THE

Sri Lanka Law Reports

Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2013] 1 SRI L.R. - PART 10

PAGES 253 - 280

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at M. D. Gunasena & Company Printers (Private) Ltd.

Price: Rs. 25.00

DIGEST

"Sections 1.2 determine the position of Community treaties in the British legal system. It was necessary to do so because, following the "dualist theory", international treaties to which the United Kingdom is a party bind merely the Crown qua state but have to be implemented by statute in order to have internal effect the membership of the community presupposes a monist approach, which entails direct and immediate internal effect of treaties without the necessity of their transformation into municipal law. By virtue of Section 2(1) the pre-accession Community treaties, became part of the United Kingdom Law. Post-accession treaties on the other hand, become as they stand effective by virtue of Orders in Council when approved by resolution of each House of Parliament (Section 1(3))".
(Halsbury's Statutes – Fourth Ed. Vol. 17 p 32).

Thus 'community rights' become effective in the U.K through the medium of the 1972 Act and other municipal legislation but the continued adherence to the dualist theory in the U.K. is clearly seen in the following dictum of Lord Denning:

*"Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act – with the intention of repudiating the Treaty or any provision in it – or intentionally of acting inconsistently with it – and says so in express terms – then I should have thought that it would be the duty of our courts to follow the statute. . . ." (**Macarthys Vs. Smith)** [(1)].*

In this background I would refer to the relevant provisions of our Constitution. Articles 3 and 4 of the Constitution are as follows:

3. *"In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes, the powers of government, fundamental rights and the franchise."*

4. *"The sovereignty of the People shall be exercised and enjoyed in the following manner.*

   (a) the legislative power of the People shall be exercised by Parliament consisting of elected representatives of the People and by the People at a Referendum.

   (b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

   (c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;

   (d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and

(e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors:

Article 5 lays down that the territory of the Republic of Sri Lanka shall consist of twenty –five administrative districts set out in the First Schedule and its territorial waters.

It is seen from these Articles forming its effective framework that our Constitution is cast in a classic Republican mould where Sovereignty within and in respect of the territory constituting one country, is reposed in the People. Sovereignty includes legislative , executive and judicial power, exercised by the respective organs of government for and in trust for the People. There is a functional separation in the exercise of power derived from the Sovereignty of the People by the three organs of government, the executive, legislative and the judiciary. The organs of government do not have a plenary power that transcends the Constitution and the exercise of power is circumscribed by the Constitution and written law that derive its authority therefrom. This is a departure from the monarchical form of government such as the UK based on plenary power and omnipotence.

For instance, the dicta of Megarry V-C that –

"……it is a fundamental principle of the English Constitution that Parliament is supreme. As a matter of law the courts of England recognize Parliament as being omnipotent in all save the power to destroy its own omnipotence." (Manuel vs A.G [(2)]) at 795

would not apply to the Parliament of Sri Lanka which exercises legislative power derived from the People whose sovereignty is inalienable as laid down in Article 4(a) referred above.

The same applies to the exercise of executive power. There could be no plenary executive power that pertain to the Crown as in the U.K and the executive power of the President is derived from the People laid down as in Article 4(b). Hence the statement in Halsbury's Statute cited above that –

> *".....international treaties to which the United Kingdom is a party bind merely the Crown qua state but have to be implemented by statute in order to have internal effect;"*

has to be modified in its application to Sri Lanka to interpose the essential element of constitutionality and should read as follows;

> *"international treaties entered into by the President and the Government of Sri Lanka as permitted by and consistent with the Constitution and written law would bind the Republic qua state but have to be implemented by statute enacted under the Constitution to have internal effect".*

This limitation on the power of the executive to bind the Republic *qua* state is contained in Article 33 which lays down the powers and functions of the President. The relevant provision being Article 33(f) reads as follows:

> *"to do all such acts and things, not being inconsistent with the provisions of the Constitution or written law as by international law, custom or usage he is required or authorized to do."*

Thus, the President, as Head of State is empowered to represent Sri Lanka and under Customary International Law enter into a treaty or accede to a Covenant, the contents of which is not inconsistent with the Constitution or written law. The limitation interposes the principle of legality being the primary meaning of the Rule of Law, " that everything must be done according to law. (Administrative Law by Wade and Forsyth-9th Ed. Page 20).

