially and the sequence of events that occurred thereafter. The Appellant filed action in the District Court of Mount Lavinia against the defendant named in the plaint to eject her and those under her occupying the premises in suit on the basis that she had sub-let the premises and that she had failed to pay the rent from September 1999 to 31st October 2001, and for arrears of rent and damages. It was also averred in the plain that the premises in suit was coming under the purview of the Rent Act. The said defendant had filed answer denying the allegations in the plaint and prayed that the action of the Appellant be dismissed. When the case had been taken up for trial on 27.04.2004 the defendant had been absent and unrepresented and the case had been fixed for exparte trial and the exparte trial had been taken up on 30.04.2004 and the plaintiff had given evidence and ex parte judgment had been entered on 17.8.2005. When steps were taken to have the ex parte decree served, the Fiscal had reported that the defendant had died. Thereupon the plaintiff had filed papers to substitute the present Respondent in the room of the deceased defendant by making an application in terms of S.839 of the civil procedure code.

The Respondent had filed objections to the application of the Appellant and the matter had been fixed for inquiry at which the Appellant as well as the Respondent had given evidence. At the conclusion of the inquiry the learned District Judge had made order allowing the Respondent to be substituted whereupon he appealed to the Civil Appellate High Court. The Civil Appellate High Court set aside the order of the learned District Judge and the present appeal is against the said judgment.

One of the first questions that could be asked would be as regards the survival of the action. It is necessary to consider the nature of the action for this purpose. The present case was filed by the Appellant to eject the defendant from the premises where she had been a tenant and the prayer was to eject the defendant and to claim arrears of rent and damages. The Plaintiff also asserted that the Rent Act No7 of 1972 applied to the premises. It transpires from the facts made available to Court that the defendant had died intestate, and issueless and there was no evidence to show that she had left an administrable estate. The question that would arise then is as to whether the action which was basically a tenancy action would survive the death of the tenant specially when no claims had been made for the succession of the tenancy. In such a situation it would be prudent to state that since the tenancy action is based on a contract of tenancy that the death of the tenant would terminate the tenancy and therefore the action would not survive as in a contract of tenancy, death of either party would

terminate the contract. S.36 f the Rent Act provides for succession to tenancy in a situation where the tenant dies. The landlord or any person specified in the said section could take steps as set out therein to name a person to succeed to tenancy. In the present case no such steps have been taken by the landlord or by anyone on behalf of the deceased tenant. The landlord who is the Plaintiff on the other hand had taken steps to effect substitution of a nephew of the deceased tenant to proceed with the action. It is in that respect that the learned district judge had made an order to substitute the respondent in the room of the deceased tenant. As stated above since there was no claim to succeed to the tenancy in respect of the premises in suit the death of the tenant terminated the tenancy and therefore the action could not be proceeded with thereafter. The resultant position would be that the decree entered would be a nullity and of no effect in law. If the premises in suit had been occupied by some third party the Plaintiff should have had to advise herself regarding the obtaining of vacant possession of premises.

Although the Appellant and the Respondent have made submissions regarding matters relating to succession and which matters were considered by both the District Court and the High Court, a consideration of the survival of the action as discussed above would have concluded this matter.

In the generality of civil cases proceeded with under the provisions of the Civil Procedure Code where succession to a defendant who dies during the pendency of an action a consideration, of the provisions of s.341)1) of the Civil Procedure Code would be relevant. In that light as the Respondent is the defendant's sister's son, and hence a nephew of the defendant it certainly would make him a next of kin. If he made any claim to the estate of the defendant he may be entitled to such estate if there were no other claims from any other relative of the defendant. There is no evidence of such a claim having been made by the Respondent. If the Respondent had made such a claim and had acted in respect of the estate of the deceased he could be said to have adiated the inheritance or acted as an executor de son tort. But there is no such evidence. Therefore it is my view that the mere fact that the Respondent was the nephew of the defendant does not give the right to the plaintiff to substitute him in the room of the defendant and forced to inherit the obligations of the defendant.

In view of the above conclusions the questions on which leave to appeal was granted are answered as follows:

(i) The Learned High Court Judge had not erred in deciding that S.341(1) of the Civil Procedure Code was the applicable section.

(vi) The Plaintiff has no right to appoint the Respondent as a substituted defendant to serve the decree entered in the case which became a nullity due to the death of the defendant.

(vii) The Plaintiff was not entitled to make an application under S.839 of the Civil Procedure Code.

(viii) The judgment of the High Court is a valid judgment.

The appeal of the Appellant is dismissed with costs fixed at Rs. 21,000.

JUDGE OF THE SUPREME COURT

AMARATUNGA J.

I agree.

JUDGE OF THE SUPREME COURT

IMAM J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of AN Application for Leave to Appeal from the Judgment dated 03-06-2010 in NCP/HCCA/ARP No. 322/2007(F) in terms of Section 5C (1) of the Act No. 54 of 2006.

SC. Appeal No. 105/10

S.C. HC(CA)LA. Application No.210/10
NCP/HCCA/ARP NO. 322/2007(F)
D.C. Pollonnaruwa Case No. 8621/L

Bowekumburegedara Dharmasiri Fernando
C/o. Sanjeewa Rice Mill
Weerapura, Thambala,
Polonnaruwa.

