

ASOKAN

v.

PALANIVELU

SUPREME COURT

ISMAIL, J., WANASUNDERA, J. AND

RATWATTE, J.

S.C. APPEAL NO. 52/81

C.A. APPEAL NO. 269/80 (F)

D.C. COLOMBO CASE NO. 3228/RE

NOVEMBER 9, 10 and 12, 1981.

Landlord and tenant – Tenancy – Succession – S. 36 of Rent Act – Non-joinder – Sub-tenancy – Right to carry on business.

One Palanivelu was the owner and proprietor of the eating-house business of Asoka Lodge which he ran at premises No. 169 Sea Street as the tenant of one Ameen. Palanivelu by Agreements X2 of 15.1.1973 and X3 of 9.2.1975 entrusted the management and control of the business to defendant on a commission basis for 5 years from 9.7.1975. Palanivelu paid the rents to Ameen. Palanivelu died on 3.9.1976 and on 6.9.1976 his widow the plaintiff wrote to Ameen that she was continuing the tenancy. She continued to pay the rents to Ameen who however continued to issue the receipts in the name of Palanivelu. Ameen denied receipt of notice of Palanivelu's death. The defendant taking up the position that he was a subtenant of Palanivelu and that X2 and X3 were sham documents to avoid the provisions of the Rent Act made arrangements to convert the business to a jewellery business.

Held:

- (1) The plaintiff became the tenant of the premises by the operation of s. 36(2)(c)(i) of the Rent Act and it was not necessary for the plaintiff to have joined the other heirs of Palanivelu in the action.
- (2) The defendant and Ameen acted in collusion to deprive the plaintiff of the tenancy.
- (3) The defendant was not a subtenant but only in management and control of the business of which plaintiff was the lawful owner and he had no right to occupy or carry on the business except under plaintiff.
- (4) The plaintiff was entitled to occupy the premises.

Cases referred to

- (1) *Patirana v. Somalatha de Silva* (1978) 79(2) NLR 265
- (2) *Charles Appuhamy v. Abeysekera* (1954) 56 NLR 243

(3) *Jayasinghe v. Hussain* (1955) 56 NLR 381

(4) *Andiris Appuhamy v. Kuruppu* (1963) 65 NLR 21

Appeal from judgment of the Court of Appeal.

J.W. Subasinghe, Senior Attorney, with S. Sivarasa.

D.J.C. Nilanduwa and N. Chelliah for defendant - appellant - appellat.

C. Thiagalingam, Q.C., with S. Mahenthiran for plaintiff - respondent - respondent.

Cur. adv. vult.

December 14, 1981

RATWATTE, J.

The Plaintiff instituted this action against the Defendant praying for the following reliefs;

- (a) for a declaration that the Plaintiff is entitled to occupy premises bearing assessment No. 169, Sea Street, Colombo 11 as against the Defendant;
- (b) for a declaration that the Plaintiff is the lawful owner and proprietor of the business of Asoka Lodge which was being carried on in the said premises.
- (c) for a declaration that the Defendant has no right to occupy and/or carry on any other business in the said premises except through and under and/or as the agent of the Plaintiff;
- (d) for interim and permanent injunctions restraining the Defendant from preventing and/or obstructing the Plaintiff and/or her son, servants or agents from entering the said premises and from occupying the room in the upstairs portion of the said premises and from making any structural alterations in the said premises and/or in any way changing the said nature of the said business and/or removing the furniture and fittings until the final determination of this action.

The Plaintiff's case is as follows:

She is the widow of the late Thambiah Palanivelu (referred to hereinafter as Palanivelu) who died on 03.09.1976. Palanivelu carried on the business of an eating house and restaurant called Asoka Lodge at premises bearing No. 169, Sea Street, Colombo 11. Palanivelu was the tenant of the said premises under a person named M. A. M. Ameen. In January 1973 Palanivelu entered into