In this background, I would examine the submissions that have been made. Counsel for the Petitioner contended that Sri Lanka acceded to the Covenant (as referred to above) on 11.6.1980 and to its Optional Protocol on 3.10.1997. The Petitioner produced the Declaration made by Sri Lanka upon accession to the Optional Protocol which would be reproduced later. The petitioner contends that pursuant to this Declaration he addressed a communication to the Human Rights Committee at Geneva alleging that the conviction and sentence entered and imposed by the High Court, affirmed by the Court of Appeal and the dismissal of his appeal by this Court is a violation of his rights set forth in the Covenant. That, the Committee came to a finding forwarded to the Government, that the conviction and sentence imposed " disclose violations of Article 14 paragraphs 1, 2, 3 and paragraph 14(g) read together with Article 2 paragraphs 3 and 7 of the Covenant. The Committee came to a further finding that Sri Lanka as a "State party is under an obligation to provide the Petitioner with an effective and appropriate remedy, including release or retrial and compensation."

I pause at this point to note only two matters that require attention. They are:

(i) The alternative remedies specified by the Committee cannot be comprehended in the context of our court procedure. A release and compensation (to be sought in a separate civil action) predicate a baseless *mala fide* prosecution whereas a retrial is ordered when there is sufficient evidence but the conviction is flawed by a serious procedural illegality. The High Court convicted *the Petitioner on the basis of his con*fession after a full *voir dire* inquiry as to its voluntariness. If the confession is adequate to base a conviction, a retrial (as contemplated by the Committee) would be a superfluous re-enactment of the same process.

(ii) Petitioner has been convicted with having conspired with others to overthrow the lawfully elected Government of Sri Lanka and for that purpose attacked several, Army camps. The offences are directly linked to the Sovereignty of the People of Sri Lanka and the Committee at Geneva, not linked with the Sovereignty of the People has purported to set aside the orders made at all three levels of Courts that exercise that judicial power of the People of Sri Lanka.

The objection of the Deputy Solicitor General to the application is based on the matter stated at (ii) above. He submitted that judicial power forms part of the Sovereignty of the People and could be exercised in terms of Article 4(c) of the Constitution, cited above, only by Courts, Tribunals or institutions established or recognized by the Constitution or by law. This basic premise is elaborated in Article105(1) which reads as follows:

"Subject to the provisions of the Constitution, the institutions for the administration of justice which protect, vindicate and enforce the rights of the People shall be –

(a) The Supreme Court of the Republic of Sri Lanka;

(b) The Court of Appeal of the Republic of Sri Lanka;

(c) The High Court of the Republic of Sri Lanka and such other Courts of First Instance, tribunals or such institutions as Parliament may from time to time ordain and establish.

The resulting position is that the Petitioner cannot seek to "vindicate and enforce" his rights through the Human rights Committee at Geneva, which is not reposed with judicial power under our Constitution. *A fortiori*, it is submitted that this court being " the highest and final Superior Court of record in the Republic" in terms of Article 118 of the Constitution cannot set aside or vary its order as pleaded by the petitioner on the basis of the findings of the Human Rights Committee in Geneva which is not reposed with any judicial power under or in terms of the Constitution.

On the other hand Counsel for the Petitioner contended that Sri Lanka acceded to the Optional Protocol in 1997 and made the declaration cited above and the Petitioner invoked the jurisdiction of the Committee at Geneva in the exercise of the rights granted by the Declaration. Therefore he has a legitimate expectation that the findings of the Committee will be enforced by Court. In the alternative it was submitted that this Court should recognize the findings and direct the release of the Petitioner from custody.

The respective arguments of Counsel run virtually on parallel tracks, one based on legitimate expectation and the other on unconstitutionality. They converge at the basic issues as to the legal effect of the accession to the Covenant in 1980, the accession to the Optional Protocol and the

Declaration made in 1997. These issues have to be necessarily considered in the framework of our Constitution which adheres to the dualist theory as revealed in the preceding analysis, the sovereignty of the People of Sri Lanka and the limitation of the power of the President as contained in Article 4(1) read with Article 33 (f) in the discharge of functions for the Republic under customary international law.

The President is not the repository of plenary executive power as in the case of the Crown in the U.K. As it is specifically laid down in the basic Article 3 cited above the plenary power in all spheres including the powers of Government constitutes the inalienable Sovereignty of the People. The President exercises the executive power of the People and is empowered to act for the Republic under Customary International law and enter into treaties and accede to international covenants. However, in the light of the specific limitation in Article 33(f) cited above such act cannot be inconsistent with the provisions of the Constitution or written law. This limitation is imposed since the President is not the repository of the legislative power of the People which power in terms of Article 4(a) is exercised by Parliament and by the People at a Referendum. Therefore when the President in terms of customary international law acts for the Republic and enters into a treaty or accedes to a covenant the content of which is not inconsistent with the Constitution or the written law, the act of the President will bind the Republic *qua* State. But, such a treaty or a covenant has to be implemented by the exercise of legislative power by Parliament and where found to be necessary by the People at a Referendum to have internal effect and attribute rights and duties to individuals. This is in keeping with the *dualist* theory which underpins our Constitution as reasoned out in the preceding analysis.

