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stated that he never executed a Deed to Transfer of the land in question, by the Deed No. 975 and that he never sold the said land to Eranga Lanka Jayasekera and therefore his name has been falsely entered in the said Deed No. 975 as the seller.

That the entry in the said Deed No. 975 that Anura S. Hevawasam has placed his signature on to this and two other instruments of the same tenor on 05.05.2006 at Polgasowita was a false entry. On his evidence it was clear that since the signature appearing on the said Deed No. 975 as that of Anura S. Hewawasam was not his signature, the signature had been forged. He also clarified that the portion of the attestation by the Respondent as the Notary in the said Deed No. 975 to the effect that the seller Anura S.Hewawasam was known to him who signed illegibly in English in the presence of the aforesaid witnesses on the 5th day of May 2006 was a false attestation as he had never been to the office of the Respondent. He further stated that he got to know from the complainant that the land in question belonging to him had been sold by way of a fraudulent Deed attested by the Respondent and he had been taken to meet the Respondent and had subsequently sold 10 perches of the land in question to the Complainant by a different Deed.

C.S. Dahanayake, Assistant Documents Officer, Land Registrar (Mt. Lavinia) was also summoned and he explained the procedure that the Deed No. 998 specifies several prior registrations i.e. M 490/52, was followed in registering deeds in the Land Registry. He explained the steps taken to register Deeds bearing Nos. 998 and 975. Deed No. 998 had been handed over on 14.08.2006 to the Land Registry and Day Book No. 37790 had been assigned to it and the said Deed

had been registered on 14.08.2006 in the Land Register in Volume M 2971/54M 259/281, M 307/243,M 462/48 and M 200/106. Therefore the relevant registers depicted as prior registrations had been examined and it had been found that the land described in the schedule to the Deed No. 998 has no relevance to the lands registered under the prior registrations given in the Deed. Therefore Deed No. 998 (P2) had been registered in a fresh volume and fresh folio. He further testified that Deed No. 975 (P8) has been handed over on 12.09.2006 to the Land Registry and Day Book No. 43675 had been assigned to it and the said Deed has been registered on 12.09.2006 in the Land Register in Volume M 2981/161. The prior registrations given in Deed No.75 also had no relevance to the land described in the schedule to the said Deed and therefore there was an error in the prior registrations specified in both Deeds bearing Nos. 998 and 975. Although Deed No. 975 ought to have been registered prior to Deed No. 998, what has been registered first is Deed No. 998 and Deed No. 975 has been registered later which was improper. Had the Deed No. 975 been registered first as it ought to have been done, the said registration should have been incorporated in Deed No. 998 by the relevant Notary since the buyer in Deed No. 975 is the seller in Deed No. 998. Hence he confirmed that both Deeds bearing Nos 998 and 975 have not been registered by the Respondent Attorney in the proper sequence and that the prior registrations therein were erroneous.

Madurappulige Saleem, Management Assistant, Land Registry (Homagama)

This witness was called to give evidence pertaining to the monthly lists that had to be submitted by the Respondent to the Land Registry Homagama along with the duplicates of the

Deeds attested by the Respondent. In his testimony he stated that the Respondent came within the Notarial jurisdiction of the Homagama Land Registry and therefore the Respondent was duty bound to submit monthly lists to the said Registry along with the duplicates of the Deeds attested by him during the course of every month on or before the 15th day of the following month. The Respondent's name was registered as a Notary coming within the jurisdiction of the Land Registry Homagama and his office address is given as Wethara, Polgasowita. And that the Respondent has been registered as a Notary coming within its jurisdiction since 12.06. 2003 to date. As an example it was stated that since the Deed No 998 (P2) which had been attested on 05.07. 2006 by the Respondent, its duplicate ought to have been submitted to the Land Registry Homagama on or before 15th August 2006. But the Respondent had failed to submit the duplicate of the said Deed on or before the relevant date. He also confirmed that since the Deed No. 975 (P8) which has been attested on 05.05.2006 by the Respondent, its duplicate ought to have been submitted to the Land Registry Homagama on or before 15th June 2006. But the Respondent had failed to submit the duplicate of the said Deed on or before the relevant date. He stated that whether a duplicate has been tendered to the Land Registry can be verified from the Notarial Check Book wherein all the duplicate deeds that have been tendered are entered. Upon perusing the relevant Notarial Check Book, the witness confirmed that the Respondent has not tendered any duplicates of deeds attested by him in the month of July 2006 and August 2006. For the month of June 2006 a monthly list has been submitted by the Respondent incorporating 3 Deeds i.e 995, 996 and 997 and therefore Deed No. 975 has been left out by the Respondent from the monthly list he submit-

ted in June 2006. Apart from the aforesaid 3 deeds 995, 996 and 997, the Respondent has not tendered any duplicates of Deeds for the year 2006 nor has he submitted nil lists. It was clarified from the witness as to the procedure to be adopted when a notary does not attest any deed for a particular month and the witness stated that even if no deed is attested by a notary in a particular month, he is duty bound to submit a "Nil List" to the Land Registry stating that no deed has been attested by him during the relevant month. The Respondent has not submitted even a nil list for the months of July 2006 and August 2006.