a written agreement with the Defendant by which Palanivelu appointed the Defendant as the Manager of the said business upon the terms and conditions set out in the agreement, a copy of which has been produced marked X2 (also marked D39). X2 was signed on 15.01.1973 and the appointment of the Defendant as Manager was for a period of 3 years from 15.01.1973. On 09.07.1975 Palanivelu entered into a fresh agreement, X3 (also marked D40) with the Defendant by which Palanivelu handed over the management and control of the said business on a commission basis for a period of 5 years from 09.07.1975 upon the terms and conditions set out in X3. Thereafter the Defendant paid to Palanivelu every month right up to his death a sum of Rs. 1,200/-. After the death of Palanivelu the Defendant paid the sum of Rs. 1,200/- per month to the Plaintiff up to the end of December 1978. After Palanivelu died on 03.09.1976, the Plaintiff wrote to Ameen the Landlord of the premises on 06.09.1976 informing him of the death of Palanivelu and asking Ameen to extend to her the co-operation that he had extended to her late husband. A carbon copy of this letter has been produced marked X4, (also as P4). The Plaintiff thereafter continued to pay the monthly rents to Ameen, but the latter continued to issue receipts in the name of Palanivelu. On 13.05.1977 the Plaintiff's Attorney-at-Law wrote the letter X6 (D6) to Ameen requesting *inter alia* that the rent receipts be issued in favour of the Plaintiff. Ameen sent the reply X7 (D4) through his Attorney-at-Law, *inter-alia* denying the receipt of the notice of death of Palanivelu. The Plaintiff's Attorney-at-Law replied to X7 by his letter X8 (P20) dated 11.07.1977. No reply was sent by Ameen to X8. The Plaintiff thereafter continued to tender every month the monthly rental to Ameen through her Attorney-at-Law up to December 1978. The Plaintiff averred that the premises are governed by the provisions of the Rent Act. No. 7 of 1972 and that after Palanivelu's death, Plaintiff is the tenant of the premises in terms of Section 36 of the Rent Act. After Palanivelu's death the Plaintiff carried on the said business at the said premises and the Defendant continued as the Manager. The Defendant agreed with the Plaintiff in the presence of a number of others to continue the management of the business under the Plaintiff on the terms and conditions set out in X3. The Defendant paid the Plaintiff a sum of Rs. 1,200/- per month up to December 1978. The Plaintiff averred that the Defendant is now attempting to change the nature of the said business, is disputing the Plaintiff's ownership of the business and is endeavouring to start a new jewellery business and further that the Defendant has kept the premises closed since 14.01.1979. The premises consists of the ground floor where the business is carried on and an upstairs portion with a room which is reserved for the occupation of the proprietor. During Palanivelu's lifetime, he occupied that room. After his

death it was reserved for occupation by the Plaintiff and her children whenever they came to Colombo. On 14.01.1979 the Defendant attempted to break open the said room and to make structural alterations to the room as well as to the ground floor. The Plaintiff thereupon through her agent complained to the Police. The Plaintiff instituted this action on 29.01.1979.

The Defendant in his answer stated that prior to 15.01.1973, Palanivelu carried on the business of an eating house and restaurant in premises No. 169, Sea Street, Colombo under the name of Chitra Cafe. He pleaded that Palanivelu sublet the said premises to the Defendant from on or about 15.01.1973. He further pleaded that the agreements X2 and X3 were written in order to overcome the provisions of the Rent Act No. 7 of 1972. He stated that the security deposits referred in X2 and X3 were given for the safe return of the furniture and fittings let to the Defendant by Palanivelu. The Defendant further pleaded that after Palanivelu's death the Plaintiff informed the Defendant that Ameen had recognised her and accepted her as the tenant and that acting on this information, the Defendant continued to remain in the premises as the subtenant of the Plaintiff and continued to pay the monthly sum of Rs. 1,200/- to the Plaintiff. After the Defendant became a subtenant under Palanivelu the Defendant commenced the business of an eating house and hotel under the name of Asoka Lodge; but Palanivelu had registered the business carried on by the Defendant under the name of Asoka Lodge in Palanivelu's name. The Defendant denied that a room in the upstairs portion of the said premises was reserved by Palanivelu or subsequently for the Plaintiff. Towards the end of June 1977 Ameen's rent collector questioned the Defendant by what right the Defendant was occupying the premises and the Defendant informed the rent collector that he was a sub-tenant under Palanivelu and after the latter's death he continued to occupy the premises as a sub-tenant of the Plaintiff. The Defendant further stated that the rent collector informed him that Ameen at no stage recognised the Plaintiff as the tenant of the premises. Sometime later as the rent collector informed the Defendant that Ameen was contemplating to institute an action to have him ejected from the premises, the Defendant informed the Plaintiff about Ameen's threat and further informed her that he had no alternative but to negotiate with Ameen to become the tenant. The Defendant averred that in the latter part of August 1977, the Plaintiff came to Colombo and the Defendant informed her that Ameen had agreed to accept the Defendant as his tenant. It was then agreed between the Plaintiff and the Defendant that the latter was to pay a further sum of Rs. 10,000/- on account of the furniture and fittings let to the Defendant by Palanivelu and