Plaintiff

Vs

Chandrasena Pathirannehelage Piyaratne Somasiri
240, Centre Road, Palugasdamana

Defendant

And

Chandrasena Pathirannehelage Piyaratne Somasiri
240, Centre Road, Palugasdamana

Defendant-Appellant

Vs.

Bowekumburegedara Dharmasiri
Fernando
C/o. Sanjeewa Rice Mill
Weerapura, Thambala,
Polonnaruwa.

Plaintiff-Respondent

And Now

SC. Appeal No. 105/10

Chandrasena Pathirannehelage Piyaratne Somasiri
240, Centre Road, Palugasdamana

Defendant-Appellant-Petitioner

Vs.

Bowekumburegedara Dharmasiri
Fernando
C/o. Sanjeewa Rice Mill
Weerapura, Thambala,
Polonnaruwa.

Plaintiff-Respondent-Respondent

*** * * ***

BEFORE : Amaratunga,J.
P.A. Ratnayake, PC. J.
Imam, J.

COUNSEL : Hemasiri Withanachchi for the Defendant-Appellant-Appellant.

D.M.G. Dissanayake for the Plaintiff-Respondent-Respondent.

ARGUED ON : 09-01-2012

DECIDED ON : **28-03-2012**

*** * * * ***

P.A. Ratnayake, J.

This is an appeal made to this Court in terms of Section 5(c)(1) of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006, from the Civil Appellate High Court of the North Central Province.

Plaintiff-Respondent-Respondent (hereinafter referred to as the "Respondent") instituted a case against the Defendant-Appellant-Petitioner (hereinafter referred to as the Petitioner) at the District Court of Polonnaruwa to obtain the following reliefs.

"(i) a declaration that Permit bearing No. 11/4/1/17A dated 12.07.1991 was a lawful valid permit of the Provincial Land Commissioner;

(ii) a declaration that the Respondent was the owner of the land described in the Schedule to the Plaint upon the said Permit;

(iii) ejectment of the Appellant and the persons holding under him from the said land and the delivery of the peaceful possession to the Respondent;

(iv) damages against the Appellant in a sum of Rs.1,000/- per mensem from the date of the action."

The Respondent stated in his plaint that he has been issued with a permit under Land Development Ordinance, dated 12.07.2009 bearing No. 11/4/1/17A in respect of the land described in the schedule to the plaint. He cultivated the said land and laid a foundation for two rooms. The Petitioner has entered this land without his leave and license and continues to be in possession.

The Petitioner in his Answer has taken up the position that the land he is in possession is a different land described as lot 946 of Final Colony Plan po.160 and does not fall within the land described in the permit of the Respondent and with the permission of the authorities he had commenced constructing a house and had initiated steps to obtain a long term lease from the state. He also counter claimed Rs.500,000/- as compensation for the development, made by him if judgment is entered in favour of the Respondent. By way of a replication the Respondent denied the counter claim.

The District Court gave judgment as prayed for by the Plaintiff and the Civil Appellate High Court affirmed the District Court judgment. This Court has given Leave to Appeal on the following Question of law in paragraph 24(i), (ii) and (iii) of the Petition of Appeal which states as follows:-

"24(i) Whether the Respondent has discharged the burden of establishing the identity o the land described in the schedule to the Plaint in reference to the Plans referred to therein?

(ii) Did the Civil Appellate High Court and the District Court err in law by not taking into consideration the fact that the Plan FCP. **පො.** 160 was not referred to in the Permit (**පැ.1**) although it was in existence at the time of the issuance of the Permit (**පැ.1**)?

(iii) Did the Civil Appellate High Court and the District Court err in law by not taking into account that the boundaries and the extent described in the Permit (**පැ.1**) issued to the Respondent did not tally with the boundaries and the extent described in the Plan (**වි.1**) in order to properly identify the corpus?"

It is averred in the plaint by the Respondent that the land given to him by the permit annexed in the plaint as 'P1' is described in the schedule to the plaint.

The Schedule to the Plaint is as follows:-

" උතුරු මැද පළාතේ පොළොන්නරුව දිස්ත්‍රික්කයේ, තමන්කඩුව ප්‍රාදේශීය ආදායම් නිලධාරී කොට්ඨාශයේ, මැද පත්තුවේ, පොත්ගුල් පෙදෙස ග්‍රාම සේවා නිලධාරී කොට්ඨාශයේ, පොත්ගුල් පෙදෙස නැමති ගමේ පිහිටා ඇති සර්වේ ජනරාල්වරයා වසින් පිළියෙල කරනු ලැබ ඔහු භාරයේ ඇති අංක දරණ පිඹුරේ 3/28/75 - 368 අංක 81/83 බම් කටටය වශයෙන් නිරූපනය කර ඇති අංක ප.ඉ.කේ.ගේ අංක 11/4/1/17 ඒ නවනගරය/2 යටතේ ප්‍රමාණයෙන් අක්කර: නැත, රූඩ්: එකයි, පර්චස්: නැත (අක්කර: 00, රූඩ් :01, පර්චස්:00)ක් ඇතැයි ගණන් බලා ඇති ඉඩම සඳහා සීමාවන්:

උතුරට: පාර

නැගෙනහිරට: වාර මාර්ග ඇල,

දකුණට: අංක 84 ඉඩම.