On the other hand, where the President enters into a treaty or accedes to a Covenant the content of which is "inconsistent which the provisions of the Constitution or written law" it would be a transgression of the limitation in Article 33(f) cited above and *ultra vires*. Such act of the President would not bind the Republic *qua* state. This conclusion is drawn not merely in reference to the dualist theory referred to above but in reference to the exercise of governmental power and the limitations thereto in the context of Sovereignty as laid down in Article 3,4 and 33(f) of the Constitution.

In this background I would now revert to the accession to the Covenant in 1980 and the Optional Protocol in 1997.

As noted in the preceding analysis, the Covenant is based on the premise of legislative or other measures being taken by each State Party "accordance with its constitutional processes..... to give effect to the rights recognized in the .....Covenant" (Article 2). Hence the act of the then President in 1980 in acceding to the Covenant is not per se inconsistent with the provisions of the Constitution or written law of Sri Lanka. The accession to the Covenant binds the Republic *qua* state. But, no legislative or other measures were taken to give effect to the rights recognized in the Convention as envisaged in Article 2. Hence the Covenant does not have internal effect and the rights under the Covenant are not rights under the law of Sri Lanka.

It appears from the material pleaded by the Petitioner that in 1997 the then President as Head of State and of Government acceded to the Optional Protocol and made a Declaration as follows:

"The Government of the Democratic Socialist Republic of Sri Lanka pursuant to Article (1) of the Optional Protocol

recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Democratic Socialist Republic of Sri Lanka, who claim to be victims of a violation of any of the rights set forth in the Covenant which result either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Democratic Socialist Republic of Sri Lanka or from a decision relating to acts, omissions, developments or events after that date. The Democratic Socialist Republic of Sri Lanka also proceeds on the understanding that the Committee shall not consider any communication from individuals unless it has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement."

There are three basic components of legal significance in this Declaration relevant to the matter at issue – viz:

(i) A conferment of the rights set forth in the Covenant on an individual subject to jurisdiction of the Republic;

(ii) A conferment of a right on an individual within the jurisdiction of the Republic to address a communication to the Human Rights Committee in respect of any violation of a right in the Covenant that results from acts, omissions, developments or events in Sri Lanka;

(iii) A recognition of the power of the Human Rights Committee to receive and consider such a communication of alleged violations of rights under the Covenant.

Components 1 and 2 amount to a conferment of Public Law rights. It is therefore a purported exercise of legislative power which comes within the realm of Parliament and the

People at a Referendum as laid in Article 4(e) of the Constitution cited above. Article 76(1) of the Constitution reads as follows:

"(1) Parliament shall not abdicate or in any manner alienate its legislative power, and shall not set up any authority with any legislative power;

(2) It shall not be a contravention of the provisions of paragraph (1) of this Article for Parliament to make, in any law relating to public security, provision empowering the President to make emergency regulations in accordance with such law."

Therefore the only instance in which the Parliament could even by law empower the President to exercise legislative power is restricted to the making of regulations under the law relating to public security. It has not submitted the President had any authority from Parliament, post or prior to make the declaration cited above. Therefore, components 1 and 2 of the Declaration are inconsistent with the provisions of Article 3 read with Article 4 (c) read with Article 75 (which lays down the law making power) of the Constitution.

Component 3 is a purported conferment of a judicial power on the Human Rights Committee at Geneva "to vindicate a Public Law right of an individual within the Republic in respect of acts that take place within the Republic is inconsistent with the provisions of Article 3 read with 4(c) and 105(1) of the Constitution.

Therefore the accession to the Optional Protocol in 1997 by the then President and Declaration made under Article 1, is inconsistent with the provisions of the Constitution specified above and is in excess of the power of the President as

contained in Article 33(f) of the Constitution. The accession and declaration does not bind the Republic *qua* state and has no legal effect within the Republic.