D. T. De Silva Lokubogahawatte, Adminstrative Secretary, BASL was only a formal witness whose evidence was led in order the mark the Original Record (P20) of the Preliminary inquiry by the Panel "D" of the BASL under reference No. PPC/1657 against D. S. Bodhinagoda, the Respondent.

It is noteworthy that the Respondent did not lead evidence, but in his written submissions claimed that no monetary loss was suffered. He led no evidence on this matter at the trial. He has baldly denied that any monetary loss was suffered by the complainant by a bald statement in his written submissions. Had this evidence been given he could have been cross examined and the truth or falsity of these statements could be ascertained by the Court. The Respondent instead chose not to call evidence nor give evidence in this case. The Court has considered the transfer of the land and the mitigation factors regarding the pecuniary loss caused to the complainant. The Judicature Act No. 2 of 1978 sets out the law governing Rules. Section 42(2) of the said Act

empowers the Supreme Court to suspend from practice or remove from office every Attorney-at-Law who shall be guilty of any deceit, malpractice, crime or offence after an inquiry.

The Rule issued against the Respondent embodies charges of malpractice and/or deceit, *In Re Arthenayake, Attorney-at-Law* [(2)] it was held that

> *"The question of law is whether the acts which the respondent has committed amount to a malpractice within the ambit of Section 42(2) of the Judicature Act. . .*
>
> *. . . . . Without endeavoring to embark on a precise definition of the word malpractice in section 42(2) of the Judicature Act, it is my view that to warrant the exercise of the disciplinary powers of this court on the ground that an attorney is guilty of malpractice the professional misconduct complained of must be of such a character as, in the opinion of this court, could fairly and reasonably be regarded as being improper or deplorable or reprehensible when judged in relation to the accepted standards of professional propriety and competence." per Athukorale, J.*

The testimony of all the witnesses was clear and cogent and remained unassailed even under cross examination. It is noteworthy that the Respondent did not show cause at this inquiry and no evidence was led on his behalf despite the opportunity granted to him.

Therefore it has been established by evidence that the complaint of the Complainant is well founded and that the Respondent has misled the complainant and deceived him regarding the title to the land in question and proceeded to attest two fraudulent Deeds bearing No. 998 and 975. Even

the title report given to the Complainant by the Respondent is a false title report.

The intention of deceiving the Complainant can be clearly attributed to the Respondent by the fact that the Respondent attested two fraudulent Deeds and handed over a false title report and also by the fact that the Respondent failed to submit the duplicates of the said fraudulent deeds to the Land Registry of Homagama as required in terms of the Notaries Ordinance. The conduct of the Respondent amounts to malpractice and deceit within the meaning of Section 42(2) of the Judicature Act No. 2 of 1978.

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 dishonourable conduct unworthy of an Attorney-at-Law.

From the evidence adduced particularly the evidence of the Complainant, the representative of the Land Registry of Mt. Lavinia and the representative of the Land Registry Homagama, it is amply clear that the Respondent has failed to observe the Rules to be observed by Notaries as stipulated in Section 31 of the Notaries Ordinance No. 1 of 1907 as amended. The specific Rules that the Respondent has failed to observe which are pertinent to this matter are the Rules pertaining to the search of the Registers in the land registry before executing deeds affecting lands [Subsection (17) (a) and (17) (b)], insertion of correct date of execution of the deed [Subsection 18], attestation (Subsection 20) and transmis-

sion of duplicates of deeds to the Registrar of Lands [Subsection 26 (a) and 26 (b) which are reproduced below:

Notaries Ordinance Section 31 subsection:

17(a). "Before any deed or instrument (other than a will or codicil) affecting any interest in land or other immovable property is drawn by him, he shall search or cause to be searched the registers in the land registry to ascertain the state of the title in regard to such land and whether any prior deed affecting any interest in such land has been registered."

17) (b) – "If any such prior deed has been registered, he shall write in ink at the head of the deed the number of the register volume and the page of the folio in which the registration of such prior deed has been entered.

Provided that if the parties to the transaction authorize the notary in writing to dispense with the search, the search shall not be compulsory, but he shall before the deed or instrument is tendered for registration write at the head thereof the reference to the previous registration, if any."

18 – "He shall correctly insert in letters in every deed or instrument executed before him the day, month, and year on which and the place where the same is executed, and shall sign the same."

20 – "He shall without delay duly attest every deed or instrument which shall be executed or acknowledged before him, and shall sign and seal such attestation. . .."