බටහිරට: පාර

යන මෙකී මායිම් තුල පිහිට ඉඩමේ අවසාන පිඹුරේ එප්සීපීපො 17/249 මිනින්දෝරු දෙපාර්තමේන්තුවෙන් මැන සාදන ලද 1969-10-19 දරණ ප්ලැනේ ලොට් අංක 946 වශයෙන් දක්වා ඇති ඉඩම එකී ප්ලැනේ සඳහන් පරිදි:

උතුරට: 945 පාර

නැගෙනහිරට: ඇල,

දකුණට: 947 ද,

බටහිරට: අතුරු පාරද,

යන මෙකී මායිම් තුළ පිහිට ඉඩම වේ. "

The permit marked 'P1' refers only to Surveyor General's plan referred to as 3/28/75 -368. It also refers to allotment 81/83 of the said plan purported to be given to the Respondent. The extent of the land is given as 1 Rood.

Respondent in the plaint refers to allotments of land in two Surveyor General's plans as describing the land given to him on permit 'P1', i.e. plan 3/28/75 - 368 allotment 81/83 and Final Colony Plan PO 17/249 allotment 946. Permit 'P1' refers to only Surveyor General's plan 3/28/75- 368 lot 81/83. This plan was never produced by the Respondent.

The representative of the District Surveyor at page 135 of the District Court proceedings says as follows:-

" ..... අංක 3/28/75 -368 පිඹුරක් සර්වේ ජනරාල් වෙත නැහැ. එවැනි පිඹුරක් නොමැති බව මට ස්ථිරව කියන්න පුලුවන්. පැ1 දරණ අවසර පත්‍රය මත 3/28/75 -368 දරණ පිඹුරට අදාළ කැබැලි අංක 81 හා 83 දීලා තියෙනවා., 3/28/75 -368 දරණ පිඹුරක් අප දෙපාර්තමේන්තුවේ නොමැති බවට, මෙම ඉඩම් කට්ට සම්බන්ධයෙන් (82 හා 83) සර්වේ ජනරාල්ගේ පිඹුරුවල මෙහෙම අංකයක් සඳහන් කර නැත."

In respect of Final Colony Plan 17/249 Lot 946 the representative of the District Surveyor at page 150 of the proceedings states as follows:-

" ප්‍ර: මෙම එප්.සී.පී.පො.17/249 කියන පිඹුරේ ලොට් අංක 946 න් පෙන්වා තිබෙනවාද?

උ: නැහැ..

ප්‍ර: තමාගේ ස්ථාවරයක් එහෙම නම් වී.5ට අනුව එප්.සී.පී.පො.17/249 පිඹුරේ 946 කියලා ලොට් එකක් නැහැ?

උ: නැහැ.

ප්‍ර: තමාට එක ස්ථිර වශයෙන් කියන්න පුලුවන්?

උ: පුලුවන්."

According to his statement there is no Surveyor General's plan bearing No. 3/28/75 - 368 with the Surveyor General and also there is no allotment 946 in FCP Po 17/249. He also says that there are no allotments bearing 81 and 83 in any of the Surveyor General's plans.

The representative of the District Surveyor identifies "V1" which is Final Colony Plan Po.160 lot 946 at page 135 of the proceedings in the following manner.

" වී 1 පෙන්වා සිටී. 'වී1 ලේඛණය අවසාන ජනපද පිඹුර පො. 160 ලෙස කැබලි අංක 946 සඳහා පිඹුරක්. මෙය අපේ දෙපාර්තමේන්තුවේ නිල පිඹුරේ පිටපතකි. මුල් පිටපත මම ළඟ තියෙනවා. එම නිල පිඹුරට අනුව කැබලි අංක 946 හි හතර මායිම පවතින අන්දම කියන්න පුලුවන්.

උතුරට: අංක 945 දරණ මාර්ගය

නැගෙනහිරට: වාරි මාර්ග ඇල හා එච් සී පී 218

දකුණට: මෙම පිඹුරේ අංක 947 දරණ බිම් කැබැල්ල.

බටහිරට: 945 දරණ මාර්ගය.

මෙම හතර මායිම ඇතුලත ඇති ඉඩමේ විශාලත්වය රූඩ් 2යි පර්චස් 10කි. "

He also states at page 148 of the proceedings that boundaries of land claimed by the Defendant in his Answer tallies with the boundaries given in the Surveyor General's Plan FCP. Po. 160 lot 946. The following evidence which deals with a

comparison of the allotment in the said plan and allotment of land referred to in the Answer clearly demonstrate this position.

"ප්‍ර: චිත්තියේ උත්තරයේ තිබෙන ලොට් 946 ඉඩමේ උප ලේඛණයේ මායිම වශයෙනුත්, අවසාන ජනපද පිඹුරු අංකයෙනුත් ගැලපෙනවාද?

උ: ගැලපෙනවා."