that the Plaintiff will have no further claims against the Defendant. The Defendant therefore paid the Plaintiff a sum of Rs. 10,000/-. The Defendant stated that he became Ameen's tenant from 01.09.1977. He further pleaded that as the tenant of the premises he decided in November 1978 to run a jewellery business with some others as partner in the said premises. The Defendant prayed for a dismissal of the Plaintiff's action.

After trial the learned District Judge gave judgment for the Plaintiff in terms of paragraphs (a), (b), (c) and (e) of the prayer to the plaint with costs. The Defendant appealed and the Court of Appeal affirmed the judgment of the District Court and dismissed the appeal subject to a variation in the decree regarding the issue of the permanent injunction. The Court of Appeal granted leave to the Defendant to appeal to this Court.

When this appeal was taken up for argument in this Court, learned Counsel for the Defendant raised a preliminary objection on the basis of Rule 30 of the "Supreme Court Rules, 1978". Learned Counsel Mr. Subasinghe argued that the appearance of the Plaintiff was entered out of time. According to the docket, the Registrar had sent the notice of this appeal to the Plaintiff on 13.08.1981 and in terms of Rule 30 the Respondent should have entered an appearance in the Registry within 14 days of the receipt of the Notice. The appearance on behalf of the Plaintiff has been filed on 04.09.1981. Mr. Subasinghe submitted that the Plaintiff is not properly before this Court. Learned Counsel for the Plaintiff, Mr. Thiagalingam stated that he has been instructed that within two days of the receipt of the notice of appeal by the Plaintiff the appearance was filed on her behalf. The proxy which was filed on 04.09.1981 is dated 03.09.1981. As there was no material to indicate when the notice of appeal was received by the Plaintiff who lives in Nainativu, we overruled the preliminary objection.

Mr. Subasinghe then formulated the first point of law which he was raising as follows: "whether in view of the provisions of Section 9 of the Business Names Ordinance (Chapter 149) the Plaintiff can maintain this action." Mr. Subasinghe submitted that the Plaintiff had failed to notify the Registrar of Business Names of the death of her husband Palanivelu and to register herself as the individual carrying on the business. This point had been taken up in the petition of appeal filed in the Court of Appeal in paragraphs 10 (X) (a) and (b). Mr. Subasinghe further submitted that although this point was argued in the Court of Appeal, it has not been dealt with at all by the Court of Appeal in its judgment. Mr. Subasinghe further stated that he was not personally

aware whether this point was argued in the Court of Appeal, but he was basing his submission on what is stated in paragraph 15(g) of the petition of appeal filed in this Court. Mr. Thiagalingam stated that though this point has been taken up in the petition of appeal filed in the Court of Appeal, it was not argued in the Court of Appeal, as it had not been taken up in the District Court. Mr. Subasinghe at this stage abandoned this point of law.

Mr. Subasinghe then formulated the following five points of law on which he was going to base his arguments:

1. Is it a proper inference from the facts proved and upon a proper construction of the documents D39 and D40 (X2 and X3), that the Defendant is a sub-tenant of Palanivelu.
2. Is it a proper inference from the facts proved in this case that the Defendant is a tenant of M. A. M. Ameen from 01.09.1977.
3. Since the documents P6 to P18 have not been written and signed by the Defendant, can the Court of Appeal draw any inference from these documents.
4. On the facts proved did the Plaintiff become a tenant under Ameen by virtue of Section 36(2) (c)(i) of the Rent Act.
5. Can a co-heir who inherits the half share of a business maintain an action without joining the other co-heirs as partners in respect of the business.

In the order of the Court of Appeal granting leave to the Defendant to appeal to this Court, there is no reference to any substantial question of law to be adjudicated upon by this court. In terms of Article 128 of the Constitution, an aggrieved party can appeal to the Supreme Court from a judgment of the Court of Appeal, with the leave of the Court of Appeal, if a substantial question of law is involved. Mr. Thiagalingam submitted that not one of the five questions raised by Mr. Subasinghe is a question of law.