26(a) – " He shall deliver or transmit to the Registrar of Lands of the district in which he resides the following document, so that they shall reach the Registrar on or before the 15th day of every month, namely, the duplicate of every deed or instrument (except wills or codicils) executed or acknowledged before or attested by him during the preceding month, together with a list in duplicate (monthly list), signed by him, of all such deeds or instruments. . . ."

26-(b) – "if no deed or instrument has been executed before any notary in any month, the notary shall, unless he is absent from Sri Lanka. furnish a nil list for that month on or before the 15th day of the following month."

On a consideration of the totality of the evidence and documents produced at this inquiry, the acts of malpractice and deceit by the Respondent have been established by overwhelming evidence. Applying the standard of proof required in inquiries of this nature the Respondent is found guilty of the charges levelled against him in the Rule and hold that the Respondent committed acts which amount to malpractice and/or deceit within the ambit of Section 42(2) of the Judicature Act.

Considering the nature of the malpractice and deceit committed by the Respondent the legal profession has been brought into disrepute. The Respondent's conduct is plainly dishonourable and disgraceful and certainly unworthy of an Attorney-at-Law. Hence the Respondent has breached Rules 60 and 61 of the Supreme Court (Conduct of Etiquette for Attorneys-at-Law) Rules 1988.

In deciding what course of action should be taken against the Respondent the court is mindful of the case of In Re Srilal Herath[3] which held that:

> *"The question that the Court has to ask itself is whether a person who has been found guilty of misappropriation of a client's money and has aggravated his offence by his refusal to make good that amount despite repeated requests, can be safely entrusted with the interests of unsuspecting clients who may have recourse to him. There can be no two answers to this question. Hence there is one course open to us, namely to strike off the Respondent from the Roll" – Per Kulatunga J.*

In terms of the above evidence adduced including the documents placed before Court there is proof that the Respondent is guilty of malpractice and deceit within the ambit of Section 42(2) of the Judicature Act (read with Rule 79 of the Supreme Court Rules of 1978) which renders the Respondent unfit to remain as an Attorney-at-Law, and this Court accordingly removes him from the role of Attorney-at-law and the Registrar of the Supreme Court is directed to remove his name from the role of Attorney.

TILAKAWARDANE J. - I agree.

IMAM J. - I agree.

DEP. J - I agree.

Rule affirmed.

ASSOCIATED NEWSPAPERS OF CEYLON LTD VS. CHANDRAGUPTA AMERASINGHE

SUPREME COURT
SHIRANI TILAKAWARDANE, J.
MARSOOF, P.C. J.
HETTIGE, P.C. J.
SC CHC [APP] 30/2003
HC [CIVIL] 12/2001 (3)
JUNE 13, 2012

Code of Intellectual Property Act – 32 of 1979. Section 7(h), section 10 [a], Section 11 [1] & 13 [b], Section 17 [1], Section 17 [3] – Interpretation Ordinance Section 69[3] [b] – Publication of Photographs – Violation of Intellectual Property rights – Economic Rights – Who has the exclusive rights for the photographic work – Author – Employer – Could a Court take notice of relevant gazette notifications – Can a question of law be raised in appeal? – Errors in litigation strategy – Evidence Ordinance Section 57 [1]. – Right to information ..... Notice of a Gazette?

The respondent filed action the commercial High Court alleging that his intellectual property rights had been violated by the appellant's publication of the 9 photographs in issue taken by the respondent. It was also contended that the aforesaid publication violated economic rights as well.

The photographs were taken in 1983 when the respondent was in the employment of "Aththa' Newspapers. In 1997, when the respondent was working for 'Ravaya' Newspaper he had consented to Ravaya's publication of the photographs. it was published again by Ravaya in 1999. By this time, the appellant published them in 'Dinamina' and Daily News. It was the position of the respondent that he did not at any time directly or indirectly authorize the appellant to publish the photographs in its newspapers – which even lacked a citation listing the respondent as the source of the photographs.

The Commercial High Court held with the respondent and awarded damages to be paid by the appellant to the respondent.

With special leave being granted,

Held:

(1) The photographic works are owned exclusively by the respondent who being the author is the first owner of the copyright in his photograph especially as he never transferred his ownership and he therefore continued to retain ownership.

(2) Despite the fact that the photographs had been published in the Ravaya Newspaper in 1997 – the appellant quite apart from failing to exercise the common courtesy of obtaining permission from the respondent not only failed to obtain permission from the respondent but also failed to indicate even the source of the photographs.

Per Shiranee Thilakawardane, J.:

> "..... one of the photographs was sold at Rs. 10,000/- in 1996 – despite this being the only consideration of value, the Court is in agreement with 'Cornish' as expressed in his work on intellectual property that the work of a humble photographer is in the same category as the work of a great artist and this Court will not disturb the High Court Judges' assessment of the commercial value of the photographs. This Court agrees that the exclusive, historical and invaluable nature of the photographs is independent of how often they were sold and how much they were sold for – the lack of an existing market does not alone suggest an absence of value."