Further according to the evidence of the representative of the District Survey Office at page 162 of the proceedings FCP Po.160 which was produced as 'V1' was prepared during the period 1969 to 1971. Permit 'P1' issued under the Land Development Ordinance is dated 12.7.1991. Accordingly Plan 'V1' was available when permit 'P1' was issued. If the land given on permit 'P1' was lot 946 of FCP Po. 160 no explanation has been given by the Respondent as to why the permit 'P1' does not make any reference to plan 'V1' . The District Court and the Civil Appellate High Court has committed an error in not considering this aspect.

No connection was established by the Respondent between the Surveyor General's plan 'V1' which is Final Colony Plan Polonnaruwa 160 and plan referred to in permit 'P1' which is plan 3/28/75. Further the land given to the Respondent by 'P1' is 1 rood in extent. But lot 946 of Final Colony Plan Po. 946 is 2 roods 10 perches in extent. The Respondent has not made any effort to explain this difference. At pages 105 and 106 of the proceedings he states as follows:-

" ප්‍ර: මෙම ඉඩමේ ප්‍රමාණය අක්කර 1/2 ක් විතර කියා ඔබ කීවා?
තමා අධිකරණයෙන් ඉල්ලන්නේ අක්කර 1/2 ඉඩමක් ලබා දෙන්න?

උ. ඔව්.

ප්‍ර. 'පැ.1.' ලේඛණය සාක්ෂිකරුට පෙන්වා සිටි. එම ඉඩමේ විශාලත්වය රූඩ් 1 ක්. රූඩ් 1ක් කියන්නේ පර්චස් 40 කි කියා තමා දන්නවාද?

උ. මට ඒ ගැන දැනීමක් නැහැ"

In Palisena v. Perera 56 NLR 407and Bandaranaike vs. Karunawathie 2003 (3) SLR 295 it has been held that the title of the permit holder is sufficient to maintain a vindicatory action against a trespasser.

In Pieris vs. Savunahamy 54 NLR 207 Dias J held that in a vindicatory action the burden of proof rests upon the Plaintiff to prove his title including the identification of the boundaries.

The impugned permit produced as 'P1' by the Respondent is dated 91-07-12. It is purported to have been signed by the Divisional Secretary and Assistant Government Agent Thamankaduwa.

Jayasooriya Mudiyanselage Gamini Jayaweera Bandara who was the Divisional Secretary and Assistant Government Agent Thamankaduwa during the relevant period ie. 91-07-12, has given evidence and in his testimony at page 167 of the District Court proceedings he denies that the signature appearing in 'P1' is his signature. When giving evidence he states as follows;-

> **"මම ප්‍රාදේශීය ලේකම් හා උප දිසාපති තනතුර දැරුවා තමන්කඩුව. (මේ ලේඛණය බලා කියන්න) එහි දැක්වෙන 91-07-12 වකවානුවේ මම රාජකාරී කළා. ඔය දැක්වෙන අක්ෂර මේ හා සමානව අත්සනක් පේන්න තියෙනවාත මේ විදියට මම අත්සන කැපිලා යන විදියට ඉර ගහන්නේ නැහැ. මෙ 'පැ.1.' දැක්වෙන අත්සන මගේ අත්සන නොවන බව මම ගරු අධිකරණයට කියා සිටින්නේ. ඊට අමතරව 'පැ.1.' ලේඛණයේ දක්වා තිබෙනවා 91-07-12 කියන ඉලක්කම් ලිවිමේදී, මම ඉලක්කම් ලියන්නේ '9' ඉලක්කම අඩ සඳක් විදියට ලියනවා. 1, 2 අංක මම ලියන ආකාරයටම කියලා හරියට මතක නැහැ "**

The proceedings do not reveal any positive action taken by the Respondent to controvert the position of this witness and to prove the genuineness of this document. The District Court or the Civil Appellate High Court had not paid much attention to this important aspect.

Further in a vindicatory action it is necessary to establish the corpus in a clear and unambiguous manner. The Respondent has completely failed to establish the identity of the corpus.

In the circumstances I answer the question of law in paragraph 24(i) of the Petition of Appeal in the negative and paragraphs 24(ii) and 24(iii) in the affirmative. Accordingly I set aside the judgment of the Civil Appellate High Court of the North Central Province dated 03-06-2010, and the judgment of the District Court of Polonnaruwa dated 30.08.2005. I dismiss case No. 8621/L filed by the Plaintiff-Respondent-Respondent at the District Court of Polonnaruwa.

I make no order as to costs.

JUDGE OF THE SUPREME COURT

Amaratunga, J.

I agree

JUDGE OF THE SUPREME COURT

Imam, J.

I agree

JUDGE OF THE SUPREME COURT

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

S.C. (Spl) LA No.49/2010
CA (Writ) No.277/2008

Batugahage Don Udaya Shantha,
No.122/A/4/B, Kothalawala,
Kaduwela.

Petitioner-Petitioner

Vs.

1. Jeevan Kumaranatunga,
The Minister of Lands and Land Development,
Govijana Mandiraya,
Rajamalwatta Road,
Battaramulla.