Mr. Subasinghe argued that a wrong inference drawn by a judge from proved facts is a question of law. He further argued that the Court of Appeal granted leave because that Court was satisfied that there were substantial questions of law. We indicated to Counsel that we will deal with this matter in our final judgment, and we allowed Mr. Subasinghe to continue.

As stated by Mr. Subasinghe himself the five questions raised by him are interlinked, some of them more closely so. Most of the arguments adduced by Mr. Subasinghe in support of the first question of law raised by him applied to the 2nd and 3rd. It will therefore be convenient to deal with the first, second and third questions together.

In my view issues 1 and 8 raised at the trial in the District Court deal with the matters that come within the ambit of the first question of law. Both these issues were answered by the trial Judge in favour of the Plaintiff. I am also of the view that issues 14, 15, 16, 21 and 22 cover the 2nd question of law raised by Mr. Subasinghe. The learned District Judge's finding on these issues was that though Ameen accepted the Defendant as his tenant of the premises from 01.09.1977, Ameen and the Defendant acted in collusion in fraud of the Plaintiff and attempted to deprive the Plaintiff of her right to the tenancy. He held that the Plaintiff was the tenant of the premises and that the Defendant was estopped from denying that the Plaintiff is the tenant. Mr. Subasinghe's argument was that these are not pure questions of fact. He contended that assuming that the learned trial Judge's findings on certain disputed questions of fact are correct, the inferences he drew from the facts he held to have been proved, are wrong. Mr. Subasinghe attempted to canvass some of the findings of fact by the Trial Judge on the ground that he had not taken certain matters into consideration in arriving at these findings. It is not necessary to cite authorities for the proposition that sanctity attaches to the decisions of a trial Judge, who has seen and heard the witnesses who give evidence at the Trial.

As regards the first question of law, the question that arises for consideration is whether the agreements X2 and X3 were sham or fictitious documents executed to circumvent the provisions of the Rent Act which prohibit sub-letting of premises by a tenant. In considering this question it is relevant to ascertain what was the true intention of the parties. This, as Mr. Thiagalingam submitted is a pure question of fact. The learned Trial Judge analysed very carefully the oral and documentary evidence led in the case and came to the conclusion that the two agreements are documents by which the Defendant was appointed to manage and control the business which Palanivelu was carrying on in the premises in question. The learned Trial Judge has adopted the correct legal principles in arriving at his conclusions. The Court of Appeal has affirmed the findings of the learned Trial Judge and the Court of Appeal has further closely analysed the two documents particularly the document X3. The Court of Appeal has referred to and

discussed a number of authorities on similar questions which have arisen in other cases. On the facts established at the trial and on the construction of the documents, the Court of Appeal has affirmed the judgment of the learned District Judge as to the true nature of the Agreements. I need only refer to the judgement of Chief Justice Samarakoon in the case of *Pathirana vs. Somalatha de Silva*⁽¹⁾. The Plaintiff in that case who owned and ran a bakery in certain premises by an agreement gave the premises together with the bakery business and the furniture and fittings to the Defendant in that case for a period of two years. After the two years period lapsed, the Defendant failed to vacate the premises. The Defendant had also sub-let the premises contrary to the terms of the lease. The Plaintiff filed action against the Defendant. The Defendant pleaded that the document was not a lease of a business but in fact a mere letting of the premises. The trial Judge entered judgment for the Plaintiff and on appeal by the Defendant the Supreme Court affirmed the judgment of the District Court. Samarakoon Chief Justice in the course of his judgment stated as follows at page 267:

"In deciding the question as to whether a document such as this is a lease of a business or merely a letting of premises one has first to look at the totality of its provisions and the object it seeks to achieve. *Vide Charles Appuhamy v. Abeysekera*, (2) 56 N.L.R. 243 (2) and *Jayasinghe v. Hussein*, 56 N.L.R. 381.⁽³⁾ Secondly, whether the facts established in evidence show that in fact it has achieved something different and whether the document was only a cover for it. *Andiris Appuhamy v. Kuruppu*, 65 N.L.R. 21.⁽⁴⁾ The evidence led in this case shows that what was let was a bakery business, which business the defendant ran during the period of two years and was still running at the time of the trial. I therefore reject the contention that P1 was merely a letting of premises."