(3) It is only a pure question of law which does not require the ascertainment of new facts that can be raised for the first time in appeal. The appellant's failure during the proceedings before the High Court to [1] challenge the originality/ownership of the work or to [2] lead any evidence – are errors in litigation strategy that cannot be rectified through appeal.

(4) Under Section 57[1] of the Evidence Ordinance, Court is mandated to take notice of - all laws or rules having the force of law, now or hereto before and thereafter to be in force in any part of Sri Lanka – Nowhere in this mandate is there a requirement that the appellant be notified.

Per Shiranee Tilakawardane, J.:

> "A nation of people who make their life choices on the information they receive from the media need to support and acknowledge their bravery and fearlessness especially when they become independent monitors of power and the checks and balances in exposing the truth thereby being a cornerstone in creating a fair and just society. The extended lens of dedicated fearless and responsible journalists has often been the tool in effecting social justice and they must be protected nurtured and supported as much as an irresponsible journalist who distorts and violates the truth for biased reasons must be soundly condemned and exposed, as they shame a noble profession."

APPEAL from the Commercial High Court.

Cases referred to:

(1) *Jayawickrema Vs. Silva* 76 NLR 427

(2) *Leechman Co. Ltd Vs. Rangalle Consolidated Ltd* 1981 2 Sri LR 373

Kushan D' Alwis with *Prasanna de Silva* and *Kanchana Ratwatte* for defendant –appellant.

Saliya Pieris with *Upul Kumarapperuma, Irusha Kalidasa* and *Varuna de Saram* for plaintiff – respondent.

October 05, 2012

MS. SHIRANEE TILAKAWARDANE.J.

The Defendant-Appellant (hereinafter referred to as the "Appellant") preferred this Appeal against the judgment entered in case No HC (CIVIL) 12/2001 (3) of the Commercial High Court of Colombo dated the 11th of September 2003 on the following grounds:

i. Did the Learned High Court Judge err in holding that damages occurred to the Plaintiff-Respondent (here-

inafter referred to as the "Respondent") on the basis that the Respondent had economic rights to the photographs?

ii. Did the Learned High Court Judge err in awarding damages to the Respondent in the sum of Rs. 1,000,000/-?

iii. Did the Learned High Court Judge improperly rely on a Gazette submitted by the Respondent without notice to the Appellant?

In considering these questions of law it is opportune to analyze the pleadings, documents and evidential facts relevant to the case.

The Respondent filed action alleging that his intellectual property rights had been violated by the Appellant's publication of the 9 photographs in issue, taken by the Respondent, (hereinafter referred to as the "photographs") in the "Daily News" and "Dinamina" newspapers on the 24th of July 1999. More specifically, the Respondent pleaded that the aforementioned publication violated his economic rights as guaranteed by Section 10 of the now repealed Code of Intellectual Property Act No. 52 of 1979 (as amended, hereinafter referred to as the "Code") and his moral rights as guaranteed by Section 11 of the Code, as the photographs were published without his consent or knowledge. Though this law is now repealed in terms of section 69(3)(b) of the Interpretation Ordinance the rights acquired under the repealed law would not be affected. Accordingly, the Respondent prayed for a declaration that his intellectual property rights had been violated by the Appellant and claimed for damages in the sum of Rs. 2,500,000/-.

In the presentation of his evidence before the learned High Court Judge, the Respondent explained that he took the photographs in Borella during the communal riots of July 1983. The Respondent further stated that he was in possession of the negatives of the Photographs, a fact corroborated by a witness, Nihal Asoka Siriwardane.

In explaining the volatile context in which the Photographs were taken, the Respondent spoke of the great difficulty he endured – including intimidation, threats of harm and actual assault – to photographically capture the unfolding events of the communal riots of 1983. So dangerous and unpredictable was the atmosphere of the riots that the Respondent, according to his testimony, would sometimes expose only a single frame on a roll before storing it for safekeeping, so as to prevent the loss of precious footage due to the imminent danger of his camera being snatched and / or broken at any moment. His simple narrative of the facts disclose succinctly, the risk to life and limb that he willingly exposed himself, in probably recognizing his social responsibility and seeing himself as the conduit in supplying explicit and vivid information, which he discerned and recognized as being the need of the hour, for the people of a nation to make informed choices. It was only due to the promulgation under Emergency Regulations of the Gazette No 245/8 dated 18th May 1983 of a ban on the publication of incendiary photographs (that could foment communal instability) that the Respondent could not publish his photographs immediately.