I wish to add that the purported accession to the Optional Protocol in 1997 is inconsistent with Article 2 of the Covenant which requires a State Party to "take the necessary steps in accordance with its constitutional processes……..to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the ……Covenant." I cited the European Communities Act 1972 of the U.K as an instance in point where steps were taken to give effect to a treaty obligation before the treaty came into force. No such steps were taken to give statutory effect to the rights in the Covenant. Without taking such measures, in 1997 the Optional Protocol was acceded to purporting to give a remedy through the Human Rights Committee in respect of the violation of rights that have not been enacted to the law of Sri Lanka. The maxim *ubi Jus ibi remedium* postulates a right being given in respect of which there is a remedy. No remedy is conceivable in law without a right.

In these circumstances the Petitioner cannot plead a legitimate expectation to have the findings of the Human Rights Committee enforced or given effect to by an order of this Court.

It is seen that the Government of Sri Lanka has in its response to the Human Rights Committee (produced by the Petitioner with his papers) set out the correct legal position in this respect, which reads as follows:

> *"The Constitution of Sri Lanka and the prevailing legal regime do not provide for release or retrial of a convict-*

ed person after his conviction is affirmed by the highest appellate Court, the Supreme Court of Sri Lanka. Therefore, the State does not have the legal authority to execute the decision of the Human Rights Committee to release the convict or grant a re-trial. The Government of Sri Lanka cannot be expected to act in any manner which is contrary to the Constitution of Sri Lanka."

If the provisions of the Constitution were adhered to the then President as Head of Government could not have acceded to the Optional Protocol in 1997 and made the Declaration referred to above. The upshot of the resultant incongruity is a plea of helplessness on the part of the Government revealed in the response to the Human Rights Committee cited above, which does not reflect well on the Republic of Sri Lanka.

For the reasons stated above I hold that the Petitioner's application is misconceived and without any legal base.

The application is accordingly dismissed.

JAYASINGHE J., - I agree

UDALAGAMA J., - I agree

DISSANAYAKE J., - I agree

AMARATUNGA J., - I agree

Application dismissed.

IN RE RULE AGAINST AN ATTORNEY-AT-LAW

SUPREME COURT
SC RULE 1/2010
SHIRANEE TILAKAWARDANE, J.
IMAM, J.
DEP. P.C. J.

Rule against an attorney-at-law – Failure to act in accordance with the provisions of the Notaries Ordinance 1 of 1907. - Section 31 Deceit – Malpractice – Judicature Act 2 of 1978 Section 42 [2] – SC Rule of 1988 – 60-61. 79 [5]

Rule was issued on the respondent attorney-at-law on the allegation of professional misconduct involving elements of deceit and moral turpitude. The respondent attorney-at-law was charged for misleading the complainant and deceiving him regarding the title to the land and for executing two fraudulent deeds.

Held

(1) From the evidence adduced it is clear that the respondent attorney-at-law has failed to observe the Rules to be observed by Notaries – Section 31, Notaries Ordinance. The respondent had failed to observe the provisions in Section 17[a], Section 17 [b], Section 18 – Section 20, Section 26 [a], Section 26 [b], Section 31.

Per Shiranee Tilakawardane, J.

> "The respondent after having attested fraudulent deeds and thereby causing grave financial loss to the complainant, has deliberately failed to honour even the settlement he agreed to before the BASL. Therefore it is abundantly clear that the respondent has made a promise without intending to honour it which also tantamounts to dishonorable conduct unworthy of the attorney-at-law".

Cases referred to:-

(1) *Daniel Vs. Chandradeva* 1994 2 Sri LR 1

(2) *In Re Arthenayake Attorney-at-Law* 1987 1 Sri LR 314

(3) *In re Srilal Herath* 1987 1 Sri LR 57

Ms. Viveka Siriwardane de Silva SSC for Attorney General.

Rohan Sahabandu PC for B.A.S.L.

Complainant appears in person.

Respondent appears in person.

Cur.adv. vult.

February 20, 2013.

Rule dated 04.11.2010 was issued under the hand of the Registrar of the Supreme Court on the Respondent Attorney-at-law (hereinafter referred to as the Respondent) to show cause why he should not be suspended from practice or be removed from the office of Attorney –at-Law of the Supreme Court in terms of Section 42(2) of the Judicature Act No. 2 of 1978 for deceit and/or malpractice and thereby conducting himself in a manner unworthy of an Attorney –at-Law.

This Rule is a sequel to two preliminary inquiries conducted by two panels of the Bar Association of Sri Lanka (BASL) against the Respondent. At the conclusion of the said inquiries, the respective panels had unanimously recommended that the Respondent be reported to the Supreme Court for necessary action.

On 17.12.2010, the Rule was read out to the Respondent in open court to which he pleaded not guilty and moved for time to show cause. The matter was thereafter fixed for inquiry.