The Trial Judge and the Court of Appeal have adopted the principles enumerated by the Chief Justice in the above mentioned case.

It was not the case of the Plaintiff that Palanivelu himself ran the business right up to his death. The Plaintiff's evidence was that sometime after X3 was entered into, Palanivelu went back to Nainativu and the Defendant ran the business and paid Palanivelu the sum of Rs. 1,200/- per month, which was the commission agreed to by the parties. After Palanivelu's death the Plaintiff continued to be the owner of the business and the Defendant paid to her the sum of Rs. 1,200/- per month right up to December 1978.

These matters are pleaded in paragraph 14 of the plaint. The Defendant in answering paragraph 14 of the plaint states in paragraph 10 of the answer, *inter-alia*, that he "continued to pay the monthly sum of Rs. 1,200/- as paid earlier." He goes on to state that "save and except as herein admitted the Defendant denies the rest of the averments contained in the said paragraphs." Mr. Thiagalingam contended that the Defendant in paragraph 10 of his answer has admitted that he paid the sum of Rs. 1,200/- per month till December 1978. Mr. Subasinghe argued that there is no such admission. Mr. Subasinghe referred to paragraph 6 of the plaint wherein also the Plaintiff has stated that the Defendant paid to her the sum of Rs. 1,200/- till December 1978. Mr. Subasinghe then referred to paragraph 6(a) of the answer in which the Defendant has denied the averments in paragraph 6 of the plaint. What Plaintiff in effect states in paragraphs 6 and 14 of the plaint is that the sum of Rs. 1,200/- was paid as commission first to Palanivelu and then to the Plaintiff. In paragraph 6 of the answer the Defendant pleads that the Plaintiff sub-let the premises to him. I am of the view that when the Defendant in paragraph 6(a) of the Answer denied paragraph 6 of the plaint, the denial was in effect a denial that the payment was paid as commission. The Defendant's evidence at the Trial was that he paid the sum of Rs.1,200/- to the Plaintiff only till August 1977 and that the payment was made as rent to Palanivelu and later to the Plaintiff. The learned Trial Judge has accepted the Plaintiff's evidence that the Defendant paid her Rs. 1,200/- per month till December 1978.

It was only in the answer that the Defendant took up the position that he became a sub-tenant of Palanivelu from 15.01.1973 on which date X2 was signed. The learned Trial Judge as stated earlier after a careful analysis of the evidence, has come to the conclusion that it was only after the dispute started in December 1978, that the Defendant has put forward this defence. It is quite clear from the oral and documentary evidence that the Defendant considered himself as the Manager of the business first under Palanivelu and later under the Plaintiff. The Defendant himself in his evidence stated that when the landlord Ameen asked him in July 1977 in what capacity he was staying in the premises, he had replied to Ameen that he was running the business on a commission basis under Palanivelu. Thereupon Ameen questioned him as to whether there was any writing and when he replied that there was an agreement, Ameen asked him to produce it. The Defendant states that he went subsequently with the document, apparently X3, and according to the Defendant, Ameen read the document and shouted out that the agreement was false and that the Defendant was a subtenant. Mr. Thiagalingam contended that

this evidence of the Defendant clearly showed that the Defendant himself considered X3 as a commission agreement and the idea of subtenancy was given to the Defendant by Ameen. I am of the view that there is much substance in this contention of Mr. Thiagalingam.