When the photographs were taken in 1983, the Respondent was in the employment of "Aththa" newspapers. By July of 1997, the Respondent was working for "Ravaya" newspa-

pers and had consented to Ravaya's publication of the photographs in connection with the 14th anniversary of the 1983 riots. In July of 1999, the said photographs were again published by "Ravaya" newspaper but, at this time, the Appellant also published them in its "Dinamina" and the "Daily News" newspapers. The Respondent, at the trial, asserted the fact that he did not at any time directly or indirectly authorize the Appellant to publish the Photographs in the Appellant's newspapers and took the opportunity to note that the Photographs were published by the Appellant as parts of news articles which even lacked a citation listing the Respondent as the source of the photographs and otherwise failed to mention how the photographs were obtained. It is important to note here that, during these proceedings, the Appellant unequivocally conceded that (i) the Respondent, in fact, took the Photographs during the July 1983 riots and that (ii) the Appellant did, in fact, publish the photographs in the manner and on the date as alleged by the Respondent.

In considering the first question of law this Court examines the judgment aforesaid as to whether the Learned High Court judge erred in holding that damages occurred to the Respondent on the basis that the Respondent had economic rights in the photographs.

As it is not in doubt whether the Respondent took the photographs or whether the Appellant published them, the High Court was left to consider two principle questions: (i) Did the Respondent tender consent to the Appellant to allow the latter's publication of the photographs and (ii) did the Respondent have the capacity to consent to their publication in the first place or to put it in another way did the Respondent's

employment arrangement between "Aththa" newspapers allow the Respondent to retain ownership of the photographs. These aforementioned questions, and therefore, the larger question of whether the Respondent is entitled to economic rights arising from the copyright of the photographs in terms of the Code is a question of fact and not of law and, to be properly tried before this Court, would require the ascertainment of new facts – this is especially so with respect to the question of the Respondent's capacity to consent, as the contract of employment between the Respondent and "Aththa" newspapers was not an issue at the time of trial.

It is well established that appellate review is a forum restricted only to reviewing questions of law. In *Jayawickrama Vs. Silva* [1] , the Learned Judge stated that "a pure question of law can be raised in appeal for the first time, but if it is a mixed question of fact and law it cannot be done." The case of *Leechman Co Ltd., Vs. Rangalle Consolidated Ltd.* [2] at 373 espouses the same principle in inverse terms, with the Learned Judge stating that "a pure question of law which does not require the ascertainment of new facts can be raised for the first time in appeal." The scope of jurisdiction established by a breadth of case law from which the above examples are picked guide this Court to conclude that questions of fact brought to this Court's attention at the time of appeal, and which necessarily require the ascertainment of new facts, cannot be considered. The Appellant's failure during the proceedings before the High Court to (i) challenge the originality and ownership of the work or to (ii) lead any evidence during the course of the trial or at the time of cross-examination, are errors in litigation strategy that cannot be rectified through appeal.

Even assuming that this Court is not precluded from considering the economic rights questions placed before us, an analysis of the relevant legislation reveals that there exists no applicable safe harbor or exemption under which the Appellant's actions can be deemed legitimate. A brief outline of the body of relevant copyright law can be summed up as follows:

1. Section 7 (h) of the Code sets out a definition of the scope of work to be protected by copyright. This section expressly includes photographic work.

2. Section 10(a) of the Code sets out the Framework for the economic rights of the author and provides the author with exclusive rights to do or authorize reproduction.

3. Section 11(1) of the Code discusses the moral rights of an author and states that the author of a protected work shall have the right to claim authorship of his work in connection with acts referred in Section 10 and therefore reproduction of the said photographs under Section 10(a) is a violation of the author's moral rights.

4. Section 13(b) of the Code states that notwithstanding Section 10, protected work can be used without the author's consent:

   ... in the case of any article published in newspapers or periodicals on current economic, political or religious topics . . . the reproduction of such article or such work in the press or the communication of it to the public, unless the said article when first published. . . was

accompanied by any express condition prohibiting such use, and that the source of the work when used in the said manner is clearly indicated.

5. Section 17 (1) of the Code indicated that the rights protected under section 10 are those of the author who created the work.

6. Section 17(3) of the Code discusses works created in the course of employment indicating that where in the course of the author's employment under a contract of service or work commissioned, the rights in Section 10 will be transferred to the employer or commissioner, where terms to the contrary are not stipulated.

From the above review of the rules governing copyright, it appears that the Appellant's case rests solely on the application of Section 13(b)'s "newsworthiness" exemption or, alternatively, the availability of the allocation of presumed employer ownership under 17(3). Neither, rule, however, is applicable to the case at hand for reasons that will be dealt with later in this judgment.

Section 13(b)'s exemption is unavailable to the Appellant for the simple reason that, at the time of the Appellant's publication of the Photographs in 1999, the communal riots of 1983 were no longer current "political" events. While it could be argued that the 14" anniversary of the 1983 riots was itself the current event to which the Appellant's publication was connected, the legislative intent of 18(b) clearly was to allow for the dissemination of information surrounding actual transpired events, and not to serve as a loophole for use of material in subsequent "news cycles" of an initial event. This determi-

nation combined with the fact that the Appellant appears to have added insult to injury by failing to even acknowledge the source from which the said photographs were taken leads this Court to conclude that the High Court Judge was correct in finding that the Appellant could not rely on Section 13(b) of the Code.