The Attorney General appeared in support of the Rule. The Bar Association was represented by Mr. Rohan Sahabandu, PC and the Respondent appeared in person.

In *Daniel Vs. Chandradeva*[1], which explicitly considered the standard of proof in inquiries relating to a Rule under Section 42(2) of the Judicature Act, it was held as follows:

> *"Where the conduct of an attorney is in question in disciplinary proceedings, it requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction that a just and correct decision has been reached. The importance and gravity of asking an attorney to show cause makes it impossible for the Court to be satisfied of the truth of an allegation without the exercise of caution and unless the proofs survive a careful scrutiny.* ***Proof beyond reasonable doubt is not necessary, but something more than a balancing of the scales is necessary to enable the Court to have the desired feeling of comfortable satisfaction.*** *"A very high standard of proof is required where there are allegations involving a suggestion of criminality, deceit or moral turpitude." per Amerasinghe, J.*

In terms of the charges preferred against the Respondent Attorney on the allegation of professional misconduct, as it involved an element of deceit and moral turpitude this court has examined the evidence on the basis as to whether the charges have been established on a high standard of proof and not on a mere balance of probabilities.

The Rule containing the charges levelled against the Respondent reads as follows:

TO THE RESPONDENT ABOVENAMED

Whereas a complaint has been made to His Lordship the Chief Justice by Mr. D.M.A.J. Dissanayake (herein after

referred to the "complainant") of No. 12, Ruben Perera Mawatha, Boralesgamuwa supported by an affidavit dated 04th January 2007 alleging deceit and malpractice on your part:

AND WHEREAS, the said complaint made by the said complainant discloses that,

(a) You were retained to execute a Deed of Transfer by Anura S. Hewawasam.

(b) The Deed, numbered 975 has thus been executed and attested by you on 5th May 2006 whereby, the land morefully described inthe Schedule had been transferred to Eranga Lanka Jayasekara.

(c) You, in the attestation clause has specifically stated that the executant was known to you and further that the witnesses Prasanna L. Jayasekera and Vimal Hewapathirana had declared to you that the executant of the said Deed No. 975 was known to them.

(d) You, had then proceeded to place your official seal in certifying and attesting the said Deed No. 975.

(e) You, were retained to execute a Deed of Transfer by Eranga Lanka Jayasekera.

(f) The Deed numbered 998, had thus been executed and attested by you on 5th July 2006 whereby, the land morefully described in the Schedule had been transferred to Dissanayake Mudiyanselage Anura Jeewanda Dissanayake for consideration of Rs. 1,000,000/-.

(g) You, in the attestation clause had specifically stated that the executant was known to you and further that

the witnesses Senanayake Liyanage Don Lulasiri and Vimal Hewapathirana had declared to you that the executant of the said Deed No. 998 was known to them.

(h) You, had then proceeded to place your official seal in certifying and attesting the said Deed No. 998.

(i) You, had prior to executing the aforementioned instrument informed Dissanayake Mudiyanselage Anura Jeewanda Dissanayake that you had searched the Registers in the Land Registry for the purpose of ascertaining the state of the title in regard to the said land and that the title was in order.

(j) It now transpires that Deeds bearing Nos 975 and 998 had been prepared in a fraudulent manner.

(k) It now transpires that the lawful owner of the land described in the Schedules of the said Deeds, Anura S. Hewawasam had never sold the said land and upon being informed of it has lodged a complaint to that effect.

(l) Furthermore, though you had agreed on 8th September 2007, at the inquiry held by a panel appointed by the Bar Association of Sri Lanka, to pay Rs. 300,000/- on or before 31st December 2007 and the balance amount in monthly installments, you have failed to act as per the settlement.

(m) You, as a Notary had failed to act in accordance with the provisions of the Notaries Ordinance, in particular section 31 of the said Ordinance.

AND WHEREAS, the aforesaid complaint made by the said complainant discloses that you have, by reason of the aforesaid acts of misconduct, committed,

(a) Deceit and or malpractice within the ambit of Section 42(2) of the Judicature Act (read with Rule 79 of the Supreme Court Rules of 1978) which renders you unfit to remain as an Attorney-at-Law.