1A. Hon. Janaka Bandara Thennakoon,
Hon.The Minister of Lands and Land Development,
Govijana Mandiraya,
Rajamalwatta Road,
Battaramulla.

2. Dinesh Gunawardena,
Minister of Urban Development and Sacred Area Development,
3rd Floor, Sethsiripaya,
Battaramulla.

2A. Hon.The Attorney General,
Attorney General's Department,
Colombo 12.

3. P. Ramanujam,
The Secretary,
The Ministry of Urban Development and
Sacred Area Development,
3rd Floor,
Sethsiripaya,
Battaramulla.

3A. Mr. Gotabaya Rajapaksha,
The Secretary,
The Ministry of Defence,
No.5/15,
Baladhaksha Mawatha,
Colombo 03.

4. Manel Jayasena,
The Divisional Secretary,
The Divisional Secretariat,
Sri Jayawardenapura Kotte,
No.341/2,
Kotte Road,
Rajagiriya.

4A. Mr. Amal J.S.S. Edirisooriya,
The Divisional Secretary,
The Divisional Secretariat,
Sri Jayawardenapura Kotte,
No.341/2, Kotte Road,
Rajagiriya.

5. Sri Lanka Land Reclamation & Development
Corporation, No.03,
Sri Jayawardenapura Mawatha,
Welikada.

6. Karunasena Hettiarachchi,
The Chairman,
Sri Lanka Land Reclamation & Development
Corporation, No.03,
Sri Jayawardenapura Mawatha,
Welikada.

6A. Mr. Harshana De Silva,
The Chairman,
Sri Lanka Land Reclamation & Development Corporation, No.03,
Sri Jayawardenapura Mawatha,
Welikada.

7. G. Alawattegama,
General Manager,
Sri Lanka Land Reclamation & Development Corporation, No.03,
Sri Jayawardenapura Mawatha,
Welikada.

7A. Mrs. Sama Gunawardhana,
The General Manager,
Sri Lanka Land Reclamation & Development Corporation, No.03,
Sri Jayawardenapura Mawatha,
Welikada.

8. C. Ranasinghe,
Land Acquiring Officer,
Greater Colombo Flood Control Project,
No.3,
Sri Jayawardenapura Mawatha,
Welikada.

Respondents-Respondents

BEFORE : Dr. Shirani A. Bandaranayake, CJ.
K. Sripavan, J.
Priyasath Dep, PC., J.

COUNSEL : Manohara de Silva, PC., with
Arienda Wijesurendra for the Petitioner-Petitioner

N. Pulle, SSC., with N. Wigneswaran, SC.,
for the 2A and 5th Respondents-Respondents

ARGUED ON : 22-08-2011.

WRITTNE SUBMISSIONS TENDERED ON : Petitioner-Petitioner : 24-10-2011

Respondents-Respondents : 30-09-2011 and 04-11-2011

DECIDED ON : 29.03.2012.

Dr. Shirani A. Bandaranayake, CJ.

This is an application for Special Leave to Appeal from the judgment of the Court of Appeal dated 10-02-2010. By that judgment the Court of Appeal dismissed the petitioner-petitioner's (hereinafter referred to as the petitioner) application for Writs of Certiorari and Mandamus to quash the order made in Gazette Notification dated 23-10-1991 and an order directing the 1st respondent to divest the petitioner's land.

Being aggrieved by the said judgment the petitioner came before this Court, by way of a Special Leave to Appeal Application.

The petitioner had filed his application for Special Leave to Appeal on 22.03.2010 and thereafter had made an application to file amended caption by his motion dated 21-09-2010, which had been allowed and the Special Leave to Appeal application was fixed for support on 06-12-2010. The respondents-respondents (hereinafter referred to as the respondents) by their motion dated 10-10-2010,

had moved this Court that the petitioner had failed to tender notice of this application on the respondents along with the petition filed before this Court by the petitioner, which was in contravention of Rule 8(3) of the Supreme Court Rules, 1990 and that the petitioner had failed to prosecute his application with due diligence and therefore the said Special Leave to Appeal application should be dismissed *in limine.*

The judgment of the Court of Appeal was delivered on 10-02-2010 and the petitioner had filed the petition, affidavit and other documents in the Supreme Court for Special Leave to Appeal on 22-03-2010. According to the Original Record of the Supreme Court no steps had been taken thereafter until September 2010 and on 21-09-2010 the petitioner had filed a motion stating that he is filing documents marked as A, X, Y1, Y2, Y3 and Z. The petitioner had also moved this Court to grant permission to amend the caption as 1st -4th and 6th – 7th respondents had ceased to hold office and therefore to add the New Ministers and the Secretaries. The said motion was submitted to a single Judge sitting in Chambers on which permission had been granted on 01-10-2010.

Learned President's Counsel for the petitioner submitted that after the judgment was delivered on 10-02-2010 that he became aware that the General Elections were to be held on 08-04-2010. The petitioner was also aware that subsequent to the General Elections in April 2010, the Ministers, Secretaries to the Ministries and Chairmen of Corporations would cease to hold office. Accordingly, learned President's Counsel for the petitioner submitted that together with the petition dated 22-03-2010, a motion was filed seeking permission from the Supreme Court to tender annexures and Respondents' notices subsequently in terms of Rule 40 of the Supreme Court Rules, 1990. Learned President's Counsel for the petitioner further submitted that the Registrar of the Supreme Court had failed to

submit the said application which sought an extension of time in terms of Rule 40 of the Supreme Court Rules of 1990, to a single Judge sitting in Chambers.