The presumption established under Section 17(3) that an employer holds ownership in employee-created work is also unavailable to the Appellant. The words crucial to our determination of the inapplicability of Section 17 (3) are: "in the absence of contractual provisions to the contrary". While it may well be that the Respondent's contractual relationship with "Aththa" newspapers – his employer at the time the Photographs were taken – did not stipulate that the Respondent would retain ownership of them, the Appellant's failure to introduce or request the introduction of the contract between Respondent and "Aththa" newspapers into evidence for review, precluded the High Court from being able to determine whether Section 17(3)'s presumption was met. Had the contract been presented for the High Court's review, an analysis of the terms of the contract of service or the specific nature of the work commissioned would have been undertaken. An analysis of, among other things, (i) whether the Photographs were taken for personal interest or investigation, (ii) whether the Photographs were taken during or outside of working hours, (iii) whether the Photographs were taken in furtherance of the Respondent's work assignment and professional objectives, may well have led the High Court to have concluded that ownership remained with "Aththa" newspapers and not the Respondent. As the High Court was not afforded the opportunity to undertake such a factual

analysis – and since such questions of fact cannot be reviewed at the appellate level as have hereinabove been explained – this Court finds that the Learned High Court Judge did not err in holding that damages occurred to the Respondent on the basis that the Respondent had economic rights in the photographs. The evidence before the Court therefore leads the Court to conclude that the photographs were taken for personal interest or investigation and not in furtherance of a work assignment that the Respondent had, at the risk of personal safety and with his camera and film. Therefore the photographic works are owned exclusively by the Respondent, who being the author is the first owner of the copyright in his photographs especially as the evidence is that he never transferred his ownership and he therefore continued to retain ownership.

The importance of this topic requires this Court to examine and refer to several relevant international legislative instruments in relation to the rights of the author of copyrighted works. Firstly, this Court will refer to the Berne Convention for the protection of Literary and Artistic Works 1886 (as amended, hereinafter referred to as the "Berne Convention"), to which Sri Lanka is a signatory. Under Article 5 of the Berne Convention, copyright for creative works do not have to be asserted or declared, as they are automatically in force at creation and are not subject to any "formalities" such as registration or application in countries adhering to the Convention. As soon as the work is written or recorded on some physical medium, the author is automatically entitled to all copyrights in the work, as well as any derivative works. In addition, Article 2 ensures that the rights are protected until the author explicitly disclaims them or the copyright

expires. Consistent with Section 17(3) of the Code, which refers to photographs taken in the course of employment under a contract of service, the Berne Convention also deems that the photographer is the sole owner of the copyright in a work upon its creation, in so far as the image was not made under an agreement to the contrary, in which case the ownership of the copyright would vest in the employer.

Under the current system of law in Sri Lanka, the author is not encouraged to create works outside the ambit of the employment contract or terms of work commissioned out of fear of losing rights to the work. This disincentive, in the future, could lead to lack of journalistic motivation and therefore deterioration in investigatory reporting and subsequent communication to the public. The public has a right to information both communicated via articles, photographs and other medium. As a result of narrowly interpreted laws this right to information may be restricted and ultimately confine the media, which would ultimately impact the fabric of social justice that holds a nation together.

In this regard, the Court wished to draw attention to the approach taken in continental European States where employers must purchase the usage rights from the author by means of an individual or collective agreement. The authors retain any usage rights not licensed to the employer by that contract, for example the right to reuse photographs already published would require permission from the original creator unless the right to reproduce is explicitly stated in the contract, the rights have expired or such reproduction is restricted by law. They are usually entitled to receive further remuneration for uses that go beyond those covered in the contract of employment. The law must at all times balance

the exercise of an authors copyright with public interest. This is seen clearly in the United Kingdom where Section 171 (3) of the Copyrights Designs and Patents Act 1988 provides the courts with the jurisdiction to refrain from enforcing copyright claims on the grounds of public interest.

The Court next considers whether the Learned High Court Judge erred in awarding damages to the Respondent in the sum of Rs. 1,000,000/-.

It is the opinion of this Court that the Learned High Court Judge was correct in awarding damages of Rs. 1,000,000/- to the Respondent for several reasons.

The photographs were taken during the communal riots of 1983, a period of extreme unrest and conflict among ethnic communities in Sri Lanka. The photographs captured by the Respondent were not merely photographs of the aftermath of the riots, but of actual live incidents that took place in the Borella area in real time. The photographs taken by the Respondent seem to be exclusive photographs which represent the appalling violence that took place during the communal riots of July 1983 and it is alleged that there are no other photographs by any other photographer depicting the scenes as seen in the photographs. Further, the Respondent was subjected to assault, intimidation and threats and in fact his camera was destroyed during the course of taking the photographs. There is no dispute that the photographs were taken in difficult and dangerous circumstances and with grave danger to the Respondent's life.