(b) By reason of the aforesaid act you have conducted yourself in a manner which would reasonably be regarded as disgraceful or dishonorable of Attorneys-at-Law of good repute and competency and have thus committed a breach of Rule No. 60 of the Supreme Court (Conduct of and Etiquette of Attorneys-at-Law) Rules of 1988 made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka and;

(c) By reason of the aforesaid acts and conduct, you have conducted yourself in a manner unworthy of an Attorney-at-Law and have thus committed a breach of Rule No. 61 of the said Rules;

AND WHEREAS, this Court is of the view that proceeding against you for suspension or removal from the office of Attorney-at-Law should be taken under section 42(2) of the Judicature Act No. 2 of 1978 read with the Supreme Court (Conduct of and Etiquette of Attorneys –at-Law) Rules of 1988 made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

THESE ARE THEREFORE to command you in terms of section 42(3) of the Judicature Act No. 2 of 1978 to appear in

person before this court at Hulftsdorp. Colombo 12, Sri Lanka, on this 17th Day of December 2010 at 10.00 a.m. in the forenoon and show cause as to why you should not be suspended from practice or be removed from the office of Attorney-at-Law of the Supreme Court of the Democratic Socialist Republic of Sri Lanka, in terms of Section 42(2) of the Judicature Act and it is ordered that this Rule be served on you through the Fiscal of the District Court of Homagama."

In terms of Rule 79(5) of the Supreme Court Rules 1978, a list of witnesses and documents was annexed to the Rule issued against the Respondent which was subsequently amended by an amended list of witnesses and documents filed by way of a motion dated 13th December 2011 which was served on the Respondent.

The Respondent was entitled to file a list of witnesses and documents in terms of Rule 80(3), if he intended to rely on evidence but the Respondent chose not to do so.

The Respondent did not rely on any evidence on his behalf nor did he give evidence at the inquiry although he informed court at the commencement of the inquiry that he had cause to show.

It is to be noted that the Respondent was afforded an opportunity to provide explanations prior to the issuance of the Rule against him and availing himself of the opportunity so granted to him, the Respondent had tendered explanations by letter dated 03.05.2007 (P21B) and affidavit dated 30.06.2008 (P21C) to the Registrar of the Supreme Court.

The Respondent did not deny the attestation of the two fraudulent Deeds bearing Nos. 975 and 998. He had merely

denied the charges in the complaint made against him but did not even attempt to justify his conduct. The Respondent states that he has made good the loss suffered by the complainant by transferring a land belonging to his daughter to the Complainant and by payment of monies at various stages to the complainant. The Respondent counter claimed that the complaint against him was fraught with malice.

It is pertinent to note that the said explanations have been duly considered by the Disciplinary Committees of the BASL during the preliminary inquiries prior to taking a decision to report the Respondent to the Supreme Court for necessary action.

Two preliminary inquiries had been conducted by the BASL against the Respondent as described below:

At the first inquiry under Ref No. PPC/1657 (original record marked P20) by the Panel "D" of the BASL comprising:

(a) Mr. Sarath Jayawardene AAL (Chairman)

(b) Mr. Owen De Mel, AAL (Member)

(c) Mr. G.S.J. Widanapathirana, AAL (Member)

This inquiry had been initiated after a complaint had been lodged by the complainant to the BASL at the same time that he lodged an identical complaint with His Lordship the Chief Justice. The BASL has referred the complaint to its panel "D". Both the Complainant and the Respondent had been present at the said inquiry and there had been a settlement on 08.09.2007 where the Respondent had agreed to make a payment of Rs. 10 lakhs to the complainant as follows:

The Respondent had agreed to pay the complainant a sum of Rs. 300,000/- on or before 31.12.2007. Thereafter

Rs. 10,000/- per month on or before 25th of each month until the full claim of Rs. 10 lakhs is settled. In the event the Respondent defaults in the said payments the matter was to be referred back to the BASL. Both the Complainant and the Respondent had signed the said settlement.

Subsequently the complainant has informed the BASL that the Respondent had not complied with the settlement agreed upon and no monies had been paid to the complainant as per the settlement. The panel "D" having noted that the Respondent has deliberately violated the conditions of the agreement had decided that the Respondent should be reported to the Supreme Court for necessary action.

The 2nd Inquiry was held under Ref No. P/10/2007 (original record marked P21) by a Disciplinary Committee of the BASL comprising:

(a) Mr. Nihal Fernando, PC (Chairman)

(b) Mr. T. G. Gooneratne, AAL (Member)

(c) Mrs. J. M. Coswatte AAL (Member)

This inquiry has been initiated on a direction by His Lordship the Chief Justice for a preliminary inquiry to be held in terms of Section 43(1) of the Judicature Act on a complaint made by the complainant by way of an affidavit dated 04.01.2007 (P 10) containing allegations of misconduct against the Respondent.