As regards the 2nd question of law raised by Mr. Subasinghe, the Plaintiff in her evidence stated that on 06.09.1976, i.e. 3 days after Palanivelu's death, she sent by registered post the letter X4 to Ameen informing him of Palanivelu's death. Ameen denied that he received X4. Since Ameen continued to send the rent receipts in respect of the premises in Palanivelu's name, the Plaintiff's Attorney-at-law, Mr. Suntheralingam wrote the latter X6 (D6) dated 13.05.1977 to Ameen, drawing his attention to X4 and informing Ameen that in terms of Section 36(2)(c) of the Rent Act, the Plaintiff is the lawful tenant of the premises. The money order for Rs. 160/- being the rent for May 1977 was also enclosed. Ameen was requested to send a receipt in the name of the Plaintiff. Ameen's Attorney-at-law replied to X6 by X7 dated 06.07.1977. Mr. Suntheralingam replied to X7 by X8 (P20). No reply was received to X8. Thereafter Mr. Suntheralingam wrote the letters P21 to P36 enclosing Money Orders for Rs. 160/- in respect of each month up to December 1978. Along with X7 the money order sent with X6, was returned. But none of the subsequent money orders received by Ameen from Mr. Suntheralingam had been returned though they had not been cashed and neither had he replied to any of the letters P21 to P36. It is clear therefore that when the Defendant negotiated with Ameen to take the premises in his name, Ameen was aware that Plaintiff was claiming to be the tenant in terms of Section 36 of the Rent Act and that the Plaintiff was regularly sending the monthly rent. Ameen was called as a witness by the Defendant and in his evidence he stated that he did not receive X4. The learned District Judge rejected this evidence of Ameen. Mr. Subasinghe has not been able to establish that this finding of the Trial Judge was wrong. We are of the view that on the oral and documentary evidence in the case, the finding of the Trial Judge which has been affirmed by the Court of Appeal, that the Defendant and Ameen acted collusively as stated earlier, and the further finding that the Defendant is estopped from denying that the Plaintiff is the tenant, are correct.

I now come to the 3rd question raised by Mr. Subasinghe. These documents P6 to P18 were documents that were considered by the Trial Judge and the Court of Appeal along with other documents, in arriving at the conclusions referred to above. P6 to P15 were letters which the Plaintiff claimed were sent by the Defendant to

her son, Parameswaran who gave evidence at the trial. P16 to P18 were letters said to have been sent by the Defendant to Palanivelu. When these letters were first produced when the Plaintiff was giving evidence, they were shown to the Defendant by his Counsel and the Defendant had stated that P6 to P18 were not in his handwriting and that he had not signed them. Plaintiff was an illiterate woman who could not read or write. Parameswaran in his evidence related the circumstances under which P6 to P18 were received by him and stated that they were letters from the Defendant. The trial Judge held that the letters P6 to P18 were all documents which have been "written and signed" by the Defendant. The Court of Appeal held that that finding cannot be supported as neither the Plaintiff or her son were familiar with the Defendant's handwriting. But the Court of Appeal was of the opinion that it is implicit in the finding of the District Judge that the District judge was also satisfied that they are documents which have been sent by or at the instance of the Defendant with the full knowledge and approval of their contents. The Court of Appeal went on to carefully examine the evidence and the contents of these documents. The Court of Appeal has further referred to certain admissions made by the Defendant. These admissions tally with some of the contents of the letter P6 to P18, and are referred to in the judgment of the Court of Appeal. And the Court of Appeal finally came to the conclusion that "the inference that the said documents — P6 to P18 — are all letters, at any rate, sent by or at the instance of the Defendant with the Defendant's full knowledge and approval of the contents, is quite justifiable." The Court of Appeal went on to hold that therefore the trial Judge was entitled to take the contents of these letters into consideration in arriving at his decisions. I am unable to say that the Court of Appeal was wrong in arriving at this conclusion.

For the above reasons, I am of opinion that the findings of the learned District Judge in regard to issues 1,8,14,15,16,21, and 22 which decisions have been affirmed by the Court of Appeal, are correct. Mr. Subasinghe's submissions regarding the first three questions raised by him therefore fail.

The 4th and 5th questions raised by Mr. Subasinghe can be dealt with together. They are mixed questions of fact and law. They had been raised in the Court of Appeal too. In this connection the following answer of the trial Judge to Issue No. 1 is relevant:

"The Defendant who was managing and controlling the said business in terms of X3 under the deceased Palanivelu continued

to do so under the Plaintiff under the terms and conditions set out in the document 'X3.'"

I have already held that this was a correct finding. It is implicit in this finding that the Plaintiff as the surviving spouse, carried on in the said premises the business carried on by the deceased tenant, Palanivelu. The Plaintiff therefore clearly comes within the ambit of Section 36(2)(c)(i) of the Rent Act. It was accordingly not necessary for the Plaintiff to have joined the other heirs of Palanivelu in the action. The Plaintiff was entitled to institute the action in its present form. The submissions of Mr. Subasinghe regarding the 4th and 5th questions also fail.

For these reasons I would affirm the Judgment of the Court of Appeal and dismiss this Appeal with costs.

Ismail, J. I agree.
Wanasundara, J. I agree.

Appeal dismissed