Section 13(b) of the Code states that the source of the work reproduced needs to be clearly indicated and therefore despite the fact that the photographs had been published in the "Ravaya" newspaper in 1997, the Appellant, quite apart from failing to exercise the common courtesy of obtaining

permission from the Respondent, not only failed to obtain permission from the Respondent but also failed to indicate even the source of the photographs when the Appellant published them in 1999 as evinced in the evidentiary facts.

According to the evidence of the Respondent, one of the Photographs was sold at the value of Rs. 10,000/- in 1996. despite this being the only indication of value, the Court is in agreement with Cornish as expressed in his work on Intellectual Property, that the work of a humble photographer is in the same category as the work of a great artist and, this Court will not disturb the Learned High Court Judge's assessment of the commercial value of the photographs. This Court agrees that the "exclusive, historical and invaluable" nature of the photographs is independent of how often they were sold and how much they were sold for – the lack of an existing market does not alone suggest an absence of value.

Finally the Court also considers whether the Learned High Court judge improperly relied on a Gazette submitted by the Respondent without notice to the Appellant.

The Gazette at issue – the Extraordinary Gazette Notification No. 251/21 dated 2nd July 1983 read with Regulation 14 of Extraordinary Gazette Notification No. 245/8 dated 18th May 1983 – is a document, of which the High Court was statutorily empowered to take judicial notice. Under Section 57(1) of the Evidence Ordinance 1896, the Court is mandated to take notice of ". . . [a]ll laws or rules having the force of law, now or heretofore in force or hereafter to be in force in any part of Sri Lanka." Nowhere in this mandate is there a requirement that the Appellant be notified of the High Court's reliance on established law. It is the opinion of the Court that the Learned High Court judge had correctly considered the Gazette and the absence of notice to the Appellant was not in any way a deficiency of due process.

There is indeed an urgent need for protection of journalists like the Respondent who with skill and commitment respond to the journalistic duty to honor the citizenry of our nation by fulfilling their primary obligation to report on facts in an unbiased, independent, undistorted, and disciplined manner, providing the unvarnished truth whilst maintaining an objective perspective of the people and events they cover. Their journalistic lens needs to be strengthened and empowered by law and their skills be developed through education and investment, propelling them in turn to report with a higher degree of accountability, independence and fairness. A nation of people who make their life's choices on the information they receive from the media need to support and acknowledge their bravery and fearlessness especially when they become independent monitors of power and the checks and balances in exposing the truth, thereby being a cornerstone in creating a fair and just society. The extended lens of dedicated, fearless and responsible journalists has oft been the tool in effecting social justice and they must be protected, nurtured and supported, as much as an irresponsible journalist who distorts and violates the truth for biased reasons must be soundly condemned and exposed as they shame a noble profession.

In the light of the foregoing, this Court rules that the Respondent is in possession of the economic rights of the said photographs for the reasons stated above and that the judgment of the Learned High Court Judge is affirmed. The sum of Rs. 1000,000/- awarded as damages to be paid within one month. The Appeal preferred by the Appellant be accordingly dismissed with costs in a sum of 25,000/-.

MARSOOF, PC, J. – I agree.

HETTIGE, PC, J. – I agree.

Appeal dismissed.

EKANAYAKE AND 4 OTHERS VS. RATRANHAMY

SUPREME COURT
DR. SHIRANI A. BANDARANAYAKE, CJ.
CHANDRA EKANAYAKE J AND
S.I. IMAM, J.
S.C APPEAL NO. 05/2010
S.C.H.C (CA) LA NO. 282/2009
HCCA RATNAPURA NO. SP/HCCA/RAT/452/2007 (CA)
D.C. EMBILIPITIYA CASE NO. 3612/L
5TH OCTOBER, 2010

Civil Procedure Code – Section 773 – Power of the Court of Appeal, if it thinks fit, to receive and admit new evidence, additional or supplementary to the evidence already taken in the Court of first instance – Vindicatory action – Burden of establishing title.

The Appellants had instituted action in the District Court for a declaration of title regarding the land described in the schedule to the plaint and to eject the Respondent and those who are holding under him from the said land. The Appellants had claimed that they had inherited the property from their father and had relied on a Statutory Determination marked "P2".

The District Court had decided in favour of the Appellants by its judgment dated 24.1.2001. The Respondent appealed against the District Judge's decision. While the appeal was pending, the aforesaid Statutory Determination was cancelled by Gazette No. 1181/19 dated 25.4.2001. The High Court delivered its judgment setting aside the judgment of the District Court dated 24.1.2001 for the reason that the said Gazette Notification had forfeited the title of the Appellants.

Held:

(1) An Appellate Court, could order a new or further trial on the ground of discovery of fresh evidence subsequent to the trial.