Learned President's Counsel for the petitioner relied on the decision in **A.H.M. Fowzie and two others v Vehicles Lanka (Pvt) Ltd.** ((2008) B.L.R. 127) where considering the applicability of Rule 40, this Court had stated that,

> " It is in order to follow the said procedure that it is imperative for a petitioner to comply with Rule 8 of the Supreme Court Rules 1990 and in the event there is a need for a variation or an extension of time, the petitioner could make an application in terms of Rule 40 of the Supreme Court Rules of 1990."

Accordingly learned President's Counsel for the petitioner contended that the requirements in Rule 8(3) of the Supreme Court Rules, 1990 are subject to the provisions made in Rule 40 and therefore non-compliance with Rule 8(3) *Per se* is not fatal to this application as the petitioner had moved for an extension of time in terms of Rule 40 of the Supreme Court Rules, 1990.

Learned President's Counsel for the petitioner also submitted that the petitioner had sought permission to amend the caption and to tender the respondents' notices, along with the amended caption and the said motion was considered by a single Judge sitting in Chambers on 01-10-2010 and order had been made stating that "permission granted."

The contention of the learned President's Counsel for the petitioner is mainly based on the grounds that, the petitioner had submitted a motion at the very outset moving for an extension of time in terms of Rule 40 of the Supreme Court

Rules, 1990 and that thereafter permission was granted by a single Judge sitting in Chambers to issue notice on the respondents.

The petitioner had filed the application for Special Leave to Appeal on 22-03-2010. According to the Minute of the Registrar of the Supreme Court made on 22-03-2010, only the petition, affidavit and the documents had been filed and no notices were tendered for the purpose of serving same on the respondents. Thereafter on 21-09-2010, the petitioner had filed a motion for the purpose of tendering documents marked as A, X, Y1, Y2, Y3 and Z. At the same time the petitioner had moved to obtain permission for the petitioner to file amended caption as 1st to 4th and 6th and 7th respondents had ceased to hold office and therefore to add the new Ministers and Secretaries as parties to the Special Leave to Appeal application.

In the said notice the petitioner had also stated thus;

> " I also seek Your Lordships' Court permission to file the respondents' notices along with the amended caption."

This motion was submitted to a single Judge sitting in Chambers on 30-09-2010 where the permission had been granted. Thereafter on 14-10-2010, the petitioner had filed another motion with the amended caption and sought a date to support the application. Again this motion was submitted to a single Judge sitting in Chambers and a date was given to support this application with notice to the added respondents.

On 25-10-2010, notices were sent to the respondents. According to the entries made in the Original Record, that was the first time notices were served on the respondents after the application was filed on 22-03-2010. Soon after, on 10-11-

2010, the respondents had filed a motion stating that the petitioner had tendered notices of the Special Leave to Appeal application only after six (6) months of the filing of this application and therefore the petitioner had not complied with Rule 8(3) of the Supreme Court Rules, 1990 and that this application should be dismissed *in limine.*

This motion was also submitted to a single Judge sitting in Chambers on which it was directed that to let the Counsel support the motion in open Court on the date it was fixed for support.

When this matter was taken up for support it was decided to first consider the preliminary objection raised by the respondents.

It is therefore abundantly clear that the petition was filed on 22-03-2010 and the notices were issued only on 25-10-2010. It is also evident that after filing petition, affidavit and the documents on 22-03-2010, a motion was filed to tender additional documents to amend the caption and issue notices on the respondents stated in the amended caption which was filed only on 21-09-2010. Accordingly after filing papers, for a period of six (6) months the petitioner had not taken any steps in prosecuting this application.

The objection raised by the learned Counsel for the respondents is that the petitioner had not filed his notices in accordance with the Supreme Court Rules of 1990.

Supreme Court Rules have been made in terms of Article 136 of the Constitution, for the purpose of regulating generally the practice and procedure of the relevant Courts.

It is common ground that the petitioner had filed the Special Leave to Appeal application from the judgment of the Court of Appeal to the Supreme Court. The Rules pertaining to such applications are dealt with in Part I A of the said Rules. Rule 8 of the said Rules deals with the issuance of notice and Rule 8(1) specifically states that when an application for Special Leave to Appeal is lodged in the Registry of the Supreme Court, the Registrar should forthwith give notice by registered post of such an application to each of the respondents. For this purpose it would be necessary for the said notices to be tendered to the Registrar of the Supreme Court by the petitioner. This is clearly stipulated in Rule 8(3) of the Supreme Court Rules, which reads as follows:

> " The petitioner shall tender with his application such number of notices as is required for service on the respondents and himself together with such number of copies of the documents referred to in sub-rule (1) of this rule as is required for service on the respondents. The petitioner shall enter in such notices the names and addresses of the parties, and the name, address for service and telephone number of his instructing Attorney-at-law, if any, and the name, address and telephone number, if any, of the Attorney-at-law, if any, who has been retained to appear for him at the hearing of the application, and shall tender the required number of stamped addressed envelopes for the service of notice on the respondents by registered post. The petitioner shall forthwith notify the Registrar of any change in such particulars."