Although the Respondent had been noticed to appear before the said committee on 02.10.2008 by the Registrar of the Supreme Court and the said notice had not been returned, the Respondent had been absent and unrepresented and he had not given any reasons for his absence. The Panel

having noted that the Respondent had been present at the inquiry on 31.05.2008 and represented by Counsel, and that the Respondent (P21C) together with documents annexed marked V1 – V4, continued with the inquiry in the absence of the Respondent.

The Complainant who was present had brought to the Panel's notice the 1st inquiry referred to above.

The Disciplinary Committee has noted the following at the inquiry as reflected in the original record (P21);

The main charge against the Respondent is that the Respondent AAL has acted for the buyer as well as the seller of a certain allotment of land which was purchased by the complainant as the buyer. . .. . .”

Having considered the material before it, the panel had concluded that the Respondent has breached the code of ethics governing the conduct of Attorneys-at-Law and in those circumstances decided to report the Respondent to His Lordship the Chief Justice for appropriate action.

At the trial the complainant D. M. A. J. Dissanayake testified that he had made a complaint to His Lordship the Chief Justice by way of an affidavit dated 04.01.2007 (P 10) against the Respondent. He had responded to an advertisement in the Silumina newspaper dated 05.03.2006 (P 11) about lands being sold in exchange for cars or vans in good condition and made inquiries by telephone on the number given in the advertisement. A land in Boralesgamuwa which is 20.5 perches in extent was shown to the complainant by a person by the name of Eranga Lanka Jayasekera who claimed to be a Doctor and the owner of the said land in

question. Since the complainant showed interest in purchasing it and inquired about the title to the said land, Eranga Lanka Jayasekera had informed the complainant that he can verify the title of the said land from a lawyer by the name of D. S. Bodhinagoda (Respondent) who handles legal matters for his family and that the said Eranga Lanka Jayasekera had introduced him to the Respondent. During the course of the complainant's evidence he identified the Respondent as the lawyer who was introduced to him as D. S. Bodhinagoda. The Respondent had confirmed that the land in question belongs to Eranga Lanka Jayasekera and that the latter has clear title to the said land and that all the relevant Deeds are in his custody.

He had believed the Respondent since the Respondent is an Attorney-at-Law and also because the Respondent has been an acting Magistrate of the Kesbewa Magistrate's Court. He had requested the Respondent to carry out a title search in respect of the land in question and that the Respondent has informed him that the Respondent had carried out a title search and he had confirmed that there is clear title for the last 70 years. The complainant and Eranga Lanka Jayasekera, the purported seller had agreed that the said land will be exchanged for two vehicles belonging to the complainant and cash for the balance. The complainant had signed an agreement dated 11.03.2006 (P12) at the Respondent's office agreeing to exchange two vehicles belonging to him and in addition to pay a sum of Rs. 250,000/- and the purported seller also had signed an agreement (P13) at the same time agreeing to exchange his land with the complainant for the said vehicles and the said sum of money. The Respondent had placed his seal and signed and certified these two agreements (P12 and P13). The Deed of Transfer No. 998 (P 2)

in respect of the land in question had been executed at the Respondents office between Eranga Lanka Jayasekera as the purported seller and the complainant as the buyer and the Respondent has attested the said Deed by signing and placing his seal thereto.

The Respondent had charged a sum of Rs. 58,000/- to execute and attest the Deed of Transfer No. 998 (P2) including the stamp fees in proof of which the Respondent had issued a receipt dated 12.06.2006 (P 14). Although the Respondent had undertaken to register the Deed No. 998 he had failed to do so despite constant reminders by the complainant. The Respondent had on one occasion informed the complainant that Eranga Lanka Jayasekera had been taken into custody by the Mt. Lavinia Police for selling lands on forged deeds and upon hearing this complainant had proceeded to the Mt. Lavinia Police Station and found the person whom he knew as Eranga Lanka Jayasekera in the Police cell. The complainant had thereafter proceeded directly to the Respondent's office and the Respondent had handed over the original of the Deed No. 998 to the Complainant to get it registered in the Land Registry.

The complainant also handed over the Deed No. 998 to the Land Registry of Mt. Lavinia to register the same, the officials of the Land Registry of Mt. Lavinia had alerted the complainant that there is no prior registration in respect of the land in question although several prior registrations had been incorporated by the Respondent in the Deed No. 998. Upon making inquiries from the residents of the neighboring lands, it had transpired that the legal owner of the land in question is one Anura S. Hewawasam and not Eranga Lanka Jayasekera.