(2) The applicability of the Gazette Notification of 25.04.2001 clearly comes within the provisions of Section 773 of the Civil Procedure

Code and therefore there had not been any misdirection by the High Court in accepting new evidence in the appeal.

(3) In a vindicatory action the burden of establishing title devolves on the Plaintiff. The only exception to this general principle is where the Plaintiff had earlier enjoyed peaceful possession of the property in question and alleged that he had been ousted by the defendant. In such circumstances the Plaintiff has in his favour a presumption of title, which is rebuttable.

(4) The High Court did not misdirect itself by considering the Gazette Extraordinary No.1181/19 dated 25.04.2001 as valid.

(5) In a vindicatory action it is necessary for the title to be present with the Plaintiff not only at the beginning of the action, but until the conclusion of the case. Therefore the High Court did not err in entering the judgment purely based on the Gazette Extraordinary No./181/19 dated 25.04.2001.

Cases referred to:

1. *Beatrice Dep V. Lalani Meemaduwa* (1997) 3 Sri L.R. 379
2. *Ratwatte Vs. Bandara et.al* – (1966) 70 NLR 231
3. *Rev. Kiralagama Sumanaratna Thero Vs. Aluwihare* (1985) 1 Sri L.R. 19
4. *Ladd Vs. Marshall* (1954) 3 All E R 745
5. *De Silva Vs. Goonatillake* (1931) 32 NLR 217
6. *Muthusamy Vs. Seneviratne* (1946) 31 C.L.W. 91
7. *Mudalihamy Vs. Appuhamy* (1981) 1 C.L.R. 67
8. *Silva Vs. Jayawardena* (1942) 43 NLR 551
9. *Elisahamy Vs. Punchi Banda* (1911) 14 NLR 113
10. *Fernando Vs. Appuhamy* (1921) 23 NLR 476

APPEAL from the Judgment of the Civil Appellate High Court of the Sabaragamuwa Province holden at Ratnapura.

Chathura Galhena for Plaintiff – Respondent – Appellants

Thisath Wijayagunawardena with *Prabash Somasinghe* for the Defendant – Appellant – Respondent.

Cur.adv.vult.

Febuary 25th, 2012

DR. SHIRANI A. BANDARANAYAKE, CJ.

This is an appeal from the judgment of the Civil Appellate High Court of the Sabaragamuwa Province holden at Ratnapura (hereinafter referred to as the High Court) dated 23-09-2009. By that judgment, learned Judges of the High Court had set aside the judgment of the District Court of Embilipitiya dated 24-01-2001 given in favour of the plaintiff-respondent-appellants (hereinafter referred to as the appellants) and allowed the appeal of the defendant-appellant-respondent – (hereinafter referred to as the respondent). The appellants came before this Court by way of a leave to appeal application, on which leave to appeal was granted by this Court on the following questions:

1. Did the Civil Appellate High Court misdirect itself on the concept of accepting new evidence in an appeal?

2. Did the Civil Appellate High Court misdirect itself by considering the said Gazette Extraordinary No. 1181/19 dated 25-04-2001 as valid?

3. Did the Civil Appellate High Court err in entering the judgment purely based on the Gazette Extraordinary No. 1181/19 dated 25-04-2001?

The facts of this appeal, as submitted by the learned Counsel for the appellants, albeit brief, are as follows:

The appellants had instituted action in the District Court of Embilipitiya claiming *inter alia,* a declaration of title regarding the land morefully described in the schedule to the plaint and to eject the respondent and those who are holding under them from the valid portion of land. The respondent in

his answer had taken the position that the appellants do not have title to the land described in the schedule and the said land is owned by one B.T.A.B. Maddegama. The said Maddegama had made an application in the District Court to intervene as a defendant claiming title to the land described in the schedule, which was allowed by the learned District Judge, wherein he had claimed prescriptive title.

The appellants had claimed that they had inherited the property in question from their father and had relied on a Statutory Determination marked එ. 2.

The District Court had decided in favour of the appellants by its judgment dated 24-01-2001.

Being dissatisfied by the decision of the learned District Judge, the respondents appealed to the Court of Appeal. With the establishment of the Provincial Appellate High Courts in 2007, the said appeal before the Court of Appeal was subsequently transferred to the Civil Appellate High Court of the Sabaragamuwa Province holden in Ratnapura.

While the appeal was pending, the Statutory Determination marked එ. 2 was cancelled by the Gazette Extraordinary No. 1181/19 dated 25-04-2001 (X2).

Thereafter the respondent had filed an application before the Court of Appeal in the nature of *restitution integrum* on the basis of the said Gazette Notification dated 25-04-2001.

The Court of Appeal had dismissed the said application as the matter was pending before the High Court.

The High Court delivered its judgment on 23-09-2009, setting aside the judgment of the learned District Judge as the Gazette Notification marked X2 had forfeited the title of the appellants.