Rule 8(3) clearly states that notices should be tendered along with the application for Special Leave to Appeal. As stated earlier the petitioner had not filed notices along with his petition, which was filed on 22-03-2010. Learned President's Counsel for the petitioner contended that he had moved for an extension of time to tender notices in terms of Rule 40 of the Supreme Court Rules as the respondents would cease to hold office after the General Election, which was held on 08-04-2010. Learned President's Counsel for the petitioner further submitted that this motion of 22-03-2010 had not been submitted by the Registrar of the Supreme Court to a single Judge in Chambers.

As stated earlier, after filing the petition, affidavit and the documents on 22-03-2010 the petitioner had filed a motion only on 21-09-2010, which sought permission for amending the caption, to accept the additional documents and the notices along with amended caption. It is not correct to state that the said motion had not been submitted to a single Judge in Chambers. In fact the Registrar of the Supreme Court had tendered it to a single Judge sitting in Chambers on 30-09-2010 for consideration and permission was granted on 01-10-2010. However no notices were despatched and again another motion was filed on 14-10-2010 along with an amended caption and seeking dates to support the application. This was allowed and the application was fixed for support, subject to the condition that notices should be served on the added respondents. Thereafter, notices were sent on 25-10-2010.

It is therefore clear that at the time the Special Leave to Appeal application was filed on 22-03-2010 neither the notices were tendered nor a motion was filed in terms of Rule 40 of the Supreme Court Rules, 1990, moving for an extension of time to tender notices.

Rule 8(3) referred to earlier states that the notices that have to be sent to the respondents should be tendered along with the application filed in the Supreme Court. Accordingly, the petitioner should have tendered his notices on 22-03-2010.

Learned President's Counsel for the petitioner took up the position that he had moved this Court by way of a motion for an extension of time to issue notices and that had been tendered as stated earlier on 21-09-2010. Rule 40 provides for an extension of time in tendering notices as required by Rule 8(3), which should be considered by a single Judge in his Chambers.

The question that arises at this juncture is that whether an extension of time to issue notice could be obtained under and in terms of Rule 40 of the Supreme Court Rules, 1990 after a lapse of six (6) months from the date of filing of the application for Special Leave to Appeal.

The answer to this question could be found in Rule 8(5). After the petitioner files notices in the Registry along with his application in terms of Rule 8(3) it is necessary that he attends at the Registry of the Supreme Court after two weeks of the filing of the application and before three weeks of such filing, to verify that such notices have not been returned undelivered. In the event, if there are notices which have been returned undelivered, the petitioner should take steps to furnish the correct addresses for the purpose of serving notices on such respondents.

The objection of Rule 8(5) is too fold. Firstly it makes provision to ascertain as to whether the notices have been tendered to the respondents. Secondly it also provides in a situation where notices have been returned, for the re-issuance of the notices on the respondents. By this process it is ensured that not only the respondents are notified that there is a Special Leave to Appeal application filed

by the petitioner against the decision of the lower Court, but also that they are so notified immediately after the petitioner had filed such an application in the Supreme Court. This is for the purpose of giving adequate time for the respondents to be prepared to object to the application made by the petitioner.

It is in this background that the time period for an extension of time to issue notices on the respondents in terms of Rule 40 should be ascertained.

As stated earlier, it is necessary to file notices along with the petition and affidavit and in terms of Rule 8(5) the petitioner should ascertain as to whether the notices have been served on the respondents within a period not less than two (2) weeks and not more than three (3) weeks after the lodging of the application. Rule 8(3) read with Rule 8(5), clearly indicates that an extension of time would be required either at the very outset of the filing of the application in terms of Rule 8(3) or at a time the notices had been returned due to a defect in the given addresses as stated in Rule 8(5). It would therefore be necessary for the petitioner in both such instances to tender notices forthwith for the Registrar to issue them on the respondents.

Supreme Court Rules, in its totality, has made provision to ensure that all parties are properly notified without any undue delay in order to give a hearing for all parties so concerned. Therefore if a petitioner needs to move for an extension of time in terms of Rule 40, such a motion should be filed either at the time the application is filed in the Supreme Court or else after attending at the Registry between the period of 2-3 weeks after lodging the application in the Registry in terms of Rule 8(5).

It is therefore quite evident that a petitioner who had not complied with the provisions stated in Rule 8(3) cannot seek for an extension of time in terms of Rule 40, after a long period of time of the filing of the application. If a petitioner

is seeking to obtain further time to comply with Rule 8(3) by making an application under and in terms of Rule 40, such an application should be made immediately after filing an application or else after complying with the provisions laid down in Rule 8(5) of the Supreme Court Rules.

It is not disputed that the petitioner had not taken any steps to issue notices on the respondents at the time of the filing of this application for Special Leave to Appeal on 22-03-2010. Moreover he had not taken steps to issue notices until 21-09-2010. Therefore it is clearly evident that the petitioner had not complied with Rule 8(3) of the Supreme Court Rules, 1990.