The complainant had thereupon with great difficulty located the said Anura S. Hewawasam who had confirmed

that the land in question was owned by him. When the complainant informed the Respondent that the legal owner of the land in question is not Eranga Lanka Jayasekera but Anura S. Hewawasam, the Respondent had agreed to give a title report to the complainant and accordingly a title report dated 31.10.2006 (P 15) prepared and signed by the Respondent depicting that Anura S. Hewawasam had sold the land in question to Eranga Lanka Jayasekera who in turn has sold it to the complainant had been given by the Respondent to the Complainant. The Complainant had also requested from the Respondent a copy of the Title Deed of the previous owner from whom Eranga Lanka Jayasekera had derived title and the Respondent had produced a copy of the Deed No. 975 (P8) which had also been attested by the Respondent just two months prior to the execution of the Deed No. 998 (P2).

The Complainant had thereafter complained to His Lordship the Chief Justice, the Bar Association of Sri Lanka, the Legal Aid Commission, the Land Registry against the Respondent.

The Complainant had also lodged a complaint with the Panadura Branch of the Legal Aid Commission and the Respondent had been summoned to the Commission. At the Commission the Respondent had admitted to executing the two Deeds bearing Nos. 998 and 975 and had promised to pay Rs. 10 lakhs to the complainant which sum of money was the value stated in the Deed No. 998 as paid by the complainant for the purchase of the land in question. The Respondent had signed an agreement dated 29.05.2007 (P16) on a stamp promising to pay Rs. 10 lakhs to the Complainant.

Prior to signing and handing over the agreement P16, the Respondent had also given a promissory note dated

20.05.2007 (P 17) promising to pay Rs. 10 lakhs to the Complainant. Despite the agreement to pay the Complainant Rs. 10 lakhs, the Respondent failed and neglected to do so. The Complainant had visited the Respondent and requested for the said sum of money on more than 30 occasions but to no avail. On the complaint lodged with the BASL by the complainant, the BASL had conducted a preliminary inquiry against the Respondent under reference No. PPC/1657. Even at the inquiry conducted by the BASL under the above reference, the Respondent had undertaken to pay a sum of Rs. 10 lakhs to the complainant by paying a sum of Rs. 3 lakhs initially and thereafter the balance in monthly instalments of Rs. 10,000/-.

Since the Respondent did not pay the money as so undertaken the Complainant lodged a second complaint to His Lordship the Chief Justice by way of an affidavit dated 08.04.2008 (P 18).

As there was no immediate response a third complaint also had been lodged to His Lordship the Chief Justice by way of an affidavit dated 12.10.2008 (P 19). A second preliminary inquiry had been conducted by the BASL Disciplinary Committee headed by Mr. Nihal Fernando PC. Due to the Complainant constantly visiting the Respondent at his office and at his home requesting for the said sum of money promised by the Respondent, the Respondent had got his daughter to transfer 8 perches of land in Siyambalagoda to the Complainant worth approximately 4 lakhs but depicted in the Deed as valuing Rs. 1 Lakh in order to prevent the complainant from pursing legal action in the courts.

The complainant specifically stated that he was motivated to purchase the land in question because of the assur-

ance given by the Respondent that the title of Eranga Lanka Jayasekera the purported seller was good and that he would never have purchased the land in question if not for the said assurance of the Respondent and that he believed the Respondent and he placed his trust in the Respondent as he was a lawyer and the Respondent has breached the trust he placed in the Respondent by what the Respondent did to him.

On a subsequent date the complainant had purchased 10 perches of the land in question from the legal owner Anura S. Hewawasam paying a sum of Rs. 15 lakhs to the legal owner and that he had to re-purchase the land for the second time since Eranga Lanka Jayasekera who originally transferred the land to the complainant did not have lawful title to the land in question. The complainant has suffered a loss of approximately Rs. 33 lakhs altogether as a result of the above.

It was suggested in cross examination that the complainant has received more than Rs. 10 lakhs from time to time from the Respondent including the value of the land in Siyambalagoda, which the complainant vehemently denied. However, in re-examination the complainant clarified that altogether the maximum amount of money which has been received by him is Rs. 5 lakhs and that it was hardly enough to make good the loss he suffered of approximately Rs. 33 lakhs.

Anura S. Hewawasam who was the real owner of the land was also called and corroborated the testimony of the complainant on all the material aspects. This witness stated that he was the owner of the land described in the schedule to the Deed No 975 (P8) which is the land in question and he had the title deed to the said land in question. He categorically