In **Samantha Niroshana v Senarath Abeyruwan** (S.C. (Spl) LA. 145/2006 – S.C. Minutes of 02-08-2007) and **A.H.M. Fowzei v Vehicles Lanka (Pvt) Ltd.** (S.C. (Spl) LA.286/2007 – S.C. Minutes of 27-02-2008) I had categorically stated that I am mindful of the fact that mere technicalities should not be thrown in the way of the administration of justice. I am still in respectful agreement with the observations made by Bonser, C J., in **Wickramatillake v Marikar** ((1895) 2 N.L.R. 9) referring to Jessel M.R. in **Re Chenwell** (8 Ch. D. 506) that,

> " It is not the duty of a Judge to throw technical difficulties in the way of the administration of justice, but when he sees that he is prevented receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of the way upon proper terms as to costs and otherwise."

As stated earlier, it is necessary to consider the objective of Rule 8 of the Supreme Court Rules, 1990, when considering the preliminary objections on the

basis of non-compliance with the said Rule. Rule 8 has carefully laid down the procedure that should be followed in filing a Special Leave to Appeal application in this Court. In doing so, strong emphasis has been placed on the urgent need to give notice to the respondents, for the purpose of providing them with an opportunity for them to participate in the appeal. When time limits are clearly prescribed in the relevant Rules it is necessary for the petitioner to comply with such restrictions.

As I had stated in **Annamalai Chettiar v Mangala Karunasinghe** (S.C. (Application) 69/2003 - S.C. Minutes of 06-06-2005), **Samantha Niroshana v Senarath Abeyruwan** (Supra) and **A.H.M. Fowzie v Vehicles Lanka (Pvt) Ltd.** (Supra) an objection raised on the basis of non-compliance with a mandatory Rule, such as Rule 8 of the Supreme Court Rules of 1990, cannot be considered as a mere technical objection.

Accordingly, as stated in **A.H.M. Fowzie** (Supra) where there has been non-compliance with a mandatory Rule such as Rule 8(3), serious consideration should be given for such non-compliance as that kind of non-compliance by a party would lead to serious erosion of well established Court procedures in our Courts, maintained throughout several decades.

It should be borne in mind that the procedure that should be followed when filing applications before the Supreme Court cannot be easily disregarded as that is administered on the basis of the Rules that are made under the provisions stipulated in the Constitution. The said Rules, which have been made for the purpose of assisting the administration of the Court procedures should be followed and when they are not complied with, it cannot be said that objections raised on the basis of such non-compliance are mere technical objections.

The present Supreme Court Rules, which came into being in 1990 has clearly set out the procedure applicable in filing applications before this Court. If a party neglects or ignores to comply with such Rules, and if the other party takes an objection on that basis, such an objection cannot be ignored on the basis of categorising it as a technical objection as the fault lies with the party who had been reckless and negligent so as to ignore the written procedures laid down under the Supreme Court Rules.

The question that arises at this point would be as to whether the non-compliance with Rule 8(3) would result in the dismissal of the application. This question had been considered in a long line of cases decided by this Court where it had been held that non-compliance with Rule 8(3) would result in the dismissal of the application (**K. Reaindran v K. Velusomasunderan** (S.C. (Spl) LA. Application No.298/99 – S.C. Minutes of 07-02-2000), **N.A. Premadasa v The People's Bank** (S.C. (Spl) LA. Application No.212/99 – S.C. Minutes of 24-02-2000, **Hameed v Majibdeen and Others** (S.C. (Spl) LA. Application No.38/2001 – S.C. Minutes of 23-07-2001) **K.M. Samarasinghe v R.M.D. Ratnayake and Others** (S.C. (Spl) LA. Application No.51/2001- S.C. Minutes of 27-07-2001) **Soong Che Foo v Harosha K. De Silva and Others** (S.C. (Spl) LA. Application No.184/2003 – S.C. Minutes of 25-11-2003), **C.A. Haroon v S.K. Muzoor and Others** (S.C. (Spl) LA. Application No.158/2006 – S.C. Minutes of 24-11-2006), **Samantha Niroshana v Senarath Abeyruwan** (Supra) **A.H.M. Fowzie and two others v Vehicles Lanka (Pvt) Ltd.** (Supra) and **Woodman Exports (Pvt) Ltd. v Commissioner General of Labour** (S.C.(Spl) LA. Application No.335/2008–S.C. Minutes of 13-12-2010),**Tissa Attanayake v Commissioner General of Election** (S.C. (Spl) LA. Application No.55/2011 – S.C. Minutes of 21-07-2011).

For the reasons aforesaid, I uphold the preliminary objection raised by learned Senior State Counsel for the respondents and dismiss the petitioner's application for Special Leave to Appeal for non-compliance with Rule 8(3) of the Supreme Court Rules, 1990.

I make no order as to costs.

Chief Justice

K. Sripavan, J.

I agree.

Judge of the Supreme Court

Priyasath Dep, PC., J.

I agree.

Judge of the Supreme Court